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The Enumerated Rights Reading of the Privileges or Immunities Clause: A Response to Randy E. Barnett and Evan D. Bernick's "A Critique of Kurt Lash on the Fourteenth Amendment"

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THE ENUMERATED RIGHTS READING OF THE PRIVILEGES OR IMMUNITIES CLAUSE:
A RESPONSE TO RANDY E. BARNETT AND EVAN D. BERNICK’S
“A CRITIQUE OF KURT LASH ON THE FOURTEENTH AMENDMENT”

Kurt T. Lash

Introduction

PART I: THE ANTEBELLUM PERIOD
A. Antebellum “Privileges and Immunities”
B. The Privileges and Immunities of Article IV
C. Antebellum Privileges and Immunities “of citizens of the United States.”
   1. Anti-Slavery Advocacy and the Enumerated Privileges and Immunities of Citizens of the United States
   2. Anti-Slavery Advocacy and the Enumerated Right to Due Process of Law
   3. Due Process Property Rights and “the Fruits of Honest Toil”
   4. John Bingham and the Rights of Citizens of the United States
   5. John Bingham’s Speech Opposing the Admission of Oregon
D. Conclusion

PART II: THE THIRTY-NINTH CONGRESS
A. Introduction to Section II
B. John Bingham and the First Submitted Draft of Section One
   1. John Bingham Submits the Draft
   2. Context: The Consensus Reconstruction Understanding of the Federal Bill of Rights
      a. Omitting the Ninth and Tenth Amendments From the Bill of Rights
      b. John Bingham’s Inclusion of Article IV in the Bill of Rights
   3. The Debates of February 28
   4. Objections and Postponement
C. The Civil Rights Act
   1. John Bingham and 1866 Civil Rights Bill
   2. John Bingham’s Due Process Understanding of the Civil Rights Bill
   3. Removing “Civil Rights” From the Civil Rights Bill
   4. Context: The Consensus Understanding of Corfield v. Coryell in the Debates Over the Civil Rights Act
D. The Final Draft of the Privileges or Immunities Clause
   1. Bingham’s Speech Introducing the Second and Final Draft of the Privileges or Immunities Clause
   2. The Speech of Jacob Howard
   3. Adding the Citizenship Clause

PART III: PUBLIC UNDERSTANDING OF THE PROPOSED FOURTEENTH AMENDMENT
A. Enumerated Rights in the Public Debate
B. Only Enumerated Rights?
C. A Final Word on the Right of Suffrage

PART IV: POST-RATIFICATION ISSUES
A. Repassage of Civil Rights Act
B. The Memorial of Victoria Woodhull
C. John Bingham’s 1871 Speech Explaining the Privileges or Immunities Clause
D. Summary

Conclusion
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Introduction

One is always pleased when one’s articles and books gain the attention of distinguished scholars like Randy Barnett and Evan Bernick. It is best if they agree with your ideas, of course. But even disagreement can have the benefit of drawing scholarly attention to what you believe are critical historical issues. And good faith scholarly engagement always benefits both sides in academic debate: Ideas and theories are clarified, evidence is more closely examined, and the precise nature of scholarly disagreement is identified in a manner that benefits those following the debate. So it is in this case. Although Barnett and Bernick’s article, “The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment,” is not the knock-out punch the authors likely intended, it nevertheless helps clarify the nature of the current debate over the original meaning of Section One of the Fourteenth Amendment. I welcome their challenge.

Barnett and Bernick embrace what I call the Fundamental Rights reading of the Privileges or Immunities Clause of the Fourteenth Amendment. This view maintains that the Privileges or Immunities Clause should be understood as protecting a set of absolute rights nowhere expressly enumerated in the text of the constitution, for example the unenumerated economic right to contract or to pursue a trade. My work rejects the Fundamental Rights view and argues that the historical record supports what I call the Enumerated Rights reading of the Privileges or Immunities Clause. This view maintains that the privileges or immunities of citizens of the United States are those rights enumerated in the text of the Constitution, including but not limited to the rights enumerated in the first eight amendments. This is how the amendment was described by its author John Bingham and this is how the public most likely understood the text.

Ohio Representative John A. Bingham drafted the Privileges or Immunities Clause, successfully fought for its addition to the Fourteenth Amendment, helped secure its ratification and, later, provided a detailed explanation of the history behind the drafting of the Clause. Described as the “James Madison” of Section One of the Fourteenth Amendment, John Bingham should be celebrated as one of the greatest heroes in American Constitutional history. Bingham’s theory of

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2 See Kurt T. Lash, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 283-84 (Cambridge Press 2014) (describing the Randy Barnett’s reading of the “Privileges or Immunities Clause” as the “Fundamental Rights” reading). Others also have described Randy Barnett’s theory as the “Fundamental Rights” reading of the Privileges or Immunities Clause. See Eric Claeys, Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan, 45 San Diego L. Rev. 777, fn. 9 and accompanying text (2008).
3 See Randy E. Barnett, After All These Years, Lochner Was Not Crazy—It Was Good, 16 Geo. J.L. & Pub. Pol’y 437, 438, 442 (2018) (“there can be little doubt that, historically, the rights of property and contract were among the privileges or immunities of citizens of the United States to which the Fourteenth Amendment referred.”).
4 See Lash, THE FOURTEENTH AMENDMENT, supra note 2 at 279.
6 Like myself, Barnett and Bernick seek the original meaning of the Fourteenth Amendment in general and the Privileges or Immunities Clause in particular. See B&B, supra note 1, at 7. Accordingly, when we say we are

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the constitutional rights of citizens and the natural rights of all persons is as essential to understanding the framework of Section One as is studying the constitutional theory of James Madison in order to understanding the framework of the original constitution and the Bill of Rights.

While the members of Thirty-Ninth Congress pursued multiple and sometimes conflicting agendas, John Bingham focused his efforts on drafting and passing a constitutional amendment requiring the states to enforce the Bill of Rights and giving Congress power to enforce this obligation if the states refused to do so themselves.7 Bingham believed that such an amendment would not take any pre-existing rights away from the states since their officials had already taken an oath to uphold the federal Constitution and its enumerated rights of citizens of the United States.8 A fervent supporter of constitutional federalism, Bingham opposed efforts to nationalize the general subject of civil rights in the states,9 and he opposed the Civil Rights Act on the grounds that protecting the equal due process rights of person and property first required passing a constitutional amendment.10 Bingham’s first draft of Section One relied on the language of Article IV which, Bingham insisted, should be read as impliedly referring to the rights “of citizens of the United States.”11 When that draft failed to win sufficient support, he abandoned the language of Article IV and drafted a clause that expressly protected the rights “of citizens of the United States”—language with a long antebellum history of referring to the enumerated rights of citizens of the United States.12 Bingham’s amendment also included provisions protecting the rights of life, liberty and property and demanding the equal protection of the laws—provisions that, when combined with Section Five, authorized legislation like the 1866 Civil Rights Act. Congress embraced Bingham’s new language, passed the amendment, and sent it to the states for ratification.13 When, midway through the process, radical Republicans advocated abandoning the amendment and proceeding as if they already had power to enforce civil rights in the states, Bingham convinced his colleagues to stay the course and vindicate the people’s right to determine their own fundamental law.14 In sum, John Bingham stands center stage in the grand constitutional drama of the Fourteenth Amendment.

Given Bingham’s commitment to enumerated rights, it is not surprising to find Fundamental Rights theorists looking elsewhere for a hero of the Privileges or Immunities Clause. Randy Barnett and Evan Bernick, for example, declare that they “side with Jacob Howard.”15 This is somewhat surprising, given that Jacob Howard opposed the Privileges or Immunities Clause,16 voted against submitting it to Congress for debate,17 and favored a far narrower version of Section One than the

“siding” with Bingham or Howard, we are using these men and their ideas as representing in important ways how the public that ratified the Fourteenth Amendment likely understood the proposed text.

7 See, e.g., Cong. Globe, 39th Cong., 1st Sess., 1034 (February 26, 1866); Cong. Globe, 39th Cong., 1st Sess., 1088 (February 28, 1866); See also generally, id. 1087-95.
8 See, e.g., Cong. Globe, 39th Cong., 1st Sess., 1034 (February 26, 1866); Cong. Globe, 39th Cong., 1st Sess., 2542 (May 10, 1866).
10 See id. at 1290–96.
12 See, Cong. Globe, 39th Cong., 1st Sess., 2530–45 (May 10, 1866). See also, infra Part I.
15 B&B, supra note 1, at 69.
16 See, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 98 (Benjamin Kendrick, ed) (Lawbook Exchange reprint, 2005). Although Howard had originally joined the majority of the committee in voting in favor of Bingham’s proposal, id. at 87, he then changed his mind and voted to remove Bingham’s proposal from the amendment, id. at 98, and voted against allowing Bingham to submit his proposal as a separate amendment. Id. at 99. When Bingham convinced the majority of his colleagues to re-adopt his version, Howard refused to budge and joined two other members in voting against Bingham’s draft. See id. at 106.
17 Id. at 99.
one drafted by John Bingham and ratified by the people of the United States.\footnote{Howard voted in favor of a version originally submitted by Robert Dale Owen which read, “Section 1. No Discrimination shall be made by any state, nor by the United States, to the civil rights of persons because of race, color, or previous condition of servitude.” See Journal of the Joint Committee, supra note 21, at 83.} One presumes, of course, that Barnett and Bernick side with Howard, not because of his constitutional preferences, but because of one particular speech that Howard delivered on May 23, 1866. On that day, acting as a last-minute stand-in for William Pitt Fessenden,\footnote{As Chair of the Joint Committee, Fessenden had been chosen to present the proposed draft to the House of Representatives, but he fell ill at the last minute. See, Cong. Globe, 39th Cong., 1st Sess., 2764 (May 23, 1866).} Jacob Howard introduced the Joint Committee’s draft of the Fourteenth Amendment to the Senate of the United States.\footnote{Cong. Globe, 39th Cong., 1st Sess., 2764–67 (May 23, 1866).} In that speech, Howard explained that the privileges and immunities of citizens of the United States included both the “fundamental” state-secured rights granted equal protection under Article IV, Section 2, and the personal rights enumerated in the first eight amendments to the Constitution.\footnote{Id. at 2765.} To Fundamental Rights theorists like Barnett and Bernick, when Howard quoted the “fundamental principles” section from the antebellum Article IV case Corfield v. Coryell, this signaled Howard’s belief that the Privileges or Immunities Clause transformed all of the local privileges and immunities given relative protection under the Comity Clause into absolute unenumerated national rights. Put another way, they read an 1866 reference to “fundamental” rights the same way people today read post-New Deal Supreme Court references to fundamental rights.\footnote{Since the time of the New Deal, the court has divided constitutional rights into two main categories: Those deemed “fundamental” which receive special protection from government regulation and those not deemed fundamental which are largely left to majoritarian politics. See, e.g., Carolene Products, fn. 4.} As I will explain in some detail below, this anachronistic reading of Howard’s speech is not supported by the historical record.

The best reading of Howard’s description of the Privileges or Immunities Clause is one that coincides with the understanding of the man who drafted the Clause. The privileges or immunities of citizens of the United States are those enumerated in the United States citizen’s Constitution. That constitution enumerates a number of rights, including the relative rights protected by Article IV as well as the absolute rights enumerated in the Bill of Rights. As far as Article IV, Section 2 rights are concerned, the evidence is overwhelming that most people in 1866 understood Article IV (and Article IV cases like Corfield v. Coryell) as guaranteeing nothing more than the relative rights of equal treatment.\footnote{See infra note 21, at 83.} Article IV and Corfield had been repeatedly discussed in the debates of the Thirty-Ninth Congress and this consensus understanding had been conceded by Republicans of all stripes.\footnote{Lash, THE FOURTEENTH AMENDMENT, supra note 21, at 20-47; 162-68.} When Jacob Howard named both Article IV Section 2 and the first eight amendments as “Privileges or Immunities of citizens of the United States,” he had done nothing more than name two sets of enumerated constitutional rights, some relative (those protected by Article IV and discussed in Corfield) and some absolute (those listed in the Bill of Rights). In doing so, he echoed the long-expressed understanding of the Clause’s author, John Bingham. As one would expect from a text produced by a moderate Republican in 1866, the Privileges or Immunities Clause did not abolish constitutional federalism. It enforced the Moderate Reconstruction Republican view that states ought to respect constitutionally enumerated rights, whatever their nature, and that Congress should have the express power to enforce these enumerated rights against state abridgement.

The historical evidence supporting the Enumerated Rights reading of the Privileges or Immunities Clause is broad and deep, and presenting a representative selection of that evidence requires an essay of some length. As a claim of original meaning, the Enumerated Rights reading...
requires an in-depth exploration of how words and phrases were commonly understood by members of Congress and the public in 1866. This exploration, in turn, requires analysis of how meanings and understandings developed in the period leading up to the Civil War and Reconstruction. My work in this area involves two books and many articles published over a period of almost two decades. In their “critique,” Barnett and Bernick address various aspects this lengthy body of work and claim that I have failed to make a persuasive case. Their argument seems to turn on five specific claims. First, Barnett and Bernick address my work on the term “privileges and immunities” during the antebellum period. Although they concede my claims about the antebellum consensus understanding of Article IV, Section 2 and cases like Corfield, they challenge my claim that during this same period one can find a separate strain of “privileges and immunities of citizens of the United States” involving enumerated constitutional rights. Second, Barnett and Bernick challenge my claims about John Bingham. Although they concede that I have proven that Bingham believed the privileges and immunities of citizens of the United States included enumerated constitutional rights, Barnett and Bernick insist that Bingham also believed the rights of national citizenship included unenumerated absolute rights. Third, Barnett and Bernick claim I have erred in claiming that Reconstruction-era references to the “Bill of Rights” were references to enumerated constitutional rights such as those enumerated in the first eight amendments. According to Barnett and Bernick, the term “Bill of Rights” had no fixed meaning during this period and one cannot assume that references to the Bill of Rights by Bingham and others actually involved a reference to enumerated rights. Fourth, Barnett and Bernick claim that Jacob Howard’s reference to Corfield v. Coryell cannot be understood as a reference to its consensus antebellum meaning. Instead, they claim that by quoting Corfield’s “fundamental” rights passage, Howard meant to signal, and would have been understood as signaling, that the relative rights of Corfield and Article IV, Section 2 had been transformed into absolute unenumerated national rights. Fifth and finally, Barnett and Bernick claim that I have failed to persuasively explain the relationship between the 1866 Civil Rights Act and Section One of the Fourteenth Amendment. Specifically, they claim that the Fourteenth Amendment must be understood as constitutionalizing the 1866 Civil Rights Act and that the Privileges or Immunities Clause is the only Clause that can accomplish this. Since the Enumerated Rights reading of the Privileges or Immunities Clause cannot be understood as constitutionalizing the Civil Rights Act, this must mean that the Enumerated Rights reading is incorrect. In this essay, I respond to all of these claims.

My response proceeds along roughly chronological lines. Part I addresses the antebellum period and the two strains of “privilege and immunities” that emerged during this period. Although Barnett and Bernick concede the existence of one strain—the privileges and immunities “of citizens in the several states” protected by Article IV, Section 2 and described in cases like Corfield v. Coryell—they claim my work fails to establish the existence of an altogether different strain of privileges or immunities involving the constitutionally enumerated rights “of citizens of the United

States.” In this section, I challenge their reading of the historical record and I explain why anti-slavery Republicans were especially eager to embrace the idea that the privileges or immunities of citizens of the United States involved enumerated constitutional rights and only enumerated constitutional rights. This section concludes with an introduction to the antebellum constitutional theories of John Bingham. Long before the debates of the Thirty-Ninth Congress, Bingham insisted that the rights of national citizenship were enumerated in the Bill of Rights, and he insisted that the Fifth Amendment’s Due Process Clause guaranteed rights belonging to all persons. Both of these views would play a critical role in Bingham’s later efforts to pass an amendment protecting the Privileges or Immunities of Citizens of the United States and the equal right of all persons not to be deprived of life, liberty or property without due process of law.

Part II addresses the constitutional debates of the Thirty-Ninth Congress. Focusing in particular on John Bingham, the author of the Joint Committee’s first submitted draft of Section One, this section explains how Bingham understood the words of the draft as protecting the constitutionally enumerated rights of citizens, particularly those enumerated in the federal Bill of Rights. Although Barnett and Bernick claim that references to the Bill of Rights in the Thirty-Ninth Congress had no fixed meaning, this section explains that such references always involved constitutionally enumerated rights. Although members divided over whether the Bill of Rights included all ten of the original amendments or only the first eight, they all agreed that the federal Bill of Rights involved rights listed in the federal Constitution. This section also explores the debates over the Civil Right Act, an Act that both John Bingham and the House Sponsor of the Civil Rights Act, James Wilson, described as protecting rights declared by the Due Process Clause of the Fifth Amendment. The evidence strongly suggests that Bingham and others would have understood the Fourteenth Amendment’s Due Process Clause (in addition to the Equal Protection Clause) as authorizing civil rights legislation like the 1866 Civil Rights Act. This Section concludes with an analysis of the final draft of Section One and the speeches of John Bingham and Jacob Howard who introduced the proposed Amendment to their colleagues in the House and the Senate. Both men continued to describe the Privileges or Immunities Clause as protecting constitutionally enumerated rights. Although Jacob Howard included the enumerated rights protected by Article IV and described in Corfield v Coryell as protected Privileges or Immunities, both Howard and his colleagues understood Corfield as involving nothing more than the relative rights secured by the Comity Clause. Members had presented and agreed upon this understanding of Corfield and Article IV, Section 2, multiple times during the debates on the 1866 Civil Rights Act.

Part III discusses the ratification period and the public debates on the proposed Fourteenth Amendment. Although proponents often linked Section One to rights protected by the 1866 Civil Rights Act, they rarely discussed which provision in Section One authorized the Act. Over time, proponents increasingly described the rights of national citizenship protected by Section One as including rights enumerated in the Bill of Rights, in particular the rights of free speech and assembly enumerated in the First Amendment. At no time did anyone describe Section One as protecting unenumerated absolute rights. Much of the public debate over Section One involved whether it guaranteed black citizens the right to vote—a possibility most proponents of the amendment expressly denied. Although Barnett and Bernick claim that Republicans failed to employ the Enumerated Rights reading in response to “black suffrage” accusations (thus calling into question whether they held such a reading), their claim is equally incorrect and misguided. In fact, some Republicans did employ Enumerated Rights arguments against claims that the Amendment protected the unenumerated right to vote. But most of all, Barnett and Bernick’s argument erroneously assumes that the right to vote could not be derived from enumerated texts in the Constitution. John Bingham knew better, and he explained why these enumerated provisions should not be read as giving Congress general power to force the states to accept black suffrage. Finally, this section presents examples of members of the ratifying public describing the Privileges or Immunities Clause as protecting enumerated constitutional rights and only enumerated constitutional rights. In Massachusetts, for example, a legislative committee tasked with studying
the proposed Amendment complained that the Privileges or Immunities Clause did noting more than protect rights already enumerated in the Constitution, such as those listed in the Bill of Rights. According to the committee, this rendered the Privileges or Immunities Clause redundant since states already were obligated to respect such rights. Coming to the same conclusion from a different direction, Reverdy Johnson, a member of the Joint Committee which chose the final language of the Privileges or Immunities Clause, also insisted that the Clause protected only enumerated constitutional rights, and thus could not reasonably be read as protecting the unenumerated right to vote.

Part IV addresses post ratification issues, including the 1870 repassage of the Civil Rights Act, the Woodhull Committee Report and John Bingham’s 1871 explanation of the Privileges or Immunities Clause. Although post-ratification evidence is necessarily weak as a source of the original public understanding of a text, Barnett and Bernick believe these three events especially undermine the Enumerated Rights reading of the Privileges or Immunities Clause. In fact, repassage of the Civil Rights Act strongly supports my argument that the 1866 Civil Rights Act protected rights secured by the final two clauses of the Section One and not (as Barnett and Bernick claim) the Privileges or Immunities Clause. This is because in repassing the Act, Congress extended most of its protections to all persons—a class protected by the Due Process and Equal Protection Clauses, and not the Privileges or Immunities Clause. Although Congress chose not to extend equal real estate rights to non-citizens, this does not mean that they could not do so, nor does it mean that they considered real estate ownership to be an unenumerated right of citizenship. A majority of Congress might simply have been unwilling to extend equal real property rights to non-citizens, a possibility made all the more likely given the oft-expressed (and often racist) concerns about non-citizens in the western states. As far as the Woodhull Committee Report is concerned, although it does not support the Enumerated Rights reading, it cuts even more strongly against Barnett and Bernick’s Fundamental Rights reading of the Privileges or Immunities Clause. Most of all, the Woodhull Committee Report cannot reasonably be understood as reflecting the views of John Bingham as, only weeks later, Bingham delivered a speech explaining in detail his personal understanding of the Privileges or Immunities Clause. In this speech, Bingham unequivocally adopts the Enumerated Rights reading of the Privileges or Immunities Clause. Although Barnett and Bernick claim that Bingham’s speech includes references to unenumerated rights, our study of Bingham’s antebellum speeches prove that, once again, Bingham referred to enumerated constitutional rights, and only enumerated constitutional rights, as the privileges and immunities of citizens of the United States.

PART I: THE ANTEBELLUM PERIOD

I make two key claims in regard to the antebellum period that I believe are important to understanding the original meaning of the Privileges or Immunities Clause and its relationship to Article IV (and Article IV cases like Corfield). First, the historical evidence overwhelmingly indicates that judges and constitutional commentators viewed Article IV and cases like Corfield v. Coryell as protecting nothing more than the relative rights of sojourning state citizens. Not only did this view remain stable up to and after the Civil War, the “equal rights only” reading of the Comity Clause became increasingly important to anti-slavery Republicans. It was essential to their constitutional theory that Article IV, Section 2 be understood as providing nothing other than the relative rights of sojourning citizens. Barnett and Bernick address none of this in their critique.

Second, the historical evidence reveals the existence of an altogether different category of rights, privileges and immunities belonging to “citizens of the United States.” In some of the most high-profile constitutional debates in the period between the Founding and the Civil War, anti-slavery advocates described the rights of national citizenship as involving only the constitutionally enumerated rights of American citizens. As the Civil War approached, anti-slavery Republicans
continued to use this “enumerated rights only” argument in opposition to the claims of slave holders that American citizens had an unenumerated absolute right to carry their “property” into the territories. Barnett and Bernick’s attempt to use antebellum pro-slavery arguments to counter this evidence simply reinforces my claim that the enumerated rights understanding of the rights privileges and immunities of citizens of the United States would have been both well-known and robustly adhered to by anti-slavery Republicans.

A. Antebellum “Privileges and Immunities”

Determining the communicative meaning of 1866 legal texts containing the terms “privileges” and “immunities” requires an investigation of how these terms were understood in the period leading up to the Civil War. This is because these terms and phrases were not wholly new in 1866, but had been the subject of substantial discussion and debate between the Founding and the Civil War.

My investigation of the antebellum usage of the terms privileges and immunities reveals that they were used generally to refer to specially conferred rights or, as I put it, “particular rights conferred on a certain group or people,” rather than “natural rights belonging to all people or all institutions.”26 This specially conferred right understanding of privileges and immunities remained common right up to the time of the ratification of the Fourteenth Amendment. For example, according to Judge George W. Paschal in his influential Annotated Constitution of the United States (1868), “[p]rivileges are special rights belonging to the individual or class, and not the mass.”27

Barnett and Bernick claim that my conclusions about the consensus antebellum understanding of the paired term “privileges and immunities” are “sharply at odds” with the those presented by Professor Eric Claeys,28 a work, the authors stress, that “Lash has not responded to.”29 Although it is true I have not “responded” to Prof. Claeys’ work, this is because there is nothing to respond to. Our work does not conflict. In his article, Claeys focuses on Blackstone’s use of the terms “privileges” and “immunities” and colonial charters.30 Claeys goes out of his way to say that he does not explore antebellum American usage of the terms and that “a complete analysis of privileges or immunities would need to determine whether the terms evolved in meaning from 1600 to 1868.”31 According to Claeys, antebellum study of these terms is important because, “[i]t is also probable that American usages of privileges and immunities evolved significantly from 1766 to the post-Civil War period.”32 In sum, while Prof. Claeys’ work on Blackstone is interesting33 it is clearly not “sharply at odds” with my findings regarding antebellum usage.34

26 See Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 20.
29 B&B, supra note 1, at 9.
30 See, Claeys, supra note 32 at 781 (“This essay surveys colonial charters and relevant provisions of the Articles of Confederation—but most of all Sir William Blackstone’s Commentaries on the Laws of England.”).
31 Id. at 789.
32 Id. at 782.
33 Claeys focuses on the original meaning of Blackstone’s use of “privileges and immunities,” a meaning which Claeys links to individual natural rights. My own study of the Commentaries shows that sometimes Blackstone uses the individual terms “privileges” and “immunities” as references to individual natural rights, but at other times he uses the paired term “privileges and immunities” to refer to the government conferred collective rights of a corporation. See 1 Blackstone at ¶129, ¶468. See also Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 15.
34 Despite not studying antebellum usage which, he concedes, likely changed the original Blacksonian meaning, Claeys nevertheless muses that “as of 1868, privileges and immunities of citizenship probably referred to a

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The common antebellum usage of the terms “privileges and immunities” as referencing a specially conferred set of rights is important. It tells us that particular sets of “privileges and immunities” might differ depending on the rights-holding person, group or institution. This in turn suggests that the privileges and immunities “of citizens in the several states” might have been understood as referring to a different set of “privileges or immunities” than those held by “citizens of the United States.”

B. The Privileges and Immunities of Article IV

As noted above, my work on antebellum usage indicates the emergence of two separate strains of “privileges and immunities”; one strain associated with the rights “of citizens in the several states” protected by the Comity Clause of Article IV, Section 2, the other strain associated with the enumerated constitutional rights “of citizens of the United States.” Barnett and Bernick accept my findings regarding the first strain, the consensus understanding of the rights protected under the Comity Clause, the “privileges and immunities of citizens in the several states.”

The common antebellum understanding of the Comity Clause was that it provided sojourning citizens equal access to a limited set of state-secured rights (those deemed “fundamental”). The Clause mandated, for example, that if a state allowed its own citizens to pursue a certain trade, then it should provide the same right to visitors from out of state. The “privileges and immunities of citizens in the several states” were not absolute national rights. If a state did not allow its own

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35 B&B, supra note 1, at 10 (“The dominant interpretation, [Lash] argues, was that the Privileges and Immunities Clause was a “Comity Clause” requiring states “to grant sojourning citizens of other states some of the same privileges and immunities that the state conferred on its own citizens.” With this assessment of antebellum authorities, we have no quarrel.”). (Footnotes omitted). Other critics of the Enumerated Reading of the Privileges or Immunities Clause have attempted to dispute the broad and deep antebellum understanding of the Comity Clause as providing sojourning citizens equal access to a limited set of state-secured rights (those deemed “fundamental”). James Fox, for example, criticizes my failure to appreciate the natural rights component in opinions like Corfield v. Coryell, and he points out that many antebellum treatise writers advocated natural rights restrictions on state authority. See James W. Fox, Jr., Publics, Meanings & Privileges of Citizenship, 30 Const. Commentary 567, 575-76 (2015) (book review). What Fox cannot dispute, however, is the broad antebellum consensus that the language of the Comity Clause and Corfield as providing nothing more than equal access to state secured rights. No one interpreted the Clause or the Case as representing natural rights which states could not deny to their own citizens. See Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 2-47, 162-68.

36 See Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 2-47.

37 This explanation was repeated in every major constitutional text of the period that addressed the Comity Clause. See, e.g., James Kent, Commentaries on American Law pt. 4, at 35 (7th ed. N.Y., Kent 1851); John Bouvier, Institutes of American Law 66 (2d. ed. Phila., Peterson & Co, 1854); Thomas Cooley, Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union 15 (Boston, Little, Brown & Co. 1868); 3 Joseph Story, Commentaries on the Constitution of the United States Section 1800, at 674-75 (Boston, Hilliard, Gray & Co. 1833).

38 In his critique of the Enumerated Rights reading of the Privileges or Immunities Clause, James Fox accuses me of trying to read natural rights out of antebellum doctrines like those associated with Corfield and the Comity Clause. See, Fox, Publics, Meanings & Privileges of Citizenship, supra note __ at 575. I do nothing of the kind. Corfieldian state-secured rights included rights many people at the time would have understood as natural rights. But, as cases like Corfield make clear, none of these rights are protected by the Comity Clause unless they are first secured by a state to its own citizens. Neither Corfield nor any legal authority described these rights (natural or positive) as absolute national rights. There was an important strand of natural rights theory put forward by anti-slavery constitutionalists, one involving the Due Process Clause of the Fifth Amendment. I discuss that strain of thought and its relationship to Section One of the Fourteenth Amendment below. See infra __ at footnote __ and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=3351142
citizens to pursue a certain trade then neither could a visiting out-of-state citizen. The Comity Clause did not, however, require a state to give visitors equal rights in all matters involving local residents. According to Justice Washington in Corfield v. Coryell,39 “[w]e feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; . . . What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.”40 Washington nevertheless enumerated a number of subjects in which visitors were guaranteed equal treatment, including

“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 or 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.”41

The above list of “fundamental rights” did not involve fundamental absolute rights which states had to provide both their own citizens and out of state visitors. Instead, these were subjects receiving relative protection under the Comity Clause. Washington provided this list in order to “constrain” the potential scope of the Comity Clause and reject (the claim being made in Corfield itself) that out-of-state visitors could demand any local right given to local citizens “merely upon the ground that they are enjoyed by those citizens.”42 As Justice Joseph Story put it in his Commentaries on the Constitution, the Comity Clause as interpreted by cases like Corfield v. Coryell “confer[ed]” on visiting citizens “all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.”43 Similarly, according to antebellum legal scholar and judge James Kent, “[t]he provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . . means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights. Their persons and property must, in all respects, be equally subject to [state] law.”44

The historical evidence establishing the equal treatment reading of the Comity Clause as the consensus antebellum understanding of the rights of Article IV, Section 2 is broad and deep.45 Not

40 Id. at 551.
41 Id. at 551-52.
42 Id. at 552.
43 Joseph Story, 3 Commentaries at 675, 675 n.1 (citing Corfield v. Coryell).
44 Livingston v. Van Ingen, 9 Johns. R. 507 (N.Y. 1812) (opinion of Kent. Ch. J.) See also 2 Kent, Commentaries on American Law, Prt 4, at 35 (7th ed. N.Y., Kent 1851). (“The article in the constitution of the United States, declaring that citizens of each state were entitled to all the privileges and immunities of citizens in the several states, applies only to natural born or duly naturalized citizens, and if they remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other.”).
45 In addition to the above cited sources and cases, see Campbell v. Morris, 3 H. & McH 535 (Md. 1797); Abbott v. Bayley 23 Mass. (6 Pick) 89 (1827). In 1848, Alabama Chief Justice Henry Collier collected the cases and explained:

By the second section of the fourth article of the federal constitution, it is enacted, that “the citizens of each State, shall be entitled to all privileges and immunities of citizens in the several States.” It has been held that
surprisingly, Barnett and Bernick concede the issue as they could not reasonably do otherwise. Their concession is nevertheless important. It means that Barnett and Bernick agree that the set of rights protected under the antebellum understanding of the Comity Clause are altogether different from the set of absolute rights they claim are protected by the Fourteenth Amendment’s Privileges or Immunities Clause. Barnett and Bernick, of course, believe that, at some point, Republicans came to believe that the relative rights of the Comity Clause had been transformed into absolute national rights. No such transformation occurred at any point during the antebellum period, however. In fact, anti-slavery Republicans were deeply committed to the idea that the Comity Clause provided nothing more than equal access to a limited set of state-secured rights. The reason involved slavery.

In Dred Scott v. Sanford, the Supreme Court considered whether slave owners had an unenumerated absolute right to carry their slaves into federal territory. A majority of the Supreme Court concluded they did, and they declared unconstitutional the Missouri Compromise which excluded slavery from the northern territories. While the Court was considering the issues in Dred Scott, another case was under review in the state of New York—one with an even more politically explosive claim by slave owners. In the 1860 case Lemmon v. The People, the New York state courts considered whether the Comity Clause of Article IV granted out-of-state citizens the absolute unenumerated right to carry their slaves into free states as they moved from one state to another. According to the slave owners in Lemmon, the property rights protected by Article IV and described as fundamental rights in Corfield v. Coryell ought to be interpreted as absolute “privileges and immunities” which the state of New York must respect regardless of its local prohibition of slavery. In its decision, the highest court in New York rejected the absolute fundamental rights reading of Article IV. Instead, the court embraced the traditional antebellum reading of the Comity Clause as providing no more than relative protection to Corfield’s “fundamental” rights. According to New York’s Justice Wright, Article IV “was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens.” Because New York law prohibited the importation of slaves by anyone, including its own citizens, the court ruled that there had been no violation of Article IV.

Lemmon v. People attracted nation-wide interest. Republicans feared the United States Supreme Court would hear the appeal of the slave-owning plaintiffs in Lemmon and use the intention of this clause was to confer on the citizens of each State a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same State would be entitled to under the like circumstances. Corfield v. Cargill [Corfield v. Coryell], 4 Wash. C. C. Rep. 371; Livingston v. Van Ingen, 9 Johns. Rep. 507. In Campbell v. Morris, 3 Har. & McH. Rep. 535, it was said that the terms privilege and immunity are synonymous, or nearly so; privilege, signifies a peculiar advantage, exemption, immunity; immunity, signifies exemption, privilege. A particular and limited operation is to be given to the words “immunities and privileges” in this section of the constitution, and not a full and comprehensive one. . . . The object of the entire provision was to secure to the citizens of all the States the peculiar advantage of acquiring and holding real as well as personal property, and to provide that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected.

46 60 U.S. 393 (1857).
47 Id. at 452.
48 20 N.Y. 562 (1860).
49 Id. at 578.
50 Id. at 626.
51 Id. at 632.
52 There was considerable fear at the time that the New York court’s decision in Lemmon would be appealed to the United States Supreme Court, where its reversal would constitute the “second Dred Scott” decision that Lincoln and others had warned about, which would nationalize slavery. See, e.g., The Dred Scott Case, 1 HARPER’S WKLY., 193, 193 (1857) (commenting on the possible future of the Lemmon case and complaining that “all these
opportunity to extend the holding of Dred Scott and interpret Article IV as establishing an unenumerated privilege or immunity to carry slaves into the free states of the North. When Civil War broke out, the case became moot. But the New York Court’s decision in Lemmon which maintained the traditional understanding of the Comity Clause was viewed as both a correct reading of the Constitution and an important victory by anti-slavery Republicans. The case itself became the primary interpretation of the Comity Clause by Reconstruction Republican civil rights advocates like Judge George Paschal in his 1868 treatise The Annotated Constitution of the United States.\textsuperscript{53} As we shall see, even the most radical of Republicans in the Thirty-Ninth Congress conceded that the Comity Clause and cases like Corfield v. Coryell protected nothing more than the relative rights of out-of-state visitors.

C. Antebellum Privileges and Immunities “of citizens of the United States.”

At the same time a consensus emerged around the meaning of Corfield and the relative privileges and immunities of citizens in the several states, one can find an increasing number of anti-slavery advocates embracing a different set of privileges or immunities belonging to “citizens of the United States.” The rights of national citizenship first became the subject of national debate during the political controversy attending the admission of Missouri. The state was to be carved out of the original Louisiana cession which, under the treaty with France, guaranteed the inhabitants the “rights, advantages and immunities of citizens of the United States.”\textsuperscript{54} As described at the time by a northern newspaper, Article III was an attempt to provide the inhabitants of the territory “all the immunities & privileges of citizens of the United States.”\textsuperscript{55} According to members of Congress, Article III provided for “the privileges of citizens of the United States,”\textsuperscript{56} and later political tracts explained that the Cession Act’s phrase “rights, advantages and immunities” “undoubtedly means those privileges that are common to all the citizens of this republic.”\textsuperscript{57} What unites all of these paraphrased references to rights, privileges and immunities is the unique group holding these rights: “citizens of the United States.” Unlike the Comity Clause which speaks of the privileges or

\textsuperscript{53}See, George W. Paschal, The CONSTITUTION OF THE UNITED STATES, DEFINED AND CAREFULLY ANNOTATED 225-26 (1868).


\textsuperscript{55} Louisiana Memorial, E. ARGUS (Portland, Me.), Nov. 8, 1804, at 2.

\textsuperscript{56} See DEBATES IN THE HOUSE OF REPRESENTATIVES, ON THE BILLS FOR CARRYING INTO EFFECT THE LOUISIANA TREATY 60 (Phila., Palmer Bros. 1804) (Early Am. Imprints, Series 2, no. 7492) (remarks of Representative Gaylord Griswold).

immunities of “citizens in the several States,” these debates involved the rights of the group specifically named in the Fourteenth Amendment.

The antebellum debate which brought this language into play involved whether the so-called Tallmadge Amendment admitting Missouri as a free state violated the Treaty’s guarantee that the inhabitants of the Louisiana would receive all the “rights, advantages and immunities of citizens of the United States.” Pro-slavery advocates opposed the amendment as a violation of the reserved rights of the states as protected by the Ninth and Tenth Amendments, and as violating the treaty-protected rights, advantages and immunities “of citizens of the United States” to permit slavery in their state if they wished to do so.

In response, anti-slavery advocates like Daniel Webster, David Morrill, and Rufus King insisted that the “rights, advantages and immunities of citizens of the United States” involved only those rights secured by the federal Constitution. The right to chattel slavery was a creature of state law and not an enumerated right of national citizenship. As Daniel Webster explained:

“The rights, advantages and immunities here spoken of must, from the very force of the terms of the clause, be such as are recognized or communicated by the Constitution of the United States; such as are common to all citizens, and are uniform throughout the United States. The clause cannot be referred to rights, advantaged and immunities, derived exclusively from the State governments, for these do not depend upon the federal Constitution.”

New Hampshire Senator David Morrill presented the same view:

“What are the rights of the citizens of the United States? All the rights they possess, as such, are derived from the Constitution; and these are Federal rights, enjoyed by every citizen in every State in the Union. Federal rights, all of which are derived from the Constitution, extend to States as well as to citizens, and to all the States equally. Every State that exercises a power that any other State cannot, derives a power from a cause other than the Constitution of the United States. Any citizen who enjoys a right which another citizen in the United States does not enjoy, secures that right from some other source than the Constitution of the United States. The following are federal rights, namely: Each State is entitled to two Senators—the Legislature shall choose them—they shall be privileged from arrest; each State shall appoint electors; the electors of each State shall meet on the same day and vote for two persons; the cognizance of controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States. These are all secured to Missouri, and all other rights derived from the Constitution of the United States.”

Finally, Rufus King echoed the same argument:

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59 See id. at 1198 (speech of Mr. Scott of Missouri).
60 See id. at 1200. See also id. at 1174 (speech of Mr. Taylor of New York) (“Gentlemen have said the amendment is in violation of the treaty, because it impairs the property of a master in his slave.”).
61 Daniel Webster, A Memorial to the Congress of the United States, on the subject of restraining the increase of slavery in new states to be admitted to the Union 15 (Dec. 3, 1819 (emphasis added).
The first clause of this stipulation will be executed by the admission of Missouri as a new state into the union, as such admission will impart to the inhabitants of Missouri “all the rights, advantages, and immunities” which citizens of the United States derive from the Constitution thereof:—these rights may be denominated federal rights, are uniform throughout the union, and are common to all its citizens: But the rights derived from the constitution and laws of the states, which may be denominated state rights, in many particulars, differ from each other. . . . As the admission of a new state into the union confers upon its citizens only the rights denominated federal, and as these are common to the citizens of all the states, as well as those in which slavery is prohibited, as of those in which it is allowed, it follows that the prohibition of slavery in Missouri will not impair the federal rights of its citizens, and that such prohibition is not restrained by the clause of the treaty which has been cited.”

These are examples of an Enumerated Rights understanding of the rights “of citizens of the United States.” The rights of national citizenship involve those “federal” rights that are “recognized or communicated by the Constitution” or are “derived from the Constitution” and are therefore “common to all citizens.” The idea that national rights involved only those rights “communicated” or “derived” by the Constitution was essential to their argument. The inhabitants of the Louisiana Territory were promised nothing more than the constitutionally enumerated rights, advantages and immunities of citizens of the United States, and the right to own slaves was not one of these enumerated rights. As David Morrill declared, “all the rights [that citizens of the United States] possess, as such, are derived from the Constitution”

These were not one-time arguments about an obscure treaty provision, long-forgotten or ignored by the time of the Civil War. To begin with, the anti-slavery advocates won the original debate and Missouri was admitted as a free-state. The language of the Louisiana treaty was itself repeated in later treaties, including the Alaska Treaty of 1866. Most importantly, the arguments by Webster, Morrill and King that the rights “of citizens of the United States” are only those “derived” or “communicated” by the Constitution were repeatedly published, particularly in the years just before the Civil War. Webster’s speech was republished in 1854, 1856 and 1857. Rufus King’s speech was reprinted in 1857, and David Morrill’s speech was republished by Washington D.C.’s Daily National Intelligencer in 1859. The multiple replications of these arguments in books and major newspapers on the threshold of the Civil War illustrate the longevity of these arguments among anti-slavery Republicans and makes it quite likely that they would be

63 Rufus King, Niles Register (Baltimore, MD), December 4, 1819, p. 217. (emphasis added); Republished, American Eloquence 46 (1859); National Recorder, Vol. 2 p. 388.; See also, Connecticut Journal (12-21-1819); Volume: LII; Issue: 2721; Page: [1] (New Haven, Connecticut). Rufus King’s speech was reprinted in 1857 as part of a collection of American political speeches. See Frank Moore, 2 American eloquence: a collection of speeches and addresses by the most eminent orators of America 46 (New York, 1857).
64 Annals of Cong., 16th Cong. 1st Sess. at 146.
65 See Statutes at Large, 16th Cong., 1st Sess. 545 (March 6, 1820) (The “Missouri Compromise”).
66 Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. III, Mar. 30-June 20, 1867, 15 Stat. 539, 542.
67 See Daniel Webster et al., A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION (1819), reprinted in THE NEBRASKA QUESTION 9, 9-12 (N.Y., Redfield 1854.). See also, Horace Greeley, A HISTORY OF THE STRUGGLE FOR SLAVERY EXTENSION OR RESTRICTION IN THE UNITED STATES, FROM THE DECLARATION OF INDEPENDENCE TO THE PRESENT DAY 22, 23 (New York, 1856) (reprinting Webster’s speech, including his discussion of the Louisiana Cession Act).
known among anti-slavery Reconstruction Republicans. This is particularly true of John Bingham, who regularly praised and quoted Daniel Webster in the Thirty-Ninth Congress.70

Barnett and Bernick point out that these were not the only responses to the opponents of the Tallmadge Amendment.71 I agree. In fact, my work explains in detail the different views in play during the Missouri admission debates.72 Nevertheless, it is simply a fact that anti-slavery advocates repeatedly argued that federal rights were only those derived from the federal Constitution not dependent on State law. I stand by this claim. It was made over and over again during the debates and not contradicted by a single anti-slavery advocate. The fact that anti-slavery advocates made additional (and non-contradictory) arguments supporting a ban slavery in Missouri does not in any way undermine my claims about those arguments that were based on the Enumerated Rights understanding of the “rights, advantages and immunities of citizens of the United States.” But most of all, it is the longevity of these particular arguments and their continued importance among the opponents of slavery that make them especially important to originalists seeking the original understanding of legal texts produced by anti-slavery Republicans.

Barnett and Bernick suggest that since Webster, Morrill and King only specifically listed enumerated structural rights (such as the right of the people in each state to be represented by two senators) as the rights “of citizens of the United States,” they may have been arguing that only enumerated structural rights were the rights of citizens of the United States. No one, of course, made such an oddly restrictive claim. Instead, Morrill himself expressly declared that both structural rights and “all other rights derived from the Constitution of the United States” were the rights “of citizens of the United States.” Barnett and Bernick’s suggestion is thus equally implausible and expressly contradicted by the evidence.

Oddly, Barnett and Bernick attempt to undermine the importance of this evidence by highlighting the arguments of pro-slavery advocates who held very different views of the matter and who insisted on the unenumerated right to bring slaves into Missouri.73 As pointed out above, my work concedes and describes in detail various counter-understandings of the rights of national citizenship. But most importantly (and most obviously) nothing about the constitutional views of pro-slavery advocates undermines my claims about the ante-bellum constitutional ideas that are most likely to have informed the ideas and actions of the anti-slavery Republicans in the Thirty-Ninth Congress. In fact, the pro-slavery evidence cited by Barnett and Bernick highlights why anti-slavery advocates in the 1820s and anti-slavery Republicans in the 1850s would embrace an “enumerated rights only” understanding of the language of the Louisiana Cession Act.

Barnett and Bernick also claim to have identified four ante-bellum cases in which courts seem to adopt an unenumerated rights understanding of the rights “of citizens of the United States.” Before addressing these particular cases, I want to clarify once more the specific nature of my argument. Barnett and Bernick have constructed something of a strawman claim in which I am characterized as claiming “wide-spread” anti-bellum consensus, which they then refute by pointing to examples of counter-views made during this same period. In fact, I make no such claims of uniform consensus and my work concedes (and quotes) various counter-arguments. Ante-bellum America was rich with competing theories of national rights and national citizenship. Indeed, the inability to reach a stable national consensus on these issues resulted in a civil war. But the obvious fact of historical diversity does not prevent us from identifying certain ideas that seemed more prevalent than others, particularly among certain sub-communities. A clear example here would be

71 B&B, supra note 1, at 29-30.
72 See Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 52–61 (describing and quoting the different arguments by pro-slavery and anti-slavery advocates).
73 B&B, supra note 1, at 30 (“But Lash does not acknowledge that slavery advocates at other times relied instead upon general political-philosophical principles and invoked unenumerated rights.”) (emphasis added). See also id. (citing resolutions issued by the General Assembly of Virginia rejecting the proposition that the ‘rights secured by the treaty are those only which are conferred by the federal Constitution.”)
the consensus antebellum understanding of the Comity Clause. Although one can find alternative and conflicting readings of the clause (readings I present in my work), the evidence nevertheless strongly supports a conclusion that one particular understanding was particularly prevalent—the equal rights reading. Barnett and Bernick concede this understanding despite the fact that they also (presumably) know of the existence of some counter-understandings. I say this because I concede the possibility that the day may come when someone finds a case or commentary that presents an unenumerated rights understanding of the rights of citizens of the United States that was not the product of pro-slavery advocacy. On that day, we will need to determine its significance in light of the full historical record.

But this is not that day. Not one of the non-slavery cases identified by Barnett and Bernick stand for the proposition that the rights “of citizens of the United States” include unenumerated rights.

Barnett and Bernick begin by claiming that in Desbois’ Case,74 Louisiana courts held that “the rights and privileges of a citizens of the United States” included the “federally unenumerated privilege of practicing law in Louisiana.”75 An examination of Desbois, however, reveals no such holding. Jean Baptiste Desbois claimed that, because the Louisiana Cession Act made him a citizen of the United States, he was entitled to practice law in the State of Louisiana. The Louisiana court ruled in favor of Desbois, but not on the basis of an unenumerated federal privilege. According to the court in Desbois, “[h]y one of the rules of this Court, the application [to practice law] is not to be admitted, unless he be a citizen of the United States.” After a lengthy discussion, the court concluded that Desbois, as an inhabitant of the Territory of Louisiana at the time of the Louisiana Treaty, became a citizen of the State upon its admission into the Union. As Joseph Story would later agree, when Desbois became a citizen of one of the several states he was ipso facto made a citizen of the United States. Therefore, according to the rules of the state court, Desbois had the state-conferrred right to practice law in Louisiana. There is no discussion anywhere in Desbois regarding an unenumerated federal right to practice law.76

United States v. Laverty,77 the next case cited by Barnett and Bernick, involved whether inhabitants of the Louisiana Territory at the time of the Treaty became citizens of the State. If so, then they also became citizens of the United States and were not subject to laws regulating enemy aliens. The Laverty decision explores who counts as an “inhabitant” under the Treaty and congressional statutes. The federal court concluded that, “by the several acts of Congress, and the admission of the State of Louisiana into the Union, all bona fide inhabitants became citizens of the state.”78 There is nothing in Laverty about “rights, privileges and immunities of citizens of the United States” including unenumerated federal rights.

Desbois and Laverty are the only two cases identified by Barnett and Bernick as involving the actual enforcement of an unenumerated “right, advantage and immunity of citizens of the United States.” As we have seen, they do no such thing. The only other cases cited by Barnett and Bernick involve nothing more that dicta which the authors claim imply the existence of unenumerated rights “of citizens of the United States.” These claims fare no better.

For example, the Barnett and Bernick argue that dicta in Chief Justice John Marshall’s opinion in City of New Orleans v. Armas79 carries the “implication [] that the constitutionally unenumerated right to have titles decided by the tribunals of one’s own state was among the ‘rights, advantages

74 2 Mart. 185 (La. 1812)
75 B&B, supra note 1, at 33.
76 Chris Green makes the same mistaken assertion about Desbois as “contradict[ing] Webster’s constitutional rights only construction [of the Louisiana Treaty language].” See Green, Incorporation and Nothing But Incorporation, supra note ___ at 113.
77 26 F. Cas. 875 (D. La. 1812)
78 Id. at 877.
79 34 U.S. 224 (1835).
and immunities of citizens of the United States.”

This is a remarkable reading of dicta in a case involving an otherwise unremarkable point: Disputes over title are matters of state law, and therefore are not among the “rights advantages or immunities of citizens of the United States” over which federal courts have Article III jurisdiction. Instead, wrote Chief Justice John Marshall, “[t]he inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.” To Barnett and Bernick, Marshall’s reference to the reserved power of the states to decide local property title disputes is actually an implied declaration that “citizens of the United States” have an unenumerated federal right to have title disputes decided by state tribunals. But there is nothing in the opinion that justifies, much less requires, such an understanding of Marshall’s brief reference to constitutional federalism and the rights of citizens to local self-government. If there is any implication in this dicta, it is an implied reference to the Tenth Amendment.

Barnett and Bernick also cite Chief Justice Marshall’s opinion in Delassus v. United States. Here, the authors quote Marshall’s statement that the Louisiana Treaty’s language of “‘rights, advantages and immunities’ included ‘the perfect inviolability and security of property.’” Once again, the authors believe they have found dicta implying Marshall's belief in unenumerated absolute federal rights. Marshall’s opinion, however, discusses whether the Louisiana Treaty preserved pre-existing vested property rights. The protection of vested property rights, of course, is an antebellum doctrine associated with the enumerated right not to be deprived of life, liberty and property without due process of law. At most, Marshall is signaling his belief that vested property rights are one of the enumerated rights of citizens of the United States protected under the enumerated Due Process Clause. In any event, Marshall simply holds that that property right at issue “is protected and secured by the [Louisiana] treaty” because “[t]he language of the treaty ceding Louisiana excludes every idea of interfering with private property.” There is no language anywhere in Delassus suggesting that the Treaty’s phrase “rights, advantages and immunities of citizens of the United States” refers to rights nowhere enumerated in the Constitution.

In sum, Barnett and Bernick have failed to produce a single example of anyone during the antebellum period describing the “rights, advantages and immunities of citizens of the United States” as involving unenumerated constitutional rights except for pro-slavery advocates of the unenumerated right to chattel slavery. Far from undermining my claims, their own evidence illustrates why an enumerated rights understanding of the “privileges and immunities of citizens of the United States” was critically important to anti-slavery Republicans. Nor can Barnett and Bernick dismiss theEnumerated Rights understanding of the rights of citizens of the United States

80 B&B, supra note 1, at 34.
81 34 U.S. 224 (1835).
82 Id. at 225.
83 B&B, supra note 1, at 34.
84 Even if Marshall’s dicta could be read as implying the existence of such a right, he would be referring to the federally enumerated right not to be deprived of life, liberty or property without due process of law. I have the same response to Barnett and Bernick’s attempt to make something out of Justice Curtis’s reliance on Armst in his Dred Scott dissent. See, infra note ___ and accompanying text.
85 34 U.S. 117 (1835).
86 B&B, supra note 1, at 34 (citing Delassus, 34 U.S. at 118).
87 Delassus, 34 U.S. at 118 (“The right of property is protected and secured by the treaty, and no principle is better settled in this country than that an inchoate title to lands is property. This right would have been sacred independent of the treaty. The sovereign who acquires an inhabited country acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes any idea of interfering with private property.”).
89 Delassus, 34 U.S. at 118.
on the grounds that it allows for unenumerated rights as well as enumerated rights. Arguments like those presented by Webster, Morrill and King exclude that possibility. 90

1. Anti-Slavery Advocacy and the Enumerated Privileges and Immunities of Citizens of the United States

Particularly significant for those seeking the original understanding of the Fourteenth Amendment are antebellum references to the “privileges and immunities of citizens of the United States,” which associated those rights with rights enumerated in the amendments to the federal Constitution. For example, in 1835, Democrat Attorney General Benjamin Franklin Butler wrote to Secretary of State about the Louisiana Cession Act’s declaration that inhabitants of the territory would “enjoy all the rights, advantages and immunities of citizens of the United States,” and the implication of this language for citizens residing in the carved-out territory of Arkansas. Paraphrasing the Treaty’s language, Butler wrote that the citizens of Arkansas:

“undoubtedly possess the ordinary privileges and immunities of citizens of the United States. Among these is the right of the people ‘peaceably to assemble and to petition the government for the redress of grievances.’” 91

Butler’s letter tells us that as early as 1835, high-level federal officials paraphrased the language “rights, advantages and immunities of citizens of the United States” as the “privileges and immunities of citizens of the United States.” It also tells us that these officials interpreted both phrases as a reference to the enumerated constitutional rights of American citizens.

90 James W. Fox Jr. argues that antebellum treaties with similar language to the Louisiana Treaty could be read as protecting unenumerated rights. See, Fox, Publics, Meanings & Privileges of Citizenship, supra note __ at 577. For example, Fox argues that the Treaty of Guadalupe Hildago not only included the Louisiana language but also language that appeared to protect the unenumerated rights of property and contract. This is not correct. Here is the actual language of the Treaty:

Article VIII . . .
In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

Article IX
The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States. and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the mean time, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.


Nothing here contradicts an enumerated rights reading of the rights “of citizens of the United States.” The treaty language speaks to the rights of property (including property acquired by contract) and declares that such property rights shall receive the same protections as those afforded to United States citizens. United States citizens, of course, are protected against unjust deprivations of property under the enumerated Fifth Amendment to the Constitution. See also, infra, note __ and accompanying text (discussion of Due Process property rights and the Civil Rights Act).

The antebellum enumerated rights understanding of the privileges and immunities of citizens of the United States was particularly important to abolition constitutionalists. Although some abolitionists denounced the Constitution as "a covenant with death and an agreement with Hell," others embraced the Constitution and the enumerated rights theory of the privileges and immunities of citizens of the United States. For example, as the abolitionist Joel Tiffany put it in his *A Treatise on the Unconstitutionality of American Slavery* (1849):

What are the privileges, and immunities of citizenship, of the United States? We have already seen that to be a citizen of the United States is to be entitled to the benefits of all the guarantys of the Federal Constitution for personal security, personal liberty and private property. . . . But what further guarantys, for personal security and liberty, could a government provide, than the constitution of the United States has already provided?

It has secured the right of petition,—the right to keep and bear arms, the right to be secure from all unwarrantable seizures and searches, the right to demand, and have a presentment, or indictment found by a grand jury before he shall be held to answer to any criminal charge, the right to be informed beforehand of the nature and cause of accusation against him, the right to a public and, speedy trial by an impartial jury of his peers, the right to confront those who testify against him, the right to have compulsory process to bring in his witnesses, the right to demand and have counsel for his defence, the right to be exempt from excessive bail, or fines, &c., from cruel and unusual punishments, or from being twice jeopardized for the same offence; and the right to the privileges of the *great writ of Liberty, the Habeas Corpus*. And all these guarantys preceded by the express declaration, that they are given to establish justice, provide for the common defence, and secure the blessings of liberty. Tiffany insists that these privileges and immunities of citizens of the United States are those enumerated in the Constitution. This includes not only the rights enumerated in the Bill of Rights, but also “privileges and immunities” enumerated elsewhere in the Constitution, such the habeas corpus rights enumerated in Article I, Section 9, clause 2. Although traditionally viewed as binding only the federal government, Tiffany insisted that these enumerated rights were as binding upon the states as they were national government. According to Tiffany:

When a restriction is thus put in general terms, upon a subject equally affecting all the people, it is safe to infer that it applies to all, and is restrictive of both the State and National Government. Thus, "No person shall be deprived of life, liberty, or property, without due process of law. No person shall be held to answer to a capital or otherwise infamous crime, but upon presentment or indictment &c. No person shall be twice put in jeopardy of life, or limb, &c., &c. &c., all these, and such like guaranties are National in their character, and binding upon the State, as well as the National Government."

As other scholars have documented, Joel Tiffany was not the only antebellum constitutional theorist to insist that the “privileges and immunities of citizens of the United States” enumerated in the Bill of Rights ought to bind both state and federal governments. Among those sharing this “Barron-contrarian” view of enumerated rights was John Bingham, author of the Privileges or Immunities Clause. Before discussing Bingham’s views, however, it is important to first understand

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94 Id. at 106.
95 A term coined by Akhil Amar as a reference to antebellum theorists who believed states were obligated to respect the Bill of Rights. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 145 (1998).
how abolition constitutionalists understood the Fifth Amendment’s enumerated right not to be deprived of life, liberty or property without due process of law.

2. **Anti-Slavery Advocacy and the Enumerated Right to Due Process of Law**

The enumerated rights of greatest interest to abolition constitutionalists was the Due Process Clause of the Fifth Amendment. Joel Tiffany, for example, focused on the Fifth Amendment’s enumerated right to due process and insisted that this right could never be reconciled with the existence of chattel slavery. Tiffany quoted the amendment’s declaration that “No person shall be deprived of life, liberty, or property, without due process of law” and then pointed out that “[i]t cannot be claimed that the word ‘person’ does not include the so called slave.”

Tiffany was not alone in making this Due Process argument against slavery. In the years prior to the Civil War, anti-slavery advocates increasingly focused on the Due Process Clause as establishing the Constitution as a fundamentally pro-freedom document, and as forbidding any federal cooperation with the institution of slavery. Frederick Douglass, for example, broke from the anti-Constitution theories of William Lloyd Garrison and argued that a plain reading of the Due Process Clause and other enumerated constitutional rights could not be reconciled with the existence of slavery. In his essay, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Douglass wrote:

This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself . . . The Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus—the great writ that put an end to slavery and slave-hunting in England—it secures to every State a republican form of government. Any one of these provisions, in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America.

Similarly, the 1860 Republican Party Platform declared:

“That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that "no persons should be deprived of life, liberty or property without due process of law," it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.”

For the opponents of slavery, the Due Process Clause formed the bridge between the natural rights asserted in the Declaration of Independence and the enumerated legal requirements of the American Constitution. Indeed, to these abolitionists, the Due Process Clause was the *embodiment* of the Declaration of Independence. As the 1843 Liberty Party Platform declared:

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96 Tiffany, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY*, supra note __, at 120.


RESOLVED, That the fundamental truths of the Declaration of Independence, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government, by that amendment of the constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law.\textsuperscript{100}

When Congress debated the Thirteenth Amendment, abolitionist repeatedly linked the natural rights asserted in Declaration of Independence to the enumerated Fifth Amendment right not to be deprived of life, liberty or property without due process of law. For example, Massachusetts Senator Charles Sumner declared that “the distinctive elements of a republic according to the idea of American institutions” were found “first, in the Declaration of Independence, by which it is solemnly announced “that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” And they will be found, secondly, in that other guarantee and prohibition of the Constitution, in harmony with the Declaration of Independence; “no person shall be deprived of life, liberty, or property without due process of law.”\textsuperscript{101}

This melding of the Declaration of Independence and the Due Process Clause is also apparent in Owen Lovejoy’s speech in the Thirty-Eighth Congress introducing a bill to end the practice of slavery. On December 14, 1863, Illinois Representative Owen Lovejoy “introduced a bill to give effect to the Declaration of Independence, and also to certain provisions of the Constitution of the United States.”\textsuperscript{102} As reported in the Congressional Globe:

[Lovejoy’s] bill was read. It recite[d] that all men were created equal, and were endowed by the Creator with the inalienable right to life, liberty, and the fruits of honest toil; that the Government of the United States was instituted to secure those rights; that the Constitution declares that no person shall be deprived of liberty without due process of law, and also provides—article 5, clause 2—that “this Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, and the judges in each State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding;” that it is now demonstrated by the rebellion that slavery is absolutely incompatible with the union, peace, and general welfare, for which Congress is to provide. It therefore enacts that all persons heretofore held in slavery in any of the States or Territories of the United States are declared free men, and are forever released from slavery or involuntary servitude, except as punishment for crime, on due conviction.\textsuperscript{103}

3. \textit{Due Process Property Rights and “the Fruits of Honest Toil”}

Notice that Lovejoy substitutes the phrase “the fruits of honest toil” for the Declaration’s term “property.” Lovejoy then quotes the Due Process Clause and its protection of life, liberty and property as an example of how the Constitution secures these declared rights to “the fruits of honest toil.” John Bingham, the man who drafted Section One of the Fourteenth Amendment, used similar rhetoric in describing the property rights protected against unjust deprivation under the Due Process Clause. In an 1857 speech opposing slavery in Kansas, Bingham repeated the common abolitionist argument that slavery was incompatible with the equal rights of life, liberty and property enumerated in the Fifth Amendment to the federal Constitution. In doing so, Bingham insisted that


\textsuperscript{103} Id. (reporter’s account of the reading of the Bill).
the Due Process Clause prohibited unequal deprivations of the “production of labor” and the “fruits of his toil.” Here is Bingham:

It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that no person shall be deprived of life, liberty or property, without due process of law. It makes no distinction either on account of complexions or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the production of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.104

As did other anti-slavery Republicans, Bingham linked the rights of due process to the equal right not be deprived of the fruits of one’s labor (one’s “honest toil”). Recognizing Bingham’s antebellum understanding of equal due process in matters relating to “property and the production of labor” (the “fruits of toil”) helps us understand how Republicans in the Thirty-Ninth Congress, including John Bingham, could view the non-discrimination provisions in the Civil Rights Act as an enforcement of the rights of due process.105 It also puts us on notice that Reconstruction-era references to the constitutionally protected rights of labor may be references to the equal right not to be deprived of property without due process of law, and not references to free-floating absolute economic rights.

4. John Bingham and the Rights of Citizens of the United States

John Bingham’s understanding of the rights of national citizenship are particularly important not because he held unique views, but because he ultimately translated his understanding into the text of a constitutional amendment. The antebellum speeches of John Bingham provide significant insight into the constitutional theories that informed his actions in the Thirty-Ninth Congress, both in regard to the framing of Section One and his understanding of the Civil Rights Act.

Years before the debates of 1866, Bingham had publicly declared his belief that states ought to enforce the constitutionally enumerated rights of citizens of the United States, particularly those listed in the Bill of Rights. Among these rights were those enumerated in the Fifth Amendment which Bingham described as declaring the natural right of all persons not to be deprived of life, liberty or property without due process of law. These natural rights of due process were by their very nature equal rights—rights belonging to all persons regardless of race or citizenship. All of these ideas appear in Bingham’s antebellum speeches and then reappear in the debates of 1866.

In 1856, for example, John Bingham spoke against a proposed constitution for the State of Kansas on the ground that it failed to protect the rights of citizens of the United States enumerated in the First and Fifth Amendments to the Constitution. According to Bingham:

[Any territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States “to know, and argue, and to utter freely, according to conscience,” is absolutely void, because it is not consistent with that provision of the Constitution which declares that the Congress of the United States shall not pass any law abridging the freedom of speech or of the press.” . . . This pretended legislation of Kansas violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force, while the Constitution provides that Congress shall make no law abridging freedom of speech

105 See infra note ___ and accompanying text.
or of the press; and it expressly prescribes that “no person shall be deprived of life, liberty, or property without due process of law.”

Which shall stand—the Constitution which guarantees to each man personal liberty, and to collective man empire, or these atrocious statutes which inaugurate the worst despotism that world ever saw?106

Here Bingham describes the rights of “a citizen of the United States” as enumerated constitutional rights, specifically those enumerated in the First and Fifth Amendments. The phrase Bingham used to describe the enumerated First Amendment right to free speech, the right “to know, to argue, and to utter freely according to conscience,” reappears, to the letter, in Bingham’s 1871 speech explaining the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.107

In his 1857 speech opposing the allowance of slavery in Kansas, Bingham again described the rights of citizens of the United States as involving enumerated constitutional rights, and he insisted that Congress should not sanction state abridgement of these rights. Bingham explained that the Northwest Ordinance demanded that new states respect the right that “that no man should be therein deprived of his liberty or property, but by the judgment of his peers, or the law of the land; that the inhabitants thereof (all the inhabitants) should be always entitled to the benefits of the writ of habeas corpus, and of the trial by jury; that private property should not be taken even for public use without full compensation therefor.”108 Far from being abrogated by the adoption of the Constitution, the enumerated rights protected by the Ordinance were affixed to the text of the Constitution through the adoption of the Bill of Rights. “The fifth and sixth of these amendments,” Bingham explained, “contained substantially, and almost literally, the provisions of the articles of the ordinance, and, like them, declare that “no person shall be deprived of life, liberty, or property, without due process of law;” that the people shall have the trial by jury in all cases involving life or liberty; and that private property shall not be taken for public use without just compensation.”109

Focusing on the Fifth Amendment, Bingham stressed that the language of the Due Process Clause protected the equal natural right of every person not to be deprived of life, liberty or property without due process of law:

The Constitution is based upon the Equality of the human race. In the words of Washington, “It is completely free in its principles.” A State formed under the Constitution, and pursuant to its spirit, must rest upon this great principle of Equality. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. Mere political or conventional rights are subject to the control of the majority; but the rights of human nature belong to each member of the State, and cannot be forfeited but by crime. . . .

It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that no person shall be deprived of life, liberty or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property,
the production of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.\(^\text{110}\)

Bingham refers to the enumerated right not to be deprived of property as protecting the “the production of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.” This is not an unenumerated absolute economic right, but an aspect of every person's right to expect equal protection of their right not to be unjustly deprived of life, liberty or property.

5.  \textit{John Bingham’s Speech Opposing the Admission of Oregon}

In 1859, John Bingham delivered a speech in the House of Representatives detailing his reasons for opposing the admission of Oregon as a new state in the Union. In this speech, Bingham presents his theory of the enumerated privileges and immunities of citizens of the United States and the natural right of all persons to be equally protected in their rights of due process. There is no more important piece of historical evidence regarding the roots of John Bingham’s theory of the Constitution and, for that reason, I provide below a substantial excerpt from the speech.\(^\text{111}\)

Although Oregon’s proposed state constitution banned slavery, it also excluded free blacks from entering the state and prohibited blacks from owning property, entering into contracts, or filing suit in Oregon state court.\(^\text{112}\) To Bingham, these restrictions amounted to a denial of the right to due process of law as declared by the Fifth Amendment to the federal Constitution--an enumerated right of citizens of the United States that Bingham insisted states were obliged to enforce according to the terms of Article IV and the Supremacy Clause.

Bingham constructs his theory on an idea first articulated by Joseph Story in his \textit{Commentaries on the Constitution}. According to Story, citizens “of the states” are, \textit{“ipsos facto,” citizens “of the United States.”}\(^\text{113}\) The text of Article IV, Section 2, declares that “citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”\(^\text{114}\) If “citizens of a state” are, by necessary implication, citizens of the United States, then Article IV may be read as if it contains an “ellipsis,” or an implied parenthesis: “Citizens (of the United States) of each State shall be entitled to all privileges and immunities of citizens (of the United States) in the several States.” Therefore, Bingham argued, Article IV properly read obligates the states to respect \textit{all} of the rights of citizens of the United States, \textit{especially} the enumerated equal right of all persons not to be deprived of life, liberty or property without due process of law. The proposed provisions in the Oregon Constitution excluding black citizens from the state and denying them access to its courts therefore could be reconciled with this enumerated right of national citizenship. As we shall see, John Bingham will repeat all of these arguments in the Thirty Ninth Congress.\(^\text{115}\)

\textit{John Bingham’s Oregon Speech}

It has always been well understood amongst jurists in this country, that the citizens of each State constitute the body politic of each community, called the people of the State; and that the citizens of each State in the Union are \textit{ipsos facto} citizens of the United States. (Story on the Constitution, vol. 3, p. 565). . . .

\(^{111}\) Readers may find the full speech at Cong. Globe, 35th Cong., 2nd Sess., 981-85 (Feb. 11, 1859).
\(^{112}\) See id. at 984.
\(^{114}\) U.S. Const., Art. IV, Section 2, clause 1.
\(^{115}\) See infra note ___ and accompanying text.
And in further illustration of my position I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word “person,” as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that “no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.” And this guarantee applies to all citizens within the United States. That these wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers, may not be infringed, it is further in this national Constitution provided [quotes the Supremacy Clause].

There, sir, is the limitation upon State sovereignty—simple, clear and strong. No State may rightfully, by constitution or statute law, impair any of these guarantied rights, either political or natural. They may not rightfully or lawfully declare that the strong citizens may deprive the weak citizens of their rights, natural or political; and if the State should do so by enacting statutes to that effect, there stands the limitation of the Constitution of the United States, sanctioned by the strong averment assented to and ratified by all the people and all the States—this Constitution shall be the supreme law; and the judges in every State shall be bound thereby...

I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the “privileges and immunities” of a citizen of the United States. What says the Constitution:

“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” Article 4, section 2.

Here is no qualification, as in the clause guarantying suffrage or an elective representation to the people; here is no room for that refined construction, that each State may exclude all or any of the citizens of the United States from its territory. The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to “all privileges and immunities of citizens in the several States.” Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to “all privileges and immunities” of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is “the privileges and immunities of citizens of the United States in the several States” that it guaranties...

Sir, if the persons thus excluded from the right to maintain any suit in the courts of Oregon were not citizens of the United States; if they were not natives born of free parents within the limits of the Republic, I should oppose this bill; because I say that a State which, in its fundamental law, denies to any person, or to a large class of persons, a hearing in her courts of justice, ought to be treated as an outlaw, unworthy a place in the sisterhood of the Republic. A suit is a legal demand of one’s right, and the denial of this right by the judgment of the American Congress is to be sanctioned as law! But, sir, I maintain that the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; and therefore I hold this section for their exclusion from that State and its courts, to be an infraction of that wise and essential provision of the national Constitution to which I before referred, to wit:

“The citizens of each State shall be entitled to all privileges and immunities of citizens IN THE SEVERAL STATES.” . . .
Nobody proposes or dreams of political equality any more than of physical or mental equality. It is as impossible for men to establish equality in these respects as it is for “the Ethiopian to change his skin.” Who would say that all men are equal in stature, in weight, and in physical strength; or that all are equal in natural mental force, or in intellectual acquirements? Who, on the other hand, will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation? . . .

All free persons, then, born and domiciled in any State of the Union, are citizens of the United States; and, although not equal in respect of political rights, are equal in respect of natural rights. . . .

I as fully recognize the fact that all political privileges are, and ought to be, under the absolute control of the majority in a republican government; and their will is, and should be, the law. But, sir, while this is cheerfully conceded, I cannot, and will not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which, not to confer, all good governments are instituted; and the failure to maintain which inviolate furnishes, at all times, a sufficient cause for the abrogation of such government; and, I may add, imposes a necessity for such abrogation, and the reconstruction of the political fabric on a juster basis, with surer safeguards.

I ask no change of the law as it is written in the Federal Constitution. I leave the States as that constitution leaves them, free to regulate the elective franchise among citizens of the United States; to extend it to or to withhold it at their pleasure from all colored citizens, or only some of them; from all minors, white or black; and, if they see fit, from the best portion of the citizens of the United States—from all the free intelligent women of the land. But I protest against the attempt to mar that great charter of our rights, almost divine in its conception and in its spirit of equality, by the interpolation into it of any word of caste, such as white, or black, male or female; for no such word is in that great instrument now, and, by my act, or word, or vote, never shall be.

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, is the rock on which that Constitution rests—its sure foundation and defense. Take this away, and that beautiful and wise and just structure, so full of the goodness and truth of our fathers, falls. The charm of that Constitution lies in the great democratic idea which it embodies, that all men, before the law, are equal in respect to those rights of person which God gives and no man or State may rightfully take away, except as a forfeiture for crime. Before your constitution, sir, as it is, as I trust it ever will be, all men are sacred, whether white or black, rich or poor, strong or weak, wise or simple.

I cannot consent to mutilate and destroy that great instrument, the Constitution of my country, by supporting a bill which, on its face, gives effect to a State constitution which denies to citizens of the United States the right of a fair trial in the courts of justice for the enforcement of a right or the redress of a wrong. In opposing this bill, sir, I am doing what I can to maintain the Constitution and the honor of my country. 116

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In this speech, Bingham repeats a number of ideas we first identified in his speeches of 1856 and 1857. Once again, Bingham describes the rights of citizens of the United States as involving enumerated constitutional rights such as those protected by the First and Fifth Amendments to the Constitution. As was the case in prior speeches, Bingham’s discussion of natural rights is limited to those natural rights actually enumerated in the Constitution and secured by the Fifth Amendment’s Due Process Clause. As he had done in prior speeches, Bingham describes the Due Process Clause as protecting the natural rights of all persons not to be deprived of property without due process of law; his description of the due process property right as involving each person’s right “to work and enjoy the product of their toil” echoes his previous description of the right involving “the production of labor” and as mandating that “no man shall be wrongfully deprived of the fruit of his toil.” Once again, these are not references to absolute unenumerated natural rights, but are instead references to the right not to be deprived of property produced through toil without due process of law. In this entire speech, from is discussion of the First Amendment rights to “right to know; to argue and to utter, according to conscience,” to the Fifth Amendment due process right of all persons not to be deprived of the right “to work and enjoy the product of their toil” without due process of law, Bingham only cites constitutionally enumerated rights as the privileges and immunities “of citizens of the United States.”

Relying on a theory he will repeat in the Thirty-Ninth Congress, Bingham finds such rights implied in the language of Article IV. Although the Comity Clause speaks only of the “citizens of each state,” Bingham insists that the Clause should be read as if it included the critically important language “of citizens of the United States.” Relying on Story’s “ipso facto” theory of state citizenship, Bingham explains that citizens of each State are “ipso facto” citizens “of the United States.” Accordingly, we can fairly add this necessarily implied language to the express language of Article IV’s that it reads “The citizens (of the United States) of each State shall be entitled to all privileges and immunities of citizens (of the United States) in the several States.”

Crucially, Bingham understands that without the addition of this implied ellipsis, Article IV expressly refers only to the rights of “citizens of each State . . . in the several States.” These rights, as explained in Corfield, involve only “those constitutional rights and immunities which result exclusively from State authority or State legislation.” It is only by way of the additional implied reference to the rights “of citizens of the United States” that Bingham can argue that Article IV obligates states to respect the enumerated privileges and immunities of national citizenship. Bingham’s speech, therefore, is premised on the idea that there are two kinds of “rights and immunities”: those associated with the express language of Article IV (privileges and immunities of citizens of each State), and those associated with the implied language referring to the privileges and immunities “of citizens of the United States.”

Finally, it is important to understand Bingham’s distinction between the rights of national citizenship and the natural rights of all persons. In the above speech, Bingham emphasized that the right not to be deprived of life, liberty or property was a natural right of all persons. Here is the critical passage:

“And in further illustration of my position I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word “person,” as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that “‘no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.”


According to Bingham, “[t]he charm of that Constitution lies in the great democratic idea which it embodies, that all men, before the law, are equal in respect to those rights of person which God gives and no man or State may rightfully take away, except as a forfeiture for crime.” In these passages, Bingham is not speaking of absolute unenumerated substantive rights. He is expressly referring to the enumerated due process clause and its declaration that “all men, before the law, are equal in respect to those rights of person which God gives.”

Bingham repeated this “equal rights” reading of the Due Process Clause in speeches delivered during the Civil War. In his 1862 speech advocating the abolition of slavery in the District of Columbia, Bingham declared:

Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word “freeman,” and adopts in its stead the more comprehensive words “no person;” thus giving its protection to all, whether born free or bond. The provision of our Constitution is, “no person shall be deprived of life, or liberty, or property without due process of law.” This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century. . . . The later and nobler revelation to our fathers was that all men are equal before the law.

No matter upon what spot of the earth’s surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor; no matter whether wise or simple; no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law; that no person, by virtue of the American Constitution, by the majesty of American law, shall be deprived of life or liberty or property without due process of law.

As we shall see, Bingham’s long-standing belief in the equal right of all persons not to be deprived of life liberty or property without due process of law will inform both his drafts of Section One of the Fourteenth Amendment and his opposition to the non-discrimination provisions of the 1866 Civil Rights Act—an act Bingham described as protecting the equal due process rights of life, liberty and property.

D. Conclusion

Despite their best efforts, Barnett and Bernick have failed to undermine any aspect of the Enumerated Rights reading of antebellum discussions regarding privileges and immunities of citizens of the United States. They have conceded the consensus antebellum understanding of Corfield v. Coryell and Article IV's “privileges and immunities of citizens in the several states” as providing no more than relative protection for a limited set of “fundamental” state secured rights. They have conceded the existence of anti-slavery activists who presented an enumerated rights reading of the “rights, advantages and immunities of citizens of the United States,” and they have failed to render such references obscure or idiosyncratic. They have failed to identify a single instance of an abolitionist, an anti-slavery constitutionalist, or an antebellum Republican expressing anything other than an Enumerated Rights understanding of the privileges and immunities of citizens of the United States. Their efforts to interpret references to labor rights as references to absolute unenumerated rights have been shown to have been references to the enumerated Due Process right not to be deprived of life, liberty or property without due process of law. Most of all, their abridged discussion of John Bingham’s antebellum speeches omitted

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119 Id. at 985.
Bingham’s natural rights reading of the equal rights of Due Process and erroneously identified terms and phrases in his speeches as references to absolute unenumerated rights. Instead, the historical record unequivocally shows Bingham in all of his speeches as describing the rights of citizens of the United States as enumerated constitutional rights. Bingham never described the rights of citizens of the United States as involving anything but enumerated constitutional rights. This allowed him to claim he sought to bind states to nothing other than those rights already declared in the people’s Constitution.

Just to review the claim I am making about this evidence: The Enumerated Rights reading of the Privileges or Immunities Clause claims that this Clause, along with the rest of Section One of the Fourteenth Amendment, reflects anti-slavery Republican constitutional theory in general and the theories of John Bingham in particular. This theory maintains that the privileges and immunities of citizens of the United States, unlike the privileges and immunities of citizens of the several States, are those enumerated in the text of the federal Constitution. This idea can be traced back to ideas first articulated on a national level by those opposing slavery in Missouri, and it is an idea that clearly informed antebellum constitutional theory of John Bingham. There is no evidence that any Republican constitutional theorist or anti-slavery activist believed that the “privileges and immunities of citizens of the United States” included unenumerated absolute rights. Although Republicans broadly embraced the rhetoric of the Declaration of Independence, they just as broadly viewed that rhetoric as having been constitutionalized in the Due Process Clause of the Fifth Amendment. Similarly, when John Bingham spoke of natural rights and the right of all persons to be protected in the products of their labor and fruits of their toil, he was expressly referring to what he viewed as the natural rights protected under the Due Process Clause of the First Amendment. Bingham believed this enumerated privilege or immunity of citizens of the United States, along with other enumerated rights like the First Amendment’s right “to know, to utter freely according to conscience,” should be binding upon the states. Even this belief was grounded in enumerated constitutional text, in this case Bingham’s “ellipsis” reading of Article IV, Section 2.

In Part II, I address Barnett and Bernick’s claims about the debates of the Thirty-Ninth Congress, the framing of the amendment, and the place of the Civil Rights Act in the structure of Section One. I will argue that the antebellum constitutional theories of anti-slavery advocates in general and John Bingham in particular informed the framing and public understanding of Section One of the Fourteenth Amendment. The Privileges or Immunities Clause declares the rights “of citizens of the United States,” rights described by both John Bingham and Jacob Howard involving the constitutionally enumerated rights of national citizenship. The last two clauses of Section One declare the rights of all persons, or what Bingham insisted were the equal natural rights of every person not to be deprived of life, liberty and property without Due Process of Law. Describing the

121 In his review of my book, James Fox argues that the 1821 opinion of William Wirt denying that blacks could be citizens of the United States “contradicts” my claim of a distinction between the rights of “citizens in the several states” and those belonging to “citizens of the United States.” See James W. Fox, Jr., Publics, Meanings & Privileges of Citizenship, supra note ___ at 578. This is not correct. In his opinion, Wirt explains that “free persons of color” in Virginia should not be considered citizens of the United States and thus qualified to receive a federal coasting license. According to Wirt, no one could be a citizen of the United States unless they were also a citizen in their state of residence. If free blacks were considered “citizens of Virginia,” even if Virginia refused to recognize such a status, then these free blacks upon traveling to other states would qualify for the protection of the Comity Clause and wind up with more rights in the states they visited then they did in their state of residence, “a consequence which certainly could not have been in the contemplation of the convention.” See William Wirt, Rights of Free Negroes in Virginia, 7 Nov. 18211 Ops. Atty. Gen. 506. Fox believes this argument somehow collapses the distinction between the privileges “of citizens in the several states” and the privileges “of citizens of the United States.” It does not. Wirt is simply repeating the common antebellum claim that national citizenship was generally dependent on state citizenship. Nothing about his argument denied a distinction between the two. In fact, Wirt illustrates the distinction by pointing out that once one receives the standard rights of state citizenship, one then qualifies for a separate set of federal privileges such as those bestowed by the federal Constitution’s Comity Clause. Id.
Civil Rights Act as effort to secure the equal rights of due process, Bingham refused to support such an act prior to the addition of an amendment expressly giving Congress power to enforce the rights of due Process.

PART II: THE THIRTY-NINTH CONGRESS

A. Introduction to Section II

Although this response necessarily focuses on discussions involving the Privileges or Immunities Clause, it is important to keep in mind the broader context of Congress’s work in the Thirty-Ninth Congress. Within days of the opening roll-call on December 4, 1865, Secretary of State Seward announced the ratification of the Thirteenth Amendment. The Senate Judiciary Committee immediately began work on what would become the 1866 Civil Rights Act—legislation Judiciary Committee Chair Lyman Trumbull would insist was an appropriate exercise of power under Section 2 of the Thirteenth Amendment. In the House, meanwhile, Rep. Thaddeus Stevens called for the creation of a Joint Committee made up of members from both the House and Senate. This committee would be tasked with determining what actions had to be taken before Congress would allow the readmission of representatives from the former Confederacy. This Joint Committee, of which John Bingham was a member, would draft and submit a variety of proposed constitutional amendments. None of these proposals would gain sufficient support until May 1866 when Stevens convinced the Joint Committee to combine the separate proposals into a single five-section amendment, the Fourteenth Amendment. In the meantime, the Senate would spend its opening weeks debating Trumbull’s proposed Civil Rights Act, and the House would spend its opening weeks debating proposed constitutional amendments submitted by the Joint Committee, including an amendment drafted by John Bingham. From the beginning, therefore, the Fourteenth Amendment and the Civil Rights Act were on different tracks, drafted by different people, and reflected different agendas.

B. John Bingham and the First Submitted Draft of Section One

On December 6, 1865, only two days after the opening of the Thirty-Ninth Congress, John Bingham introduced two joint resolutions proposing amendments to the Constitution. The first forbade assuming the war-incurred debts of the rebel states. The second was meant to “empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property.” Although the Congressional Globe does not give us the exact language of Bingham’s proposed amendment, we know that this was an effort to enforce the Due Process Clause of the Fifth Amendment. In his antebellum speeches, Bingham had repeatedly described the Due Process Clause as embodying the principle of equality and the natural right of all persons to the equal protection of their right not to be deprived of life,

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122 See, Proclamation of Secretary of State William Seward, Ratification of the Thirteenth Amendment (December 18, 1865), in 13 Statutes at Large (December, 1865, to March, 1867), Appendix, Proclamations and Executive Orders, No. 52, pp.774-75 (Boston: Little, Brown, and Company 1868).
125 See Journal of the Joint Committee, supra note __, at 82-88.
126 For a general description of these events and their timing, see Lash, Enforcing the Rights of Due Process, supra note ___.
128 Id.
liberty or property without due process of law. Ultimately, Bingham will separate the ideas of equal protection and due process into the final two clauses of Section One. Even in their final form, however, these clauses will continue to reflect Bingham's belief that the principles of equal protection and due process protect natural rights belonging to all persons.

Bingham's initial proposals were sent to the House Judiciary Committee. That committee, however, would not be tasked with the job of discussing proposed constitutional amendments in the Thirty-Ninth Congress. Instead, the House and Senate formed the Joint Committee on Reconstruction, and selected John Bingham as one of its fifteen members. This committee was tasked with drafting and submitting proposed constitutional amendments that the Committee believed must be added to the Constitution before allowing the readmission of the former rebel states.

On January 9, 1865, in a speech addressing President Johnson's policies, John Bingham laid out the basic constitutional theory that would guide his efforts that session towards securing a specific constitutional amendment. “[I]n view of the fact that many of the States . . . have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens,” Bingham explained, “it is time that we take security for the future, so that like occurrences may not again arise to distract our people and finally to dismember the Republic.” Using the same “ellipsis” theory of the Comity Clause that Bingham first articulated in his 1859 speech opposing the admission of Oregon, Bingham explained how Article IV, Section 2 already obligated the States to respect the privileges and immunities “of citizens of the United States”:

When you come to weigh these words, “equal and exact justice to all men,” go read, if you please, the words of the Constitution itself: “The citizens of each State (being ipso facto citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis “of the United States”) in the several States.” This guarantee of the privileges and immunities of citizens of the United States in, not of, the several States. This guarantee of your Constitution applies to every citizen of every State of the Union; there is not a guarantee more sacred, and none more vital in that great instrument.

This is the same reading of Article IV that Bingham first presented in his 1859 opposing the admission of Oregon. Echoing the same theory he held before the Civil War, Bingham maintained that the citizens of the States are, by definition, “citizens of the United States.” This being the case, we can read Article IV as if it referred to the privileges and immunities “of citizens of the United States.” So understood, Article IV obligated the states to respect all of the rights of national citizenship.

Barnett and Bernick insist that Bingham’s January 9 speech supports the Fundamental Rights reading of the Privileges or Immunities Clause. After quoting the “ellipsis” passage in Bingham’s speech, Barnett and Bernick provide the following summation:

129 See supra note __ and accompanying text.
131 For representative documents of the Joint Committee and their proposed constitutional amendments, See Kurt T. Lash, 2 THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS (forthcoming, University of Chicago Press) (2 volumes).
133 See supra note __ and accompanying text.
“In Bingham’s words, the Privileges and Immunities Clause of Article IV guaranteed to U.S. citizens the enjoyment of “natural or inherent rights, which belong to all men irrespective of all conventional regulations.” (fn to Bingham’s 1859 speech) That these included rights set forth in the 1789 amendments can be seen in Bingham’s express reference to the Fifth Amendment in 1859 as being among the “privileges and immunities of citizens of the United States” and in the subsequent evolution of the text of his proposed amendment.”

These are not, of course, “Bingham’s words” at all, either in 1859 or in 1866. Bingham never said “the Privileges and Immunities Clause of Article IV guaranteed to U.S. citizens the enjoyment of ‘natural or inherent rights, which belong to all men irrespective of all conventional regulations.’” What Bingham did explain in 1859 was that Article IV obligated the states to enforce the Due Process Clause of the Fifth Amendment, and that that amendment protected persons, not just citizens, and that this particular amendment protected “natural or inherent rights.” Barnett and Bernick combine portions of Bingham’s 1859 and 1866 speeches in a manner that makes it appear as if Bingham declared that Article IV protected “natural or inherent” rights “including” (but not limited to) the rights in the Fifth Amendment. Having studied his antebellum speeches, we know this is not what Bingham actually said. In 1859, Bingham did not cite the Fifth Amendment as an example of the natural rights protected by Article IV. Bingham cited the Fifth Amendment as the constitutional provision which protected the natural or inherent rights of persons, citizen and non-citizen alike—enumerated rights that states were obligated to enforce under his ellipsis reading of Article IV.

In his January 9, 1866, speech, Bingham points out that the states “have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens,” including the natural rights protected by the Fifth Amendment. Bingham therefore intended to propose an amendment “giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their personal rights.” Such an amendment, Bingham insisted, will not “mar” the constitution, but “will perfect it.”

Following up on his promise, on January 12, Bingham introduced to the Joint Committee an amendment granting Congress “power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property.” His proposal was sent to a sub-committee made up of William Pitt Fessenden, Thaddeus Stevens, Jacob Howard, Roscoe Conkling, and John Bingham himself. On January 20, that subcommittee reported three proposed amendments to the full Joint Committee. Two proposals were versions of an apportionment amendment (what would ultimately be the subject of Section Two of the Fourteenth Amendment). The third was an expanded version of Bingham’s proposal of January 12:

“Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.”

The Joint Committee postponed discussion of the “equal protection” amendment and instead focused on the apportionment amendments. The Committee ultimately adopted one version of

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135 B&B, supra note 1, at 11.
137 Id.
138 Journal of the Joint Committee, supra note __, at 46.
139 Id. at 46-47.
140 Journal of the Joint Committee, supra note __, at 49-51.
141 Id. at 51.
the apportionment amendment submitted the same to the House where it was debated during the final days of January 1866.\textsuperscript{142}

On January 25, 1866, in the middle of the apportionment amendment debates, Bingham explained that this was just the first of a number of proposed amendments the Joint Committee was likely to send to the House. Bingham informed his colleagues that the Joint Committee was currently working on an amendment empowering Congress “to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guarantied to him from the beginning.”\textsuperscript{143} Acknowledging that some of his colleagues thought that Congress already “has the power, implied necessarily, to enforce all the guarantees of the Constitution,” Bingham insisted this was not the case. Congressional enforcement of the rights of national citizenship required a constitutional amendment. Bingham explained:

“[Y]our Constitution declares that no person shall be deprived of life without due process of law; yet, in support of what I have just said on the necessity of an additional grant of power, allow me to remind the House of the fact that this highest right which pertains to man or citizen, life, has never yet been protected, and is not now protected, in any State of this Union by the statute law of the United States. . . . And this results from the accepted construction that this Government has not the power by law to enforce in the States this guarantee of life.”\textsuperscript{144}

Having submitted the apportionment amendment, the Joint Committee by that time was in fact working on an amendment empowering congressional enforcement of equal rights. The Committee struggled, however, to find agreement on the right language. On January 27, Bingham on behalf of the subcommittee reported a slightly modified draft:

“Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges.”\textsuperscript{145}

Finally, on February 3, Bingham proposed replacing the subcommittee’s original proposal altogether with an entirely new draft:

“This 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 (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5 \textsuperscript{th} Amendment).”\textsuperscript{146} (parentheticals in original).

This draft, proposed on Bingham’s own initiative, deleted the phrase “equal political rights and privileges” from the subcommittee’s draft, and instead adopted the language of Article IV, Section 2, and the Fifth Amendment’s Due Process Clause.

Having studied his antebellum speeches, we can see how this proposal reflects John Bingham’s particular theory of the rights of citizenship and the equal natural rights of all persons. The language of Article IV (according to Bingham’s ellipsis theory) obligates the States to respect all of the rights

\textsuperscript{142} See, e.g., Cong. Globe, 39th Cong. 1st Sess., 351, 353–59 (January 22, 1866); 376–89 (January 23, 1866); 403-07 (January 24, 1866); 422–35 (January 25, 1866); Cong. Globe, 39th Cong., 1st Sess., 508 (January 30, 1866). For a selection of those debates, see Lash, THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS, supra note __.

\textsuperscript{143} Cong. Globe, 39th Cong., 1st Sess., 429 (January 25, 1866).

\textsuperscript{144} Id.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 60-61.
of national citizenship, while the language of the Due Process Clause involves the idea that all persons have an equal natural right not to be unjustly deprived of life, liberty or property. Both represented rights that Bingham insisted had been “guaranteed to [citizens] from the beginning,” but that Congress had previously lacked the enumerated power to enforce.

The Joint Committee adopted Bingham’s substitute,147 and, on February 10, 1866, voted to submit the amendment to the House for its consideration.148 Bingham introduced the proposal on February 26149 and, for the next three days, the House debated the first submitted draft of what would become Section One of the Fourteenth Amendment.

1. John Bingham Introduces the Draft

On February 26, 1866, John Bingham introduced his amendment and delivered a short speech explaining its purpose and meaning. Bingham began by stressing the limited textual nature of the proposal—it protected only those rights already enumerated in the Constitution. Bingham called “the attention of the House to the fact that the amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.”150 The amendment, Bingham used “the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the first Congress in 1789, and made part of the Constitution of the country.”151

Although such rights were already in the Constitution, it had been “the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution.”152 The limited scope of the proposal ensured that the amendment did not violate any constitutional rights of the people in the states, since “the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.”153

Over and over again, Bingham stressed the fact that the amendment involved only pre-existing enumerated rights: The “amendment proposed stands in the very words of the Constitution,” “every word of the proposed amendment is to-day in the Constitution of our Country,” it imposed no obligation on the States “which is not now enjoined upon them by the letter of the Constitution.”154 This was an amendment that protected enumerated constitutional rights and only enumerated constitutional rights.

The next day, a number of members spoke on the amendment, including California Republican William Higby who spoke in support and New York Republican Robert S. Hale who spoke in opposition. Higby focused on the proposal’s use of the language of the Comity Clause. Noting that sojourning citizens had not been protected as they traveled from states to state, Higby praised the amendment for “giv[ing] force and effect and vitality to that provision of the Constitution which has been regarded heretofore as nugatory and powerless.”155

Speaking against the amendment, Robert Hale focused on the proposal’s use of the language of the Fifth Amendment. Hale insisted that the Due Process Clause, along with the rest of the Bill

147 Id. at 61.
148 Id. at 62.
149 Cong. Globe, 39th Cong., 1st Sess., 1033 (February 26, 1866).
150 Cong. Globe, 39th Cong., 1st Sess., 1034 (February 26, 1866).
151 Id.
152 Id.
153 Id.
154 All at id.
155 Cong. Globe, 39th Cong., 1st Sess., 1054 (February 27, 1866).
of Rights, was meant to be a restriction on, not a grant of power to, Congress. Bingham’s proposal, Hale claimed, intruded upon the reserved rights of the States by empowering Congress to regulate matters relating to life, liberty and property. Explained Hale:

“[T]he gentleman from Ohio [Mr. BINGHAM] refers us to the fifth article of the amendments to the Constitution as the basis of the present resolution, and as the source from which he has taken substantially the language of that clause of the proposed amendment I am considering. Now, what are these amendments to the Constitution, numbered from one to ten, one of which is the fifth article in question? What is the nature and object of these articles? They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation. They are not matters upon which legislation can be based.156

According to Hale, the Fifth Amendment, like the rest of the Bill of Rights ("amendments to the Constitution, numbered from one to ten") bound the states, but was enforceable only by courts of law. In response, John Bingham challenged Hale to name a “single decision” in which courts had enforced the Fifth Amendment’s right to due process against a state. “Where is the decision,” Bingham demanded, “I want an answer.”157 Hale demurred, not having “been able to prepare a brief for this argument.” Hale had, nevertheless, “somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected.”158 Wisconsin Democrat Charles Eldredge then spoke up, challenging Bingham to produce a case denying that the Fifth Amendment bound the states.159 Bingham would do so the next day. For the moment, however, Hale continued to insist that the Bill of Rights already bound the states and that Bingham’s proposal was an unnecessary and dangerous intrusion on State rights:

“If [Bingham] claims that those provisions of the constitution or the laws of Oregon are inconsistent with the bill of rights contained in the Constitution of the United States, then I answer that his remedy is perfect and ample, and the courts may be appealed to to vindicate the rights of the citizens, both under civil and criminal procedure. Their powers are ample; it never was questioned, it never could be questioned, that the decrees of the courts, in all the States at least where slavery did not exist, have been thoroughly and sufficiently enforced.”160

By the end of the day, it was clear that support for Bingham’s amendment was faltering. The next day, Bingham will discuss the meaning and importance of Chief Justice John Marshall’s opinion in Barron v. Baltimore—a moment as important to Bingham’s own thinking about the draft as it is to our understanding of why he changed the ultimate language of Section One. Before getting to that speech, however, it is necessary to address Barnett and Bernick’s claims about the common understanding of the term “Bill of Rights” during Reconstruction.

2. Aside: The Consensus Reconstruction Understanding of the Federal Bill of Rights

156 Id. at 1064.
157 Id.
158 Id.
159 Id.
160 Id. at 1065.
The above quoted exchange between Bingham and Hale contains a number of references to the Bill of Rights. If there was any doubt about the meaning of the term, Hale erases it by expressly defining the “amendments to the Constitution, numbered from one to ten” as “constitute[ing] the bill of rights.”\(^{161}\) Hale’s understanding of the term “the bill of rights” was perfectly consistent with how the term was generally used during the time of Reconstruction.

In their critique, however, Barnett and Bernick resist the idea that in 1866 there was any fixed meaning to the term “Bill of Rights.” Citing the work of Gerard Magliocca, Barnett and Bernick claim “that the first ten (or eight) amendments were not commonly called “the Bill of Rights” until the Twentieth Century.”\(^{162}\) Barnett and Bernick try to deploy this “contested understanding of the Bill of Rights” argument in their analysis of the work of John Bingham. They argue that when John Bingham used the phrase “bill of rights,” there is no reason to think he meant it “solely to refer to . . . enumerated rights.”\(^{163}\) After all, they claim, in Bingham’s 1859 Oregon speech, Bingham seems to have associated Article IV with “the (unenumerated) rights to “know” and to “work and enjoy the product of . . . toil.”\(^{164}\) Bingham included Article IV in his description of the “bill of rights” in his speeches of February 1866. Putting these pieces together, this means that Bingham included unenumerated (Article IV) rights as part of his understanding of “the bill of rights.” Although today this might sound like an odd interpretation of the “bill of rights,” it is just another example of how speakers in 1866 had no fixed understanding of the term bill of rights.

This argument fails for multiple reasons. First, and most importantly, Barnett and Bernick have misinterpreted Bingham’s references to the right “to know” and to “work and enjoy the product of . . . toil.” These are not references to unenumerated rights. These are descriptions of rights enumerated in the First and Fifth Amendments. We know this is the case from our study of Bingham’s antebellum speeches. For example, Bingham referenced the First Amendment protected right to “know” in his 1856 speech where he declared:

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\text{[A]ny territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States “to know, and argue, and to utter freely, according to conscience,” is absolutely void, because it is not consistent with that provision of the Constitution which declares that the Congress of the United States shall not pass any law abridging the freedom of speech or of the press.}\]

The entire phrase, “to know, and argue, and to utter freely, according to conscience,” involves rights Bingham’s finds enumerated in the First Amendment. Next, Bingham referenced the right to “work and enjoy the product of . . . toil” in his 1857 speech where he explained:

\[
The Constitution provides, as we have seen, that no person shall be deprived of life, liberty or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the production of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.\]

Barnett and Bernick’s claim about Bingham’s reference to unenumerated rights thus fails from the outset. They fare no better in their efforts to divorce references to the “Bill of Rights” from the rights enumerated in the 1791 amendments. Here they have failed to distinguish references to “a

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\(^{161}\) Id. at 1064

\(^{162}\) B&B, supra note 1, at 14.

\(^{163}\) B&B, supra note 1, at 39.

\(^{164}\) Id. at 39.

\(^{165}\) See supra note [86] and accompanying text.

bill of rights” from references to “the federal Bill of Rights.” As Gerard Magliocca has shown, in the period between the Founding and the Civil War, one could find the general term “bill of rights,” used in reference to a variety of things, from the English Bill of Rights,167 to the Virginia Bill of Rights,168 to a statutory bill of rights,169 to the Declaration of Independence.170 There is no confusion here. There are many things one can describe as being in the “in the nature of a bill of rights,” the federal Bill being only one among many.171

Reconstruction-era speakers had no difficulty explaining which “bill of rights” they were referring to. For example, here are two speeches in which John Bingham used the term “bill of rights,” one in reference to the Declaration of Independence, the other in reference to the federal Bill of Rights. The first is from 1861:

“Is there no reference to a higher law in your sublime Declaration of Independence, that immortal bill of rights, which will live as long as language lives, in the words “these states are, and of right ought to be, free and independent states, and may do what independent states may of right do?”172

In the above, Bingham clearly references the Declaration of Independence and nothing else. Now, compare the above passage with a speech that Bingham delivered the next year:

“Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word “freeman,” and adopts in its stead the more comprehensive words “no person;” thus giving its protection to all, whether born free or bond. The provision of our Constitution is, “no person shall be deprived of life, or liberty, or property without due process of law.” This clear recognition of the rights of all was a new gospel to mankind.”173

In this speech, Bingham describes the Fifth Amendment as a provision located in “our Constitution[‘s] bill of rights.” In both speeches, Bingham tells his audience which “bill of rights” he is referring to. In the first speech, he refers to the Declaration (and nothing else). In the second, he refers to the federal Constitution (“its bill of rights”), and nothing else.

As Prof. Magliocca demonstrates, prior to 1860 it was fairly common for speakers to describe the Declaration of Independence a bill of rights.174 But in doing so, no one confused the Declaration with the federal Bill of Rights. Bingham’s speeches above are one example. There are many others. At the New York Peace Convention of 1863, Virginian J.R. Wood complained that the administration’s conduct during the civil war had acted “as though the American Revolution had not entered into history, the Declaration of Independence had never been proclaimed, and a free constitutional government, with its bill of rights . . . were but the ‘baseless fabric of a vision.”175

167 See Richmond Whig (Richmond, Virginia), January 16, 1855 p. 4.
168 See Richmond Whig (Richmond, Virginia), April 24, 1866, p. 2.
169 See Augusta Chronicle (Augusta, Georgia), March 27, 1866, p. 2 (referring to the Civil Rights Bill as a “bill of rights.”).
170 Cong. Globe, 36th, 2d, at app. 83.
171 See Columbian Register (New Haven, Connecticut), April 28, 1866, p. 2 (using the term in reference to the federal Bill of Rights).
172 Cong. Globe, 36th, 2d sess., at app. 83.
173 Cong. Globe, 37th, 2d sess., 1638. (emphasis added)
Although Wood was a Democrat, we find the same clear distinction between the Declaration of Independence and the Bill of Rights in the speeches by no less a fan of the Declaration than the Radical Republican Charles Sumner. In his 1864 Senate speech, “No Property in Man,” Sumner distinguished the Declaration from the federal Bill of Rights and used the term “bill of rights” as a rhetorical reference to one of the Bill’s enumerated rights, the Fifth Amendment:

But the guarantee of a republican form of government must have meaning congenial with the purposes of the Constitution . . . But no American need be at a loss to designate some of the distinctive elements of a republic according to the idea of American institutions. These will be found first, in the Declaration of Independence, by which it is solemnly announced “that all men are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.” And it will be found, secondly, in that other guarantee and prohibition of the Constitution, in harmony with the Declaration of Independence; “No person shall be deprived of life, liberty, or property without due process of law.” . . . But, independent of the clause of guarantee, there is the clause just quoted, which in itself is a source of power; “No person shall be deprived of life, liberty, or property without due process of law.” This was a part of the amendments to the Constitution proposed by the First Congress, under the popular demand for a Bill of Rights. Though brief, it is in itself alone a whole Bill of Rights.176

As Sumner’s speech illustrates, when Reconstruction-era speakers referenced the federal Bill of Rights they commonly associated the term with the rights enumerated in the 1791 constitutional amendments. Here, for example, is President James Buchanan in his 1860 Message to Congress:

Under this [Article V], amendments have been proposed by two-thirds of both Houses of Congress, and have been ‘ratified by the Legislatures of three fourths of the several States,’ and have consequently become part of this Constitution. To this process the country is indebted for the Clause prohibiting Congress from passing any law respecting the establishment of religion, or abridging the freedom of speech, or of the press, or of the right of petition. To this we are, also, indebted for the Bill of Rights, which secures the people against any abuse of power by the federal Government. Such were the apprehensions justly entertained by the friends of State-rights at that period as to have rendered the Constitution could have long survived without these amendments.”177

As we have already seen, when John Bingham referred to “our Constitution[’s]” bill of rights he did so in reference to constitutionally enumerated rights.178 As Prof. Magliocca points out in his book, “by the time the Fourteenth Amendment was being debated, Bingham was using the term [Bill of Rights] for the first set of amendments repeatedly.”179 Magliocca also does not believe that anyone listening to Bingham “were confused about what Bingham and his colleagues meant by that phrase.”180 Magliocca is right. Bingham and his colleagues shared a common understanding that references to the federal Bill of Rights were references to enumerated constitutional rights. In fact, by the time of Reconstruction, there had been a long-standing tradition of equating the federal bill of rights with the 1791 amendments.

177 “President’s Message,” The Examiner (Frederick, Maryland), p. 1 (Dec. 12, 1860). (emphasis added).
178 Cong. Globe, 37th, 2d sess., 1638.
179 Magliocca, THE HEART OF THE CONSTITUTION, supra note __ at 63. (emphasis added)
180 Id. at 188, n.16.
As early as 1840, former New Hampshire Governor C. P. Van Ness in his argument before the Supreme Court referred to Barron vs. The City of Baltimore and its holding that “that the amendments to the Constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government.” Similarly, in his 1860 message to Congress, President Buchanan described the Bill of Rights as an example of amendments added by way of Article V. In 1862, John Bingham spoke of the federal Constitution and “its Bill of Rights” as containing the Fifth Amendment’s Due Process Clause. That same session, Representative Benjamin Thomas of Massachusetts declared “nor are we to forget that the Constitution is a bill of rights as well as a frame of government; that among the most precious portions of the instrument are the first ten amendments; that it is doubtful whether the people of the United States could have been induced to adopt the Constitution except upon the assurance of the adoption of these amendments.” In 1864, during the debates on the proposed Thirteenth Amendment, New York Representative John Pruyn explained that “[t]he twelve amendments to the Constitution have been made, the first ten almost simultaneously with its adoption. They are declaratory and restrictive, containing the great principles of the Bill of Rights. The eleventh and twelfth amendments were adopted a few years subsequently.”

Additional examples abound: An 1865 editorial in the Albany Argus described “[t]he bill of rights embodied in the Federal Constitution, with its amendments” as “a fair delineation of what civil liberty is.” In 1866, an editorial in the Chicago Republican quoted the Fifth and Sixth Amendments and complained that President Johnson’s veto of the Freedmen’s Bureau Bill meant that “if any State by its local laws violates these and the various other privileges enumerated in the Bill of Rights, the United States must be powerless to remedy the wrong.” During the debates in the Thirty-Ninth Congress, Ohio Rep. William Lawrence reminded his colleagues that “[t]he bill of rights to the national Constitution declares that: ‘No person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.” There are too many similar examples to fully cite in one article.

These references to the federal Bill of Rights often were part of an “origins story” about the Founding. For example, the above cited speech by Rep. Thomas in which he reminded his colleagues that the addition of the ten amendments constituting the Bill of Rights were necessary to secure the ratification of the Constitution. Similarly, an 1855 editorial in the Albany Evening Journal explained that:

182 Explained Buchanan:

“In this article [V], amendments have been proposed by two-thirds of both Houses of Congress, and have been ‘ratified by the Legislatures of three fourths of the several States,’ and have consequently become part of this Constitution. To this process the country is indebted for the Clause prohibiting Congress from passing any law respecting the establishment of religion or abridging the freedom of speech, or of the press, or of the right of petition. To this we are also indebted for the Bill of Rights, which secures the people against any abuse of power by the federal Government. Such were the apprehensions justly entertained by the friends of State Rights at that period as to have rendered it extremely doubtful whether the Constitution could have long survived without these amendments.”

President Buchanan’s Message to Congress, published in The Examiner (Frederick Maryland), Dec. 12, 1860, p. 1.
185 Cong. Globe, 38th Cong. 1st Sess., 2940 (June 14, 1864).
186 Daily Albany Argus (published as Albany Argus), p. 2, Aug. 16 (1865); The Effect of the War Upon Civil Liberty.
188 Cong. Globe, 39th Cong., 1st sess. at 1833 (April 7, 1866).
When the instrument was proposed by the Convention of the several States for their adoption, in 1787, the chief and indeed almost the only ground of objection to it, was the lack of sufficient guaranties of State and Personal Rights. Eight of the thirteen States positively refused to agree to it, unless such guaranties should be given. They were accordingly given by Ten Amendments proposed in the First Congress. . . . In a word the Ten Amendments constitute a Bill of Rights.\textsuperscript{190}

In an 1863 essay on the Conscription Act, George B. Butler wrote that concerns over state rights “commenced in the effort to amend the Constitution by the introduction of a bill of rights (the ten amendments).”\textsuperscript{191} In his 1864 political essay, “The Future,” author of the New York Code of Civil Procedure Montgomery H. Throop provided a detailed origins story of the 1791 amendments known as the federal Bill of Rights:

“Thus it was supposed, that by the independence of the Legislature and the President's responsibility to it, the liberties of the nation were effectually secured against the usurpations of the Executive. At the same time, great dissatisfaction was manifested at the omission of the convention to incorporate a bill of rights into the Constitution, so as to secure the liberties of the individual against the exercise either of unlawful powers, or of lawful powers in an oppressive manner.

The eighty-fourth number of The Federalist is principally devoted to showing that the Constitution is not open to any solid objections by reason of that omission; but the alarm which the absence of a bill of rights aroused was so great, that although, after a long hesitation on the part of some of the States, the Constitution was ratified by the requisite number, several of the conventions expressed officially an earnest wish to have amendments immediately incorporated into it, which should supply that omission.

And accordingly, several "declaratory and restrictive" amendments to the Constitution were at once adopted, in order, as expressed in their preamble, "to prevent misconstruction or abuse of its powers," among which were the following: "Congress shall make no law . . . abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. . . ."\textsuperscript{192}

One of the clearest examples of this commonly-told “origins” story about the ten amendments constituting the federal “bill of rights” is found in an 1867 speech by Ohio State Supreme Court Judge R. P. Ranney:

“You all know the history of the ten amendments. When the Constitution of the United States was first submitted to the States for ratification, it was found not to contain what is commonly called a bill of rights—that is, provisions containing limitations on the power of the government. The advocates of the Constitution said this was unnecessary. Why? Because there was nothing granted to the Government except what was clearly expressed in the letter of the Constitution. But to make assurance doubly sure, a large number of States to which the Constitution was submitted, recommended amendments constituting a bill of rights. I will call

\textsuperscript{190} Albany Evening Journal, p. 2 (March 10, 1855). See also Weekly Racine Advocate, April 2, 1855, p.1 (same editorial).


your attention to the tenth amendment. It provides that the powers not herein expressly
delegated to the General Government, are reserved to the States and the people thereof.\footnote{193} In short, there is ample evidence that Reconstruction-era references to the federal Bill of Rights referred to, and were understood as referring to, the enumerated constitutional rights listed the 1791 amendments. This includes John Bingham’s references to the federal Bill of Rights which, as Magliocca notes in his book, referred to enumerated constitutional rights. Not only is this evidence copious and indisputable, as far as I know no one has discovered evidence of anyone describing the federal Bill of Rights as including anything other than constitutionally enumerated rights. When Barnett and Bernick declare that “Lash does not demonstrate that Bingham’s use of the “bill of rights” was understood by the 1868 public to include only enumerated rights” and “[g]iven recent scholarship on the use of the term “the Bill of Rights,”” we believe such a demonstration to be impossible,” they have completely missed a convincing corpus of historical evidence demonstrating precisely what they believe impossible.

\textit{a. Omitting the Ninth and Tenth Amendments From the Bill of Rights}

In the speech quoted above, Democrat Judge Ranney included the Tenth Amendment as part of the federal Bill of Rights.\footnote{194} Some Republicans, including Jacob Howard and John Bingham, mentioned only the first eight amendments when they described the federal Bill of Rights.\footnote{195} Howard and Bingham’s omission of the Ninth and Tenth Amendments likely reflects those amendments common association with federalism and the doctrine of state rights. In the period between the Founding and Reconstruction, the Ninth and Tenth Amendments had been commonly described by courts and legal commentators as twin guardians of American federalism,\footnote{196} often in support of policies directly antithetical to those of abolitionist Republicans.

In the original debates on the admission of Missouri, proponents of slavery insisted the Ninth and Tenth Amendments prevented Congress from banning slavery in the territory.\footnote{197} In his concurring opinion in \textit{Dred Scott v. Sanford},\footnote{198} for example, Justice John A. Campbell declared that “the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people.”\footnote{199} In his speech supporting South Carolina’s secession from the Union, Democrat Judah P. Benjamin quoted the Ninth and Tenth Amendments as “an important addition made to the Constitution by which it was expressly provided that it should not be construed to be a General Government over all the people, but that it was a Government of States . . . The language of the ninth and tenth amendments to the Constitution is susceptible of no other construction.”\footnote{200} In his speech opposing the Thirteenth Amendment, New York’s Fernando Wood declared “[t]he control over slavery, and the domestic and social relations of the people of the respective States, was not and never was intended to be delegated to the United States, and cannot now be delegated except by the consent of all the States. Articles nine and ten of the Amendments

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\footnote{193} Speech of [Ohio Supreme Court Justice] Hon. R. P. Ranney, at Mansfield O., August 6, 1867, reported in Plain Dealer (Cleveland Ohio), August 9, 1867, p. 1.
\footnote{194} Speech of [Ohio Supreme Court Justice] Hon. R. P. Ranney, at Mansfield O., August 6, 1867, reported in Plain Dealer (Cleveland Ohio), August 9, 1867, p. 1.
\footnote{195} Cong. Globe, 39th Cong. 1st Sess. 2766 (1866) (Howard) (first eight amendments “stand simply as a bill of rights in the Constitution”); \textit{Cong. Globe}, 42d Cong. 1st Sess., Appendix, 81-86 (March 31, 1871) (Bingham) (“Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights.”).
\footnote{196} See, generally, Kurt Lash, \textit{THE LOST HISTORY OF THE NINTH AMENDMENT}, supra note \_.
\footnote{197} See Annals of Cong., 15th Cong., 2d sess. 1197 (February 1819) (Remarks of Mr. Scott from Missouri).
\footnote{198} 60 U.S. 393 (1857).
\footnote{199} Dred Scott, 60 U.S. at 511.
\end{footnotes}
to the Constitution are conclusive on this point.” In the Thirty-Ninth Congress, Pennsylvania Democrat Benjamin M. Boyer opposed Section Two of the Fourteenth Amendment and quoted the Ninth and Tenth Amendments as evidence that Congress had no right to “disfranchise the majority of the citizens of any State on account of their past participation in the rebellion.” This practice continued after the Thirty-Ninth Congress: In the Fortieth Congress, opponents of the 1870 Enforcement Act insisted that its passage violated the state rights principles of the Ninth and Tenth Amendments.

These are just a few examples. As I have extensively documented elsewhere, for the first one hundred and fifty years of our constitutional history, the Ninth Amendment was regularly paired with the Tenth Amendment as one of the twin guardians of American federalism. In light of this long-standing association of the Ninth and Tenth Amendments with slavery, secession and state rights, it is not surprising that some Reconstruction Republicans distinguished the personal rights enumerated in the first eight amendments from the federalist rights enumerated in the last two. Those who included the Ninth and Tenth Amendments as part of the Bill of Rights simply acknowledged that the bill contained both personal and structural rights. Whether one limited one’s description of the federal Bill of Rights to the first eight amendments or included all ten, all references to the federal Bill of Rights were understood as references to enumerated constitutional rights.

b. John Bingham’s Inclusion of Article IV in the Bill of Rights

One last “Bill of Rights” related issue involves John Bingham’s brief foray into describing the federal Bill of Rights as including the enumerated rights in Article IV, Section 2, as well as the rights enumerated in the 1791 amendments. The statements were made on February 26 and February 28 as part of Bingham’s unsuccessful effort to pass the first submitted draft of what would become Section One. Here again is the Joint Committee’s draft, authored by John Bingham:

ARTICLE—. 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.

On February 26, 1866, John Bingham explained the amendment and its purpose and, in doing so, stressed the fact that the proposal protected no other rights than those already enumerated in the Constitution:

201 Cong. Globe, 38th Cong. 1st Sess., 2941 (June 14, 1864).
203 See Cong. Globe, 41st Cong., 2d Sess., appx. 354 (May 18, 1870) (statement of Sen. Hamilton) (citing the Ninth and Tenth amendments together as establishing the principle of enumerated federal power and protecting the reserved sovereignty of the states); id. at app’x 431 (May 27, 1870) (statement of Rep. Swan) (same).
204 See Lash, LOST HISTORY OF THE NINTH AMENDMENT, supra note ____.
205 See, e.g., Albany Evening Journal, p. 2 (March 10, 1855) (describing the ten amendments of the Bill of Rights as enumerated “State and Personal Rights”). See also Weekly Racine Advocate, April 2, 1855, p.1 (same).
Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the first Congress in 1789, and made part of the Constitution of the country. The language of the second section of the fourth article is—

“The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.”

The fifth article of the amendment provides that—

“No person shall be deprived of life, liberty, or property, without due process of law.”

... And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.

Bingham’s above reference to “these great provisions of the Constitution, this immortal bill of rights” makes it sound as if he is including the enumerated rights of Article IV as part of the Bill of Rights. Then, on February 28, just before joining the vote to withdraw the amendment, Bingham again seemed to describe both Article IV and the Fifth Amendment as part of the Bill of Rights:

What do gentlemen say to these provisions? “Oh, we favor that; we agree with the President that the basis of the American system is the right of every man to life, liberty, and the pursuit of happiness: we agree that the Constitution declares the right of every citizen of the United States to the enjoyment of all privileges and immunities of citizens in the several States, and of all persons to be protected in life, liberty, and property.”

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, “We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed.”

If Bingham really believed Article IV was part of the federal Bill of Rights, this would be unusual but it would not contradict the Enumerated Rights reading of the Privileges or Immunities Clause. After all, Jacob Howard included both Article IV and the first eight amendments as among the enumerated privileges and immunities of citizens of the United States. Bingham would be doing the same. Still, Bingham’s inclusion of Article IV as part of the Bill of Rights is odd enough to require some kind of explanation.

Either Bingham literally believed the federal Bill of Rights includes Article IV, or he was speaking rhetorically. The latter would not be surprising, given Bingham’s longstanding view that the language of Article IV, properly read, had the effect of obligating the states to respect the federal Bill of Rights. In other words, Bingham had the same understanding of the federal Bill of Rights as did his colleagues, but he rhetorically included Article IV as part of his effort to convince his colleagues that his Article IV-based amendment would obligate the states to enforce the Bill of Rights. In fact, the very next day, Bingham engaged in an altogether common conversation about the ten amendments of the Bill of Rights with Representative Hale. Here is Hale:

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208 Cong. Globe, 39th Cong., 1st Sess., 1034 (February 26, 1866).
210 See supra note ___ and accompanying text.
“[T]he gentleman from Ohio [Mr. BINGHAM] refers us to the fifth article of the amendments to the Constitution as the basis of the present resolution, and as the source from which he has taken substantially the language of that clause of the proposed amendment I am considering. Now, what are these amendments to the Constitution, numbered from one to ten, one of which is the fifth article in question? What is the nature and object of these articles? They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation.\textsuperscript{211}

Hale does not respond to Bingham’s argument of the day before as if he thought Bingham had presented an unusual (and expanded) definition of the Bill of Rights. Instead, Hale assumes the common understanding that the Bill of Rights involves the rights enumerated in the 1791 amendments (“numbered from one to ten”). Bingham, in turn, does not correct him, but simply challenges Hale to produce a case in which courts enforced the Fifth Amendment against the states.\textsuperscript{212} In fact, once Bingham agreed to withdraw his initial Article IV-based amendment, he never again described the Bill of Rights as including Article IV. From that time forward, Bingham adopted the same view as Hale, Jacob Howard and everyone else: The federal Bill of Rights involved the 1791 amendments. As Bingham later declared, “Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights.”\textsuperscript{213}

Whether Bingham originally held an idiosyncratic view of the federal Bill of Rights and later changed his mind (as I have suggested in past writing), or whether he originally spoke only rhetorically in an effort to emphasize the role of Article IV in obligating the states to respect the federal Bill of Rights, makes no difference to the Enumerated Rights reading of the Privileges or Immunities Clause. In all of his speeches, Bingham always associated the Bill of Rights with rights enumerated in the federal Constitution. In other words, all of Bingham’s speeches are consistent with the Enumerated Rights reading of the privileges and immunities of citizens of the United States. The real problem with Bingham’s February 1866 description of this first submitted draft of Section One was that it failed to convince his colleagues to support the amendment.

3. \textit{The Debates of February 28}

On the last day of the three-day House debate on Bingham’s Article IV-based draft, critics continued to attack the proposed amendment as an unwise expansion of federal power. New York Republican Thomas Davis, for example, insisted that the amendment was a “radical and fatal” blow to federalism and state rights: It gave “Congress the power to make all laws to secure to every citizen in the several States equal protection to life, liberty, and property, is a grant for original legislation by Congress. If Congress may give equal protection to all as to property, it is itself the judge of the measure of that protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it make it equal.”\textsuperscript{214} Vermont’s Frederick Woodbridge countered that the proposal “merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship.”\textsuperscript{215} Woodbridge continued, explaining that his view that the Article IV-based amendment would empower Congress to do nothing more than enforce the traditional relative rights of Article IV:

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\item \textsuperscript{211} Cong. Globe, 39th Cong., 1st Sess., 1064 (February 27, 1866).
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Cong. Globe, 42d Cong. 1st Sess., Appx., 84 (March 31, 1871) (Bingham).
\item \textsuperscript{214} Cong. Globe, 39th Cong., 1st Sess., 1087 (February 28, 1866).
\item \textsuperscript{215} Id. at 1088.
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“It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection of his property which is intended to the other citizens of the State.\textsuperscript{216}

John Bingham then rose one last time and defended his proposal from claims that it violated the principles of federalism, while at the same time insisting that it did much more than simply allow Congress to enforce the relative rights of Article IV. Bingham “repel[led] the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it.” “The proposition pending before the House,” Bingham declared, “is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day. It ‘hath that extent—no more.’”\textsuperscript{217}

Bingham’s assurance to his colleagues cannot be reasonably understood as anything other than a declaration that the amendment protected only pre-existing enumerated constitutional rights. Those are the only rights that “stand[] in the Constitution to-day.” As explained in detail above, Bingham’s reference to the federal Bill of Rights would have been understood as a reference to rights enumerated in the 1791 amendments and Bingham himself never used the term in reference to anything except enumerated constitutional rights.

Continuing to stress the proposals limit to rights already enumerated in the Constitution, Bingham pointed out that the words of the proposal came from the hand of the people themselves:

“It rests upon the authority of the whole people of the United States, speaking through their Constitution as it has come to us from the hands of the men who framed it. The words of that great instrument are:

“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

“No person shall be deprived of life, liberty, or property, without due process of law.”\textsuperscript{218}

In words echoing his ellipsis understanding of Article IV, Bingham chided his colleagues for resisting an amendment that would allow Congress to enforce the Bill of Rights against the States:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, “We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed.” . . .

Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property: we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.”\textsuperscript{219}

\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 1089.
\textsuperscript{219} Id.
As for state rights, Bingham denied that “any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States.” The problem, Bingham explained, was the current lack of congressional authority to enforce these pre-existing rights. Responding to Robert Hale’s comment the previous day that individuals could “enforce in the United States courts the bill of rights under the articles of amendment to the Constitution,” Bingham cited Chief Justice John Marshall’s opinion in *Barron v. Baltimore*. There, the Supreme Court had denied that “the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts.” Bingham further quoted from *Livingston v. Moore* where the Supreme Court stated that “[a]s to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States.” Bingham then demanded, “What have gentlemen to say to that? Sir, I stand relieved to-day from entering into any extended argument in answer to these decisions of your courts[.]” It is worth noting that this entire exchange between Hale and Bingham over these two days assumes both they and their hearers shared the common understanding that the term “bill of rights” refers to the “articles of amendment to the Constitution.” Thus, the relevance of *Barron v. Baltimore*, a case involving one of those articles of amendment (the Fifth)

As far back as 1859 in his speech opposing the admission of Oregon, John Bingham had insisted that states had a pre-existing obligation to respect the federal Bill of Rights. This obligation arose from state officials taking an oath to support the Constitution, including Article IV which under the ellipsis reading, impliedly referred to all of the enumerated rights of citizens of the United States. Now, in his final effort to convince his colleagues to pass his Article IV-based amendment, Bingham repeated the same argument. Stressing the obligations of state officials to uphold their oaths, Bingham quoted Daniel Webster’s declaration that “[the Constitution] incapacitates any man to sit in the Legislature of a State who shall not first have taken his solemn oath to support the Constitution of the United States. From the obligation of this no State power can discharge him.” “Those oaths have been disregarded,” Bingham insisted, and “those requirements of our Constitution have been broken; they are disregarded to-day in Oregon; they are disregarded to-day, and have been disregarded for the last five, ten, or twenty years in every one of the eleven States recently in insurrection.”

Bingham then focused on the right to due process as enumerated in the Fifth Amendment’s Due Process Clause. Bingham noted that “[States] elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property.” If Congress passed the proposed amendment, then “if [state officials] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow men.” “Why should it not be so,” Bingham demanded, “[i]s the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter?”

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220 Id.
221 Id.
222 Id. at 1090.
223 Id.
224 Cong. Globe, 35th Cong., 2nd Sess., 981-85 (Feb. 11, 1859). See also supra note __ and accompanying text.
226 Id.
227 Id. at 1090
228 Id. Note that Bingham had long insisted that the Due Process Clause necessarily contained an implied principle of equal protection. See, supra note __ and accompanying text.
229 Id.
The problem, insisted Bingham, was the lack of congressional power to enforce the Bill of Rights. Reading from Federalist No. 45, “a paper written by James Madison,” Bingham quoted Madison’s assurance that “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” This federalist principle of limited federal power “stands as the very text of the Constitution itself, which declares that—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people.” Bingham then read portions of McCulloch v. Maryland, Martin v. Hunter’s Lessee, Gibbons v. Ogden, Story’s Commentaries on the Constitution, and Kent’s Commentaries—all for the proposition that Congress had no constitutional authority to enforce the bill of rights. Rejecting the implied powers doctrine of Prigg v. Pennsylvania, as well as expansive interpretations of Section Two of the Thirteenth Amendment, Bingham demanded:

And from what expressly delegated power in the Constitution can any such power be implied? Passing the anti-slavery amendment, is there any one prepared to say that the bill of rights confers express legislative power on Congress to punish State officers for a willful and corrupt disregard of their oaths and oppressive and flagrantly unjust violations of the declared rights of every citizen and every free man in every free State? The words of Madison cited are very significant: “The powers reserved to the several States will extend to all the objects which concern the lives, liberties, and properties of the people.”

Bingham concluded by repeating his long-held view that the Fifth Amendment’s enumerated right to Due Process secured the natural right of all persons to be equally protected against deprivations of their life, liberty or property without due process of law:

*Your Constitution* provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.

Bingham’s singular focus on empowering Congress to enforce constitutionally enumerated rights is unmistakable. Over and over again, Bingham insists that his proposal does nothing other than protect rights already enumerated in the Constitution, in particular the Fifth Amendment of the Bill of Rights. Being so limited, the proposal took nothing from the states that they had not already been bound by oath to respect. Bingham’s textualism is also reflected in his insistence that no text in the Constitution granted Congress power to enforce the enumerated rights of Due Process. Before Congress could act, it would have to pass a constitutional amendment.

Bingham’s words and arguments were reported in major national newspapers. Here are the critical portions of Bingham’s speech as published by the New York Times:

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230 Cong. Globe, 39th Cong., 1st sess. at 1093. The *Congressional Globe* here either misquotes Bingham or Bingham misquotes Federalist No. 45. Although the text in the Globe reads “Federal,” Madison actually wrote “The powers reserved to the several States.”

231 Id. at 1093.

232 Id.

233 Id.

234 Id. at 1094.

Electronic copy available at: https://ssrn.com/abstract=3351142
“He [Bingham] repelled the assertion, made in the heat of debate, that the Committee or any of its members sought, in any form, to mar the Constitution or take from any State rights that belonged to it under the Constitution. This was simply a proposition to arm the Congress of the United States, by the consent of the people, with power to enforce the bill of rights as it stood in the Constitution. It had that extent—no more.

... [The President] told Congress that it was the right of every man to be secure in life, liberty and property; but that rested on a higher authority—on the authority of the people, speaking through their Constitution, wherein they declared that the citizens of each State should be entitled to all the privileges and immunities of citizens of the United States in each State, and that no person should be deprived of life, liberty or property without due process of law. He argued that the proposed amendment did not in any way interfere with the rights of States.”

I have not found any newspaper that reported the specific language recorded in the Congressional Globe where Bingham stated “Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law.” Instead, multiple newspapers simply reported Bingham’s insistence that the proposition was meant only to enforce the Bill of Rights. Here, for example, is the summary of the Boston Daily Advertiser:

“Mr. Bingham closed the debate. He concisely answered the objections which had been urged against the amendment, and then most eloquently advocated its passage, saying it was nothing more nor less than a proposition to give Congress power to enforce the guarantees of the Bill of Rights.”

Members of the public following the debate in the newspapers could have no doubt that Bingham was proposing an amendment that did nothing more or less than empower Congress to enforce the federal Bill of Rights, a term commonly understood as a reference to the amendments of 1791.

4. Objections and Postponement

Following Bingham’s final statement, his colleague on the Joint Committee, Roscoe Conkling (who in committee had voted against the proposal) conceded some of his time to New York Republican Giles Hotchkiss. Described by Earl Maltz as a “mainstream Republican,” Hotchkiss remained committed the principle of constitutional federalism—a principle he believed was threatened by Bingham’s amendment. According to Hotchkiss, “[Bingham’s] object in offering this resolution and proposing this amendment is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another.” If that was all the amendment secured, Hotchkiss would have voted in support. As written, however, the amendment “authorize[d] Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property.” Hotchkiss was “unwilling that

235 NEW YORK TIMES (NY, NY), March 1, 1866, p. 5. An almost verbatim account was published in the Chicago Republican (Daily Inter Ocean), March 1, 1866, p. 1.
236 (February 28, 1866).
237 Boston Daily Advertiser, March 1, 1866, p.1.
Congress shall have any such power.” Should Congress one day fall into the “hands of rebels,” “we may have a Congress here who would establish such rules in my State as I should be unwilling to be governed by.”

Hotchkiss had no concerns about enforcing the rights of article IV, rights which Hotchkiss described as “provid[ing] that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another.”

His concerns were focused on giving Congress to establish “uniform laws uniform laws throughout the United States” relating to the protection of life, liberty and property. Such power left the substance of such uniform laws “to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not upon two thirds of Congress and three fourths of the States.”

Hotchkiss therefore suggested the Committee redraft the amendment in a manner that “these guarantees in the Constitution . . . cannot be stripped from us by any accident, and I will go with the gentleman.” Specifically, “[w]hy not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment.”

Hotchkiss’s objections posed a problem for Bingham in three different ways. First, it signaled that Bingham was losing the support of moderate Republicans—support he could not afford to lose. Secondly, Hotchkiss interpreted Bingham’s effort as seeking to enforce nothing more than the rights of equal treatment, either by way of the Comity Clause (which Hotchkiss did not oppose) or by way of the equal due process rights provision (Hotchkiss himself sought nothing more than an anti-discrimination amendment, thus his proposed language). This fell far short of Bingham’s announced goal of enforcing the absolute rights enumerated in the Bill of Rights. Finally, Hotchkiss had a point: As drafted, the amendment might be read as granting Congress power to establish uniform laws on the subjects of life, liberty and property.

Bingham desired no such thing and he had insisted that the protections of the amendment would come into play only in cases where states failed to enforce the “privileges and immunities of citizens of the United States.” Hotchkiss, however, was not convinced and Bingham bowed to the inevitable. Upon Conkling’s motion, discussion of the amendment was postponed until April.

By the time the Joint Committee finally submitted its second and final draft of Section One, the language of Article IV had been removed. Instead, Bingham’s new draft would begin with language that Chief Justice John Marshall himself insisted was required if states were to be bound to enforce the Bill of Rights, “No State shall . . .” These words would be followed by a phrase with an antebellum history of referring to the enumerated rights of national citizenship, “make or enforce any law abridging the privileges or immunities of citizens of the United States.” Before discussing that second and final Joint Committee draft, we must first discuss the 1866 Civil Rights Act.

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240 Id.
241 Id.
242 Id.
243 Id.
244 I do not so much disagree with Barnett and Bernick’s account of Bingham’s exchange with Hotchkiss as I find it incomplete. They are right that Hotchkiss was concerned about unconstrained federal power and a failure to permanently secure equal rights. B&B, supra note 1, at 36-37. What they leave out Hotchkiss’s failure to understand that the draft was meant to enforce the Bill of Rights—a failure that obviously would have deeply concerned Bingham.
246 In Barron v. Baltimore, Chief Justice John Marshall insisted that “had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original constitution,” who, in Article I, Section 10, had begun every restriction upon the states with the words “No state shall . . .” See Barron v. Baltimore, 32 U.S. 243, 250. See also, Akhil Amar, THE BILL OF RIGHTS, supra note ___ at ___.

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C. The Civil Rights Act

In the previous sections, I have addressed Barnett and Bernick’s claims about the two strains of antebellum “privileges and immunities,” their claims about John Bingham’s belief in unenumerated absolute national rights, and their attempt to “problematize” Reconstruction references to the federal Bill of Rights. All of these claims have been shown to either lack historical support or to rely on a misreading of the historical evidence. The best reading of the historical evidence regarding all of these topics supports the Enumerated Rights reading of the Privileges or Immunities Clause. As we shall see, nothing in Jacob Howard’s speech contradicts the Enumerated Rights reading and in fact strongly supports it.

Before getting to that speech, however, it is important to address an issue that arose in the Thirty-Ninth Congress between the withdrawal of the Joint Committee’s first submitted draft and the submission of the Committee’s second and final Draft of Section One. It was during this period that Congress debated and passed the 1866 Civil Rights Act. This Act and its relationship to Section One of the Fourteenth Amendment is of particular importance to those who hold a Fundamental Rights reading of the Privileges or Immunities Clause. According to Barnett and Bernick, “the credibility of any proposed interpretation of the Fourteenth Amendment must be measured, in part, by considering how well it accounts for the Civil Rights Act of 1866.” Because the Enumerated Rights reading of the Privileges or Immunities Clause does not appear to authorize the Civil Rights Act, Barnett and Bernick insist that this cannot be the correct reading of the Clause.

This argument only works if one believes (1) that Section One of the Fourteenth Amendment must have been drafted in a manner that authorized legislation like the Civil Rights Act and, (2) no other provision besides the Privileges or Immunities Clause could accomplish that result. The first claim is exquisitely difficult to prove, given that Act and the Amendment were drafted by different people on different committees and represent two very different theories of congressional power. But most importantly, Barnett and Bernick’s claim fails because there are other provisions in Section One besides the Privileges or Immunities Clause that can be read as authorizing legislation like the Civil Rights Act. John Bingham himself insisted that the Civil Rights Act represented an effort to enforce the rights of the Due Process Clause of the Fifth Amendment. He opposed the Civil Rights Act because passing such legislation first required passing an amendment giving Congress power to enforce the Due Process Clause and that’s exactly what he and the Committee accomplished by passing an amendment with a Due Process Clause and a provision empowering Congress to enforce “the provisions of this article.” Readers of Barnett and Bernick’s “critique” may not know about John Bingham’s association of the Civil Rights Act with the rights of due process because these authors say nothing about John Bingham’s views in their otherwise lengthy discussion of my work on the Civil Rights Act. This is surprising, given Bingham’s role in drafting both the Privileges or Immunities Clause and the Due Process Clause. At it is even more surprising given the key role Bingham’s views play in my one and only article on the subject, Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act, 106 Geo. L. J. 1389 (2018). Below, I provide a briefly summary of the

__247__ B&B, supra note 1, at 4.

__248__ Lyman Trumbull chaired the Senate Judiciary Committee that drafted the 1866 Civil Rights Act, an act he described as authorized by Section Two of the Thirteenth Amendment. John Bingham rejected that reading of the Thirteenth Amendment, and he refused to support the Civil Rights Act precisely because Congress lack the authority to pass legislation Bingham believed enforced the equal rights of due process as declared in the Fifth Amendment to the Constitution.

__249__ See infra note __ and accompanying text.

__250__ See U. S. Const., Amend. XIV, Section One (“nor shall any State deprive any person of life, liberty or property without due process of law”), Section Five (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
Introducing the 1866 Civil Rights Bill

At the same time the House of Representatives debated proposed constitutional amendments submitted by the Joint Committee on Reconstruction, the Senate debated civil rights legislation submitted by the Senate Judiciary Committee. With the exception of New York’s Ira Harris, these two committees were made up of different men and their proposals reflected very different agendas and different theories of congressional power. From the earliest days of the session, John Bingham had insisted that Congress currently lacked the power to protect individual rights against state abridgment, and that any such effort required first passing a constitutional amendment. The Chair of the Senate Judiciary Committee, Illinois Senator Lyman Trumbull, on the other hand, believed no such amendment was necessary. Instead he and his committee quickly drafted and submitted for debate the Freedmen’s Bureau Bill and the Civil Rights Bill. Both were meant to prohibit the racially discriminatory “Black Codes.”

The two bills contained the same set of non-discrimination provisions. As originally submitted to the Senate, the Civil Rights Bill declared:

[T]hat there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

These bills protected all persons (all “inhabitants”) from racially discriminatory codes. Neither bill protected absolute substantive rights. States could regulate (and deprive) the rights of “person and property,” so long as they did so in a racially nondiscriminatory manner (such as when the deprivation was “as punishment for crime whereof the party shall have been duly convicted.”)

Introducing both bills at the same time, Sen. Trumbull explained that the Freedmen’s Bill should be viewed as a continuation of all the power Congress had exercised during the war. The authority to pass the Civil Rights Bill, Trumbull claimed, was found in Section Two of the Thirteenth Amendment:

251 Chaired by Lyman Trumbull, the members of the Senate Judiciary Committee included Harris (NY), Poland (Vt) (replacing the deceased Collamer), Johnson (MD) Clark (NH), Stewart (Nevada), and Hendricks (Indiana). Harris was the only member who was also on the Joint Committee. See CG, 39th Cong. 1st sess. p. 25 (December, 12 1865) (speech of Sen. Doolittle, naming the members of the committee)

252 See Cong. Globe, 39th Cong., 1st Sess., 422–35 (January 25, 1866) (“I understand very well, Mr. Speaker, that there are gentlemen for whom I have the profoundest respect, not only for their great attainments, but for their generous and patriotic motives, who contend, against all past constructions and all past experience, that the Congress of the United States has the power, implied necessarily, to enforce all the guarantees of the Constitution. In my judgment, unless some such general provision as that to which I have referred be adopted, it is in vain that you hope for future safety or future peace in the country.”).


254 Id. at 320 (statement of Sen. Trumbull).
“With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also. Those laws that prevented the colored man going from home, that did not allow him to buy or sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.”

According to Trumbull, both the Freedmen’s Bill and the Civil Rights Bill advanced the same policy as that advocated by President Johnson, who had recently declared that “[t]he American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness, to freedom of conscience, to the culture and exercise of all his faculties.”

“The design of these bills,” Trumbull assured his colleagues, “is not, as the Senator from Indiana [Mr. Hendricks] would have us believe, to consolidate all power in the Federal Government, or to interfere with the domestic regulations of any of the States, except so far as to carry out a constitutional provision which is the supreme law of the land.”

Trumbull’s invocation of the language of the Declaration of Independence in support of a law protecting the rights of life, liberty, and property echoed the common Republican belief that slavery denied persons their natural rights to life, liberty, and property—rights expressly declared in the Due Process Clause of the Fifth Amendment. As noted above, to antisalvery Republicans, the concept of freedom, the Declaration’s “life, liberty and happiness,” and the Fifth Amendment’s protection of life, liberty and property were all closely associated ideas. As Trumbull’s colleague, Charles Sumner, insisted, “the distinctive elements of a republic according to the idea of American institutions” were found “first, in the Declaration of Independence, by which it is solemnly announced “that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” And they will be found, secondly, in that other guarantee and prohibition of the Constitution, in harmony with the Declaration of Independence; “no person shall be deprived of life, liberty, or property without due process of law.”

Republican Pennsylvania Senator Edgar Cowan recognized Trumbull’s bill as an effort to enforce the Due Process rights of life, liberty and property, but he insisted that the legislation was unnecessary because the Due Process Clause of the Fifth Amendment already guaranteed the rights of life, liberty, and property against state abridgement:

“I have only to say that the Constitution of the United States makes provision by which the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty; and if these things are done by authority of any of the southern States, there is ample remedy now. Under the fifth amendment of the Constitution, no man can be deprived of his rights without the ordinary process of law; and if he is, he has his remedy.”

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256 Id. at 322.
257 Id. (quoting President Andrew Johnson’s annual message to Congress).
258 Id. at 323. In discussing Congress’s legislative efforts during the war, Trumbull claimed Congress had relied on a number of texts in the Constitution, including the War Powers, the Comity Clause, and the Republican Guarantee Clause. See id. at 319. Trumbull’s references were not tied specifically to either the Freedmen’s Bill or the Civil Rights Bill. At this point in the debates (prior to the alteration of the Civil Rights Bill), Trumbull cited only the Thirteenth Amendment as an equal source of congressional authority for passing the two bills.
259 See supra, note ___ and accompanying text.
260 See supra note ___ and accompanying text.
261 Id. at 1480 (statement of Sen. Sumner).
262 Id. at 340 (statement of Sen. Cowan).
Cowan was just one of a number of members of the Thirty-Ninth Congress who viewed the Civil Rights Bill as an effort to enforce the Due Process Clause. Consider, as an additional example, the following excerpts from a speech on the Civil Rights Act by Pennsylvania Representative M. Russell Thayer:

Would it not be an extraordinary circumstance if the framers of the Constitution had made a Constitution which was powerless to protect the citizens of the United States in their fundamental civil rights, their rights of life, liberty and property? And yet that position are these gentlemen driven who deny the existence of any power which authorizes Congress to pass this bill.

In my judgment sufficient power is found, by implication at least, in that clause of the Constitution which guaranties to all the citizens of the United States their right to life, liberty and property. These are sources of power enough from which this power can be deduced. In my judgment no man can find any difficulty in seeking constitutional grounds upon which to place his justification for supporting this bill.

If, then, the freedmen are now citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens. They are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty and property, and no just reason exists why they should not enjoy the protection of that guarantee of the Constitution.

I approve of the proposition of the gentleman from Ohio, [Mr. Bingham] in which he offers to put this protection substantially into the Constitution of the United States, though, according to my best judgment, it is not necessary to do so, and I have little hope that the proposition he submits will ever be carried into effect. Still I will, in order to make things doubly secure, vote for the proposition of the gentleman from Ohio. I will also vote for this bill.

While engaged in this great work of restoration, it concerns our honor that we forget not those who are unable to help themselves; who, whatever may have been the misery and wretchedness of their former condition, were on our side of the great struggle which has closed, and whose rights we cannot disregard or neglect without violating the most sacred obligations of duty and of honor. To us they hold out to-day their supplicating hands, asking for protection for themselves and their posterity. We cannot disregard this appeal, and stand acquitted before the country and the world of basely abandoning to a miserable fate those who have a right to demand the protections of your flag and the immunities guarantied to every freeman by your Constitution.

Thayer says nothing about the Comity Clause in his entire speech supporting the Civil Rights Bill. Instead, Thayer points to the naturalization clause as granting power to make freedmen citizens and then names the Due Process Clause as declaring the rights covered by the bill—rights enjoyed not only by citizens, but also by “every freeman.” In addition to finding power in the Thirteenth Amendment to enforce the rights of due process, Thayer also believed that Congress had inherent power to enforce the constitutional rights of American citizens, including those protected by the Due Process Clause of the Fifth Amendment. Thus, even though Thayer supported Bingham’s proposed Amendment, he did not believe such an amendment was necessary.

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263 Id. at 1152-54.
Which brings us to the most significant members of the Thirty-Ninth Congress who viewed the Civil Rights Bill as an effort to enforce the Due Process Clause of the Fifth Amendment: John Bingham.

2. John Bingham’s Due Process Understanding of the Civil Rights Bill

On March 9, 1866, John Bingham delivered a speech explaining in detail his objections to the proposed Civil Rights Bill.\(^{264}\) Bingham assured his colleagues that he supported the general policy of protecting rights enumerated in the federal Bill of Rights:

I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic. I know if it had been enforced in good faith in every State of the Union the calamities and conflicts and crimes and sacrifices of the past five years would have been impossible.\(^{265}\)

Like Cowan and Thayer (and others), Bingham understood the proposed Civil Rights Bill as an attempt to enforce the natural due process rights of life, liberty, and property. However, in Bingham’s view, this attempt was beyond congressional authority:

[I]n view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. Who can doubt this conclusion who considers the words of the Constitution: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people?” The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised. . . .

I am with [Mr. Wilson] in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country.\(^{266}\)

Bingham agreed “with all [his] heart” that the non-discrimination rights specified in the bill should be law in every state.\(^{267}\) But, Congress should remedy the situation, “not by an arbitrary assumption of power, but by amending the Constitution of the United States.”\(^{268}\) Bingham, of course, had already proposed an amendment giving Congress power to protect Fifth Amendment due process rights (a point Thayer noted in his speech) and he would be successful in that effort before the end of the session.\(^{269}\) At this point, however, protecting the equal due process rights of life, liberty and property remained beyond the constitutional powers of Congress.

\(^{265}\) Id. at 1291 (statement of Rep. Bingham).
\(^{266}\) Id.
\(^{267}\) Id. at 1291.
\(^{268}\) Id.
\(^{269}\) Apparently, the draft of the Bill Bingham had before him had not yet been altered to protect only citizens, but still contained the original protection for “inhabitants.” Sponsors in both the House and Senate had already agreed
In addition to insisting Congress lacked the power to enforce the Due Process legislation like the Civil Rights Bill, Bingham also objected to the bill protecting only *citizens*. We know from studying Bingham’s antebellum speeches that he believed that the rights of due process were *natural* rights held by every person, not just citizens. Limiting the protection of the Civil Rights Bill to only citizens conflicted with the language of the Fifth Amendment and its demand that all persons be protected against unjust deprivations of life, liberty and property. Explained Bingham:

If this is to be the language of the bill, by enacting it are we not committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates? Do we not thereby declare the States may discriminate in the administration of justice for the protection of life against the stranger irrespective of race or color?

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 of the universal rights of man, abolished the narrow and limited phrase of the old Magna Charta of five hundred years ago, which gave the protection of the laws only to “free men” and inserted in its stead the more comprehensive 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.” Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination.

This bill sir, with all respect I submit, departs from that great law. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience? With all respect to every gentleman who may be a supporter of it, I ask, can it be sanctioned? Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says “no person,” not “no citizen,” “shall be deprived of life, liberty, or property,” without due process of law.

Bingham’s opposition to the Bill was thus *doubly* based on a Due Process understanding of the Civil Rights Bill. First, Bingham recognized the bill as an effort to protect the equal right not to be deprived of life, liberty or property without due process of law—rights declared in the Due Process Clause of the Fifth Amendment. For Congress to pass such a law, an amendment would have to first be added to the Constitution giving Congress power to enforce the rights of Due Process. Secondly, Bingham pointed out that the rights of due process were natural rights held by all persons, not just citizens. It was wrong, therefore, to pass a bill protecting only citizens’ natural right not to be deprived of life, liberty and property without due process of law.

Finally, Bingham objected to the bill’s declaration that it sought to enforce the general subject of “civil rights.” Although Bingham advocated an amendment granting Congress power to enforce enumerated constitutional rights, that was all he sought to accomplish. The substantive content of all other “civil rights” ought to be left to the people in the several states according to the principles of constitutional federalism. According to Bingham:

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See id. at 1292.

270 See *supra* note ___ and accompanying text.

271 *Id.* (emphasis added).

272 *Cong. Globe*, 39th Cong., 1st Sess., 1290 (March 9, 1866) (Bingham moving “to strike out of the first section the words ‘and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery.’”).

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When peace is restored; when the courts of justice are opened; when her white-robed ministers take the golden scales into their hands, justice is to be administered under the Constitution, according to the Constitution, and within the limitation of the Constitution.

What is that limitation, sir? Simply this, that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. . . . “[C]entralized government, decentralized administration.” That, sir, coupled with your declared purpose of equal justice, is the secret of your strength and power.

Sir, I have always so learned our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.

Now, what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws. I humbly bow before the majesty of justice, as I bow before the majesty of that God whose attribute it is, and therefore declare there should be no such inequality or discrimination even in the penalties for crime; but what power have you to correct it? That is the question.

In sum, Bingham expressly viewed the Civil Rights Bill as an effort to enforce the rights of due process as declared in the Fifth Amendment to the Constitution. He agreed that states ought to respect such rights and that Congress should have the power to force recalcitrant states to do so. Prior to the addition of an amendment such as the one Bingham had proposed, Congress had no such authority. But even if Congress had power to enforce the rights of due process, the Civil Rights Bill wrongly limited its protection of this natural right to citizens instead of all persons. Finally, the current draft wrongly presumed federal authority to regulate the general subject of “civil rights” in the states. This violated the Constitution’s balance between state and federal authority, a balance Bingham insisted remained a critical aspect of American liberty even in the aftermath of the Civil War.

To the consternation of supporters of the Civil Rights Act, Bingham’s speech was “extensively published.”274 If moderates like Bingham were willing to challenge Congress’s authority to protect due process rights, this could dangerously undermine House support for the Bill. Bingham’s arguments would have to be answered.

Later that same day, the House sponsor of the Civil Rights Bill and Chairman of the House Judiciary Committee, James Wilson, delivered his reply. Wilson could have denied Bingham’s Due Process reading of the Civil Rights Bill. Instead, Wilson agreed that the Bill enforced the rights of due process. Unlike Bingham, however, Wilson insisted Congress had the implied power to enforce the Fifth Amendment of the federal Bill of Rights. His speech is important in that it shows both the drafter of the Fourteenth Amendment’s Due Process Clause and the House sponsor of the Civil Rights Bill understood the bill as an effort to enforce the due process rights of the Fifth Amendment.

273 Id. at 1292–93.
274 See id. at 1837 (statement of Rep. Lawrence).
Amendment. According, I believe it’s worth providing some extended excerpts from Wilson’s speech:

The gentleman from Ohio [Mr. BINGHAM] tells us in the protection of these rights the citizen must depend upon the “honest purpose of the several States,” and that the General Government cannot interpose its strong right arm to defend the citizen in the enjoyment of life, liberty, and in possession of property. In other words, if the States of this Union, in their “honest purpose,” like the honesty of purpose manifested by the southern States in times past, should deprive the citizen, without due process of law, of life, liberty, and property, the General Government, which can draw the citizen by the strong bond of allegiance to the battle-field, has no power to intervene and set aside a State law, and give the citizen protection under the laws of Congress in the courts of the United States; that at the mercy of the States lie all the rights of the citizen of the United States; . . . that revolted South Carolina may put under lock and key the great fundamental rights belonging to the citizen, and we must be dumb; that our legislative power cannot be exercised; that our courts must be closed to the appeal of our citizens. . . .

He says that we cannot interpose in this way for the protection of rights. Can we not? What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that “no person shall be deprived of life, liberty, or property without due process of law.” I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights. In the case of Prigg vs. The Commonwealth of Pennsylvania—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case. . . .

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them in entitled to a remedy. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.

The citizen is entitled to the right of life, liberty, and property. Now, if a State intervenes and deprives him, without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions? . . .

Now, I want to know whether these rights [enumerated in the bill] are any greater than the rights which are included in the general term “life, liberty, and property.” And yet the gentleman admits by his instructions, and asks this House to indorse his admission, that the General Government may secure to citizens of the United States in every State the possession of these enumerated rights. I take the gentleman’s own instructions, and his argument in favor of them, and I apply them as arguments in support of the report of the Judiciary Committee.275

Wilson thus agreed with Bingham that the Civil Rights Bill constituted an effort to enforce the rights of life, liberty, and property as declared by the Fifth Amendment’s Due Process Clause. He also accepted Bingham’s argument that the unenumerated rights of state citizenship were reserved to the control of the people in the states. Wilson insisted, however, that every right announced in the Bill of Rights fell within either the scope of the federal Due Process Clause or was a necessary

275 Id. at 1294–95 (statement of Rep. Wilson). (emphasis added)
means of protecting the rights of due process. Indeed, Wilson believed that referencing the “civil rights” of federal citizenship was no different than referencing the Fifth Amendment rights of due process. The Civil Rights Bill, he explained, constituted an effort to enforce the enumerated due process rights of national citizenship, not the unenumerated civil rights of state citizenship. Like most radical Republicans, Wilson insisted that Congress had implied power to enforce the federal Due Process Clause against the states. In Prigg v. Pennsylvania, the Supreme Court found implied congressional power to enforce the Fugitive Slave Clause. If Congress had implied power to enforce the enumerated rights of slave owners, then it had no less power to enforce the enumerated rights of former slaves.

All of these debates were published in national newspapers. Those following the debates on the Civil Rights Bill knew that the Bill was described as an effort to enforce the Fifth Amendment in the Bill of Rights—a fact that triggered the same objections raised by John Bingham. For example, in his April 12, 1866, essay “The Civil Rights Bill,” S.S. Nicholas complained:

“Has Congress power to do this? That is the great question. . . . The bill of rights, or what are termed the guarantees of liberty, contained in the Federal Constitution, have none of them any sort of application to or bearing upon the State governments, but are solely prohibitions or restrictions upon the Federal Government. The recent attempt in Congress to treat them as guaranties against the State governments, with an accompanying incidental power to enforce the guaranties, is a surprising evidence of stolid ignorance of Constitutional law, or of a shameless effort to impose upon the ignorant.

Nicholas also understood the Civil Rights Bill represented an effort to enforce rights enumerated in the Fifth Amendment of the federal Bill of Rights. Like Bingham, Nicholas insisted that Congress—at that point—held no such power. Nicholas’s essay is important in that it shows that members of the public were as aware as members of Congress that the Civil Rights Act was an attempt to enforce due process rights.

3. Removing “Civil Rights” From the Civil Rights Bill

Rep. Wilson’s insistence that the Bill protected nothing more than the due process rights of life, liberty, and property was plausible only in regard to the bill’s specifically enumerated equal rights of person and property. The general terms “civil rights and immunities” were not so easily cabined. Because other members echoed Bingham’s concerns about this language, the Bill’s proponents ultimately voted in favor of Bingham’s motion to remove these general terms. As Wilson explained,

Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in

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276 41 U.S. (16 Pet.) 539, 569 (1842).
277 For example, on March 10, 1866, the New York Times reported Bingham’s March 9 speech, including his declaration that “enforcement of the bill of rights was the want of the Republic.” See New York Times (New York, N.Y.) March 10, 1866, p. 1.
278 Daily National Intelligencer (Washington, D.C.), May 8, 1866, p. 1 (noting date of writing, April 12, 1866). Although I originally believed Nicholas was referring to Congress’s efforts to pass an amendment, after studying the debates of the Civil Rights Act and the accompanying public commentary, I now realize Nicholas was writing about the Civil Rights Act and that he shared the views of Wilson and Bingham that the Bill was an attempt to enforce the Due Process Clause of the Fifth Amendment. Barnett and Bernick are right to take me to task for this mistake: Nicholas’s essay is much stronger evidence in support of the Due Process understanding of the Civil Rights Act than I had previously realized.
those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section. 280

Having removed language that arguably extended congressional power beyond enforcing the rights of due process, the House now had sufficient votes to pass the Civil Rights Bill. 281 They did so, however, without John Bingham’s support. 282 For Bingham, such an effort would have to wait until after ratification of a constitutional amendment empowering Congress to enforce the rights of due process. Once that occurred, Bingham would then support repassing the Civil Rights Act, but in a manner that extended most of the bill’s protection to all persons, not just citizens. 283

In the meantime, Congress enacted the Civil Rights Act over President Johnson’s veto (the Senate doing so by a single vote after voting to exclude New Jersey Democrat John Stockton 284). In doing so, neither House embraced any single theory of congressional authorization. Throughout the debates, members had named a variety of potential sources of power, from the Thirteenth Amendment to the Republican Guarantee Clause to the Due Process Clause. Some members, no doubt, were happy to let the Supreme Court decide the issue for them. What is clear is that there was no consensus view that Congress needed to pass an amendment authorizing the Civil Rights Act. Instead, those supporting the bill seemed to share the general view that somewhere, somehow, Congress already had the power to pass the Act.

For our purposes, the most important view was that of the man who believed Congress did not have the power to pass the Civil Rights Act, John Bingham. To the extent that Bingham drafted Section One intending to authorize legislation like the Civil Rights Act, he did so by adding provisions declaring that no person be deprived of life, liberty or property without due process of law and demanding that all persons receive the equal protection of the laws.

4. Aside: The Consensus Understanding of Corfield v. Coryell in the Debates Over the Civil Rights Act

Throughout the debates of the Thirty-Ninth Congress, members repeatedly referred to the antebellum Article IV case Corfield v. Coryell. 285 This, along with the fact that Jacob Howard quoted Corfield in his discussion of the proposed Privileges or Immunities Clause, has convinced generations of scholars that the Privileges or Immunities Clause must somehow be based on the

280 Id. at 1367 (statement of Rep. Wilson).
281 Representative Samuel Shellabarger (R-OH) supported the Bill only because it had been altered to protect only citizens—thus vindicating the strategy of narrowing the Bill—and because Congress was not asserting any power to regulate the substance of the listed rights—requiring only that whatever their substance under state law, these rights would be equally extended to all citizens regardless of race. . See id. at 1293 (statement of Rep. Shellabarger). According to Shellabarger:

[If this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people. But, sir, except so far as it confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

Id.
282 See id. at 1367 (reporting Bingham as a “nay” vote).
283 See infra note ___ and accompanying text.
Privileges and Immunities Clause discussed in Corfield. More, since the Privileges or Immunities Clause seems to use the language of absolute rights, members must have understood Corfield as discussing the absolute rights of national citizenship.

A close reading of the debates, however, reveals that no one in the Thirty-Ninth Congress held such a view. Corfield was repeatedly discussed, but it was repeatedly described as protecting nothing more than a limited set of state secured rights for which visiting citizens had a right to expect equal treatment. This consensus understanding is obscured if one simply cherry-picks individual references to Corfield or (worse) simply relies on the fact that Corfield was often discussed. The consensus understanding of Corfield in the Thirty-Ninth Congress emerges only when one studies the full debates and notes how members responded to various attempts to use Corfield in support of civil rights legislation.

For example, consider members responses to Lyman Trumbull’s early efforts to use Corfield in support of the Civil Rights Bill. On January 29, 1866, Trumbull explained that, since the abolition of slavery, southern states had passed discriminatory laws that “deny [the freedmen] certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.” According to Trumbull, “any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.” Trumbull then quoted as an example of the rights of citizens of the United States, the decision in Corfield v. Coryell and quoted Justice Washington’s list of “fundamental” “privileges and immunities.” According to Trumbull, if these were rights guaranteed to sojourning citizens, “how much more are the native-born citizens of the State itself entitled to these rights!”

Opponents of the Bill immediately challenged what they viewed as Trumbull’s effort to transform the rights of Corfield and the Comity Clause into rights citizens could invoke against their own state. According to Garrett Davis of Kentucky, the Comity Clause involved nothing more than the relative rights of sojourning citizens. Davis spent “about an hour of his speech,” quoting from and explaining antebellum Comity Clause opinions, including Justice Washington’s list of “fundamental” rights in Corfield. “All of these rights and privileges,” Davis insisted, represented nothing more than the equal rights “of citizens of one State going into another State . . . The opinion relied on by the honorable Senator [Trumbull] do not establish any other proposition.”

In response, Trumbull conceded that Corfield and the Comity Clause “relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizens belonging to the State.” He had cited Corfield only to illustrate the kinds of rights a citizen received under the Comity Clause. According to Trumbull, “[i]nasmuch as this was the definition given to the term as applied to that part of the Constitution, I reasoned from that, that


B&B, supra note __ at 10, 42.


Id.

Id. at 474-75.

Id. at 475.


Id. at 600 (Trumbull’s characterization of Davis’s argument).


Id. at 597.

Id. at 600.
when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship.” Trumbull, in other words, conceded the common understanding of Corfield and Article IV, but insisted that the same set of state-secured rights should also be equally extended to in-state citizens, regardless of color. As noted above, Trumbull believed that enforcing the Thirteenth Amendment empowered Congress to prohibit discrimination in the subjects listed in the Civil Rights Bill. Although not everyone shared Trumbull’s understanding of the Thirteenth Amendment, Trumbull’s understanding of Corfield and the Comity Clause was the same as his colleagues. The case and the Comity Clause protected nothing more than a limited set of relative rights.

A similar exchange occurred in the House when, on March 1, 1866, James Wilson introduced the Civil Rights Bill. Describing the subjects given equal protection in the Bill, Wilson declared “I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. . . . It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.” Wilson then pointed to the language of Article IV’s Comity Clause and quoted Justice Washington’s opinion in Corfield. According to Wilson, “a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them.” “Who will say,” Wilson challenged his colleagues, “that the means provided by this second section of the bill are not appropriate for the enforcement of the power delegated to Congress by the second section of the amendment abolishing slavery, which I have quoted? The end is legitimate, because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen.”

To the extent that the bill was understood as going beyond the rights of freedom established by the Thirteenth Amendment, it stood as an appropriate enforcement of the rights of life, liberty and property as described by Chancellor Kent in his Commentaries. To Wilson, the fact that the Constitution granted Congress no express authority to enforce these rights was irrelevant: “this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; hat the right to exercise this power depends on no express delegation, but runs with the rights it is designed to protect.”

As we previously noted, Wilson would eventually claim that the Bill represented an exercise of Congress’s implied power to protect the rights of life, liberty and property declared in the Fifth Amendment. Before that exchange with John Bingham occurred, however, Wilson faced a challenge to his interpretation of the Comity Clause and Corfield v. Coryell.

Speaking in opposition to the Bill, New Jersey Democrat Andrew Rogers pointed out that there was no difference between the rights contained in the Civil Rights Bill and the rights of due process protected by John Bingham’s recently proposed constitutional amendment. “Therefore,” Rogers insisted, “we have the opinion of the majority of the committee of fifteen, and the opinion of the learned gentleman form Ohio, [Mr. Bingham] that in order to do what this bill proposes, Congress must be empowered by an amendment to the organic law.”

Indiana Democrat Michael Kerr rejected the idea that the Thirteenth Amendment authorized the Bill and, to the extent supporters relied on “the second section of the fourth article of the

297 See supra note ___ and accompanying text.
299 Id. at 1118.
300 Id.
301 Id.
302 Id. at 1119
303 See supra Note ___ and accompanying text.
304 Id. at 1120 (March 1, 1866).
Constitution,” it was based on a misreading of that clause.\textsuperscript{305} Citing Kent’s Commentaries and Kent’s discussion of antebellum case law, Kerr explained “[t]he provision in question only requires that the citizens of each State shall enjoy certain privileges in the other States to which they may temporarily remove; but not that citizens of the United States shall enjoy such privileges in the States. . . . The States have not surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States.”\textsuperscript{306} The Comity Clause “confer[red] certain fundamental rights, which I will not stop now to enumerate. But they are by no means identical with those attempted to be secured by this bill.”\textsuperscript{307} Kerr then proceeded to quote substantial portions of Kent’s Commentaries, Story’s Commentaries, and Justice Washington’s list of “fundamental” rights in Corfield \textit{v. Coryell} to prove his point.\textsuperscript{308} Kerr concluded, “in all these authorities it is assumed that the privileges and immunities referred to as attainable in the States are required to be attained, if at all, \textit{according to the laws or constitutions of the States}, and never in \textit{defiance} of them. This bill rests upon a theory utterly inconsistent with and in direct hostility to every one of these authorities.”\textsuperscript{309}

Kerr’s exhaustive account of antebellum authorities was irrefutable. When Wilson next rose to defend the Civil Rights Bill, he abandoned \textit{Corfield} and the Comity Clause and focused his argument on Congress’s implied power to enforce the Due Process Clause of the Fifth Amendment. Both Rogers and Kerr were Democrats, but their interpretation of \textit{Corfield} and Article IV, Section Two represented the consensus understanding of both Republicans and Democrats in the Thirty-Ninth Congress. As we have already seen, Republican Senator Lyman Trumbull conceded that the rights of the Comity Clause discussed in \textit{Corfield v. Coryell} involved nothing more than the relative rights of out-of-state citizens.

The repeated references to \textit{Corfield v. Coryell} in the debates of the Thirty-Ninth Congress can create a kind of illusion. Members cited the case so often that it can appear as if there must have been some kind of agreed-upon reading of the case that made Justice Washington’s opinion central to the proper understanding of the Civil Rights Act and the Fourteenth Amendment. What citation rates do not disclose, however, are the arguments over the proper understanding of \textit{Corfield} that occurred in the first session of the Thirty-Ninth Congress. Although Radical Republicans sometimes seemed to suggest a broad fundamental rights reading of \textit{Corfield}, their efforts were successfully rebutted by fellow members who smothered them with citations to legal authorities and case law. By the time Jacob Howard mentioned \textit{Corfield} in his speech introducing the Fourteenth Amendment, the case and its limited scope had been repeatedly discussed by both the House and the Senate and always to the same conclusion: The “fundamental” unenumerated privileges and immunities listed by Justice Washington in \textit{Corfield} represented subjects of local law for which visiting citizens had a right to expect equal treatment. Neither the case nor the Comity Clause were understood as declaring absolute unenumerated rights.

\textbf{D. The Final Draft of the Privileges or Immunities Clause}

Despite months of work, by April of 1866 the Joint Committee had not managed to produce a single successful amendment. The House passed an apportionment amendment but the proposal failed in the Senate—blocked by a coalition of conservative and Radical Republicans.\textsuperscript{310} Bingham’s Article IV-Due Process Amendment faced heavy resistance and was withdrawn with

\begin{footnotesize}
\textsuperscript{305} Id. at 1268.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} Id. at 1269.
\textsuperscript{309} Id. at 1270. (emphasis in original).
\end{footnotesize}
debate on the amendment postponed until April. It was not likely to fare any better unless Bingham managed to find wording more acceptable to his colleagues.

The log jam broke on April 21, 1866, when Thaddeus Stevens submitted to the Joint Committee a draft multi-sectioned amendment he had received from Robert Dale Owen. This omnibus amendment combined a number of popular amendments (prohibition on paying rebel debt, for instance) with more difficult issues (limiting the political power of the returning southern states). Section One of the amendment declared that “[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.” Section Five granted Congress power to enforce “the provisions of this article.”

As written, a combination of Sections One and Five would authorize legislation like the Civil Rights Act. It also met the objections of members like Giles Hotchkiss who supported a non-discrimination provision but who insisted that Congress not be given authority to establish uniform laws on the subjects of life, liberty and property. Bingham had convinced a majority of the Committee to delete Owen’s proposed Section One and replace it with an altogether different provision—one protecting the rights “of citizens of the United States” and the rights of all persons to due process and equal protection.

The various versions of Section One discussed by the Joint Committee are interesting in themselves, but are well-discussed elsewhere. For our purposes, it is important to focus on the difference between Bingham’s withdrawn February draft and the final draft of the Joint Committee. Here are the two drafts:

ARTICLE—. 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.

ARTICLE —SEC. 1. 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

311 See, “News of Proposed Amendments in the Joint Committee on Reconstruction,” Chicago Tribune (Chicago, Ill.), April 16, 1866, p.2 (reporting the Joint Committee’s receipt of a multi-sectioned amendment submitted by Robert Dale Owen). Here is the proposal that Stevens submitted to the Joint Committee on April 21, 1866:

Article —

Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

Sect. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.

Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

Sec. 4. Debts incurred in aid of insurrection or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any State nor by the United States.

Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.

See JOURNAL OF THE JOINT COMMITTEE, supra note ___, at 83-84.

312 See supra note ___ and accompanying text.

313 See Maltz, CIVIL RIGHTS, supra note ___ at ___. See also Lash, THE FOURTEENTH AMENDMENT, supra note ___ at 144-46.

of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\footnote{Journal of the Joint Committee, supra note \_ at 106 (April 28, 1866).}

Some aspects of the two drafts are the same. As he had done his entire political career, Bingham separated the rights of “citizens” from the rights of “all persons.” This reflects his longstanding view that some rights are natural rights belonging to all persons, while others are the additional rights belonging only to citizens. To Bingham, the rights declared in the Fifth Amendment’s Due Process Clause were natural rights belonging to all persons and both drafts reflect that theory. Although the new draft lacked a power provision, this aspect had simply been moved to Section Five of the new proposal. This new arrangement met Hotchkiss’s recommendation that the \textit{amendment} declare the rights of citizens, rather simply empowering Congress to define the rights of American citizenship.

The major difference between the drafts is the abandonment of the language of Article IV (“of citizens in the several States”) and its replacement with the language “of citizens of the United States.” We have seen this replacement language before. This is the language that Bingham originally claiming was \textit{implied} by Article IV. In his speeches before the Civil War and during his defense of his original draft amendment, Bingham argued that the language of Article IV should be read as if it contained an “ellipses” referring to the “citizens of the United States.”\footnote{See supra notes \_ and \_, and accompanying text.} It was this implied language that Bingham relied upon in interpreting Article IV as obligating States to respect the Bill of Rights. What Bingham had done in this new draft was to make \textit{explicit} what he had previously claimed was \textit{implicit}. By doing so, Bingham no longer had to convince his colleagues to see words that were not actually in the text of Article IV.

As we have seen, Bingham believed and publicly insisted that the “privileges and immunities of citizens of the United States” were the constitutionally enumerated rights of citizens of the United States. We have also seen that this was not a view unique to only John Bingham. As far back as the debates over the admission of Missouri, anti-slavery advocates claimed the “rights, advantages and immunities of citizens of the United States” were the rights enumerated in the federal Constitution (and \textit{only} those rights). We also know that official reports by the Democrat Attorney General of the United States described the “privileges and immunities of citizens of the United States” as those enumerated in the 1791 amendments.\footnote{21 Territorial Papers of the United States 1085-87 (1829-1836) (cited in Lash, book at 65); Also in, Official Opinions of the Attorneys General of the United States ..., Volume 11, pp731-32. Found at \url{https://bit.ly/2RPHayM}} We know the Republican anti-slavery theorist Joel Tiffany described the “privileges, and immunities of citizenship, of the United States” as “all the guarantys of the Federal Constitution,” such as the “great writ” of habeas corpus enumerated in Article I, Section 9, and the rights enumerated in the first eight amendments.\footnote{Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery: Together with the Powers and Duties of the Federal Government in Relation to that Subject (Cleveland, Ohio: J. Calyer, 1849).} These “privileges and immunities of citizens of the United States” were altogether different from the privileges and immunities of state citizenship—a point President Andrew Johnson emphasized in his message announcing his veto of the Civil Rights Act.\footnote{Reprinted in Cong. Globe, 39th Cong., 1st sess., 1679.} In fact, when the Joint Committee adopted language protecting the privileges and immunities “of citizens of the United States,” there was no other significant usage of this particular term \textit{besides} as a reference to enumerated constitutional rights.

\begin{enumerate}
\item Bingham’s Speech Introducing the Second and Final Draft of the Privileges or Immunities Clause
\end{enumerate}
On May 10, 1866, John Bingham explained the new proposal to the House of Representatives. In his speech, Bingham recapitulated the same ideas and themes that he had stressed from the opening days of the session: Although state officials were obligated to enforce enumerated constitutional rights from the moment they took the oath to uphold the Constitution, they had failed to do so. The need for congressional power to enforce that pre-existing obligation was the “want” of the country. As he had explained from the beginning, his efforts were directed at producing an amendment enabling the enforcement of constitutionally enumerated privileges and immunities—and “no more.”

Bingham first quoted the proposed amendment, and then explained its “necessity”:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.320

This echoes Bingham’s statement on February 26, “it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution,”321 and Bingham’s declaration on March 9, “I know that the enforcement of the bill of rights is the want of the Republic.”322

As he had repeatedly insisted over the past several months, Bingham declared that enforcing these enumerated rights against the states would not violate any of the reserved rights of the states:

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.323

This is the same point Bingham made on February 26, when he declared that requiring the states to respect enumerated rights “does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.”324 Bingham now continued to hammer the same idea: Despite their pre-existing obligations to respect constitutionally enumerated rights, state officials had engaged in “flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, “cruel and unusual punishments” have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.”325 This again echoes Bingham’s point on February 26:

322 Cong. Globe, 39th Cong., 1st Sess., 1291 (March 9, 1866).
324 Id. at 1034.
And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. The House knows, sir, the country knows, the civilized world knows, that the legislative, executive, and judicial officers of eleven States within this Union within the last five years, in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.\textsuperscript{326}

As he had promised from the very beginning of the session, Bingham again insisted that the amendment did nothing more than enforce the pre-existing obligations of the states to respect constitutionally enumerated rights:

It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more.\textsuperscript{327}

Here Bingham repeats the same assurance for this draft that he made on February 28 in regard to the prior draft. At that time, Bingham explained that his purpose was “to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day. It hath that extent—no more.”\textsuperscript{328} Bingham believed, and his colleagues would have understood him as insisting, that his declared goal of enforcing enumerated rights, and only enumerated rights, had not changed, but was more perfectly accomplished by the new draft of the Privileges or Immunities Clause. This time, his colleagues had no objections.

Barnett and Bernick insist that there was a dog in Bingham’s speech that did not bark. If the right of suffrage was not a constitutionally enumerated right, why didn’t Bingham say so instead of making a complicated argument about the implied denial of the right to suffrage by Section Two of the Amendment?\textsuperscript{329} According to Barnett and Bernick, Bingham’s failure to use such an “easy” argument suggests that Bingham did not share the Enumerated Rights understanding of the Clause.

Arguments from silence are always necessarily weak, since one cannot generally read the minds of speakers to determine why they used one argument and not another. In this case, the argument is not only weak, it completely fails. Barnett and Bernick wrongly assume that the rights of suffrage cannot be drawn from the constitutionally enumerated rights in the Constitution.

\textsuperscript{326} Id. at 1034.
\textsuperscript{327} Cong. Globe, 39th Cong., 1st Sess., 2543 (May 10, 1866).
\textsuperscript{328} Cong. Globe, 39th Cong., 1st Sess., 1088 (February 28, 1866).
\textsuperscript{329} B&B, supra note 1, at 39: “Yet another dog that did not bark was Bingham’s failure, at any point, to dispel the persistent controversy over whether the right to suffrage was among the “privileges or immunities” of citizens by invoking an ERO understanding. It would have been easy enough for him to do so if that was the consensus public meaning of a term-of-art “privileges or immunities.” Bingham might simply have stated that the right to suffrage, being unenumerated in the text of the Constitution, was obviously not among the “privileges or immunities of citizens of the United States.” Instead, Bingham advanced the considerably more complex argument that the “second section” of the proposed amendment—which contemplated that states could deny suffrage to Blacks, so long as they were willing to incur the penalty of reduced congressional representation—“exclude[d] the conclusion that by the first section suffrage is subjected to congressional law.”
Bingham in fact clearly believed that there were enumerated rights that, in certain circumstances, called for federal enforcement of the right to vote. Bingham insisted, however, that absent those circumstances, these enumerated provisions were not in play. The language of Section Two signaled that Congress shared Bingham’s view. Here is Bingham:

“The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people. Why should any American citizen object to that?”

In the above passage, Bingham notes that “where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people,” this would violate the “right in the people of each State to a republican government and to choose their Representatives in Congress” and deny them these “guarantees of the Constitution.” In such a case, Congress might be justified in supplying the “remedy” of congressional laws protecting the rights of suffrage.

This dog barked. Bingham’s argument is an example of the Enumerated Rights understanding of the rights of national citizenship. These rights include not only those in the 1791 amendments but all enumerated rights, including those enumerated in the Republican Guarantee Clause and the provisions enumerating the processes of congressional representation. Congressional enforcement of these enumerated provisions might involve protecting the rights of suffrage, but with the “exception” of this scenario, Section One left the issue of suffrage was left to the states. Section Two, by allowing states to deny suffrage so long as they accepted reduced representation, “excluded” any construction of Section One as guaranteeing the rights of suffrage, except where a state violates an enumerated right of the people of the United States. Again, this is not “silence,” this is an application of the Enumerated Rights reading of the Privileges or Immunities Clause.

Finally, Bingham repeated his insistence that the amendment met the necessity of enforcing enumerated and “guaranteed privileges of citizens of the United States” against state abridgement:

“I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, “cruel and unusual punishments” have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

From the opening days of the Thirty-Ninth Congress to this final draft amendment, Bingham had transparently and consistently pursued a single goal: securing an amendment empowering Congress to enforce the enumerated rights of the federal Constitution and only the enumerated rights of the Constitution. Now, in his final speech to the House of Representatives, Bingham again assured his colleagues, “[t]hat is the extent that it hath, no more.”

It now fell to Jacob Howard to explain the proposed amendment to the Senate.

2. The Speech of Jacob Howard

It is a matter of historical irony that Jacob Howard’s speech introducing the Fourteenth Amendment has played such a significant role in scholarly efforts to determine the original meaning of Section One of the Fourteenth Amendment. The original plan was to have the Chair of the Joint Committee, William Pitt Fessenden, introduce the amendment to the Senate. Unfortunately, Fessenden fell ill and Howard stepped in as his last-minute replacement. The irony is that, in the Joint Committee discussions, Jacob Howard had repeatedly voted against this draft of Section One.

Howard had supported Bingham’s failed February draft which used the language of Article IV and the Fifth Amendment. When the Joint Committee considered Robert Dale Owen’s draft five-part amendment on April 21, 1866, Howard supported Owen’s draft Section One which read “No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.” Howard voted against Bingham’s proposal to add the words “nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.”

On April 21, Howard briefly joined the committee in voting to add Bingham’s proposed language as Section Five of the amendment: “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.” Four days later, however, Howard joined the committee in voting to remove Bingham’s language from the amendment. Howard then voted against submitting Bingham’s language as a separate amendment. Finally, on April 28, Bingham convinced a majority to replace the current non-discrimination language of Section One with the language Bingham originally proposed (and the committee briefly adopted) on April 21. This final vote on Bingham’s draft of Section One was ten to three, with Jacob Howard once again voting against Bingham’s proposal. This was the last committee vote on the language of Section One.

In sum, Jacob Howard repeatedly voted in favor of an amendment that did nothing more than prohibit racial discrimination, and he repeatedly voted against Bingham’s amendment that protected the rights of national citizenship and the equal due process rights of all persons. Whatever his understanding of the Privileges or Immunities Clause, Howard did not want that Clause added to the Constitution. Nevertheless, it fell to Howard to explain to the Senate the meaning of a text he clearly opposed.

Jacob Howard opened his May 23 speech introducing the Fourteenth Amendment to the Senate by apologizing for Fessenden’s absence. “I was anxious that he [Fessenden] should take the lead and the prominent lead, in the conduct of this discussion,” Howard confessed. Nevertheless, Howard promised to present “in a very succinct way, the views and the motives which influenced that committee, so far as I understand those views and motives.” Turning to the text, Howard explained that “[t]he first clause of this section 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.” Conceding that “[i]t is not, perhaps, very easy to define with accuracy what is meant by the expression, ‘citizen of the United States,’” Howard recounted how the Founders had approached

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332 Journal of the Joint Committee, at 61 (Feb. 3, 1866) (voting on the language); id. at 62 (Feb. 10, 1866) (voting to submit the draft to Congress).
333 Id. at 83.
334 Id. at 85.
335 Id. at 87.
336 Id. at 98-99. (April 25, 1866).
337 Id. at 99.
338 Id. at 106.
340 Id. at 2765.
341 Id.
the issue of national citizenship. Because it had been possible that the original states might treat visitors from other “foreign” states as aliens, Howard explained, the Founders had added Article IV to the Constitution “[w]ith 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.”

Howard declined to analyze the particular content of Article IV privileges and immunities, noting that doing so was not worth the time and “would be a somewhat barren discussion.” Nevertheless, the Clause must have “some good purpose” or it would “it would not be found [in the Constitution.]” Howard then referred the Senate to Justice Washington’s description of Article IV privileges and immunities in Corfield v. Coryell. Corfield, a case that Howard suggested probably represented the approach the Supreme Court would take if it found itself having to define Article IV. Howard then quoted the same “fundamental rights” passage from Corfield that others in the Senate and House had repeatedly discussed over the past several weeks. After quoting Washington’s list of “fundamental” local rights for which visiting citizens could expect equal treatment, Howard summarized, “[s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”

At this point, Howard has done nothing more than associate the Privileges or Immunities Clause with rights described in Corfield v. Coryell. His colleagues, having participated in weeks of debates which regularly included discussions of Corfield v. Coryell would have been perfectly familiar with that case and would know the consensus understanding that it involved nothing more than the relative rights of visiting citizens. In the same Senate, for example, Howard’s colleagues had previously heard Lyman Trumbull quote the same passage and explain that Corfield’s protections “relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizens belonging to the State.” The Senate, in others, was aware that attempts had been made to give a broad reading to this passage of Corfield, only to be successfully rebutted by members who explained the actual relative rights holding in Corfield and related cases.

Howard then explains that the Clause also protects the enumerated rights “secured by the first eight amendments 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

[342] Id.
[343] Id.
[344] Id.
[345] Id.
[347] Id.
[348] See, e.g., Cong. Globe, 39th Cong., 1st Sess., 475 (January 29, 1866) (Trumbull quoting Corfield during his discussion of the Civil Rights Act). See also, supra note __ and accompanying text (discussing the many times Corfield was quoted or discussed during the early months of the Thirty-Ninth Congress).
[349] Id. at 600.
[350] James Fox argues that Howard’s reference to the “fundamental” rights of Corfield v. Coryell meant that he “plainly embraced the radical Republican view of fundamental rights.” James W. Fox, Jr., Publics, Meanings & Privileges of Citizenship, supra note __ at 581. Fox makes this claim without pointing to any evidence other than Howard’s speech. Nor does Fox address any of the evidence showing how members of the Thirty-Ninth Congress actually understood Corfield and its language of “fundamental” rights. Like Barnett and Bernick, Fox simply insists that the term “fundamental” must be understood as a reference to absolute unenumerated rights. The actual historical evidence shows the contrary. Fox also seems to think that Howard’s reference to the rights of Corfield “draws a connection” to unenumerated rights that I claim Bingham “intended to avoid in adding the phrase “citizens of the United States.” Id. at 580. This is incorrect. Bingham chose language intended to refer to enumerated federal Constitutional rights, and Howard’s reference to the enumerated rights of Article IV and the enumerated rights in the 1791 amendments confirmed that meaning.
personal rights guarantied 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.352

Howard thus includes rights enumerated in Article IV and rights enumerated in the Bill of Rights as the protected “privileges or immunities of citizens of the United States.” This echoes Bingham’s own view that the Clause protects enumerated constitutional rights, whether in the Bill of Rights or elsewhere.353 Although Howard preferred a draft that provided nothing more than the rights of equal protection, he appropriately described the broader meaning of the Joint Committee’s draft.

Interestingly, it appears that Howard briefly considered limiting his description of the Privileges or Immunities Clause to just the relative rights described in *Corfield v. Coryell*. This is suggested by his original handwritten notes for this portion of his speech. Below are pages “2” through “4” of those notes, starting from the bottom of page “2” (underlining in original):

“2”

As citizens they are entitled to all the privileges and immunities of citizens in the several states (Art. 4, Sec. 2).

These privileges and immunities of citizens comprise the fundamental rights which belong to the citizens of all free governments.


“3”

By the first clause each State is prohibited from restricting these fundamental civil rights of citizens, whatever may be their nature and extent.

Don’t attempt to define them.

But the two other clauses of this amendt. go further and disable a state from depriving, not merely any citizen, but any person of life, liberty or property without due process of law or depriving to [these] the equal protection of the laws.

“4”

This abolishes all class legislation & the injustice of subjecting to one caste of persons to a code not applicable to another.354

352 Id.
353 See *supra* note __ and accompanying text.
354 https://perma.cc/V6HA-X2YK
These notes suggest that Howard originally intended a brief description of the Privileges or Immunities Clause (which he had opposed) before describing provisions establishing the rights of equal protection (which he had supported). If so, Howard had not planned originally to say anything about the first eight amendments or the Bill of Rights. At some point, however, either on Howard’s own initiative or after being prompted by another member of the Joint Committee, Howard inserted pages “2a” and “2b.” In these added notes, Howard expanded his description of the Privileges or Immunities Clause to include the rights listed in the first eight amendments. Here are those added notes apparently inserted at a later point as pages “2a” and “2b”:

“2a.”

To these privileges and immunities may be added the personal rights guaranteed and secured by the first eight amendments to the constitution, such as the freedom of speech and of the press,

--the right of petition—
--the right to keep and 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—
--the right to trial by an impartial jury, and
--the security against excessive bail and cruel and unusual punishments—

“2b.”

The courts have held that all these guarantees operate as constraints mainly upon the powers of Congress, and not upon state legislation,—
And there is no power given by the constitution to enforce them.
This proposed amendment gives the power. 355

If these pages were inserted after Howard drafted his notes on pages “2” and “3,” as appears to be the case, then his note about “fundamental civil rights of citizens, whatever may be their nature and extent” and his warning to himself “[d]on’t attempt to define them” were written before he was prompted to add the very specifically defined rights of the first eight amendments, and refer only to Washington’s language in the Corfield which limited the clause to “fundamental” locally-secured rights.

It seems then that Howard originally planned to describe the Privileges or Immunities Clause as involving nothing other than the relative rights of Article IV. 356 The insertion of pages “2a” and

355 Id.
356 To the extent that one considers post-ratification evidence, intriguing support for this possibility can be found in Howard’s later discussion of the amendment in 1869. Here is how Howard, three years later, described the amendment:

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under the second section of the fourth article of the old Constitution. That section declares that—“The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.”

There it was plainly written down. Now, sir, it seems to me, that unless the Senator from Vermont and the Senator from Massachusetts can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities
“2b” indicate that something (or someone) at the last minute convinced Howard to expand his description of the Privileges or Immunities Clause to include the enumerated rights of the 1791 amendments as additional “privileges or immunities of citizens of the United States.”357 We will never know whether John Bingham assisted his Joint Committee colleague on this portion of Howard’s speech. We do know is that Howard ultimately described the amendment in a manner consistent with Bingham’s theory of the enumerated rights of citizens of the United States and which echoed Bingham’s desire to enforce the Bill of Rights against the states.

Barnett and Bernick insist the above cannot be correct, because such a reading of the Privileges or Immunities Clause would not authorize anti-black code legislation like the 1866 Civil Rights Act.358 This would be a problem if there were no other clause in Section One authorizing nondiscriminatory legislation like the Civil Rights Act. As we have seen, however, that the man who drafted both the Privileges or Immunities Clause and the Due Process Clause understood the latter as guaranteeing the equal rights of person and property protected by the Civil Rights Act.359 It appears, moreover, that Jacob Howard held the same view.

Howard said nothing about the Civil Rights Act in his description of the Privileges or Immunities Clause. Instead, Howard referenced the Black Codes—the target of the Civil Rights Act—in his discussion of the proposed Due Process and Equal Protection Clauses:

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.”360

The “class legislation” that “subject[ed] one caste of persons to a code,” of course, are the Black Codes. According to Howard, it was the last two clauses of Section One, and not the Privileges or Immunities Clause, that prohibited racially discriminatory laws.361 This suggests that,

“Here is a mass of privileges, immunities, and rights” unless Howard believed all of these rights were the same kind of rights, and that therefore we must understand him as treating all of these rights as “absolute” rights. Id. at 41, 52. This is akin to trying to hide an elephant in a mousehole. It simply is not reasonable to place that heavy a burden on a phrase that is the equivalent of “here are a bunch of rights,” particularly in light of the clear consensus understanding of the rights of the Comity Clause.

See supra note __ at 108. More likely, and more in keeping with Howard’s efforts throughout the 39th Congress, this is another example of Howard seeking to minimize the protection of the Privileges or Immunities Clause. This seems especially likely given Howard’s opposition to federalizing the general subject of civil rights in the states. See, infra note __. If Howard originally intended to limit his description of the Privileges or Immunities Clause to mere Comity Clause rights, this would have the effect of reducing the clause to the original form that Howard had supported in February 1866. See supra note __, and accompanying text.

See supra note __, and accompanying text.

See CONG. GLOBE, 39th Cong. 1st Sess. 2766 (May 23, 1866) (emphasis added).

Christopher Green argues that Howard did not mean to link power to prohibit the Black Codes with the “last two clauses” of Section One. Green asserts that the word “this” in the above Howard quote actually refers to Section One as a whole and not to “last two clauses” of Section One. See GREEN, EQUAL CITIZENSHIP, supra note __; Green, Original Sense, supra note __. Green’s attempt to break apart an otherwise perfectly coherent and easily

See note __ and accompanying text.
to Howard at least, power to enact anti-Black Code legislation like the Civil Rights Act is found somewhere in the “last two clauses” of Section One in combination with the powers granted by Section Five. Others held the same view. Howard’s colleague, Vermont’s Republican Senator Luke Poland, for example, explained:

Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment:

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 law.

It is the very spirit and inspiration of our government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this, we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.362

According to Poland, these last two clauses in Section One “remove all doubt” as to Congress’s power to enact legislation like the Civil Rights Act. In this, he echoes Jacob Howard, John Bingham and the House sponsor of the Civil Rights Act, James Wilson. It simply is not credible for Barnett and Bernick to insist that only the Privileges or Immunities Clause could authorize the Civil Rights Act and therefore must be understood as authorizing the Civil Rights Act.

Finally, Barnett and Bernick again try to raise the “dog that did not bark.” As would other Republicans, Jacob Howard rejected the idea that the proposed amendment guaranteed blacks an equal right to vote.363 To Barnett and Bernick, Howard’s manner of doing so is suggestive: If the Privileges or Immunities Clause protected only enumerated rights, why didn’t Howard simply say the right of suffrage wasn’t in the Constitution? Here is how they put it:

Howard . . . contended that the right to suffrage had been “always . . . regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the base of society and without which a people cannot exist except as slaves, subject to a despotism.” On Lash’s account, we can only conclude that Republicans wasted a tremendous amount of time and courted unnecessary risk by failing to avail themselves of a comparatively cheap means of making plain that enumerated rights were categorically “in” and unenumerated rights categorically “out.”364

understandable paragraph is neither necessary nor plausible. The most natural reading of Howard’s speech preserves the structure of the paragraph, and coincides with the views of the clause’s author (and Howard’s colleague on the Joint Committee) John Bingham.

363 CONG. GLOBE, 39th Cong. 1st Sess. 2766 (May 23, 1866)
364 B&B, supra note 1, at 43.
Notice the ellipsis in the above quote from Jacob Howard. When one adds the language Barnett and Bernick leave out, Howard’s statement sounds quite different:

But sir, the first section of the proposed amendment does not give to either of these classes [black and white] 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.365

In the portion of Howard’s statement which Barnett and Bernick omit, Howard explains that suffrage could not be considered a national privilege or immunity because it was not a right “thus secured by the Constitution” and had instead “always been regarded in this country as the result of positive local law.” One way to be “secured by the Constitution” is to be enumerated in the Constitution. For Barnett and Bernick’s (already weak) argument from silence to work, one must assume Howard was not simply saying “the right to vote is not enumerated in the Constitution.” But this is a perfectly reasonable interpretation of what Howard actually said.

In sum, nothing in Howard’s speech contradicts the Enumerated Rights reading of the Privileges or Immunities Clause. Every one of the rights that Howard declared protected by the Clause is derived from an enumerated constitutional right—some from Article IV and some from the Bill of Rights. Most of all, there is no evidence that either Howard or his audience held a “transformative” understanding of Corfield and Article IV. Such a reading seems particularly awkward to ascribe to Howard, given his repeated efforts in the Joint Committee to vote down the Clause and replace it with a narrower version.

Jacob Howard’s later speeches in the Thirty-Ninth Congress also support a conclusion that Howard’s reference to Article IV involved the enumerated rights of equal protection and not unenumerated substantive rights. Only a few months after Howard delivered his speech on the Fourteenth Amendment, the Senate debated what conditions ought to be placed on the admission of Nebraska to the Union, in particular whether the state should be required to grant blacks the right to vote. In support of such a condition, some members argued that Congress had the power to place any condition it wished on the admission of a new state, and that the condition could not be thereafter altered without the consent of Congress. Howard was appalled by such arguments, for they suggested that Congress could regulate all manner of subjects that the Constitution reserved to the people in the states. According to Howard, if Congress could require a state to provide equal voting rights for a black man, it could also require equal voting rights for women.366 The same power would allow Congress to control state regulation of how real estate can be distributed among a decedent’s heirs and the legal proceedings in regard to the collection of debt.367 “Indeed,” objected Howard,

we may go through all the details of State policy, State legislation, and individual rights, as regulated by the constitutions of the States. . . . What, then, becomes of State rights? . . . It denies to the people of the States almost all, yes, all, substantially, of those original and immemorial rights which have been exercised by the people of the States ever since the dissolution of our connection with Great Britain.368

366 CONG. GLOBE, 39th Cong., 2d Sess. 219 (1866).
367 Id.
368 Id. (emphasis added).
Such a states-rights objection would be odd if Howard believed that his Committee had already proposed an amendment to the Constitution which transformed all natural and common law rights in the states into substantive national liberties, with additional federal power to enforce the same. More likely, Howard understood the proposed Fourteenth Amendment as leaving the general regulation of unenumerated individual rights to the discretion of the people in the states, subject only to the equal access requirements of Article IV and the general Fourteenth Amendment requirements of due process and equal protection.

3. Adding the Citizenship Clause

As submitted by the Joint Committee, Section One did not yet contain the Citizenship Clause. On May 30, 1866, one week after he introduced the draft amendment to the Senate, Jacob Howard proposed adding the following language to Section One:

“[A]ll persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.”

According to Howard, “[t]his amendment which I have offered is simply declaratory of what I regard as the law of the land already.” What followed was an extended discussion of how the citizenship provision might be best worded to take account of, among other groups, Native American populations. As part of that discussion, Wisconsin Republican Senator James Doolittle proposed simply repeating the citizenship language which opened the 1866 Civil Rights Act:

“Mr. President, the celebrated civil rights bill which has been passed during the present Congress, which was the forerunner of this constitutional amendment, and to give validity to which this constitutional amendment is brought forward, and which without this constitutional amendment to enforce it has no validity so far as this question is concerned, uses the following language:

“That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”

Why should this language be criticized any more now, when it is brought forward here in this constitutional amendment, than it was in the civil rights bill?”

Doolittle’s statement could be interpreted as implying that his fellow members had knowingly passed an unconstitutional bill, thus the need for the Fourteenth Amendment. This implied accusation prompted an immediate response from Joint Committee Chair Senator William Pitt Fessenden, who insisted that “[t]here is not one word of correctness in all that he is saying, not a particle, not a scintilla, not the beginning of truth. . . . In the first place, this [Citizenship Clause] was not brought forward by the committee of fifteen at all.” Doolittle then defended his statement by reminding Fessenden that Joint Committee member John Bingham, “in a very able speech,” had insisted that Congress lacked the power to pass the Civil Rights Act. Bingham and the Committee had subsequently produced a draft Fourteenth Amendment. Doolittle concluded:

“I say I have a right to infer that it was because Mr. Bingham and others of the House of Representatives and other persons upon the committee had doubts, at least, as to the

370 Id.
371 Id. at 2896.
372 Id.
constitutionality of the civil rights bill that this proposition to amend the Constitution now appears to give it validity and force. It is not an imputation on anyone.”

Fessenden responded by denying the Joint Committee’s draft had anything to do with the Civil Rights Act:

“I will say to the Senator one thing: whatever may have been Mr. Bingham’s motives in bringing it forward, he brought it forward some time before the civil rights bill was considered at all and had it referred to the committee, and it was discussed in the committee long before the civil rights bill was passed. Then I will say to him further, that during all the discussion in the committee that I heard nothing was ever said about the civil rights bill in connection with that. It was placed on entirely different grounds.”

Doolittle then asked, “[i]f my friend maintains that at this moment the Constitution of the United States, without amendment, gives all the power you ask, why do you put this new amendment into it on that subject?” At this point Jacob Howard spoke up:

“I was a member of the same committee, and the Senator’s observations apply to me equally with the Senator from Maine. We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.”

Howard’s statement somewhat conflicts with Fessenden’s. Where Fessenden denies the Committee gave the Civil Rights Act any thought, Howard insists they wished to place the subject matter of the Act out of the reach of later Congress’s by constitutionalizing its principles. Presumably Congress could believe the Civil Rights Act was an appropriate, if not required, exercise of power under Section Two of the Thirteenth Amendment (Trumbull’s theory). By constitutionalizing the principles in the Act, later Congress’s would be unable to reverse course. Such a theory would vindicate both the original passage and the need for the current amendment.

Regardless, once Congress agreed to add the Citizenship Clause to Section One, the Civil Rights Act and Section One now appeared to be directly related to one another. Both began with almost identical citizenship clauses and both then proceeded to enumerate a set of protected rights. It is not surprising, therefore, that public discussions of the proposed amendment during the ratification debates commonly linked the protections of Section One to the protections of the Civil Rights Act.

PART III. PUBLIC UNDERSTANDING OF THE PROPOSED FOURTEENTH AMENDMENT

Unlike the secret debates in Philadelphia which produced the original Constitution, the debates which produced the Fourteenth Amendment were published in national newspapers on a daily basis. Not only was the public fully informed about what was happening and why, the debates of the Thirty-Ninth Congress were a matter of intense public interest, both North and South. The outcome of these debates would determine the conditions under which the southern states would be readmitted to Congress. Moreover, the increasing tension between the Democratic President and the Republican Congress not only threatened the progress of Reconstruction, it threatened to produce a new and dangerous constitutional rupture between the political branches of the national
government. There was good reason, then, for the people of the United States to pay close attention to what was happening in Congress during the first half of 1866.

By the time Congress sent the Fourteenth Amendment to the States that summer for potential ratification, members of the public following the debates would already know a great deal about Section One. They would know it began as an amendment submitted by Joint Committee member John Bingham who described his efforts as giving Congress power to enforce the Bill of Rights—and nothing more. They would know that John Bingham always described the rights of citizens of the United States as rights enumerated in the Constitution. They would know Bingham also opposed the Civil Rights Act because Congress did not yet have power to enforce enumerated rights like those declared by the Due Process Clause of the Fifth Amendment. They also would know John Bingham was a member of the Joint Committee that drafted the final version Fourteenth Amendment and they likely knew (or would soon learn) that Bingham had personally drafted the Privileges or Immunities Clause.376

Long before Jacob Howard introduced the Joint Committee’s draft amendment, people following the debates would have heard multiple references to the “fundamental” relative rights described in Corfield v. Coryell. Going forward, the public knew the Privileges or Immunities Clause in the “Howard Amendment” protected enumerated constitutional rights, including both those enumerated in Article IV and those enumerated in the First Eight Amendments. Finally, they would know that the Joint Committee believed that the Equal Protection and Due Process Clauses prohibited racially discriminatory “codes” and that Section 5 of the Amendment authorized federal legislation prohibiting such codes. Finally, the public would not have heard a single word about the amendment transforming locally-protected rights into absolute unenumerated rights.

Of course, the public debates over the proposed Fourteenth Amendment involved much more than just a discussion of the Privileges or Immunities Clause. Public discussion ranged from the legitimacy of proposing an amendment while the southern states remained excluded from Congress,377 to arguments about whether the amendment established black suffrage (an idea unpopular at the time both North and South),378 to the impact of the amendment on state rights and constitutional federalism,379 to the need to protect basic constitutional rights like freedom of speech and assembly in the South.380

A lengthy amendment that was difficult to fully explore in a stump campaign speech, proponents of the Fourteenth Amendment tended to compress their discussion of Section One into

376 See, e.g., Speech of Henry Wilson, R-Mass, Anderson Indiana, Sept. 22, 1866:

“And there is another glorious provision—I think the noblest of them all—that no State shall make any law, or enforce any law impairing the rights or privileges of a citizen of the United States, and that all citizens every-where shall be under the equal protection of the law. That provision was introduced into Congress by John A. Bingham, of Ohio, one of the ablest, truest and best men in the Congress of the United States, and an honor to the State of Ohio.”

Reported in Cincinnati Commercial (Cincinnati, Oh., and reprinted in Speeches of the Campaign of 1866, 34.

377 An issue raised by the President himself. See, Proposed Fourteenth Amendment; President Andrew Johnson’s Message of Transmission (June 22, 1866), at Cong. Globe, 39th Cong., 1st Sess., 3349 (June 22, 1866).

378 See, e.g., New Hampshire House of Representatives, Speech of E. E. Hibbard, reported in The Weekly Union (Manchester, New Hampshire), July 17, 1866, p. 2 (opposing the amendment because it was an attempt “was to force the Southern people to put the negro upon an equality with the white man in the matter of suffrage.”).

379 See Speech of Senator Thomas A. Hendricks, Indianapolis, Indiana, Aug. 8, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 9 (“it takes away the independence of the State judiciary and compels it to kneel in the presence of Federal authority; it tramples under foot the policy, laws and Constitution of our State; and yet, my countrymen, Congress demands that you shall be its partisan in its support.”).

380 Speech of John Bingham, Bowerston, Ohio, Aug. 24, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 19.
one or two basic ideas. Most often proponents briefly described Section One in terms of equal rights and compared its protections to those provided by the Civil Rights Act. This brief explanation was almost invariably followed by a quick assurance that the amendment did not give black citizens the right to vote. The latter came in response to assertions by Democrats that by making freedmen citizens, this necessarily conferred the right to vote or authorized Congress to give blacks the right to vote by way of the amendment’s fifth section.

On those occasions that speakers provided a more robust description of the rights protected by the Privileges or Immunities Clause, they often mentioned the constitutionally enumerated rights of freedom of speech, press and assembly. The perceived need to protect these enumerated rights against stage abridgement was particularly fueled by national scandals like the New Orleans riots where a peaceful assembly of freedmen was violently attacked by a state-supported mob. By the time of the election of 1866, public sentiment was clearly on the side of the Republicans and an amendment protecting the equal rights of American citizenship.

Although there is a robust body of evidence suggesting the public understood the privileges or immunities of citizens of the United States included enumerated constitutional rights, there is no similar body of evidence suggesting the public believed the amendment protected absolute unenumerated rights. Speeches linking the amendment to the Civil Rights Act described Section One as providing basic rights of equal treatment, not substantive unenumerated rights. Although a few Radical Republicans believed the amendment would give blacks the otherwise unenumerated right to vote, the vast majority of Republican supporters of the bill expressly rejected this reading of the amendment.

In their discussion of the public’s understanding of the Privileges or Immunities Clause, Barnett and Bernick agree with me that the evidence suggests that the ratifying public understood the Clause as protecting enumerated constitutional rights. They insist, however, that this same

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381 See, e.g., Circular Accompanying the Call for a Convention of Southern Loyalists, July 10, 1866 (“We confidently expected his hearty co-operation with the political department of the Government in providing such governments in the States lately in rebellion as would protect the country from conspirators in official positions against its peace; and secure to loyal citizens life, liberty and property, together with the inestimable privilege of impressing upon the minds of others his conscientious convictions of truth, by speech and through the medium of the press. We also had reason to hope that the freedman as well as the loyal white man in the South would find ample protection for all his rights as an American citizen.”). See also, “The Appeal,” Southern Loyalists Convention Philadelphia, Pa., September 6, 1866 (“Statute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guaranties of the right to peaceably assemble and petition for redress of grievances. It proscribed democratic literature as incendiary, nullified constitutional guaranties of freedom and free speech and a free press. It deprived citizens of the other States of their privileges and immunities in the States.”).

382 All of the above is discussed in Lash, THE FOURTEENTH AMENDMENT, supra note 2, at 176-215.

383 Id. at 208-221, 224-26.

384 For example, in his speech describing Section One of the proposed amendment, Lyman Trumbull explained:

The first [section], and it is all one, article declares the rights of the American citizen. It is a reiteration of the rights as set forth in the Civil Rights Bill. An unnecessary declaration, perhaps, because all the rights belong to the citizen, but it was thought proper to put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic [applause] and that all who were born here, or who came here from foreign lands and were naturalized, were to be deemed citizens of the United States in every State where they might happen to dwell.

Speech of Lyman Trumbull, Chicago Illinois, Aug. 2, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 6.

385 See, e.g., Reverdy Johnson, A Further Consideration of the Dangerous Conditions of the Country, the Causes Which Have Led to It, and the Duty of the People (Baltimore; The Sun Printing Establishment, 1867), 14 (responding to Thaddeus Stevens’ claims that the amendment would empower Congress to protect the rights of suffrage).

386 B&B write:
evidence either supports or is consistent with a Fundamental Rights understanding of the Privileges or Immunities Clause. Some of their argument is based on claims we have already shown to be false: For example, they claim the public following the debates would have understood references to the Bill of Rights or to Corfield as involving unenumerated absolute rights. Neither assertion, we have seen, is correct.\textsuperscript{387}

Barnett and Bernick also claim that when proponents of the amendment described Section One as echoing or authorizing legislation like the Civil Rights Act, this implies an unenumerated rights understanding of the Privileges or Immunities Clause. The argument goes something like this: (1) The Privileges or Immunities Clause was designed to authorize legislation like the Civil Rights Act. (2) The Civil Rights Act contains anti-discrimination protections that do not track any previously enumerated right. (3) This means that the Privileges or Immunities Clause protects more than just enumerated rights. (4) This is further supported by public references to Corfield v. Coryell which was understood as listing absolute national rights.

Having studied the history of the Act and the Amendment, we know this argument cannot be correct. John Bingham did not design the Privileges or Immunities Clause to authorize the Civil Rights Act. The Civil Rights Act protected rights Bingham believed were protected by the enumerated Due Process Clause. According to Jacob Howard, it was the last two provisions in Section One, the Equal Protection and Due Process Clauses, that authorized anti-discrimination legislation, not the Privileges or Immunities Clause. Finally, there is no evidence that any member of Congress or the public understood Corfield as listing absolute national rights.

Barnett and Bernick correctly point out that proponents of the Fourteenth Amendment often associated the rights of Section One with the rights of the Civil Rights Act.\textsuperscript{388} Sometimes speakers associated the Act with the Citizenship Clause,\textsuperscript{389} sometimes with the Due Process and Equal Protection Clauses,\textsuperscript{390} and sometimes with Section One as a whole.\textsuperscript{391} In every case, however, these

\textsuperscript{387}See, supra note \_ and accompanying text.
\textsuperscript{388}See B&B, supra note 1, at 54.
\textsuperscript{389}Sen. Henry Lane, for example, explained that “[t]he first clause in that Constitutional Amendment is simply a re-affirmment of the first clause of the Civil Rights Bill, declaring the citizenship of all men born in the United States, without regard to race or color.” Speech reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 13, 14. (emphasis added).
\textsuperscript{390}Schuyler Colfax, for example, linked the civil rights act to language in the amendment declaring “that no State shall deny to any person the equal protection of life, liberty, and civil rights.” This seems clearly a paraphrase of the Equal Protection and Due Process Clauses. See Speech of Schuyler Colfax, Indianapolis, Indiana, August 7, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 14.
\textsuperscript{391}According to John Sherman (R-Ohio):

“What are the features of that amendment? Everything that was radical that he objected to —I believe the President does not like that name—was stricken out. The first section was an embodiment of the Civil Rights Bill, namely; that every body—man, woman and child—without regard to color, should have equal rights before the law; that is all there is in it; that every body born in this country or naturalized by our laws should stand equal before the laws—should have the right to go from county to county, and from State to State, to
speakers emphasized how Section One protected the equal rights of citizens of all persons. In no case did proponents of the amendment describe either the Civil Rights Act or Section One as protecting absolute unenumerated rights. For example, in a speech supporting the amendment by Senate Sponsor of the Civil Rights Act, Lyman Trumbull, Trumbull explained that the Civil Rights Bill was intended “to make all persons equal before the law—equal in right to acquire property, to dispose of property, to make contracts, enforce contracts, and in every right which belongs to man as a man.” 392 As for the Fourteenth Amendment,

“The first, and it is all one, article [in the proposed Fourteenth Amendment] declares the rights of the American citizen. It is a reiteration of the rights as set forth in the Civil Rights Bill. An unnecessary declaration, perhaps, because all the rights belong to the citizen, but it was thought proper to put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic [applause] and that all who were born here, or who came here from foreign lands and were naturalized, were to be deemed citizens of the United States in every State where they might happen to dwell.” 393

Portions of these speeches, if viewed out of context, sometimes appear to describe the rights listed in the Civil Rights Act (or Corfield) as absolute rights. When the full context of the speech is considered, however, it becomes clear that the speaker was discussing the rights of equal protection. For example, consider this excerpt from a speech by Schuyler Colfax:

We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property, and be subject to like punishments. That is the last law upon the subject. The Democrats haven’t found that out yet. They have been hunting up a new edition of Webster’s dictionary to find the meaning of the word citizen. . . .

But they say “why do you want to put this into the Constitution?” I answer, it was to embody it forever in the Constitution, and to say to the Judges of the South, who had been deciding the Civil Rights Law unconstitutional, that they must cease to lift their puny arms against this great principle of civil rights. It is put there as a guarantee for the future. [Applause.] I want this great doctrine, that there shall be equality before the law, placed where it can not be repealed, that no State shall deny to any person the equal protection of life, liberty, and civil rights. I desire that in this free land every freeman shall speak his honest sentiment without

Reported in Cincinnati Commercial (Cincinnati, Ohio), and reprinted in Speeches of the Campaign of 1866, 39. Likewise, Benjamin Butler declared:

“[The first clause] was that every citizen of the United States should have equal rights with every other citizen of the United States, in every State. Why was this necessary? It was because the President, in vetoing the Civil Rights Bill, said that it was unconstitutional to pass a law that every citizen of the United States should have equal rights with every other citizen in every State of the Union. To render that certain, which we all supported up to that hour was certain, Congress said: “Well, we will put it in the Constitution so it shall be there forever.” [A voice, “That’s the place to have it.”] Just exactly. The next thing was the subject of representation.”

Reported in Cincinnati Commercial (Cincinnati, Ohio), and reprinted in Speeches of the Campaign of 1866, 41. Butler was elected to the House in 1866 and was selected as one of the House managers for the Impeachment of Pres. Andrew Johnson.

392 Reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 6. 393 Reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 6.
molestation or danger, and that it is the only way you can have a firm and enduring Union. Who do you think is the author of the first Civil Rights Bill? I mean the human author, for it sprang from God, who declared that he was no respector of persons. It was Moses—not the Moses of to-day. [Laughter.] He said; “There shall be but one manner of law for him that is born with you and for the stranger,” and that is the true doctrine.\(^{394}\)

In the first paragraph above, Colfax describes the Civil Rights Bill as protecting “the rights of a citizen of the United States,” such as the right to “make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property.” Read by itself, this passage might be understood as a reference to absolute unenumerated rights. But then, a bit later in his speech, Colfax clarifies that these are subjects that are granted no more than equal protection under the Civil Rights Act and Section One. According to Colfax, the Civil Rights Bill represents the “great doctrine, that there shall be equality before the law, placed [in the Constitution] where it can not be repealed, that no State shall deny to any person the equal protection of life, liberty, and civil rights.” To Colfax, this was simply the divine biblical doctrine that “‘[t]here shall be but one manner of law for him that is born with you and for the stranger.’”\(^{395}\)

Similarly, at one point John Sherman seems to describe the amendment as protecting unenumerated absolute rights, including “the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause.”\(^{396}\)

Viewing Sherman’s statement in context, once again it is clear that he is listing subjects for which individuals will receive equal treatment:

“What are the features of that amendment? Everything that was radical that he objected to—I believe the President does not like that name—was stricken out. The first section was an embodiment of the Civil Rights Bill, namely; that every body—man, woman and child—without regard to color, should have equal rights before the law; that is all there is in it; that every body born in this country or naturalized by our laws should stand equal before the laws—should have the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause. Who opposes that?”

Considering the fuller context is also important in understanding the “Madison” essays published in the New York Times. In one essay, “Madison,” uses *Corfield v. Coryell* to explain the “rights and privileges of a citizen of the United States.” According to “Madison,” Washington’s list of protected subjects represented the “long-defined rights of a citizen of the United States.” Here is the passage:

What the rights and privileges of a citizen of the United States are, are thus summed up in another *case*: Protection by the Government; the enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue and obtain happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain 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,

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394 Indianapolis, August 7, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 14.

395 *Id.*

396 Speech of John Sherman, (R-Ohio), Sept. 28, reported in Cincinnati Commercial (Cincinnati, Ohio), and reprinted in Speeches of the Campaign of 1866, 39.
either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.\textsuperscript{397}

According to Barnett and Bernick, this paragraph provides “an unambiguous affirmation that the Privileges or Immunities Clause will provide absolute protection to Corfield rights.”\textsuperscript{398} But this is no more true of “Madison” than it was for Schuyler Colfax who also described “the rights of a citizen of the United States” as the right to “make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property.” Colfax and his audience understood that he was describing subjects receiving the relative rights of equal protection. Madison, by expressly quoting the “case” Corfield and its “long-defined” rights of equal treatment would have been understood as doing the same thing. If he had meant anything else, he would not have referred to Corfield’s rights as “long-defined.” In fact, this entire portion of Madison’s essay involved a discussion of the relationship between the opening words of Section One and the anti-discrimination Civil Rights Act—a relationship involving the principle of equal rights. Here is “Madison’s” summation:

“It is time that national citizenship should be defined in the Constitution and unquestionably protected by appropriate legislation. It is but following the example of other nations. The amendment is in terms the most appropriate. It is carrying out the advanced sentiment of the great masses in favor of equal rights and protection to all. It is an enlarged and comprehensive principle; and those who stop short of it but consult the prejudices of bigotry and ignorance. My own opinion is, that the Civil Rights Bill was, in this respect, constitutional.”\textsuperscript{399}

This is the language of equal protection, not absolute rights.

A. Enumerated Rights in the Public Debate

As noted in the above section, many Republican advocates of the Fourteenth Amendment were content to summarize Section One as a statement of equal rights and relate its protections to the equal rights in the Civil Rights Bill. The Privileges or Immunities Clause was rarely singled out for particular and detailed discussion. Howard’s well-circulated speech had already described the Clause as protecting enumerated constitutional rights, and Democrats had no interest in attacking the idea of protecting constitutional liberty.

Despite this relative lack of attention, however, the association of the amendment with the enumerated rights of American citizens remained an important part of the national debate. In an August 24, 1866 speech in Bowerston, Ohio, John Bingham repeated his longstanding argument that the amendment “takes from no State any right which hitherto did not exist within the letter of your Constitution, and which is essential to the nation’s life.”\textsuperscript{400} No state, however, had the right to abridge the enumerated rights of the First Amendment. Declared Bingham, “the American people can not have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.”\textsuperscript{401}

\textsuperscript{398} B&B, supra note 1, at 56.
\textsuperscript{400} Reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 19.
\textsuperscript{401} Id.
Following the deadly July assault on a black assembly in New Orleans, Republicans repeatedly stressed the importance of passing an amendment that would protect the enumerated constitutional rights of speech and assembly. In his address to the Southern Loyalists’ Convention, Texas Judge Lorenzo Sherwood declared:

We stand on the Constitutional rights of the citizen; those rights specified and enumerated in the great charter of American liberty in the following form—Security to Life, Person and Property; Freedom of the Press; Freedom of Opinion; and Freedom in the exercise of Religion. Fair and impartial Trial by Jury under such regulations as to make the administration of justice complete. Unobstructed commerce between the States, and the right of the citizens of each State to pass into and sojourn in any other State, and to enjoy the immunities and privileges of the citizens of such other State. Exemption from any order of nobility or government through privileged class: The Guaranty of Republican Government in every State and, all the People thereof, making the preservation and maintenance of the above enumerated rights, unless forfeited by crime, the constitutional test and definition of what is Republican Government.

Lorenzo insisted that “no power . . . State or National” had the authority to invade “these fundamental rights of the citizen,” and that the protection of these rights must be made co-extensive with American citizenship. Like Jacob Howard, Sherwood included the “privileges and immunities” of article IV along with the enumerated rights in the Bill of Rights as the fundamental rights of American citizenship that must be protected against both federal and state abridgment.

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403 See, for example, Ratification Debates, Pennsylvania Assembly:

Mr. M’CAMANT.

... Now, Mr. Speaker, I don’t propose to discuss the constitutionality of these amendments—I am no lawyer, sir, and if I was I should not here enter upon such a discussion. It is enough for me to know, sir, that the best judges of law and the purest and most patriotic men of our country advocate the adoption of these amendments by the people of the United States. They believe them to be right and proper—and regard them as being necessary to secure to us the blessings of peace and freedom of every man, woman and child in the country—the freedom of speech and action which before the war was denied and even now is denied to every man who has not been a rebel or a rebel sympathizer, a secessionist or a traitor. Besides that, Mr. Speaker, these amendments were fully and ably discussed in the campaign of last fall, and are fully endorsed and well understood by the loyal North, and I will vote for them. . . .

[LVI] Gentlemen of the Democratic Party, let me ask you to be as true to the Constitution as has been the Republican organization. Stand by us in demanding from the South that our citizens and loyal men everywhere be protected by their laws in the enjoyment of all their constitutional rights. It will be well for you, as a party, and a happy day for the country, when your leaders have enough of patriotism and love of country in them to place your party in this position. We demand the freedom of speech and of the press; we demand, sir, a Union reconstructed upon the principles of universal justice to all men, whether they be white or black, and if Southern rebels cannot agree to such a Union let them go down and occupy the positions once held by their slaves.


404 The Southern Loyalists’ Convention, in The Tribune Tracts No. 2, p. 25 (1866).
405 Id. at 31.
Following the Republican’s landslide victory in the elections that Fall, “Madison” wrote in the New York Times that the enumerated rights of American citizens were now certain to be secured by the Fourteenth Amendment:

The elections are now over. The country has decided between the policy of the President and Congress. The Fortieth Congress will reflect the same sentiments held by the Thirty-ninth, and being backed by the people upon issues fairly made by the President, the Congress will have more will for action, and will be more pressed to take decided measure than heretofore. The one great issue really settled is, that the people will not lose the fruits of the victory won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—full and complete protection in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; to keep and bear arms in his own defence, to be tried and sustained in every way as an equal without distinction to race, condition or color. These are the demands; these the securities required. In addition to these rights of the citizen, it is demanded that the life of the nation shall be sustained, and the Union perpetuated. Let us see how far the Constitutional Amendment is calculated to effect this object.\footnote{406}{\textquotedblleft}Madison,\textquotedblright The National Question, The New York Times, p. 2 (New York, N.Y.), November 10, 1866. As we noted in an earlier section “the pursuit of happiness” was an idea associated with the rights of productive labor and property protected under the Due Process Clause.}

In a later essay, “Madison” expounds on these ideas:

For thirty years no man could speak or write or think that Slavery was not of all the institutions most wise, economical, human, Christian and divine. To be silent was to be suspected; to speak against it insured expulsion, mobbing or hanging. Of what advantage were constitutional guarantees then? And even now, a President, who never felt the enormity of those things, forbids the circulation of a Boston newspaper, because, in his opinion, it is incendiary. This is only a continuation of the “higher law” misrule, which suppressed the circulation of all Free-Soil literature in fifteen States. Ever since the foundation of the Government, the notions of citizenship, and the rights of the red man, the black man, the naturalized citizen, and the native born white man have been exceedingly crude. . . . But this amendment will not expend itself upon the red man, the black man and the man of mixed color. Our Government, so rapid in its advancement, so glorious in its history, so mighty in its strength, will never be complete, as a great Republic, until it clearly defines citizenship and protects every man entitled to the name of American citizen, wherever upon the earth he may lawfully be. This protection must be coextensive with the whole Bill of Rights in its reason and spirit. Reason must be left free to combat error.

“Madison’s” closing reference to the Bill of Rights is linked to his earlier discussion of the “constitutional guarantees” to “speak or write.” This echoes the declaration in his first essay that the passage of the Fourteenth Amendment will protect an individual’s “right to speak and write his sentiments, regardless of localities.”\footnote{407}{Despite B&B’s claims to the contrary, Madison’s use of the term “Bill of Rights” reflects the standard understanding that the term refers to the enumerated rights of the 1791 amendments.} This is yet another example of the standard way of referring to the Bill of Rights at the time of Reconstruction—as a reference to the rights enumerated in the 1791 amendments.

Throughout the time that states were considering whether the ratify the amendment, Republican supporters continued to describe the amendment as protecting enumerated constitutional rights, especially those listed in the original amendments to the Constitution. In his January 27, 1867
speech before the House on the proposed “Cruel and Unusual Punishments Bill,” Bingham once again explained that the pending amendment would give Congress power to enforce the 1791 amendments:

One word further as to the gentleman’s statement that the provision of the eighth amendment has relation to personal rights. Admit it, sir; but the same is true of many others of the first ten articles of amendment. For example, by the fifth of the amendments it is provided that private property shall not be taken for public use without just compensation. Of this, as also of the other amendments for the protection of personal rights, it has always been decided that they are limitations upon the powers of Congress, but not such limitations upon the States as can be enforced by Congress and the judgments of the United States courts.

So far as we can constitutionally do anything to prevent the infliction of cruel punishments by State laws I wish to see it done. I trust the day is not distant when by solemn act of the Legislatures of three fourths of the States of the Union now represented in Congress the pending constitutional amendment will become part of the supreme law of the land, by which no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution, and by which also the Congress will be empowered by law to enforce every one of those limitations so essential to justice and humanity.408

Once again, Bingham links the pending amendment to the protection of enumerated constitutional rights, and nothing else.409 As one final example, consider the editorial of constitutional treatise writer George W. Paschal, published in the New York Times soon after the ratification of the Fourteenth Amendment.

Nor is the remaining guarantee in this clause less important. “No state shall make or enforce any law abridging 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.”

Law readers are so accustomed to see similar provisions in the State Constitutions, that they underrate this national guaranty. They should have lived in the South, where there was always a class of “persons” for whom there was a summary and barbarous code; they should know that the national bill of rights has, by a common error, been construed not to apply to or control the States; they should have seen and felt that for 30 years there was even half the area of the Union where no man could speak, write, or think against the institution of Slavery.”410

Readers would understand Paschal’s reference to the “national bill of rights” as a reference to the 1791 amendments, particularly the First Amendment’s enumerated rights of freedom of religion, speech and press—rights abridged by the southern states’ where no man could speak, write, or think against the institution of Slavery.” These enumerated rights would now be protected under the newly ratified Fourteenth Amendment.

B. Only Enumerated Rights?

409 See also, John A. Bingham, “The Great Importance of the Fourteenth Amendment”, New York Herald (New York, N.Y.) (December 3, 1868), p. 5 (“It provides that no States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is one of these privileges to choose representatives, to be represented in the Senate and to vote for that body, a State body too, that chooses a President. Some of the immunities are freedom from cruel and unusual punishment and unlawful seizures. It gives us full power to protect our citizens, and it was needed.”).
Barnett and Bernick do not deny the public understood Section One in general, and the Privileges or Immunities Clause in particular, protected enumerated constitutional rights. They claim that the evidence does not support a conclusion that the privileges or immunities clause only involved enumerated rights. The evidence we have, however, associates the Clause with nothing other than enumerated constitutional rights, either the equal protection rights of Article IV or the rights enumerated in the 1791 amendment. In fact, some Republicans criticized Section One because it protected enumerated constitutional rights and only enumerated constitutional rights. In the remarkable report excerpted below, a majority of the Massachusetts Committee on Federal Relations describes Section One as protecting enumerated constitutional rights like those found in Article IV and in the Bill of Rights, but criticizes the Section as mere surplusage since states are already obligated to respect these constitutional rights. Here is critical section of the Report:

Two questions present themselves at the outset: First. Does it give any additional guarantees to human rights? Second. Does the proposed amendment impair or endanger any rights now recognized by the Constitution?

The first section of the article is as follows:

“Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 is difficult to see how these provisions differ from those now existing in the Constitution. . . . Many of our ablest jurists agree with the opinion of the late Attorney-General Bates, that all native-born inhabitants and naturalized aliens, without distinction of color or sex, are citizens of the United States.

The Constitution (Article IV., section 2.) declared,—

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

“Sect. 4. The United States shall guarantee to every state in this Union a republican form of government.”

Amendments:—

“Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

“Article II. A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

“Article V. No person shall be * * * deprived of life, liberty or property without due process of law.

“Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

“Article VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”
Nearly every one of the amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights.

It is difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language; and, upon any fair rule of interpretation, these provisions cover the whole ground of section first of the proposed amendment.

To examine the first section critically, “All persons, &c., are citizens of the United States and of the state wherein they reside.” This definition of citizenship of the United States, as we have said, is practically settled quite as authoritatively as an amendment could do; indeed, probably more conclusively; for there is reason to fear that, if this question should come before the present supreme court as a new question under this amendment, there would be danger of an adverse decision.

The definition of citizenship “of the state wherein they reside” is of no effect, as none of the provisions of the amendment profess to apply to persons as citizens of a State. Further, we are not aware that there has been any decision, or that there is any agreement among legal authorities as to what constitutes citizenship of a State, apart from citizenship of the United States.

The remainder of the first section, possible excepting the last clause, is covered in terms by the provisions of the Constitution as it now stands, illustrated, as these express provisions are, by the whole tenor and spirit of the amendments. The last clause, no State shall “deny to any person within its jurisdiction the equal protection of the laws,” though not found in these precise words in the Constitution, is inevitably inferable from its whole scope and true interpretation. The denial by any State to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights which we have quoted. If it should be said that such a denial has existed heretofore in spite of these guarantees, we answer that such a denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments.

We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.411

There is no way to understand this section of the Committee Report except as a complaint that the Privileges or Immunities Clause protects enumerated constitutional rights and only enumerated constitutional rights (“these provisions cover the whole ground of section first of the proposed amendment”). Massachusetts newspapers supporting the amendment criticized the Majority Report, not by denying its interpretation of Section One, but by insisting that it was a good idea to expressly declare that states were obligated to protect enumerated constitutional rights. According to the editors of the Boston Daily Advertiser,

“To the first section, which defines citizenship, forbids any abridgement of the privileges of citizens and guarantees to all the equal protection of the laws, the object of the committee is in effect that the section would be surplusage. Many of our ablest jurists, we are told, agree with the opinion of a late Attorney-General, that citizenship is already free from any limitation of color, and thus in the judgement of the committee the definition of citizenship is

“settled quite as authoritatively as an amendment could do.” We hardly need to point that the committee here fail to distinguish between what is settled in their opinion, and what is settled as the definite and stable rule of constitutional law. . . .

And so of the other rights secured by the first section of the amendment, in the judgement of the committee they are “inevitably inferable” from existing provisions, and yet they have not been so inferred, nor are they now in all cases. To put these guarantees then in clear and unequivocal terms in the text of the Constitution, is simply a prudent precaution, and the section in which this is done, so far from being surplusage, will establish forever that which as a mere matter of construction would probably have been judicially denied ten years ago and which the committee evidently fear would be so now.”

In sum, not only is there abundant evidence in support of the Enumerated Rights reading of the Privileges or Immunities Clause, there is good reason to think the public took John Bingham seriously when he declared the Clause protected nothing but enumerated constitutional rights. Not only is there historical evidence of members of the public expressly adopting that view, this is how Bingham had described his efforts from the opening days of the Thirty-Ninth Congress. The final language of the clause protecting the “privileges or immunities of citizens of the United States” had deep roots in antebellum history as a term referencing enumerated rights and only enumerated rights. Finally, there is no evidence whatsoever that anyone supporting the amendment described it as protecting absolute unenumerated rights.

C. A Final Word on the Right of Suffrage

One of the most common Democratic criticisms of the proposed Fourteenth Amendment was that it gave black citizens the right to vote. An unpopular idea in the North at this time, Democrats hoped to inflame white fear of black political power in order to derail the amendment. Although some radical Republicans no doubt hoped the amendment could be used to enfranchise blacks, most Republicans denied that any part of the amendment could be properly construed to give blacks the right to vote. As noted above, Barnett and Bernick point to Republican denials that the amendment protected the unenumerated right to vote as evidence in favor of an unenumerated rights reading of the Privileges or Immunities Clause. But as we have already seen, this weak effort to draw meaning from silence is unpersuasive: it wrongly presumes that one could not derive the right to vote from enumerated rights (but see Bingham’s speech), and it wrongly presumes Republicans did not at times make the “easy” argument (but see Howard’s speech).

Most of all, this argument ignores the fact that Democrats pointed to multiple clauses as potentially granting blacks the right of suffrage. Sometimes they pointed at the Privileges or

413 My answer to Barnett and Bernick on this point applies equally to similar arguments made by Chris Green. See, for example, Green, supra note __, at 194 (“The enumerated-rights-only view of the Privileges or Immunities Clause was never offered during 1866 as an explanation of why the Privileges or Immunities Clause did not apply to voting.”).
Immunities Clause, sometimes at the Citizenship Clause, sometimes at Section Two, and some argued that Section Five would authorize Congress to regulate suffrage in the states. In face of these myriad claims, Republicans found it easiest to simply point out that there was nothing about the term “citizen” that necessarily involved the right to vote: women and children were

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414 See, De. Thomas Hendricks, Indianapolis, Aug. 8: If adopted this [the first] section will confer citizenship on the negroes and the Indians. Senator Doolittle’s amendment to exclude Indians from its operation was rejected. They will become citizens, not only of the United States, but of the States in which they reside. And no State can abridge their “privileges or immunities” as such citizens. What are the privileges and immunities of citizens? The word “privilege” is of comprehensive meaning in such connection; perhaps more comprehensive than the word “rights.” Privileges include rights, and also whatever else the State permits at her discretion. But does it here include political rights and privileges? To vote is a privilege usually enjoyed in the State by the adult male citizen. Why, then, is it not a privilege which the State cannot abridge if this amendment becomes part of the Constitution?

Reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 9.

415 See: Indiana, Minority report objecting to amendment:

“Fourth. The first section places all persons, without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them “citizens of the United States, and of the State wherein they reside,” thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.

1 Indiana House Journal 101 (1867): January 18, 1867

416 See, Mississippi Legislative Report opposing amendment:

The amendment introduces new rules, or attempts to enforce them on the States, in regard to citizenship and the elective franchise. All persons, natives of the United States, or naturalized, except Indians untaxed—are declared to be citizens of the United States, and of the State where they reside,—and if the elective franchise is denied or abridged to any male inhabitant of the State 21 years of age, the basis of representation shall be reduced in the proportion such male citizens shall bear to the whole number of male citizens 21 years of age in such State. It is obvious that the object is to compel the Southern States to accept negro suffrage, on pain of the reduction of their representation in Congress and the Electoral College.

The Weekly Clarion (Jackson, Miss.), January 31, 1867, p. 2. See also Mississippi Senate Journal 196 (1867).

417 See remarks of Mr. Kurtz, Pennsylvania Ratification debates:

Mr. KURTZ. . . . [LII] Whether the wording of the [citizenship] clause already quoted will ipso facto, confer the rights of suffrage upon negroes or not, may be a question, but it is quite certain that the whole of the first section taken together, will give to Congress the right, by a simple statute, to thus confer the elective franchise. By a subsequent clause in this section it is provided, that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

In no part of the proposed article, nor in the Constitution as it now stands, is there given a catalogue of the “privileges and immunities” of citizens, which by this clause the States are prohibited from abridging. In case of dispute, where exists the authority to define these “privileges and amenities?” By the fifth section of this proposed article, it is provided that the “Congress will have power to enforce, by appropriate legislation, the provisions of this article.” This, it seems to me, undoubtedly confers upon Congress the power to define what are the “privileges and immunities” of citizens, as well as to impose penalties upon all who, under authority of any pretended State law, should deny or abridge these privileges and immunities. Should this amendment be ratified, and Congress, in pursuance of the authority conferred by the fifth section, provide by “appropriate legislation” to enforce the provisions of the first section, that is, by an act declare what shall constitute the “privileges and immunities” of citizens, in that catalog embracing the elective franchise; . . . could any one pretend that such an act of Congress would be unconstitutional, or that any election officer in Pennsylvania, who should reject the ballot of a negro, would not be liable to the punishment by such act provided?

citizens, but neither enjoyed the rights of suffrage. This was the “easy” answer that addressed simultaneously arguments based on the Citizenship Clause, the Privileges or Immunities Clause, and Congress’s enforcement powers under Section Five.

One of the more unfortunate claims Barnett and Bernick make in regard to the rights of suffrage and their reading of the Privileges or Immunities Clause involves their understanding of the ideas and speeches of Frederick Johnson. Citing the work of James Fox, Barnett and Bernick accuse me of “selective” use of Douglass’s essays and ignoring portions where “Douglass gave voice to an understanding of citizenship that was not exhausted by enumerated rights.” This flippant accusation is doubly unfortunate for its complete failure to understand of Douglass’s views on the Fourteenth Amendment. Douglass opposed the Fourteenth Amendment precisely because it did not secure the freedmen’s right to vote.

Douglass believed that the Constitution, before the addition of the Fourteenth Amendment, should be understood as establishing the rights of citizen suffrage and that Congress had the implied power to enforce this right. Douglass criticized the Fourteenth Amendment because he believed its provisions amounted to “a renunciation of [Congress’s] power to secure political rights to any class of citizens, with the obvious purpose to allow the rebellious States to disfranchise, if they should see fit, their colored citizens.” The Fourteenth Amendment, Douglass declared, was an unfortunate blunder,” one that “must now be retrieved” by moving forward with a new effort to constitutionalize the right of black citizens to vote. None of the past efforts of Congress, from the Civil Rights Bill to the pending Fourteenth Amendment, could “reach the difficulty” facing the freedmen in the South until they were given the right to vote. Rather than relying on the protection of the federal officials, blacks “must have the power to protect themselves, or they will go unprotected, in spite of all the laws the Federal Government can put upon the national statute book.”

Far from supporting Barnett and Bernick’s claim about the Fourteenth Amendment protecting unenumerated rights, Douglass clearly rejected the idea that the Amendment protected the unenumerated right to vote. To fail to understand Douglass’s criticism of the Fourteenth Amendment is to fail to understand Douglass’s untiring effort to secure a Fifteenth Amendment to the Constitution.

Most people understood that the Democrats were wrong and that the proposed Amendment did not establish the rights of suffrage (thus the overwhelming electoral success of the Republicans in the elections of 1866). This obvious meaning of the amendment was a matter of frustration to

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418 See, e.g., Speech of Schuyler Colfax, Indianapolis, Indiana, Aug. 7, 1866, reported in Cincinnati Commercial (Cincinnati, Oh.), and reprinted in Speeches of the Campaign of 1866, 14.
419 See B&B, supra note 1, at 57 (“[In his essays] Douglass gave voice to an understanding of citizenship that was not exhausted by enumerated rights.”). In Fox’s review of my book, he criticizes my reading of the Privileges or Immunities Clause as downplaying or ignoring Frederick Douglass’s view of the importance of the rights of suffrage. See Fox, supra note __ at 597-99. But this is non-sequitor. Douglass himself understood that the Privileges or Immunities Clause (or the Fourteenth Amendment) did not establish the right to vote. This, to Douglass made it a “blunder” and one that Congress needed to remedy with a Fifteenth Amendment.
420 See, David W. Blight, FREDERICK DOUGLASS: PROPHET OF FREEDOM, 483 (2018) (“Over the summer of 1866, Douglass joined forces with old abolitionist friends Gerrit Smith and Wendell Phillips and openly opposed the Fourteenth Amendment on the grounds that it did not explicitly provide black suffrage.”)
421 Frederick Douglass, “Reconstruction,” The Atlantic Monthly, November, 1866 (“This unfortunate blunder [the Fourteenth Amendment] must now be retrieved, and the emasculated citizenship given to the negro supplanting that contemplated in the Constitution of the United States, which declares that the citizens of each State shall enjoy all the rights and immunities of citizens of the several States,—so that a legal voter in any State shall be a legal voter in all the States.”)
422 Id.
423 Id.
424 Id.
425 Id.
Radical Republicans (see Douglass, above), some of whom tried to insist that the amendment should not be read as denying federal power to enforce the rights of suffrage. This claim prompted a response by Reverdy Johnson, a member of the Joint Committee that drafted Section One. According to Johnson, Section One protected previously enumerated rights and only previously enumerated rights. Explained Johnson:

Mr. Stevens, of Pa., the very head and front of the radical portion of the republican party in the House of Representatives, in a recent letter to a German professor, ... maintains that, since what he erroneously says has taken place, (the adoption of the 14th amendment) he has no doubt of the power of Congress “to regulate the elective franchise, so far as it regards the whole nation, in every State in the Union.” The amendment confers no such power. It only provides: 1. That persons born in the United States, or naturalized and subject to its jurisdiction, are citizens thereof, and of the State of their residence. 2. That no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. 3. That no person shall be deprived of life, liberty, or property without due process of law, or be denied equal protection of the laws. There is nothing in either of these provisions from which the power in question can be implied. Under the Constitution, independent of this supposed amendment, the provisions as to the rights of citizens are the same as those of the amendment.

And yet Mr. Stevens himself admits, what no one has until lately denied, that Congress had no authority to interfere with suffrage in the States. How then can the amendment be held to confer that authority? I have said that in relation to this subject the Constitution and the amendment are the same. Are they not? Will Mr. Stevens, or any other man of sense, maintain that under the Constitution, without the amendment, a State could, by law, “abridge the privileges and immunities of citizens,” or deprive any person “of life, liberty or property without due process of law.” And these are all that the amendment prohibits. The fact is, that the provisions just referred to are wholly unnecessary. If the amendment had contained but the single clause defining citizenship, the Constitution would have supplied all of the securities enumerated in the second and third clauses [of Section One]. If, therefore, as Mr. Stevens concedes, citizenship does not confer the right to vote, or give to Congress any power to confer it upon the citizen, the amendment gives neither the right nor the power.

Johnson’s argument is that Section One protects no rights other than those previously protected in the enumerated texts of the Constitution, and no one had previously interpreted those enumerated texts as nationalizing the rights of suffrage. This is the “easy” Enumerated Rights argument that Barnett and Bernick claim was never made. The fact that the Republican John Bingham believed previously enumerated rights might be read as including suffrage rights does not call into question the Enumerated Rights reading of the Privileges or Immunities Clause, it just means Bingham held more expansive interpretations of previously enumerated rights than the Democrat Reverdy Johnson.

PART IV. POST-RATIFICATION ISSUES

I am content to rest my argument in favor of the Enumerated Rights reading of the Privileges or Immunities Clause on the evidence I have presented above. It is based on a clearly distinguishable antebellum strain of “privileges and immunities of citizens of the United States,” it matches the goals and descriptions of John Bingham, the man who drafted the Clause, and it matches the public descriptions of the clause reported during the congressional debates and during

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426 Reverdy Johnson, A Further Consideration of the Dangerous Conditions of the Country, the Causes Which Have Led to It, and the Duty of the People (Baltimore; The Sun Printing Establishment, 1867), 14. (November 15, 1867.) (emphasis added).
the ratification period. Although scholars occasionally object to originalist accounts that exclude the voices of women and minorities, in this case there is abundant evidence that during ratification both women’s rights groups and civil rights advocates like Frederick Douglass also shared the Enumerated Rights only view of the Privileges or Immunities Clause—and they criticized it for exactly that reason.

Post-ratification evidence is necessarily suspect as a source of the original public understanding of a text. Now that the amendment has been added to the text, parties have an incentive to describe it as broadly or as narrowly as furthers their particular agenda. One no longer has to make an argument viewed as reasonable to a supermajority of Congress or an even greater supermajority of the people. One need only convince a majority of Congress, a majority of a committee, or a majority of a court (or, sometimes, a single judge).

In this particular case, there is little if any need to consult post-ratification evidence, given the wealth of available pre-ratification evidence. Nevertheless, I will address three aspects of post-ratification evidence which Barnett and Bernick discuss in their article. They involve the repassage of the Civil Rights Act, the so-called Woodhull Report, and John Bingham’s 1871 speech describing the meaning of the Privileges or Immunities Clause.

A. Repassage of Civil Rights Act

We have already established that Bingham understood the Civil Rights Act as an effort to enforce the Due Process Clause of the Fifth Amendment, that the House sponsor of the Civil Rights Act agreed, and that Jacob Howard explained that the last two clauses of the Fourteenth Amendment prohibiting the same kinds of discriminatory codes meant to be prohibited by the Civil Rights Act. We have, in other words, accounted for the constitutionality of the Civil Rights Act wholly apart from the Privileges or Immunities Clause. Barnett and Bernick nevertheless insist that the post-ratification repassage of the Civil Rights Act poses a “big problem” for the Enumerated Rights reading of the Privileges or Immunities Clause. Because Congress extended all of the Act’s protective provisions to “all persons” as well as citizens except for the equal right to buy and sell real estate, they claim that this omission calls into question the enumerated rights understanding of the Privileges or Immunities Clause.

The argument goes something like this: In 1870, Congress extended almost all of the original Civil Rights Act’s protections to persons as well as citizens. They did not, however, extend the rights of equal protection in relation to the buying and selling of real property. This means that although most members of the Forty-first Congress thought that most of the 1866 Civil Right Act involved the rights of all persons, they must have believed that the equal right to buy and sell property was a right of “all persons.” This means that the repassed Civil Rights Act has at least one provision that members believed to be an unenumerated right of citizens of the United States. Thus,

427 Here are the two key provisions in the 1870 Enforcement Act:

Sec. 15. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all law and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding . . . .

Sec. 17. And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reenacted; and said act, except the first and second sections thereof, is hereby referred to and made a part of this act; and section fifteen and section sixteen hereof shall be enforced according to the provisions of said act.”

CONG. GLOBE, 41st Cong., 2d Sess. 3562 (May 18, 1870).
unless I believe that this portion of the repassed Act is unconstitutional (and thus fail to explain how the Fourteenth Amendment constitutionalizes the Civil Rights Act in its entirety), I must concede that the Privileges or Immunities Clause protected at least one otherwise unenumerated right of national citizenship. And if this is the case, then my Enumerated Rights reading of the Privileges or Immunities Clause is defeated.

The problems with this argument are numerous. First, it is an argument based on post-ratification acts by a political body, a necessarily weak approach to determining original meaning. Second, the argument assumes that Congress did not extend equal real property rights to non-citizens because they believed they could not. This is a completely unsubstantiated assumption. The omission may simply reflect the fact that there were not enough members who wanted to extend equal real property rights to non-citizens. This seems especially likely at time when there was substantial resistance to providing equal civil rights to non-citizen Chinese immigrants in the western states and territories. In other words, there is no reason to presume most members would have wanted to extended real property rights to non-citizens, but believed they could not. If members simply did not want to, then Barnett and Bernick’s entire argument falls apart.

Third, and most obviously, the 1870 repassage of the Civil Rights Act and the extension of almost all of its provisions to non-citizens supports the claim that the rights of the 1866 Civil Rights Act do not have to be forced into the Privileges or Immunities Clause. We already know that Bingham and Howard looked to the later provisions in Section One as authorizing equal civil rights legislation. The majority of the Forty-first Congress signaled the same understanding when they declared:

[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all law and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

This provision could not be authorized by a clause protecting the privileges or immunities of citizens. It could only be authorized by one or both of the last two clauses of Section One, both of which declare the rights of “all persons.” Barnett and Bernick have it exactly backwards when they claim that the extension of almost all of the Civil Rights Act to non-citizens “substantially

428 There are many examples of anti-Chinese immigrant sentiments in the debates of the Fortieth Congress. See, e.g., Cong. Globe, 41st Cong., 2d Sess. app’x 475 (June 13, 1870) (statement of Sen. Casserly) (“I shall not say a word in reply to the speech of the Senator from Nevada [Mr. Stewart] on the Chinese question in California, made by him after I arose, when I yielded to him to say a word in reply to the Senator from Oregon, [Mr. Williams.] That is a question of considerable dimensions, which, as even he seems to be conscious, is by no means an easy one to deal with. I trust the Senate will at this time confine itself to the subject it has before it—the consideration of the bills to enforce the fifteenth amendment.”).

429 As far as John Bingham is concerned, although he objected to the failure of the original Civil Rights Act to provide any equal due process rights for non-citizens, the fact that the 1870 Act extended most of the rights of the original Act to non-citizens may have been enough to gain his support for the bill. Bingham’s earlier opposition to the Civil Rights Act had been primarily focused on the need for Congress to first obtain an amendment granting power to enforce the rights of all persons to the equal rights of due process. Such an amendment was now part of the Constitution. It is also possible that Bingham may have distinguished the due process property rights of citizens from the due process property rights of non-citizens. See Lash, Enforcing the Rights of Due Process, supra note __ at 1455, n.244. In short, there are so many alternative explanations for this section of the repassed Civil Rights Act as to fatally undermine Barnett and Bernick’s unsubstantiated assumption that Congress wanted to protected equal real property rights of non-citizens but believed they could not because such rights were among the unenumerated rights of the United States.

430 See 1870 Enforcement Act, in Statutes at Large, Ch. 114, 16 Stat. 140, May 31, 1870.
undermine[s]” my claim that the “all persons” provisions of Section One support legislation like the Civil Rights Act. In fact, it literally substantially supports my claim.

Nothing in Congress’s 1870 decision to secure the real property rights of citizens suggests that this was an enforcement of the Privileges or Immunities Clause and not the Due Process Clause. In fact, the members of Congress could have believed they were enforcing both Clauses, since the Fifth Amendment is itself an enumerated right of citizens of the United States, as well as an enumerated right of “all persons.” Such an understanding is consistent with both the Enumerated Rights reading of the Privileges or Immunities Clause and the Due Process understanding of the 1866 Civil Rights Act (and its repassage in 1870). Nor would such an understanding necessarily require members to believe non-citizens had the same Due Process rights. As I explained in my article, it was possible that members may have believed that due process real property rights differed depending upon whether one was a citizen or a non-citizen.431 So even if members believed that it would not be a proper enforcement of the Due Process Clause to extend real property rights to non-citizens, they might have believed securing the real property rights of citizens was a proper enforcement of the Due Process Clause.

In the end, of course, we cannot possibly know exactly why members of Congress in 1870 might support the extension of some, but not all, of the rights of the Civil Rights Act to non-citizens. We only know that doing so could only have been justified as an enforcement of one or both of the “all persons” clauses of Section One and not the Privileges or Immunities Clause. That is enough to satisfy both the Enumerated Rights reading of the Privileges or Immunities Clause and the Due Process reading of the 1866 Civil Rights Act.

There are two additional pieces of post-ratification evidence mentioned by Barnett and Bernick which are worth addressing, if only to answer their claims about the theories of John Bingham. Again, I believe the framing and ratification period evidence is sufficient to support the Enumerated Rights reading of the Privileges or Immunities Clause. To the extent that one consults the post-ratification record, some of it supports this understanding (Bingham’s 1871 speech describing the Privileges or Immunities Clause and Miller’s opinion in the 1873 Slaughterhouse Cases) and some of it does not (The “Woodhull Committee Report” submitted by John Bingham who chaired the committee). Of course, the further out in time one goes, the more the record contradicts both the Enumerated Rights reading and the Fundamental Rights reading.432 None of this evidence should be given much weight for those seeking the original public understanding of the proposed Fourteenth Amendment. For that reason, this already lengthy response will not fully address Barnett and Bernick’s efforts to draw upon a variety of post-ratification evidence in support of their Fundamental Rights reading and their critique of the Enumerated Rights reading.433 My own work has explored post-ratification evidence in an effort to be as complete as possible, but I do not believe any of this evidence is either necessary for, or fatal to, the Enumerated Rights reading of the Privileges or Immunities Clause.

It does seem appropriate, however, to address Barnett and Bernick’s discussion of post-ratification evidence involving John Bingham. Whether or not I believe this aspect of the post-ratification record is essential to understanding the original meaning of the amendment, it seems reasonable to expect that any account that draws as heavily on the work of John Bingham as mine does ought to address any post-ratification statements by Bingham that seem inconsistent with my account. For this reason, below I briefly address a committee report submitted by Bingham which contradicts my account (and also contradicts Barnett and Bernick’s account), and Bingham’s 1871 speech which provides a lengthy and detailed account of the Privileges or Immunities Clause that clearly embraced the Enumerated Rights reading of the Privileges or Immunities Clause.

431 See Lash, Enforcing the Rights of Due Process, supra note __ at 1455, n.244.
432 See, e.g., United States v. Cruikshank, 92 U.S. 542 (1876).
433 See, B&B, supra note 1, at 59.
B. The Memorial of Victoria Woodhull

On December 21, 1870, women’s rights advocate Victoria C. Woodhull submitted a memorial to the United States Senate and House of Representatives calling for legislation guaranteeing women the equal right to vote in the states. 434 According to the memorial, the Fifteenth Amendment prohibits the states from “pass[ing] any law to deny or abridge the right of any citizens of the United States the right to vote . . . neither on account of sex nor otherwise.”435 Woodhull insisted that laws denying women the right to vote violated the command of the Fourteenth Amendment that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’ nor deny to any person within its jurisdiction the equal protection of the laws.”436

Woodhull presented her memorial before the House Committee on the Judiciary on January 11, 1871.437 Also appearing before the Committee in support of Woodhull’s memorial was Washington lawyer and radical Republican Albert G. Riddle. According to Riddle, passage of the Privileges or Immunities Clause had the effect of constitutionalizing the right to vote for all citizens of the United States. 438 Repeating an argument he had delivered the evening before at a convention of the National Woman Suffrage Association, Riddle insisted that Bushrod Washington’s opinion in Corfield v. Coryell held the key to understanding the Privileges or Immunities Clause, in particular Washington’s inclusion of “the right to exercise the elective franchise” as one of the protected privileges and immunities of citizens of the United States. 439 In support of this expansive reading of the Privileges or Immunities Clause, Riddle cited Justice Bradley’s recent Article IV-based circuit court opinion in the “The Crescent City Livestock Company,” including Bradley’s concession that “[i]t is possible that those who framed the article were not themselves aware of the far-reaching character of its terms,” but that the text could “bear a broader meaning.”440

Riddle later expanded on his argument before the Supreme Court of the District of Columbia in a challenge to the municipality’s refusal to register women to vote. 441 According to Riddle, the Fourteenth Amendment’s grant of American citizenship to all persons born in the United States had the effect of bestowing all the rights of American citizenship on such persons, including the right to vote. “[T]he right to vote is a natural right,” and one of citizens’ “privileges and immunities” recognized by Justice Bushrod Washington in Corfield v. Coryell.442 Although “we know as a matter of fact that women were not at all in the minds of the framers and adopters of this amendment,” as Justice Bradley explained in the “Live Stock Dealers” case, “if it is possible that those who framed the article were not themselves aware of the far-reaching character of its terms,” “if the amendment, as framed and expressed, does, in fact, bear a broader meaning . . . it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing.”443

434 See 41st Cong., 3d sess., Senate, Mis. Doc. No. 16.
435 Id.
436 Id.
437 2 HISTORY OF WOMEN’S SUFFRAGE, 1861-1876, 444 (Elizabeth Cady Stanton, Susan B. Anthony, Matilda Joslyn Gage eds, 1882).
438 Riddle’s comments about his testimony are reproduced in 2 HISTORY OF WOMEN’S SUFFRAGE, supra note __ at 448.
439 Id. at 453.
440 Id. at 457. See also Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family, 115 Harv. L. Rev. 947, 972-74 (2002).
442 Id. at 6, 26-27.
443 Id. at 29.
On January 30, the House Committee on the Judiciary delivered its response. Chaired by John Bingham, the eight-member committee divided six to two against women’s suffrage, with Representatives William Loughridge and Benjamin F. Butler dissenting. Although John Bingham chaired the Committee and submitted the Report, the Report seems to contradict some of Bingham’s express personal statements about the Privileges or Immunities Clause. Here is the key section of the Report:

The clause of the Fourteenth Amendment, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2. The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.

To remedy this defect of the Constitution, the express limitations upon the States contained in the first section of the Fourteenth Amendment, together with the grant of power in Congress to enforce them by legislation, were incorporated in the Constitution. The words “citizens of the United States,” and “citizens of the states,” as employed in the Fourteenth Amendment, did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution.

The Majority concludes that the right of suffrage traditionally involved the relationship between a citizen and their respective state. Although Justice Washington in Corfield listed the right to vote as a privilege and immunity of citizens in the several states, he specified the “elective franchise, as regulated and established by the laws or Constitution of the State in which it is to be exercised.”

The Woodhull Report majority appears to reduce the Privileges or Immunities Clause to a mere restatement of the Comity Clause of Article IV, guaranteeing nothing other than equal enforcement of state-secured rights and privileges. This would contradict Bingham’s earlier claim that that the Clause covered constitutionally enumerated rights such as those listed in the Bill of Rights. In fact, only a few weeks later, Bingham expressly defined the Privileges or Immunities Clause as protecting liberties listed in the first eight amendments and emphatically declare that the Clause was not a restatement of Article IV. How then can the report be reconciled with clearly different statements made by Bingham both before and after he submitted this report?

There are several options. First, one could view the port as reflecting Bingham’s full and complete understanding of the Privileges or Immunities Clause, and dismiss the relevance of claims he made during the framing and ratification of the amendment, and similar claims he made only weeks after issuing this report. Of all the options, this seems to weakest and least likely, as it would let the tail of a single committee report wag the dog of a substantially broader record.

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444 House of Representatives, Committee on the Judiciary, Victoria C. Woodhull, Report, 41st Cong., 3d sess., January 30, 1871, H. Rept. 22. The members of the Committee were John Bingham (Chair), Burton C. Cook, Charles A. Eldridge, Giles W. Hotchkiss, Stephen W. Kellogg, Michael C. Kerr, Ulysses Mercur, John A. Peters, William Loughridge, and Benjamin F. Butler.
445 Id.
446 Id.
447 Id.
448 See infra, note __ and accompanying text.
Second, one could reject claims that the Woodhull Report represent Bingham’s personal views and instead represent the general (lowest common denominator) views of a majority of the committee. Even if Bingham authored the report (a fact we do not actually know), it still purported to represent the collective views of the majority, not Bingham personally. Moreover, the conclusion of the Report, that the Privileges or Immunities Clause did not protect the unenumerated right to vote, is perfectly consistent with Bingham’s Enumerated Rights reading of the Privileges or Immunities Clause. Although this view is more plausible than the first, it does not explain why Bingham would be willing to submit a majority report that described the Privileges or Immunities Clause far more narrowly than Bingham himself had done, or would do only a few weeks later. It is possible that Bingham thought the matter of Woodhull’s petition was of such little importance and so weakly advanced that he did not care if the committee as a whole presented what looks like a narrower view of the Privileges or Immunities Clause than Bingham himself held. The odds of this being the case are increased by the fact that Bingham had previously held the view that the privileges and immunities clause of Article IV ought to be understood as obligating the states to respect all the numerated rights of citizens of the United States.449 Bingham may have been content to issue a report that could be read both narrowly and broadly, so long as the bottom line conformed to his actual views (the Privileges or Immunities Clause did not protect the unenumerated right to vote).

In the end, we simply cannot know what prompted Bingham to submit the Woodhull Report. In past writing, I have suggested it reflects a garbled and sloppy account of the committee’s actual thinking.450 I still think this may be the case. Nevertheless, the Report can be viewed as contradicting both my Enumerated Rights Reading and the Fundamental Rights reading. Indeed, this report is most often cited in support of a minimalist equal rights only reading of the Privileges or Immunities Clause. Not surprisingly, Barnett and Bernick do not dwell on the Woodhull Report beyond noting that it appears to conflict with my understanding of the views of John Bingham.

In the end, no matter how one reads the Woodhull Report, as a weakly argued post-ratification committee report its existence does not call into question conclusions drawn from the great body of evidence from the framing and ratification debates. Most of all, it cannot reasonably be viewed as representing the personal views of John Bingham. Only weeks later, Bingham gave a detailed account of his personal understanding of the history and meaning of the Privileges or Immunities Clause. This speech perfectly conforms with the theories Bingham presented in his antebellum speeches and in his speeches in the Thirty-Ninth Congress.

C. John Bingham’s 1871 Speech Explaining the Privileges or Immunities Clause

On March 31, 1871, John Bingham delivered a speech on the proposed Ku Klux Klan Act. In doing so, Bingham provided a detailed account of both the history of the Privileges or Immunities Clause and its meaning. Go the extent that one considers post-ratification evidence, this speech is an unambiguous defense of the Enumerated Rights reading of the Privileges or Immunities Clause and a refutation of the Fundamental Rights theory of the Clause.

As introduced by Samuel Shellabarger, the proposed Act criminalized private conspiracies to violate the “rights, privileges, or immunities of another person.”451 Shellabarger insisted that Congress had power to pass the act as an enforcement of the Privileges or Immunities Clause of the Fourteenth Amendment. According to Shellabarger, by adding the Fourteenth Amendment to

449 See Bingham, Speech of [Feb. 26, 1866]. This would answer Barnett and Bernick’s assertion that no one on the Committee asserted an enumerated rights reading of the Privileges or Immunities Clause. See B&B at ___. An Article IV based reading is itself an enumerated rights reading and, if one shared Bingham’s original view of the scope of Article IV, it represents a full Enumerated Rights reading of the Privileges or Immunities Clause.

450 See Las...
the Constitution, the “United States thereby were authorized to directly protect and defend throughout the United States those privileges and immunities which are in their nature “fundamental. . . . which inhere and belong of right to citizenship of all free Governments.”

Shellabarger then explained that defining these rights was not difficult, since “[h]ere, Mr. Speaker, we tread upon ground that, fortunately, has been explored. From the beginning of the Government down, the words in the old Constitution, “privileges and immunities of citizens in the several States,” have come under judicial notice and interpretation. . . . I read from 4 Washington Circuit Court Reports, page 380, Corfield v. Coryell.” Shellabarger then read the passage from Corfield which named “the protection of the Government; the enjoyment of life and liberty” etc as “fundamental” rights guarded by the Comity Clause.

Shellabarger’s attempt to equate the right of the Privileges or Immunities Clause with the Privileges and Immunities Clause of Article IV and the rights listed in Corfield v. Coryell raised an immediate objection by Illinois Republican John F. Farnsworth of Illinois. According to Farnsworth, Shellabarger’s interpretation of the amendment would empower Congress to regulate the entire subject of civil rights in the states—an outcome members had successfully opposed when Bingham produced his first draft of the Fourteenth Amendment in February of 1866. Farnsworth reminded the House that Bingham’s first draft had used the language of Article IV, but had been defeated by members like Giles Hotchkiss who objected to the attempt “to authorize Congress to establish uniform laws throughout the United States upon the subject named—the protection of life, liberty and property. I am unwilling that Congress shall have any such power.”

According to Farnsworth, “by the concerted action of the Republicans, [Bingham’s proposal] was given its quietus by a postponement of two months, where it slept the sleep that knows no waking.”

At this point, John Bingham interrupted and noted that “I made the motion myself to postpone and make it an order for that day, but I did not choose to call it up . . . [b]ecause I put it in another form; and I am prepared to demonstrate to the House and to the country that it is in a better form now than it was then.” Later that same day, when it came his time to speak on the bill, Bingham did exactly that.

Bingham’s speech of March 31, 1871 includes a remarkable discussion about what exactly happened in the early months of 1866 that convinced Bingham to change the language of his original draft of Section One. Delivered before the House of Representatives whose members included those who were in the Thirty-Ninth Congress (Farnsworth in particular), Bingham’s speech provides us the rare opportunity to learn the thought process behind the creation of one of the most important texts in the Constitution.

Answering Farnsworth’s question, “why did you change the amendment of February, 1866,” Bingham answered, “I took counsel, sir, of that great man, John Marshall, foremost of all the judges.”

Following the withdrawal of the February draft,

“I had read—and that is what induced me to attempt to impose by constitutional amendment new limitations upon the power of the States—the great decision of Marshall in Barron vs. the Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution as it then was: ‘The amendments [to the Constitution] contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.'
Bingham understood Marshall’s ruling in *Barron* to mean that, despite the fact that the Fifth Amendment and the rest of the Bill of Rights “secured . . . all the rights dear to the American citizen,” the court could not rightfully read them as impliedly binding the states. Bingham then explained the importance of these enumerated rights:

Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights. Those amendments secured the citizens against any deprivation of any essential rights of person by any act of Congress, and among other things thereby they were secured in their persons, houses, papers, and effects against unreasonable searches and seizures, in the inviolability of their homes in times of peace, by declaring that no soldier shall in time of peace be quartered in any house without the consent of the owner. They secured trial by jury; they secured the right to be informed of the nature and cause of accusations which might in any case be made against them; they secured compulsory process for witnesses, and to be heard in defense by counsel. *They secured, in short, all the rights dear to the American citizen.* And yet it was decided, and rightfully, that these amendments, defining and protecting the rights of men and citizens, were only limitations on the power of Congress, not on the power of the States.\(^{460}\)

Note that the above passage not contains a clear example of the consensus understanding of the federal Bill of Rights, it also defines these rights as “*all the rights dear to the American citizen.*”

Returning to his discussion of Barron, Bingham explained that he had reexamined *Barron v. Baltimore* “after my struggle in the House in February, 1866.”\(^{461}\) At that time, he “apprehended as I never did before, certain words in that opinion of Marshall,” in particular Marshall’s assertion that “‘[h]ad the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.’”\(^{462}\) Bingham now realized his first draft relied upon an implied application of the Bill of Rights against the States (his “ellipsis” reading of Article IV). As Marshall pointed out, this violated the rule of construction set out by the framers of the Constitution. When the framers wish to bind the states, as they did for example in Article I, section 10, they did not rely on implication but instead expressly declared “‘no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts’”\(^{463}\) Therefore, explained Bingham,

“[a]cting upon this suggestion I did imitate the framers of the original Constitution. As they had said “*no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;*” imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution, as follows:

“No State shall make or enforce any law which shall abridge the privileges or immunities of the 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.”

I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

\(^{460}\) Id.

\(^{461}\) Id.

\(^{462}\) Id. (citing “Barron vs. The Mayor, &c., 7 Peters, 250.”)

\(^{463}\) Id.
We know, in fact, that Bingham was thinking about *Barron v. Baltimore* in the weeks following his withdrawal of his initial draft. It was during this period that Bingham opposed the Civil Rights Bill and, in doing so, Bingham expressly cited Marshall’s opinion in *Barron* as evidence that courts had refused to the Bill of Rights against the states.464

Bingham’s decision to embrace Marshall’s advice and add the words “no state shall” was only one of the changes Bingham made in the second draft. He also abandoned the language of Article IV which he had read as implying the words “of citizens of the United States,” and instead expressly declared that “No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States. These privileges, Bingham explained, were altogether different from those protected by the bare language of Article IV. Again, because the passage addresses (and refutes) key claims of Barnett and Bernick, it is worth an extended excerpt:

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:

Article I.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Article II.
A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Article III.
No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in the manner to be prescribed by law.

Article IV.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Article V.
No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled on any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article VII.

464 See, Cong. Globe, 39th Cong., 1st sess., 1089. See also, *supra* note __ and accompanying text.
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” are *an express prohibition upon every State of the Union*, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.465

There are a number of important aspects about the above passage. First, Bingham expressly distinguishes the “privileges and immunities of citizens of the United States,” from the privileges and immunities of “citizens of a State.” This echoes a distinction one can find as far back as the Missouri debates and one which was clearly implied by Bingham’s decision to replace the initial Article IV language of the rights of citizens in the several states” with the final drafts language referring to the rights “of citizens of the United States.” Here, Bingham simply removes all doubt about whether that change reflected his view that the bare words of Article IV referred to a different set of “privileges and immunities.” He did.

But Bingham was not finished explaining why we should not read the Fourteenth Amendment as referring to the kinds of rights protected under Article IV and listed as “fundamental rights” in *Corfield v. Coryell*. Shellabarger had tried to argue that privileges and immunities protected by the Fourteenth Amendment were the same as the “fundamental” rights listed by Justice Washington in *Corfield v. Coryell*, only now transformed into rights applicable against one’s own state. Bingham had already impliedly rejected that view. Bingham insisted, however, on expressly addressing and rejecting Shellabarger’s view. Bingham explained:

Mr. Speaker, that decision in the fourth of Washington’s Circuit Court Reports, to which my learned colleague [Mr. SHELLABARGER] has referred is only a construction of the second section, fourth article of the original Constitution, to wit, “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

In the case of The United States vs. Primrose, Mr. Webster said that—

“For the purposes of trade, it is evidently not in the power of any State to impose any hinderance or embarrassment, &c., upon citizens of other States, or to place them, on coming there, upon a different footing from her own citizens.” —6 *Webster’s Works*, 112.

The learned Justice Story declared that—

“The intention of the clause (‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,’) was to confer on the citizens of each State a general citizenship, and communicated all the privileges and immunities which a citizen of the same State would be entitled to under the same circumstances.”—*Story on the Constitution*, vol. 2, page 605.

*Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no state shall abridge the privileges and immunities of citizens of the United States, which are*

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defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations.  

As had members of the Thirty-Ninth Congress every time a member had tried to press a non-traditional reading of *Corfield* and Article IV, Bingham responds with irrefutable case law and antebellum legal treatises. The “fundamental” rights of *Corfield* involved nothing more than a limited set of state-secured rights that, if (and only if) granted to state citizens, must be equally extended to out of State citizens. Not only was Shellabarger wrong about the Fourteenth Amendment, he was wrong about the meaning of *Corfield v Coryell*.  

Bingham’s view, concededly, was a narrower view of the Privileges or Immunities Clause than the one pressed by Shellabarger then, and by scholars like Barnett and Bernick today. According to Bingham, this narrow focus on the enumerated “privileges and immunities of citizens of the United States” was important. It both vindicated the people’s decision to apply the Bill of Rights against the states while at the same time preserving the essential attributes of American federalism. States had wrongly refused to respect those rights the people themselves had placed in the Constitution and it was the purpose of the Privileges or Immunities Clause to remedy that failure—and nothing more. Here, again, is Bingham:

Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half of the States of the Union. Before that a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our Divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution. (14 Howard, 19-20. Moore vs. The People.)

Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example of Illinois, to which I have referred, nor can any State ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament, to know that new evangel, “The pure in heart shall see God.”

Mr. Speaker, this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution. Do gentleman say that by so legislating we would strike down the rights of the State? God forbid. I believe our dual system of government essential for our national existence. That Constitution which Washington so aptly said made us one people, is essential to our nationality and essential to the protection of the rights of all the people at home and abroad. The State governments are also essential to the local administration of the law, which makes it omnipresent, visible to every man within the vast extent of the

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467 See also CONG. GLOBE, 42 Cong., 2d sess., app. at 26 (speech of Ohio Sen. John Sherman) (linking the Privileges or Immunities Clause to the common law and the “other rights” of the Ninth Amendment and calling for judicial identification and enforcement of the same); Barnett, RESTORING THE LOST CONSTITUTION, supra note __ at 66-67. Prof. Barnett uses Sherman’s post-adoption speech, among other things, as evidence of the original meaning of the Privileges or Immunities Clause. See, B&B, supra note 1, at 6 n. 30. Even if Sherman had spoken prior to the adoption of the Amendment, instead of years later, his views would represent a decided minority. This is especially true regarding Sherman’s use of the Ninth Amendment. See supra note __ and accompanying text.
Republic, in every place, whether by the wayside or by the fireside, restraining him by its terrors from the wrong, and protecting him by his power, in the right.

Who is here to say that any State ever had the right to defeat the very object for which all government is made?

The nation cannot be without that Constitution, which made us “one people;” the nation cannot be without the State governments to localize and enforce the rights of the people under the Constitution. No right reserved by the Constitution to the States should be impaired, no right vested by it in the government of the United States, or in any department or officer thereof, should be challenged or violated. “Centralized power, decentralized administration,” expresses the whole philosophy of the American system.

You say it is centralized power to restrain by law unlawful combinations in States against the Constitution and citizens of the United States, to enforce the Constitution and the rights of the United States citizen[s] by national law, to disperse by force, if need be, combinations too powerful to be overcome by judicial process, engaged in trampling underfoot the life and liberty, or destroying the property of the citizen. . . .

The people of the United States are entitled to have their rights guarantied to them by the Constitution of the United States, protected by national law. I enter upon no new construction.

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons? . . .

Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor.

Over and over again, and without a single exception, Bingham describes the privileges or immunities of citizens of the United States as those rights enumerated in the Constitution but which

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Congress never before had the power to enforce. Bingham closed by emphasizing that both federal and state governments were obligated to respect “American liberty” and that all men, ultimately are responsible before God:

    Liberty, our own American liberty, is the right “to know, to argue, and to utter freely according to conscience.” It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give every man his due. The justice to be established by the Constitution is the attribute of God, as to do justice is the perpetual obligation of men and nations. Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property and the prince in his palace or the king on his throne. . . .

    “State are born, live, and die upon the earth; here they accomplish their destiny; but they contain not the whole man. After the citizen has discharged every obligation he owes to society, every obligation that he owes to the State, there abides in him the nobler part of his nature—his immortal life, and to the unknown blessings of an invisible world.”

[Applause.]469

Even in this final passage, with Bingham’s rhetoric stretching heavenward, even here Bingham limited himself to naming rights specifically enumerated in the Constitution. As we know from our study of Bingham’s antebellum speeches, his reference to the rights “to know, to argue, and to utter freely according to conscience,” were references to rights protected by the First Amendment.470 We also know, and for the same reason, that his reference to the rights “to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil” were references to the Fifth Amendment right not to be deprived of life, liberty or property without due process of law.471

D. Summary

Although unnecessary in terms of establishing the Enumerated Rights reading of the Privileges or Immunities Clause, Bingham’s 1871 speech nicely recapitulates a number of themes we have followed from the beginning of this article. Just as we identified two separate strains of “privileges and immunities” during the antebellum period, one belonging to “citizens in the several states” and one belonging to “citizens of the United States,” so John Bingham insists the Fourteenth Amendment itself recognizes these two separate sets of “privileges and immunities.” According to Bingham, “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.” The rights of Corfield and Article IV, on the other hand, involved “privileges and immunities of citizens in the several States” where “the State could not refuse to extend to citizens

469 Id. at 86
470 See, Cong. Globe, 34th Cong. 1st Sess., appx. 124 (March 6, 1856). See also, supra note __ and accompanying text.
471 See Cong. Globe, 34th Cong., 3d Sess., appendix at 140 (January 15, 1857). See also, supra note __ and accompanying text.
of other States the same general rights secured to its own.” The former involves enumerated constitutional rights, the latter a set of “fundamental” civil rights that if granted to a state’s citizens must be granted to visiting citizens. Neither set involves absolute unenumerated national rights.

As Bingham had as far back as his speeches before the Civil War, he describes the Privileges or Immunities Clause only in terms of enumerated constitutional rights. Although he states that the Privileges or Immunities are chiefly defined by the First Eight amendments, thus suggesting there are other privileges or immunities of citizens of the United States, there is not reason to think he was referring to anything other than additional enumerated constitutional rights. Over the course of his career, Bingham himself had named several, including the enumerated right of the people in the states to representation in the federal Congress and the right of the people in the States to a republican government. In other words, someone like Bingham who embraced the Enumerated Rights reading of the Privileges or Immunities Clause would not have limited those rights to just those enumerated in Bill of Rights. Someone like Bingham would have limited those rights to those actually enumerated in the Constitution. This was important not only to his understanding (and continued embrace of) constitutional federalism, it also vindicated his continued insistence that the Privileges or Immunities Clause took from no state any rights it was not already morally, if not legally, obligated to enforce. This obligation flowed not from some theory of natural law, but from the oaths state officers took to uphold the Constitution. Finally, if there is any lingering doubt as to Bingham’s textualist understanding of the Privileges or Immunities Clause, consider his words in the above speech. The Fourteenth Amendment gave Congress the “power of providing by law for the protection of all the guarantied rights of the people, under the Constitution of the United States.” This power allowed the “better enforcement of all the powers vested by the Constitution in the Government of the United States, and for the better protection of the people in the rights thereby guarantied to them against States and combinations of individuals.” The Privileges or Immunities Clause demands that “no State should deny to any such person any of the rights which it [the Constitution] guaranties to all men.” As “Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights. Those amendments secured the citizens against any deprivation of any essential rights of person by any act of Congress...They [the Bill of Rights] secured, in short, all the rights dear to the American citizen.” Now that the Fourteenth Amendment was ratified, “this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution.”

In sum, there is not reasonably doubt that John Bingham embraced the (expressly) Enumerated Rights reading of the Privileges or Immunities Clause.

Conclusion

The Enumerated Rights reading of the Privileges or Immunities Clause is well supported by the historical evidence. It is supported by antebellum usage of the term “privileges and immunities of citizens of the United States,” and it is supported by the public (and publicly accessible) discussions associated with the framing and ratification of the Fourteenth Amendment. Despite Randy Barnett and Evan Bernick’s best efforts to call this evidence into question, they have failed cast substantial doubt on any of this evidence. Instead, their criticisms have been shown to rely in many cases on misreadings of the historical evidence and interpretations of texts that unjustifiably import modern understandings into antebellum and reconstruction-era texts. I imagine Barnett and Bernick will yet produce what they believe are the key pieces of evidence supporting the Fundamental Rights reading of the Privileges or Immunities Clause. As yet, however, they have not done so.

472 See supra notes ___ and ___ and accompanying text.
That said, Barnett and Bernick have performed an invaluable service to me by pointing out areas where my previous work has been unclear or which can benefit from additional historical support. They are also quite right to point out that any one attempting to synthesize two decades of my work into a single statement of the original meaning of the Fourteenth Amendment will quickly realize that, over time, I have changed my mind about a number of matters, particularly in regard to the relationship of the Civil Rights Act to Section One of the Fourteenth Amendment. Their challenge allows me to clarify my current position and the current evidence which I now believe answers that particular question.

There is no reason to adopt the Enumerated Rights reading of the Privileges or Immunities Clause if it is incorrect. If I am right, however, there is very good reason to press the Supreme Court to abandon its textually and historically unconstrained construction of the Due Process Clauses. As John Bingham insisted when members tried to bend the constitution to their policy preferences, it is the people’s right, not the court’s to alter or amend the constitution, or, as Bingham put it in words that resonate to this day, it is “the right of the great people who have saved this Republic by arms to save it by fundamental law—law emanating from the people, law resting upon the sovereign will of the people alone.”

Unnecessarily and unjustifiably opening the door to judicial construction and enforcement of unenumerated absolute rights robs the people of their sovereign right to decide for themselves what subjects may or may not be left to the debate and decision-making of a democratic majority. As much as John Bingham embraced the concept of natural rights—and he did—he understood that federal courts have no legitimate authority forcing upon the people the court’s conception of the nature and scope of those rights. Absent a decision by a supermajority of the people themselves, all discussions of natural rights is left to the people of the states. Such was the nature of dual federalism and limited federal power which John Bingham and all moderate Reconstruction Republicans embraced.

I close, once more, with the words of John Bingham. Not because we should follow “framers’ intent,” but because the evidence indicates that he fit the times into which he was born, a representative of the people’s desire to extend their enumerated rights into every hamlet in every state in the Union. Listen to John Bingham:

“Mr. Speaker, this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution.”