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## The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick

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THE ENUMERATED-RIGHTS READING OF THE  
PRIVILEGES OR IMMUNITIES CLAUSE:  
A RESPONSE TO BARNETT AND BERNICK

*Kurt T. Lash\**

INTRODUCTION

In 1871, John Bingham explained the meaning of the Fourteenth Amendment’s Privileges or Immunities Clause—a clause Bingham himself drafted and had successfully convinced his colleagues to add to the Fourteenth Amendment in 1866. According to Bingham, the privileges or immunities of national citizenship were *not* those protected by the Privileges and Immunities Clause of Article IV. Instead, the rights of national citizenship were those “guaranteed by the amended Constitution and expressly enumerated in the Constitution.”<sup>1</sup> Bingham’s explanation tracks what I have called the “enumerated-rights” reading of the Privileges or Immunities Clause.<sup>2</sup> This reading understands “the privileges or immunities of citizens of the United States” as involving only those rights enumerated in the citizen’s Constitution. This includes, but is not limited to, those rights enumerated in the Bill of Rights. In a series of books and articles published over the last few years, I have presented historical evidence suggesting that the public likely shared Bingham’s understanding when they discussed and ratified the Fourteenth Amendment in the years 1866 to 1868.

In their new article, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*,<sup>3</sup> Randy Barnett and Evan Bernick insist that this historical evidence does not support the enumerated-rights reading. Instead, Barnett and Bernick embrace what I call the “fundamental-

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1 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

2 See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 279 (2014).

3 Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 *NOTRE DAME L. REV.* 499 (2019).

rights” reading of the Privileges or Immunities Clause.<sup>4</sup> This view maintains that the 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.<sup>5</sup>

Rather than agreeing with John Bingham, Barnett and Bernick declare that they “side with Jacob Howard.”<sup>6</sup> This is somewhat surprising, given that Republican Senator Jacob Howard opposed Bingham’s Privileges or Immunities Clause,<sup>7</sup> voted against submitting it to Congress for debate,<sup>8</sup> and favored a far narrower version of Article IV, Section 1 than the one drafted by Bingham and ratified by the people of the United States.<sup>9</sup> One presumes that Barnett and Bernick side with Howard, not because of his constitutional preferences, but because of one particular speech that Howard delivered to the Senate on May 23, 1866. On that day, acting as a last-minute stand-in for William Pitt Fessenden,<sup>10</sup> Jacob Howard introduced the Fourteenth Amendment to the U.S. Senate.<sup>11</sup> In his speech, Howard explained that the privileges and immunities of citizens of the United States included rights secured by the Comity Clause and described in cases like *Corfield v Coryell*,<sup>12</sup> as well as rights secured “by the first eight amendments of the Constitution.”<sup>13</sup>

In my writing on the subject, I explain that Howard’s speech is perfectly consistent with the enumerated-rights reading of the Privileges or Immunities Clause. Howard mentioned only enumerated constitutional rights as

4 See LASH, *supra* note 2, at 283–84 (describing Randy Barnett’s reading of the “Privileges or Immunities Clause” as the “Fundamental Rights reading”).

5 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) (“[T]here 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.”). By “absolute,” I mean rights receiving more than mere procedural (due process) or equal protection.

6 Barnett & Bernick, *supra* note 3, at 589.

7 See BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 98 (1914). Although Howard had originally joined the majority of the committee in voting in favor of Bingham’s proposal, he then changed his mind and voted to remove Bingham’s proposal from the amendment, and voted against allowing Bingham to submit his proposal as a separate amendment. *Id.* at 87, 98–99. When Bingham convinced the majority of his colleagues to readopt his version, Howard joined two other members in voting against Bingham’s draft. See *id.* at 106.

8 *Id.* at 99.

9 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, as to the civil rights of persons because of race, color, or previous condition of servitude.” *Id.* at 83. Howard’s preferred proposal established nothing other than a limited set of equal rights. Bingham’s proposal, on the other hand, protected absolute rights (the Privileges or Immunities Clause), Due Process Rights and the rights of Equal Protection.

10 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. 2764–65 (1866) (statement of Sen. Howard).

11 *Id.* at 2764–67.

12 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

13 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

protected privileges or immunities. The right protected by the enumerated Comity Clause involves nothing more than the right of sojourning citizens to receive equal treatment when it comes to a limited set of state-secured rights (those designated as “fundamental” state-secured rights).<sup>14</sup> The relative protection provided sojourning citizens by the Comity Clause, in other words, is simply one of a number of enumerated constitutional rights Howard named as protected by the Privileges or Immunities Clause.

Barnett and Bernick insist that I have misread Howard’s speech. According to Barnett and Bernick, Howard was not simply naming enumerated constitutional rights; he was declaring that the Privileges or Immunities Clause protected an unenumerated set of absolute “fundamental” rights. Moreover, they insist that this was the original public understanding of the Privileges or Immunities Clause. Although Barnett and Bernick decline in their article to explain exactly how the historical record supports their theory, they nevertheless insist that the historical record does not support my enumerated-rights reading of the Privileges or Immunities Clause.

The substance of their argument involves five basic claims:

- (1) The antebellum historical record does not contain evidence of a widespread understanding of the term “privileges and immunities of citizens of the United States” as referring solely to constitutionally enumerated rights.
- (2) There is no evidence that anyone in the Thirty-Ninth Congress understood the term “privileges and immunities of citizens of the United States” as referring solely to constitutionally enumerated rights. This includes the man who drafted the Clause, John Bingham.
- (3) It is anachronistic to view Reconstruction-era references to the Bill of Rights as referring solely to constitutionally enumerated rights since there was no fixed understanding of the term “Bill of Rights” during Reconstruction.
- (4) There is no evidence that those supporting the proposed amendment during the ratification process understood the Privileges or Immunities Clause as solely referring to enumerated rights. Otherwise advocates would have used this understanding to defeat claims that the proposed amendment guaranteed the unenumerated right to vote.
- (5) The enumerated-rights reading of the Privileges or Immunities Clause must be incorrect since such a reading would not authorize legislation like the 1866 Civil Rights Act.

In this Article, I address each of these arguments in turn. I realize that Barnett and Bernick also make a number of claims regarding the postadoption historical record. I have addressed such evidence elsewhere, and length constraints prevent my repeating those arguments here. Nor is there need to do so. All poststratification evidence is necessarily weak as a source of original understanding. The substantial body of preratification evidence provides sufficient guidance for determining the original understanding of the Clause—sufficient, that is, unless one is seeking a different meaning. For those inter-

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14 See LASH, *supra* note 2, at 26–37.

ested, one of the clearest examples of the enumerated-rights reading of the Privileges or Immunities Clause is John Bingham's 1871 speech explaining the Clause to his colleagues—a speech I quoted in the opening of this Article.<sup>15</sup> For the purposes of this Article, I am content to rest my case on an analysis of preratification evidence. The fact that Barnett and Bernick insist on relying on postratification evidence simply illustrates the weakness of their argument.

One final prefatory note. In their canvass of almost everything I have written over the years on this subject—from books to articles to short essays to blog posts—Barnett and Bernick repeatedly point out that, over time, I have changed my views on a number of matters relating to the Privileges or Immunities Clause and the 1866 Civil Rights Act. Of course I have. As I continued to research and uncover the original history of the Fourteenth Amendment and the Thirty-Ninth Congress, I found myself abandoning or modifying some of my earlier thoughts about that history. It would be rather remarkable (and rather suspicious) if this were not the case. However much I might wince at some of my early speculations about the complicated events of Reconstruction, I am nevertheless deeply grateful that I have worked at institutions that have given me the time and support necessary to continue my investigations and increase my understanding of this extraordinary period of legal and constitutional creativity.

## I. THE ANTEBELLUM PERIOD

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 a particular institution,” rather than “natural rights belonging to all people or all institutions.”<sup>16</sup> 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, “[p]rivileges are special rights belonging to the individual or class, and not the mass.”<sup>17</sup> Barnett and Bernick do not directly dispute this well-

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15 CONG. GLOBE, 42d Cong., 1st Sess. app. at 83–86 (1871) (statement of Rep. Bingham).

16 LASH, *supra* note 2, at 20.

17 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 225 (Washington, D.C., W.H. & O.H. Morrison 1868) (emphasis omitted).

supported antebellum understanding of “privileges and immunities” as specially conferred rights. Instead, they suggest that the distinction between specially conferred rights and natural rights “might not be as sharp as Lash makes it out to be.”<sup>18</sup> Here, they cite the work of Professor Eric Claeys on Blackstone’s use of the terms “privileges” and “immunities.”<sup>19</sup> But Claeys by his own admission focuses on Blackstone’s use of the terms “privileges” and “immunities” and texts found in colonial charters.<sup>20</sup> 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* and *immunities* would need to determine whether the terms evolved in meaning from 1600 to 1868.”<sup>21</sup> 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.”<sup>22</sup> In sum, while Professor Claeys’s work on Blackstone is interesting,<sup>23</sup> it has nothing to do with antebellum usage of the term privileges and immunities, much less undermine my claims regarding antebellum usage of the same.

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*.<sup>24</sup>

#### A. *The Privileges and Immunities of Article IV*

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

18 Barnett & Bernick, *supra* note 3, at 509.

19 *Id.* at 509–10 (citing Eric R. 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 (2008)).

20 See Claeys, *supra* note 19, 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*.”).

21 *Id.* at 789.

22 *Id.* at 782.

23 Claeys focuses on the original meaning of Blackstone’s use of “privileges and immunities,” a meaning that 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 WILLIAM BLACKSTONE, COMMENTARIES \*129, \*468; see also LASH, *supra* note 2, at 15.

24 Barnett and Bernick try to extend their use of Claeys’s work by pointing to uses of Blackstone during the debates in the Thirty-Ninth Congress. None of their references, however, involve uses of the terms “privileges” and “immunities.” See Barnett & Bernick, *supra* note 3, at 510 at n.62.

Immunities Clause and its relationship to Article IV (and Article IV cases like *Corfield v. Coryell*). 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 antislavery 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, antebellum historical evidence reveals the existence of an altogether different category of rights, privileges, and immunities—those belonging to “citizens of the United States.” In some of the most high-profile constitutional debates between the Founding and the Civil War, antislavery advocates described the rights of national citizenship as involving *only* the constitutionally enumerated rights of American citizens. As the Civil War approached, antislavery 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 *proslavery* arguments to counter this evidence simply reinforces my claim that the enumerated-rights understanding of the privileges and immunities of citizens of the United States would have been both well known and robustly adhered to by antislavery Republicans. And it would be *this* group who framed and embraced the Fourteenth Amendment.

### B. Article IV and the Privileges and Immunities of Citizens in the Several States

It is important to understand the antebellum understanding of the Comity Clause of Article IV. This same understanding will inform the debates of the Thirty-Ninth Congress in general and Jacob Howard’s speech in particular. Thankfully, the antebellum understanding of the “Privileges and Immunities of Citizens in the several States”<sup>25</sup> is not difficult to discover. The consensus antebellum understanding of the Comity Clause is so well represented by the historical record that Barnett and Bernick concede the issue.<sup>26</sup>

As explained by Justice Bushrod Washington in the 1823 case, *Corfield v. Coryell*,<sup>27</sup> the Comity Clause of Article IV provides sojourning citizens equal access to a limited set of state-secured rights (those deemed “fundamen-

25 U.S. CONST. art. IV, § 2, cl. 1.

26 See Barnett & Bernick, *supra* note 3, at 531 (“Lash’s exegesis of leading antebellum cases is generally convincing.”). Barnett and Bernick question my analysis of a 1797 Maryland court case. See *id.* at 531 n.203 (“We are not, however, convinced by his analysis of *Campbell v. Morris*.”). They do not, however, dispute my account of the consensus “limited equal rights” understanding of *Corfield* and Article IV, Section 2, which prevailed at the time of the Civil War and Reconstruction. Nor do I expect them to, since the evidence of such a consensus understanding is overwhelming.

27 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

tal”).<sup>28</sup> For example, if a state allowed its own citizens to pursue a certain trade, then that state must provide the same right to visitors from other states.<sup>29</sup> Article IV, Section 2 was early on referred to as the *Comity Clause* precisely because it establishes a degree of “comity” between the states by guaranteeing visiting citizens from other states a degree of equal treatment.<sup>30</sup> Today, when courts use the term “fundamental” rights, they are often referring to absolute rights that no state may abridge absent special justification (such as the fundamental right to freedom of speech, or the free exercise of religion). Justice Washington’s reference to the fundamental rights of Article IV had a completely different meaning. The “fundamental” rights Washington described in *Corfield* involved a limited set of state-secured rights, which, *if* a state granted them to its own citizens, *then* that state should also grant them to visiting citizens from other states. The fundamental rights of the Comity Clause thus are not absolute rights, they are relative rights: one’s Article IV right to “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”<sup>31</sup> is wholly dependent on the degree to which a state grants its own citizens those rights. In *Corfield*, Justice Washington presented a partial list of rights he believed should count as “fundamental” rights deserving relative protection:

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 . . . .<sup>32</sup>

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28 LASH, *supra* note 2, at 2–47.

29 This explanation was repeated in every major constitutional text of the period that addressed the Comity Clause. See, e.g., 1 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 66 (Philadelphia, Robert E. Peterson & Co. 2d ed. 1854); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 15 (Boston, Little, Brown & Co. 1868); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 35 (New York, William Kent 7th ed. 1851); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 674–75 (Fred B. Rothman & Co. 1991) (1833).

30 Referring to Article IV, Section 2 has a history going back to the antebellum period. See, e.g., *Chief Justice Taney at School to a Colored Oyster Dealer*, ALBANY EVENING J., Mar. 25, 1857, at 2.

31 *Corfield*, 6 F. Cas. at 551–52.

32 *Id.*



Washington provided this list in order to “confine” 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.”<sup>33</sup> 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.”<sup>34</sup> Similarly, according to antebellum legal scholar and judge James Kent,

The 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.<sup>35</sup>

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.<sup>36</sup> Not surprisingly, Barnett and Bernick concede the issue.<sup>37</sup> 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. There is no evidence, however, that any such transformation occurred at any point during the antebellum period. In fact, antislavery 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. Sandford*,<sup>38</sup> 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

33 *Id.* at 552.

34 3 STORY, *supra* note 29, at 675 & n.1 (citing *Corfield*, 6 F. Cas. 546).

35 *Livingston v. Van Ingen*, 9 Johns. 507, 577 (N.Y. 1812) (opinion of Kent, C.J.); *see also* 2 KENT, *supra* note 29, at 35 (“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.” (footnote omitted)).

36 In addition to Story, *see* *Wiley v. Parmer*, 14 Ala. 627, 631–32 (1848) (opinion of Collier, C.J.); *Abbott v. Bayley* 23 Mass. (6 Pick.) 89, 92 (1827); *Livingston*, 9 Johns. at 507, 577 (opinion of Kent, C.J.); *Campbell v. Morris*, 3 H. & McH 535, 565 (Md. Gen. Ct. 1797); 2 KENT, *supra* note 29, at 35.

37 *See* Barnett & Bernick, *supra* note 3, at 531.

38 60 U.S. (19 How.) 393 (1857).

declared unconstitutional the Missouri Compromise, which excluded slavery from the northern territories.<sup>39</sup> 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 *Lemmon v. People*,<sup>40</sup> 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” that the state of New York must respect regardless of its local prohibition of slavery.<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup>

*Lemmon v. People* attracted nationwide interest. Republicans feared the U.S. Supreme Court would hear the appeal of the slave-owning plaintiffs in *Lemmon* and use the 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.<sup>44</sup> 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 antislavery Republicans. In his 1868 treatise, *The Constitution of the United States Defined and Carefully Annotated*, Republican civil rights advocate Judge George Paschal used *Lemmon* as the primary precedent for understanding the rights of the Comity Clause.<sup>45</sup> As we shall see, even the most radical of Republicans in the Thirty-Ninth Congress conceded that the Comity Clause

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39 *Id.* at 452.

40 20 N.Y. 562 (1860).

41 *Id.* at 578.

42 *Id.* at 626–27.

43 *Id.* at 632.

44 See, e.g., *The Dred Scott Case*, HARPER’S WKLY., Mar. 28, 1857, at 193, 193 (commenting on the possible future of the *Lemmon* case and complaining that “all these slave cases are sour enough”); *The Issue Forced Upon Us*, ALBANY EVENING J., Mar. 9, 1857, at 2 (“The *Lemmon* case is on its way to this corrupt fountain of law. Arrived there, a new shackle for the North will be handed to the servile Supreme Court, to rivet upon us. . . . [It] shall complete the disgraceful labors of the Federal Judiciary in behalf of Slavery. . . . The Slave breeders will celebrate it as the crowning success of a complete conquest.”).

45 See PASCHAL, *supra* note 17, at 225–26.

and cases like *Corfield v. Coryell* protected nothing more than the relative rights of out-of-state visitors.

In other words, when Jacob Howard in 1866 quoted *Corfield* and included the enumerated protections of the Comity Clause as privileges or immunities of citizens of the United States, he was speaking from a tradition, and to an audience, that expressly embraced the “equal-rights-only” interpretation of *Corfield* and Article IV.

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

Article IV involves the privileges and immunities of *state* citizenship—whether they exist depends on state law. The privileges and immunities of *national* citizenship, rights independent of state law, became the subject of national debate during the political controversy attending the admission of Missouri. Missouri 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.”<sup>46</sup> Under the so-called Tallmadge Amendment, Missouri would be admitted as a free state.<sup>47</sup> Proslavery advocates opposed the Amendment on the ground that it violated the Louisiana treaty’s guarantee that the inhabitants of the territory would receive all the “rights, advantages, and immunities of citizens of the United States.”<sup>48</sup> One of these rights and immunities, proslavery advocates insisted, was the right to permit slavery in their state if they wished to do so.<sup>49</sup>

In response, antislavery 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 rooted in the text of the federal Constitution. Slavery was a creature of state law, and therefore could not be considered a treaty-protected right of national citizenship. According to Daniel Webster, for example, the “rights, advantages and immunities” of citizens of the United States “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.”<sup>50</sup> Similarly, Senator David Morrill of New Hampshire explained that “[a]ll the rights [citizens of the United States] possess, as such, are derived from the Constitution.”<sup>51</sup> Finally, Rufus King echoed the

46 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 498–505 (Hunter Miller ed., 1931).

47 See 33 ANNALS OF CONG. 1170 (1819).

48 *Id.* at 1200 (statement of Rep. Scott); see also *id.* at 1173 (statement of Rep. Taylor).

49 See *id.* at 1173 (statement of Rep. Taylor) (“Gentlemen have said the amendment is in violation of the treaty, because it impairs the property of a master in his slave.”).

50 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 15 (Boston, Sewell Phelps 1819).

51 See 35 ANNALS OF CONG. 146 (1820) (statement of Sen. Morrill); see also *Mr. Morrill’s Speech—Concluded*, DAILY NAT’L INTELLIGENCER (D.C.), Feb. 5, 1820, at 2; Remarks of Mr. Morrill, in the Senate of the United States, on the Missouri Question (Jan. 17, 1820), in HILLSBORO’ TELEGRAPH (Amherst, N.H.), Mar. 4, 1820, at 1 [hereinafter Remarks of Mr.

same argument: “[The amended admission bill] 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.”<sup>52</sup>

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. As a creature of state law, one that differed from state to state, the right to own slaves by definition was not one of these constitutionally enumerated rights. As David Morrill declared, “[a]ll the rights [that citizens of the United States] possess, as such, *are derived from the Constitution.*”<sup>53</sup>

These were not one-time arguments about an obscure treaty provision, long forgotten by the time of the Civil War. To begin with, the antislavery advocates prevailed and Missouri was admitted as a free state.<sup>54</sup> The language of the Louisiana treaty was repeated in later treaties, including the Alaska treaty of 1866.<sup>55</sup> Most importantly, the arguments by Webster, Morrill, and King that the rights “of citizens of the United States” were only those “derived” or “communicated” by the Constitution were republished in the years just before the Civil War. Webster’s speech was republished in 1854, 1856, and 1857,<sup>56</sup> Rufus King’s speech was reprinted in 1857,<sup>57</sup> and David Morrill’s speech was republished by Washington, D.C.’s *Daily National Intelligencer* in 1859.<sup>58</sup> The multiple republications of these arguments in books and major newspapers on the threshold of the Civil War illustrate the longevity of these arguments among antislavery Republicans. This makes it quite likely that they would be known among antislavery Reconstruction Republi-

Morrill]. Years later, as the nation’s struggle over slavery in the territories reached a boiling point, newspapers republished Morrill’s speech. See *The Territorial Question—No. III*, DAILY NAT’L INTELLIGENCER, Sept. 15, 1859, at 3 (citing 35 ANNALS OF CONG. 145, 146 (1820)).

52 Rufus King, Mr. King’s Speeches, The Missouri Question (Nov. 22, 1817), in 17 NILES’ WKLY. REG. 209, 215 (1819); see also 2 NATIONAL RECORDER 388 (Philadelphia, Littell & Henry 1819); Rufus King, Observations on the Slavery Question (Nov. 22, 1819), in CONN. J., Dec. 21, 1819, at 1. Rufus King’s speech was reprinted in 1857 as part of a collection of American political speeches. Rufus King, Remarks on the Missouri Bill, in 2 FRANK MOORE, AMERICAN ELOQUENCE 44, 46 (New York, D. Appleton & Co. 1857).

53 35 ANNALS OF CONG. 146 (1820) (statement of Sen. Morrill) (emphasis added).

54 See generally Missouri Compromise, ch. 22, 3 Stat. 545 (1820).

55 Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russians to the United States of America, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539.

56 See WEBSTER ET AL., *supra* note 50, as reprinted in THE NEBRASKA QUESTION 9 (New York, Redfield 1854); see also HORACE GREELEY, A HISTORY OF THE STRUGGLE FOR SLAVERY EXTENSION OR RESTRICTION IN THE UNITED STATES 22–23 (New York, Dix, Edwards & Co. 1856) (reprinting Webster’s speech, including his discussion of the Louisiana Cession Act).

57 See MOORE, *supra* note 52, at 46.

58 See *The Territorial Question—No. III*, *supra* note 51.

cans. This is particularly true of John Bingham, a Republican who regularly praised and quoted Daniel Webster in the Thirty-Ninth Congress.<sup>59</sup>

Barnett and Bernick point out that the arguments of Webster, Morrill, and King were not the *only* arguments raised against proslavery opponents of the Tallmadge Amendment.<sup>60</sup> This is true, but irrelevant. First of all, my work explains in detail the various views in play during the Missouri admission debates.<sup>61</sup> It is simply a fact, however, that *one* of those arguments relied on an “enumerated-rights-only” understanding of the national rights of citizens of the United States. This particular argument was made repeatedly during the Missouri debates and it was not contradicted by a single opponent of slavery. Most of all, it is the longevity of this argument, and its continued importance among the opponents of slavery, that makes it especially important to those seeking the original understanding of legal texts produced by antislavery Republicans.

Barnett and Bernick suggest that since Webster, Morrill, and King specifically mentioned only enumerated structural rights (such as the right of the people in each state to be represented by two senators), they may have been arguing that *only* structural rights counted as the rights of national citizenship.<sup>62</sup> No one, of course, made such an oddly restrictive claim. Instead, Morrill himself 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.”<sup>63</sup> Barnett and Bernick’s suggestion not only is implausible, it is expressly contradicted by the evidence.

Barnett and Bernick attempt to undermine the importance of this evidence by highlighting the arguments of *proslavery* advocates who insisted on the unenumerated right to bring slaves into Missouri.<sup>64</sup> Obviously, the views of proslavery advocates tell us nothing about the antebellum constitutional ideas most likely to have informed the efforts of antislavery Republicans in the Thirty-Ninth Congress. In fact, the proslavery arguments cited by Barnett and Bernick highlight *why* antislavery advocates would embrace an “enumerated-rights-only” understanding of the rights of national citizenship.

Barnett and Bernick also claim to have identified four antebellum cases in which courts seem to adopt an unenumerated-rights understanding of the “rights, advantages and immunities of citizens of the United States.”<sup>65</sup> Upon examination, however, none of these cases stand for the proposition cited by Barnett and Bernick.

59 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (speech of John Bingham).

60 Barnett & Bernick, *supra* note 3, at 532–33.

61 See LASH, *supra* note 2, at 52–61 (describing and quoting the different arguments by proslavery and antislavery advocates).

62 See Barnett & Bernick, *supra* note 3, at 535.

63 See 35 ANNALS OF CONG. 146 (1820) (statement of Sen. Morrill) (emphasis added); see also *Mr. Morrill’s Speech—Concluded*, *supra* note 51; *Remarks of Mr. Morrill*, *supra* note 51. Years later, as the nation’s struggle over slavery in the territories reached a boiling point, newspapers republished Morrill’s speech. See *The Territorial Question—No. III*, *supra* note 51.

64 Barnett & Bernick, *supra* note 3, at 532–33.

65 *Id.* at 537–40.

For example, Barnett and Bernick claim that in *Desbois' Case*,<sup>66</sup> Louisiana courts held that “the rights and privileges of a citizen of the United States”<sup>67</sup> included the “federally unenumerated privilege of practicing law in Louisiana.”<sup>68</sup> 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*, “[b]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.”<sup>69</sup> 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.<sup>70</sup> 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-conferred* right to practice law in Louisiana. There is no discussion anywhere in *Desbois* regarding an unenumerated federal right to practice law.<sup>71</sup>

*United States v. Lavery*,<sup>72</sup> 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.<sup>73</sup> If so, then they also became citizens of the United States and were not subject to laws regulating enemy aliens. The *Lavery* 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 the bona fide inhabitants became citizens of this state.”<sup>74</sup> There is nothing in *Lavery* about “rights, privileges and immunities of citizens of the United States” including unenumerated federal rights.

*Desbois* and *Lavery* 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 than dicta that the authors claim *imply* the existence of unenumerated rights “of citizens of the United States.” These claims fare no better.

66 *Desbois' Case*, 2 Mart. (o.s.) 185 (La. 1812).

67 Barnett & Bernick, *supra* note 3, at 538 (quoting *Desbois*, 2 Mart. (o.s.) at 201–02).

68 *Id.*

69 *Desbois*, 2 Mart. (o.s.) at 185.

70 *Id.* at 201–02.

71 Professor Christopher Green makes the same mistaken assertion about *Desbois* as “contradict[ing] Webster’s constitutional-rights-only construction [of the Louisiana treaty language].” Christopher R. Green, *Incorporation, Total Incorporation, and Nothing but Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 113 (2015).

72 26 F. Cas. 875 (D. La. 1812) (No. 15,569a).

73 See Barnett & Bernick, *supra* note 3, at 538.

74 *Lavery*, 26 F. Cas. at 877.

For example, Barnett and Bernick argue that dicta in Chief Justice John Marshall's opinion in *City of New Orleans v. Armas*<sup>75</sup> 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 and immunities of citizens of the United States.'"<sup>76</sup> This is a remarkable interpretation 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 and immunities of citizens of the United States" over which federal courts have Article III jurisdiction.<sup>77</sup> Wrote Chief Justice John Marshall: "The 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."<sup>78</sup> 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.<sup>79</sup> 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 Marshall's dicta, it is an implied reference to the Tenth Amendment.<sup>80</sup>

Barnett and Bernick also cite Chief Justice Marshall's opinion in *Delassus v. United States*.<sup>81</sup> 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."<sup>82</sup> 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 preexisting vested property rights.<sup>83</sup> The protection of vested property rights, of course, is an antebellum doctrine associated

75 34 U.S. (9 Pet.) 224 (1835).

76 Barnett & Bernick, *supra* note 3, at 539.

77 *Armas*, 34 U.S. (9 Pet.) at 235.

78 *Id.*

79 See Barnett & Bernick, *supra* note 3, at 539.

80 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 *Armas* in his *Dred Scott* dissent. See Barnett & Bernick, *supra* note 3, at 539–40.

81 34 U.S. (9 Pet.) 117 (1835).

82 Barnett & Bernick, *supra* note 3, at 537 n.235 (quoting *Delassus*, 34 U.S. (9 Pet.) at 133).

83 *Delassus*, 34 U.S. (9 Pet.) at 133 ("The right of property then 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. Independent of treaty stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory, 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 every idea of interfering with private property . . .").

with the *enumerated* right not to be deprived of life, liberty, and property without due process of law.<sup>84</sup> 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.”<sup>85</sup> 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.

Having failed to undermine the express statements and continued influence of the theories of Webster, Morrill, and King, and having failed to produce a single example of an antislavery advocate (politician or judge) who held an unenumerated-rights reading of the treaty language, Barnett and Bernick are reduced to trying to amplify the sounds of silence. For example, they emphasize the failure of Justices John McLean and Benjamin Curtis to use the enumerated-rights reading of the “rights . . . of citizens of the United States” treaty language in their response to Justice John Catron’s concurrence in *Dred Scott*. According to Barnett and Bernick “[s]uch an argument would have been expected, had the antebellum legal meaning of ‘privileges or immunities’ been limited to enumerated guarantees.”<sup>86</sup> The fact that these Justices did not use this argument in response to Catron contributes to what Barnett and Bernick characterize as a “deafening” judicial silence.<sup>87</sup> This is not the only time in their critique that Barnett and Bernick attempt to use silence as evidence.<sup>88</sup> As we shall see, none of these attempts are persuasive.

In the case of *Dred Scott*, for example, a close examination of Justice Catron’s concurrence reveals that he was not discussing the treaty’s Article III reference to the “rights . . . of citizens of the United States.”<sup>89</sup> Catron instead was discussing the same Article’s promise to territorial inhabitants that, although they could anticipate receiving the rights of national citizenship in the future, “*in the mean time*,”<sup>90</sup> their property rights would be guaranteed. As Catron put it:

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84 See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423 (2010). For a discussion of antebellum vested rights doctrine as a due process separation-of-powers principle, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

85 *Delassus*, 34 U.S. (9 Pet.) at 133 (emphasis added).

86 Barnett & Bernick, *supra* note 3, at 540.

87 *Id.*

88 See, e.g., *id.* at 533 (discussing Missouri debates); *id.* at 545–46 (the supposed “dog that did not bark” in John Bingham’s discussion of suffrage); *id.* at 551 (similar argument regarding Howard’s treatment of suffrage); *id.* at 569–70 (same argument regarding Republican’s treatment of suffrage issue).

89 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 524 (1857) (Catron, J., concurring).

90 *Id.* (emphasis added).



[T]he treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. *All these were to be protected 'in the mean time;'* that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the treaty, each inhabitant had the right to the *free* enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, *until he became a citizen of a State of the Union of the United States.*<sup>91</sup>

As the final sentence makes clear, Catron was not discussing the rights of national citizenship. He was making a claim about rights guaranteed to inhabitants by the treaty at the time of the original cession. In their dissents, McLean and Curtis similarly addressed the treaty's guaranty of inhabitants' property rights at the time of cession, and not the rights of national citizenship.<sup>92</sup> All of these justices were "silent" about the enumerated rights of national citizenship because that issue was not being discussed. So much for a "deafening" silence.

In sum, I have produced evidence of high-profile, nationally published arguments that the "rights, advantages and immunities of citizens of the United States" involved *only* those rights enumerated in the Constitution. These arguments remained influential among antislavery advocates right up to the time of Civil War. I also have produced persuasive evidence that the term "privileges and immunities of citizens in the several states" was broadly viewed as referring to nothing more than equal access to a limited set of state-secured rights—again, even Barnett and Bernick concede the existence of this very different set of "privileges and immunities."

Barnett and Bernick, on the other hand, have failed to produce a single example of anyone, either politician or judge, who during the antebellum period described the "rights, advantages and immunities of citizens of the United States" as involving unenumerated constitutional rights *other than proslavery advocates*. Far from undermining my claims, their own evidence illustrates why the "only-enumerated-rights" understanding of the "privileges and immunities of citizens of the United States" would have influenced the thinking of antislavery Republicans.

Unable to deny the existence of two strains of antebellum "privileges and immunities," Barnett and Bernick hedge their claims by denying the existence of an antebellum "*consensus*" regarding these two strains, and by

91 *Id.* at 525 (first and fourth emphases added).

92 *See id.* at 557 (McLean, J., dissenting) ("[B]y no admissible construction can the guaranty be carried further than the protection of property in slaves *at that time* in the ceded territory.") (emphasis added); *id.* at 631 (Curtis, J., dissenting) ("[I]ts sole object was to protect individual rights of the then inhabitants of the territory. They are to be 'maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.'").

denying that an enumerated-rights understanding was “widely held.”<sup>93</sup> But these hedges simply dodge the importance of antebellum historical evidence distinguishing “privileges and immunities” of Article IV from the “privileges and immunities of citizens of the United States. This evidence establishes that there was a clear consensus that Article IV’s “privileges and immunities of citizens in the several states” involved state secured rights and *did not* involve absolute national rights (enumerated or otherwise). It also establishes that antebellum discussions of the term “privileges and immunities of citizens of the United States,” *invariably* referred to nationally secured rights, with antislavery advocates linking the phrase to constitutionally *enumerated* rights. Slavery advocates, of course, promoted very different understanding of the rights of national citizenship. Their definition, however, did not survive the Civil War.

#### D. *Enumerated Rights and Antebellum Republican Theory*

As the Missouri debate illustrates, northern abolitionists had good reason to commit themselves to an enumerated-rights reading of national privileges and immunities. This not only refuted slaveholder claims of an unenumerated right to hold slaves, it also laid the ground work for a constitutional theory opposing slavery. In the years prior to the Civil War, abolitionists increasingly cited rights enumerated in the first eight amendments as representing *national* privileges and immunities that states had no right to ignore. For example, consider the following passages from abolitionist Joel Tiffany’s *A Treatise on the Unconstitutionality of American Slavery* (1849). As you read, notice that Tiffany clearly and repeatedly defines the “privileges and immunities of citizenship of the United States” as *constitutionally* enumerated rights:

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

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93 Barnett & Bernick, *supra* note 3, at 540 (emphasis added).

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*.<sup>94</sup>

In the above, Joel Tiffany cites only enumerated constitutional rights as the “privileges and immunities of citizenship of the United States.” Although Tiffany lists rights enumerated in the Bill of Rights, he also includes other enumerated rights such as the habeas corpus rights found in Article I, Section 9, Clause 2. We shall see Jacob Howard in the Thirty-Ninth Congress take the same approach.

Despite antebellum cases such as *Barron v. Baltimore*, which held that the Bill of Rights bound only the national government,<sup>95</sup> Tiffany insisted that these enumerated constitutional rights also bound the states.<sup>96</sup> 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—as other scholars have documented.<sup>97</sup> We will find this same idea in the antebellum speeches of John Bingham, the man who would eventually draft the Privileges or Immunities Clause of the Fourteenth Amendment.

*E. The Fifth Amendment, the Declaration of Independence,  
and Abolitionist Constitutional Theory*

The enumerated constitutional right of greatest interest to abolition constitutionalists was the Due Process Clause of the Fifth Amendment. Tiffany, for example, argued that the Due Process Clause could not be reconciled with the existence of chattel slavery since “[i]t cannot be claimed that the word ‘*person*’ [in the Due Process Clause] does not include the so called slave.”<sup>98</sup> In the years prior to the Civil War, antislavery advocates increasingly focused on the Due Process Clause as proving that the Constitution was fundamentally a profreedom document.<sup>99</sup> Frederick Douglass, for example,

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94 JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 97–99 (Cleveland, J. Calyer 1849).

95 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243 (1833).

96 TIFFANY, *supra* note 94, at 106 (“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.”).

97 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 142 (1998).

98 TIFFANY, *supra* note 94, at 120.

99 In addition to other sources cited in this section, see Speech of Hon. D.E. Maxon, of Allegheny, on the Personal Liberty Bill (Mar. 14, 1800), in ALBANY EVENING J., Mar. 19, 1860, at 1 (discussing the Virginia bill of rights, the Preamble to the Constitution, the rights of habeas corpus, and the Fifth Amendment as all opposing slavery).

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.<sup>100</sup> Likewise, the 1860 Republican Party Platform declared that the Due Process Clause obligated Congress to oppose slavery in the territories.<sup>101</sup>

To many antebellum abolitionists, 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. To these abolitionists, the Due Process Clause was the *embodiment* of the Declaration of Independence. As the 1844 Liberty Party Platform declared:

*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.*<sup>102</sup>

When Congress debated the Thirteenth Amendment, abolitionists 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, Senator Charles Sumner of Massachusetts 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.”<sup>103</sup>

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, Representative Owen Lovejoy of Illinois “introduced a bill to give effect to the Declaration of Independence, and also to certain provisions of the Constitution of the United States” by abolishing slavery in the territories.<sup>104</sup> As reported in the Congressional Globe:

100 See Frederick Douglass, “*The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*” (1860), in *ANTISLAVERY POLITICAL WRITINGS, 1833–1860*, at 144, 153–54 (C. Bradley Thompson ed., 2004).

101 *Republican Party Platform*, in *A POLITICAL TEXT-BOOK FOR 1860*, at 26, 26–27 (New York, Tribune Ass’n 1860), *reprinted in DOCUMENTS OF AMERICAN HISTORY* 363, 364 (Henry Steele Commager ed., 6th ed. 1958).

102 REINHARD O. JOHNSON, *THE LIBERTY PARTY, 1840–1848: ANTISLAVERY THIRD-PARTY POLITICS IN THE UNITED STATES* 316–17 (2009) (second emphasis added).

103 *CONG. GLOBE*, 38th Cong., 1st Sess. 1480 (1864) (statement of Sen. Sumner) (emphasis omitted).

104 *Id.* at 20.

[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 . . . .<sup>105</sup>

Notice that Lovejoy substituted the phrase “the fruits of honest toil” for the Declaration’s term “pursuit of happiness,” and then he quoted the Due Process Clause as an example of how the Constitution secures the rights to “life, liberty, and the fruits of honest toil.” This equating of natural (inalienable) due process property rights with “the fruits of honest toil,” was a common Republican trope. In an 1857 speech opposing slavery in Kansas, for example, John 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.<sup>106</sup> According to Bingham, the Due Process Clause prohibited wrongful deprivations of the “production of labor” and the “fruit[s] of his toil.” He stated:

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 product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.<sup>107</sup>

In their “critique,” Barnett and Bernick insist that Bingham’s references to the rights of labor and the fruits of one’s toil are references to unenumerated absolute rights.<sup>108</sup> They are wrong. Such references instead echo a long Republican tradition of describing the constitutionally enumerated right not to be deprived of property without due process of law as including “the production of labor” and each man’s right not to be wrongfully deprived of the “fruit of his toil.”

Barnett and Bernick’s failure to understand Bingham’s use of phrases relating to the fruits of one’s toil causes a cascade of mistakes in their analysis of John Bingham and the arguments in the Thirty-Ninth Congress. Because Bingham later appears to include Article IV as part of the Bill of Rights, and because Barnett and Bernick incorrectly believe Bingham included the unenumerated “right to the fruits of one’s toil” in Article IV, they conclude Bingham used the phrase “Bill of Rights” to include unenumerated rights.<sup>109</sup> For example, Barnett and Bernick write:

What about Bingham’s references to the “bill of rights”? We have seen that the phrase “bill of rights” was not deployed by Bingham solely to refer to what Lash regards as enumerated rights. Thus, in the course of defending

105 *Id.* (reporter’s account of the reading of the bill).

106 CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857) (speech of Rep. Bingham).

107 *Id.*

108 See Barnett & Bernick, *supra* note 3, at 544.

109 See *id.*

his initial proposal, Bingham had characterized the Privileges and Immunities Clause of Article IV—which he described in 1859 as affording protection to the (unenumerated) right to “work and enjoy the product of . . . toil”—as part of the “bill of rights.”<sup>110</sup>

Barnett and Bernick’s failure to understand Bingham’s reference to the constitutionally enumerated due process right not to be deprived of the products of one’s “toil” in his 1859 speech causes their entire chain of reasoning to collapse. Bingham never described the Bill of Rights, or any of the privileges and immunities of national citizenship, as involving anything other than enumerated rights.

*F. John Bingham and the Natural Right of All Persons to Due Process*

Some enumerated rights, of course, involved principles that John Bingham and other Reconstruction-era Republicans viewed as natural rights. This was particularly true of Bingham’s view of the Fifth Amendment’s Due Process Clause.

In his 1857 speech opposing the allowance of slavery in Kansas, John Bingham insisted that “*no man* should be deprived of liberty or property but by the judgment of his peers and the law of the land.”<sup>111</sup> According to Bingham, 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, “contain *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 . . . .’”<sup>112</sup> These rights of all persons, Bingham insisted, were natural rights:

The Constitution is based upon the Equality of the human race. . . . Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights.

. . . .

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 product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.<sup>113</sup>

110 *Id.* (omission in original).

111 CONG. GLOBE, 34th Cong., 3d Sess. app. at 137 (1857) (speech of Rep. Bingham).

112 *Id.*

113 *Id.* at 139–40.

To Bingham, the Due Process Clause guaranteed to all persons the *equal protection* of their *natural rights*. These rights included the equal right of every man not to be deprived of the “fruit of his toil” without due process of law. As we shall see, this idea will inform Bingham’s due process understanding of the 1866 Civil Rights Act—an act responding to the South’s failure to equally protect the property and labor rights of all persons. In the above passage, one sees the theoretical origins of Bingham’s eventual draft of the Due Process and Equal Protection Clauses—provisions both protecting what Bingham understood to be the natural rights of *all persons*.

G. *John Bingham’s Antebellum Theory of Article IV and the Bill of Rights*  
(*the Oregon Speech*)

John Bingham’s theory of the privileges and immunities of national citizenship—a theory that would inform his first draft of Section 1—is clearly evident in his 1859 speech opposing the admission of Oregon.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> Bingham insisted that a combination of Article IV and the Supremacy Clause obligated every state in the Union, including the proposed state of Oregon, to enforce the enumerated rights in the first eight amendments, including the Fifth Amendment.

Bingham’s theory relied on a passage in Joseph Story’s influential *Commentaries on the Constitution* where Story noted that citizens of the states are “*ipso facto* [citizens] of the United States.”<sup>117</sup> As Bingham explained, 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.<sup>118</sup>

114 Readers may find the full speech at CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham).

115 See *id.* at 984.

116 See *id.*

117 3 STORY, *supra* note 29, §§ 1687–1688, at 565–66; see also CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham) (“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 *ipso facto* citizens of the United States.” (citing 3 STORY, *supra* note 29, at 565)).

118 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham) (“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.”).

When read with this implied “ellipsis,” Article IV obligates the states to respect *all* of the rights of U.S. citizens, including the enumerated equal right of all persons not to be deprived of life, liberty, or property without due process of law. According to Bingham, because the racially discriminatory provisions in the proposed Oregon Constitution violated this enumerated right of national citizenship, it should be rejected. As we shall see, John Bingham relied on the same “ellipsis” theory of Article IV in support of his first (and ultimately unsuccessful) submitted draft of the Privileges or Immunities Clause.<sup>119</sup>

As he had done in 1857, Bingham again explained that the Fifth Amendment guaranteed natural rights belonging to all persons. According to Bingham, “natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive word ‘person,’ as contradistinguished from the limited term citizen—as in the fifth article of amendments.”<sup>120</sup> In this case, the discriminatory provisions of the proposed Oregon Constitution violated the equal right of every person “to work and enjoy the product of their toil”<sup>121</sup>—language echoing Bingham’s previous description of the Fifth Amendment right not to be deprived of the “product of labor” or the “fruit of his toil” without due process of law.<sup>122</sup>

Throughout his Oregon speech, Bingham mentions a number of “privileges and immunities of citizens of the United States,” including the Fifth Amendment right not to have “private property . . . taken without just compensation,”<sup>123</sup> and the First Amendment “right to know; to argue and to utter, according to conscience.”<sup>124</sup> Every “privilege and immunity” of national citizenship Bingham names involved rights expressly enumerated in the federal Constitution. It was precisely because these privileges and immunities were enumerated in the Constitution that Bingham could argue that “[n]o State may rightfully, by constitution or statute law, impair any of these *guarantied* rights” without violating the Supremacy Clause of the federal Constitution.<sup>125</sup> By limiting his argument to provisions in the proposed Oregon Constitution that violated the enumerated constitutional privileges and immunities of citizens of the United States, Bingham could plausibly insist, “I ask no change of the law as it is written in the Federal Constitution. I leave the States as that constitution leaves them . . . .”<sup>126</sup>

119 See *infra* notes 169–81 and accompanying text. .

120 CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham).

121 *Id.* at 985.

122 CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857) (statement of Rep. Bingham).

123 CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham).

124 *Id.* at 985. Bingham expressly connected these rights with the First Amendment. See CONG. GLOBE, 34th Cong., 1st Sess. app. at 124 (1856).

125 CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham) (emphasis added).

126 *Id.* at 985.



Bingham's Oregon speech is important for several reasons. It lays out a number of constitutional theories that will reappear in Bingham's speeches in the Thirty-Ninth Congress, including his "ellipsis" theory of Article IV, his distinction between the privileges and immunities of citizens and the natural rights of all persons, and his singular focus on the enumerated rights of the Constitution as provisions to which states ought already be bound. When viewed in conjunction with his other antebellum speeches, it also reveals particular turns of phrases like a man's right to the "fruits of his toil" and the "right to know; to argue and to utter, according to conscience" as references to enumerated constitutional rights.

#### H. *Summary of Part I*

Despite their best efforts, Barnett and Bernick have failed to undermine any aspect of the antebellum evidence that supports the enumerated-rights understanding of the privileges and immunities of citizens of the United States. They concede that antebellum courts and commentators broadly understood *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. This set of "privileges and immunities" has been shown to be distinct from those *national* privileges and immunities of citizens of the United States discussed in public controversies like the debates over the admission of Missouri. Those debates show antislavery activists deploying an enumerated-rights reading of the "rights, advantages and immunities of citizens of the United States." According to these antislavery advocates, the rights of national citizenship were *only* those enumerated in the Constitution. These antislavery arguments remained influential, and repeated, right up to the time of the Civil War. Most significantly, the future draftsman of Section 1, John Bingham, described the rights of national citizenship in terms that involve *only* enumerated rights.

Barnett and Bernick not only have failed to call into question any of this evidence, they have failed to identify *a single instance* of an abolitionist, an antislavery 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 attempt to find such evidence in antebellum caselaw is unpersuasive and their arguments about references to unenumerated rights in the speeches of John Bingham are simply wrong.

It was against this antebellum theoretical background that members of the Thirty-Ninth Congress began their discussions of provisions that would form Section 1 of the Fourteenth Amendment. As we shall see, time and again, these members referred back to the consensus antebellum understanding of *Corfield v. Coryell* and Article IV, Section 2. Most importantly, John Bingham's theory of the constitutionally enumerated rights of national citizenship, and the natural rights of all persons to the equal protection of their rights of due process, became constitutionalized in the text of Section 1 of the Fourteenth Amendment.

## II. THE THIRTY-NINTH CONGRESS

### A. *Introduction to Part II*

Although this Article 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.<sup>127</sup> The Senate Judiciary Committee immediately began work on what would become the 1866 Civil Rights Act—legislation Judiciary Committee Chairman Lyman Trumbull would insist was an appropriate exercise of power under Section 2 of the Thirteenth Amendment.<sup>128</sup> In the House, meanwhile, Representative Thaddeus Stevens called for the creation of a Joint Committee made up of members from both the House and Senate.<sup>129</sup> The Joint 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 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.<sup>130</sup> In the meantime, the Senate would spend the opening weeks of its session 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.<sup>131</sup> 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 1*

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.<sup>132</sup> 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

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127 See Proclamation No. 52, 13 Stat. 774 (Dec. 18, 1865) (Secretary of State William H. Seward).

128 See CONG. GLOBE, 39th Cong., 1st Sess. 474–76 (1866) (statement of Lyman Trumbull) (discussing the proposed Civil Rights Bill).

129 CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865) (statement of Rep. Stevens).

130 See KENDRICK, *supra* note 7, at 82–88.

131 For a general description of these events and their timing, see Kurt T. Lash, *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).

132 CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865) (statement of Rep. Bingham).

property.”<sup>133</sup> 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, liberty, or property without due process of law.<sup>134</sup> Ultimately, Bingham separated the ideas of equal protection and due process into the final two clauses of Section 1. Even in their final form, however, these clauses 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.<sup>135</sup> 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.<sup>136</sup>

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 declared, “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.”<sup>137</sup> Using the same “ellipsis” theory of the Comity Clause that Bingham first articulated in his 1859 speech opposing the admission of Oregon,<sup>138</sup> 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 is of the privileges and immunities of citizens of the United States in, not of, the several

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133 *Id.*

134 See *supra* notes 114–26 and accompanying text.

135 See KENDRICK, *supra* note 7, at 38–39. The Senate authorized the creation of the Joint Committee on December 12, 1865, and the House followed suit the next day. See CONG. GLOBE, 39th Cong., 1st Sess. 24 (1865) (Senate); *id.* at 47–48 (House).

136 For representative documents of the Joint Committee and their proposed constitutional amendments, see 2 KURT T. LASH, THE RECONSTRUCTION AMENDMENTS (forthcoming 2020).

137 CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. Bingham).

138 See *supra* note 118 and accompanying text.

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.<sup>139</sup>

As he had argued before the Civil War, Bingham maintained that the citizens of each State are, by definition, “citizens of the United States.” This being the case, one could 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.

Bingham then pointed out that the states “have flagrantly violated the *absolute guarantees of the Constitution* of the United States to all its citizens,”<sup>140</sup> 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 equal personal rights.”<sup>141</sup> Such an amendment, Bingham insisted, will not “mar” the Constitution, but “will perfect it.”<sup>142</sup>

Following up on his promise, on January 12, 1865, 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.”<sup>143</sup> His proposal was sent to a subcommittee made up of William Pitt Fessenden, Thaddeus Stevens, Jacob Howard, Roscoe Conkling, and John Bingham himself.<sup>144</sup> On January 20, that subcommittee reported three proposed amendments to the full Joint Committee. Two were apportionment amendments (the eventual subject of Section 2 of the Fourteenth Amendment). The third was an expanded version of Bingham’s January 12 proposal: “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.”<sup>145</sup>

The Joint Committee postponed discussion of the above equal protection amendment and instead focused on the apportionment amendments.<sup>146</sup> The committee ultimately adopted one version of the apportionment amendment and submitted the same to the House, where it was debated during the final days of January 1866.<sup>147</sup> During those debates, Bingham signaled that this was just the first of a number of proposed amendments the Joint Com-

139 CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. Bingham).

140 *Id.* (emphasis added).

141 *Id.*

142 *Id.*

143 KENDRICK, *supra* note 7, at 46.

144 *Id.* at 46–47.

145 *Id.* at 51.

146 *Id.*

147 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 351, 353–59, 376–89, 403–07, 422–35, 508 (1866). For a selection of those debates, see 2 LASH, *supra* note 136.

mittee was likely to send to the House. The Joint Committee, he explained, 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 guaranteed to him from the beginning*.”<sup>148</sup> Acknowledging that some of his colleagues believed that Congress *already* “has the power, implied necessarily, to enforce all the guarantees of the Constitution,” Bingham insisted this was not the case.<sup>149</sup> 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.<sup>150</sup>

In fact, as Bingham spoke, the Joint Committee was 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 reported the subcommittee’s 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.<sup>151</sup>

On February 3, Bingham proposed replacing the subcommittee’s proposal with an entirely new draft:

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.<sup>152</sup>

This proposal 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 John Bingham’s antebellum speeches, we can see how this proposal reflects 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 enumerated rights of national citizenship, while the language of the Due Process Clause

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148 CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866) (statement of Rep. Bingham) (emphasis added).

149 *Id.*

150 *Id.*

151 KENDRICK, *supra* note 7, at 56.

152 *Id.* at 61.

declares all persons' equal natural right not to be unjustly deprived of life, liberty, or property. Both represented rights that Bingham insisted had been "guarantied to [citizens] from the beginning," but that Congress had previously lacked the enumerated power to enforce.

The Joint Committee adopted Bingham's substitute<sup>153</sup> and, on February 10, 1866, voted to submit the amendment to the House for deliberation.<sup>154</sup> Bingham introduced the proposal to the House on February 26,<sup>155</sup> and, for the next three days, the House debated the Joint Committee's first submitted draft of what would become Section 1 of the Fourteenth Amendment.

C. "[T]o enforce obedience to these requirements of the Constitution . . ." <sup>156</sup>:  
*The First Draft of Section 1*

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 nature of the proposal. He 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.<sup>157</sup>

The amendment, Bingham explained, 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."<sup>158</sup> Although such rights were already enumerated 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."<sup>159</sup> 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.*"<sup>160</sup>

Over and over again, Bingham stressed the fact that the amendment involved only preexisting enumerated rights: "[T]he 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] does not impose upon any State . . . any obligation which is not now enjoined upon

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153 *Id.*

154 *Id.* at 62.

155 CONG. GLOBE, 39th Cong., 1st Sess. 1033 (1866) (statement of Rep. Bingham).

156 *Id.* at 1034.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* (emphasis added).

them by the very letter of the Constitution.”<sup>161</sup> Bingham’s amendment 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.”<sup>162</sup>

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 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.<sup>163</sup>

Hale believed that the Fifth Amendment, like the rest of the Bill of Rights (“amendments to the Constitution, numbered from one to ten”) bound both the states and the federal government, 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*.<sup>164</sup> Hale conceded he could not name such a case, but he 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.”<sup>165</sup> Wisconsin Democrat Charles Eldredge then challenged Bingham to name a case *denying* that the Fifth Amendment bound the states.<sup>166</sup>

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161 *Id.*

162 *Id.* at 1054.

163 *Id.* at 1064 (second alteration in original).

164 *Id.*

165 *Id.*

166 *Id.*

Bingham would answer this challenge the next day. For the moment, however, Hale continued his speech and insisted that the Bill of Rights *already* bound the states. Bingham's proposal therefore 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.<sup>167</sup>

The next day, Bingham made a final appeal in support of this first submitted version of Section 1. In doing so, Bingham discussed the meaning and importance of Chief Justice John Marshall's opinion in *Barron v. Baltimore*—a discussion as important to Bingham's own thinking about his initial draft as it is to our understanding of why he changed the ultimate language of Section 1. 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 these debates.

#### D. *The Consensus Understanding of the Federal "Bill of Rights"*

The above-quoted exchange between Bingham and Hale contains a number of references to the "Bill of Rights." The Fifth Amendment is described as one of the "amendments to the Constitution, numbered from one to ten," and these amendments "constitute the bill of rights."<sup>168</sup> Hale insists that these amendments known as the "bill of rights" are already applicable against the states. Bingham insists Hale is incorrect and the next day, Bingham proves his point by citing *Barron v. Baltimore*, a case that all first-year law students know held that the Bill of Rights does not bind the states.<sup>169</sup> The entire exchange is perfectly understandable as a discussion of the 1791 amendments to the Constitution that we know as the "Bill of Rights." It also stands as a clear example of Bingham's theory that the "ellipsis" privileges and immunities of citizens of the United States are those enumerated in the federal Constitution.

The matter would not be worth commenting on were it not for Barnett and Bernick's quixotic claim that the term "Bill of Rights" during the Reconstruction debates did not necessarily refer to enumerated constitutional rights. Citing the work of Gerard Magliocca,<sup>170</sup> Barnett and Bernick argue "that the first ten (or eight) amendments were not commonly called 'the Bill

167 *Id.* at 1065.

168 *Id.* at 1064.

169 *See* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243 (1833).

170 GERARD N. MAGLIOCCA, *THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS* 6 (2018).



of Rights' until the twentieth century."<sup>171</sup> Thus, they insist, when John Bingham and others used the phrase "bill of rights," there is no reason to think they meant it "solely to refer to . . . enumerated rights."<sup>172</sup> In support of their argument, Barnett and Bernick point to Bingham's 1859 Oregon speech where Bingham seems to have associated Article IV with the right to "work and enjoy the product of . . . toil."<sup>173</sup> Since Bingham included Article IV in his description of the "bill of rights" in his speeches of February 1866, and since (they believe) Bingham had earlier included unenumerated rights in his discussion of Article IV, this means that Bingham must have included unenumerated Article IV rights as part of his understanding of the term "bill of rights" during the Thirty-Ninth Congress. To Barnett and Bernick, Bingham's unenumerated-rights understanding of "the bill of rights" was just another example of how speakers in 1866 had no fixed understanding of the term.

Barnett and Bernick's efforts to make references to the federal Bill of Rights mean something other than a reference to enumerated constitutional rights fails, and for several reasons. First, Barnett and Bernick have misinterpreted Bingham's references to the right 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 from our study of Bingham's antebellum speeches.<sup>174</sup>

Secondly, Barnett and Bernick fail to distinguish historical references to "a bill of rights" from references to "*the federal Bill of Rights*." In the period between the Founding and the Civil War, one can find the general term "bill of rights," used in reference to a variety of things, from the English Bill of Rights,<sup>175</sup> to the Virginia Bill of Rights,<sup>176</sup> to a statutory bill of rights,<sup>177</sup> to the Declaration of Independence.<sup>178</sup> 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 of Rights being only one among many.<sup>179</sup> 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 involves a reference to the Declaration of Independence, the other refers to the federal Bill of Rights. The first is from 1861:

171 Barnett & Bernick, *supra* note 3, at 515 (citing MAGLIOCCA, *supra* note 179, at 6).

172 *Id.* at 544.

173 *Id.* (omission in original) (quoting CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859)).

174 See *supra* note 114 and accompanying text.

175 See *From the American Organ*, RICHMOND WHIG, Jan. 16, 1855, at 4.

176 See H.R., *To Senator Sumner*, RICHMOND WHIG, Apr. 24, 1866, at 2.

177 See *The Civil Rights Bill*, DAILY CHRON. & SENTINEL (Augusta, Ga.), Mar. 27, 1866, at 2 (referring to the Civil Rights Bill as a "bill of rights").

178 CONG. GLOBE, 36th Cong., 2d Sess. app. at 83 (1861) (statement of Rep. Bingham).

179 See "*Strange Doctrine*," COLUMBIAN WKLY. REG. (New Haven, Conn.), Apr. 28, 1866, at 2 (using the term in reference to the federal Bill of Rights).

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 our 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?”<sup>180</sup>

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 . . . .<sup>181</sup>

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

Prior to 1860 it was fairly common for speakers to describe the Declaration of Independence as *a bill of rights*.<sup>182</sup> In doing so, however, no one confused the Declaration with the *federal Bill of Rights*. There are many examples. At the New York Peace Convention of 1863, Judge Flanders 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.’”<sup>183</sup> 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:

[N]o 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

180 CONG. GLOBE, 36th Cong., 2d Sess. app. at 83 (1861) (statement of Rep. Bingham) (emphasis added).

181 CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (statement of Rep. Bingham) (emphasis added).

182 MAGLIOCCA, *supra* note 170, at 58.

183 Joseph A. Flanders, Speech of Judge Flanders (June 3, 1863), in PROCEEDINGS OF THE GREAT PEACE CONVENTION 19, 19 (1863) (emphasis added).

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.*”

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.<sup>184</sup>

As early as 1840, former Governor of Vermont C.P. Van Ness, in his argument before the Supreme Court, referred to *Barron v. Baltimore* and its holding “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.”<sup>185</sup> 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.<sup>186</sup> In 1862, John Bingham spoke of the federal Constitution and “*its Bill of Rights*” as containing the Fifth Amendment’s Due Process Clause.<sup>187</sup> 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 . . . .<sup>188</sup>

In 1864, during the debates on the proposed Thirteenth Amendment, Representative John Pruyn of New York explained that “[t]welve amendments to

184 NO PROPERTY IN MAN: SPEECH OF HON. CHARLES SUMNER ON THE PROPOSED AMENDMENT OF THE CONSTITUTION ABOLISHING SLAVERY THROUGH THE UNITED STATES 8–9 (New York, Loyal Publ’n Soc’y 1864) (first and second emphases added).

185 *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 555 (1840) (emphasis added) (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

186 Explained Buchanan:

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 the 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’s Message*, EXAMINER (London), Dec. 12, 1860, at 1.

187 CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (statement of Rep. Bingham).

188 *Id.* at 1614 (statement of Rep. Thomas) (emphasis added).

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.”<sup>189</sup>

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.”<sup>190</sup> 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.”<sup>191</sup> During the debates in the Thirty-Ninth Congress, Representative William Lawrence of Ohio 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.’”<sup>192</sup> 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.<sup>193</sup> As Professor Magliocca points out in his book, “[b]y the time the Fourteenth Amendment was being debated, Bingham was using the term [Bill of Rights] for the first set of amendments *repeatedly*.”<sup>194</sup> Nor was anyone listening to Bingham “confused about what Bingham and his colleagues meant by that phrase.”<sup>195</sup>

Enumerated rights references to the federal Bill of Rights are so abundant—more than I can list in this limited Article—that they clearly represent the consensus understanding of the term. Every reference in the Thirty-Ninth Congress linking the proposed amendment to the Bill of Rights would have been understood by members (and by the public following the published debates) as linking the amendment to constitutionally enumerated rights. Nor have Barnett and Bernick produced a single example of anyone during Reconstruction referring to the federal Bill of Rights as including absolute unenumerated rights. Differences of opinion, to the extent there were any, involved whether the federal Bill of Rights included all ten of the 1791 amendments or only the first eight—an issue I briefly address in the next section.

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189 CONG. GLOBE, 38th Cong., 1st Sess. 2940 (1864) (statement of Rep. Pruyn) (emphasis added).

190 A.B.J., *The Effect of the War Upon Civil Liberty*, ARGUS (Albany, N.Y.), Aug. 16, 1865, at 2.

191 *The President’s Veto*, CHI. REPUBLICAN, Feb. 21, 1866, at 4 (emphasis added).

192 CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence) (alteration in original) (emphasis added).

193 CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (statement of Rep. Bingham).

194 MAGLIOCCA, *supra* note 170, at 62–63 (emphasis added).

195 *Id.* at 188 n.16.

*D. Omitting the Ninth and Tenth Amendments*

Reconstruction-era Republicans occasionally mentioned only the first eight amendments when they described the federal Bill of Rights.<sup>196</sup> Their omission of the Ninth and Tenth Amendments probably reflects the fact that, at the time of Reconstruction, the Ninth and Tenth Amendments were most commonly associated with the doctrines of federalism and state rights. As I have demonstrated elsewhere,<sup>197</sup> in the period between the Founding and Reconstruction, courts and legal commentators routinely described the Ninth and Tenth Amendments as twin guardians of American federalism.<sup>198</sup> As provisions protective of state rights, these two amendments were often cited in support of policies directly antithetical to those of abolitionist Republicans.

For example, in the original Missouri debates, proponents of slavery insisted that the Ninth and Tenth Amendments prevented Congress from banning slavery in the territories.<sup>199</sup> In his concurring opinion in *Dred Scott v. Sandford*,<sup>200</sup> 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.”<sup>201</sup> 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 . . . .<sup>202</sup>

The same federalist usage of the Ninth and Tenth Amendment continued throughout the Civil War and into Reconstruction. In his speech opposing the Thirteenth Amendment, New York’s Fernando Wood declared:

The 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 to the Constitution are conclusive on this point.<sup>203</sup>

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196 See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (“[The first eight amendments] stand simply as a bill of rights in the Constitution . . . .”); CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. 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.”).

197 See KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009).

198 See generally *id.*

199 See, e.g., 33 ANNALS OF CONG. 1197 (1819) (statement of Rep. Scott).

200 60 U.S. (19 How.) 393, 493 (1857) (Campbell, J., concurring).

201 *Id.* at 511.

202 CONG. GLOBE, 36th Cong., 2d Sess. 214 (1860) (statement of Sen. Benjamin).

203 CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood).

In the Thirty-Ninth Congress, Pennsylvania Democrat Benjamin M. Boyer opposed Section 2 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.”<sup>204</sup> Just days before Jacob Howard delivered his speech describing the Privileges or Immunities Clause as protecting rights listed in the first eight amendments, northern and southern newspapers published the opinion of a Louisiana judge striking down the Civil Rights Act, in part because its passage violated the restrictions on federal power enumerated in the Ninth and Tenth Amendments.<sup>205</sup>

In light of this longstanding association of the Ninth and Tenth Amendments with slavery, secession, and state rights, it is not surprising that some Republicans in the Thirty-Ninth Congress 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, on the other hand, simply acknowledged that the Bill of Rights contained both personal and structural rights.<sup>206</sup> Nothing about this difference of opinion is helpful to Barnett and Bernick. Whether one limited 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.

#### *E. John Bingham and Article IV*

One last “Bill of Rights” issue involves John Bingham’s apparent inclusion of Article IV, Section 2 as part of the federal Bill of Rights.<sup>207</sup> Bingham appeared to make this suggestion in his speeches of February 26 and February 28, a time when he was promoting a version of Section 1 that was itself partially based on the language of Article IV. Here is that version—the first draft of Section 1 submitted by the Joint Committee and 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

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204 CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer).

205 See Dixon, *Judge Abell’s Opinion and Other Matters*, BOS. DAILY ADVERTISER, May 18, 1866, at 1; *The Civil Rights Bill Unconstitutional*, DAILY PHOENIX (Columbia, S.C.), May 19, 1866, at 2.

206 See, e.g., ALBANY EVENING J., Mar. 10, 1855, at 2 (describing the ten amendments of the Bill of Rights as enumerated “State and Personal Rights”); WKLY. RACINE ADVOC., Apr. 2, 1855, at 1 (same).

207 An aside: compare the speech with the accounts of the speech in newspapers. *E.g.*, *A Model Speech*, VT. WATCHMAN & ST. J., Mar. 9, 1866, at 1; *House of Representatives*, N.Y. HERALD, Feb. 27, 1866, at 1. These accounts do not appear to show Bingham including Article IV in the Bill of Rights. The intriguing possibility of mistranscription by the reporter of the Congressional Globe is beyond the scope of this response and, ultimately, has no effect on the enumerated-rights reading.

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.<sup>208</sup>

On February 26, 1866, John Bingham explained the amendment's purpose and, in doing so, stressed the fact that the proposal protected only those rights already enumerated in the Constitution:

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 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.<sup>209</sup>

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 language of Article IV as part of the Bill of Rights. Bingham appeared to repeat this suggestion two days later, on February 28:

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.”<sup>210</sup>

If Bingham really believed Article IV was part of the federal Bill of Rights, this would be unusual. It would not, however, contradict the enumerated-rights reading of the Privileges or Immunities Clause. As we shall see,

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208 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).

209 *Id.*

210 *Id.* at 1089.

Jacob Howard also included both Article IV and the first eight amendments as among the enumerated privileges and immunities of citizens of the United States protected by Section 1. 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 included 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. We saw this in his 1859 Oregon speech.<sup>211</sup> It may be that Bingham had the same common understanding of the federal Bill of Rights as did his colleagues, but he rhetorically linked Article IV to the Bill of Rights since Bingham believed that Article IV was the textual *vehicle* by which states were obligated to enforce the Bill of Rights. Interestingly, Bingham's colleagues seemed to assume that Bingham shared the same common understanding of the federal Bill of Rights as did everyone else in the Thirty-Ninth Congress. Consider, for example, Representative Hale's response to Bingham's speech of February 26:

[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.<sup>212</sup>

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 Hale's definition of the Bill of Rights as amendments "numbered from one to ten." Instead, Bingham simply challenges Hale to produce a case in which courts enforced the Bill of Rights against the states.<sup>213</sup>

Bingham's Article IV-based draft of Section 1 failed to gain sufficient support in the House and Bingham agreed to have it withdrawn and redrafted.<sup>214</sup> In his final draft of Section 1, Bingham abandoned the language of Article IV, and Bingham himself never again suggested that Article IV was part of the Bill of Rights. Instead, Bingham expressly embraced the same view as Hale, Jacob Howard, and everyone else: the federal Bill of

211 See *supra* note 114 and accompanying text.

212 CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale) (second alteration in original).

213 *Id.*

214 *Id.* at 1095.



Rights involve those rights enumerated in 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.”<sup>215</sup>

Whether Bingham originally held an idiosyncratic view of the federal Bill of Rights and later changed his mind, or whether he originally spoke only rhetorically in an effort to emphasize the role Article IV played 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. All of Bingham’s speeches, in fact, are consistent with the enumerated-rights reading of the privileges and immunities of citizens of the United States.

*F. Bingham’s Focus on Enumerated Rights: The Debates of February 28*

On the last day of the three-day House debate on Bingham’s initial 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 . . . . If Congress may give equal protection to all as to property, it is itself the judge of the measure of that protection.”<sup>216</sup>

Just before agreeing to withdraw his proposal for redrafting, John Bingham rose one last time and defended the proposal from claims that it violated the principles of federalism. 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.”<sup>217</sup> “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.’”<sup>218</sup>

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 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.

215 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

216 CONG. GLOBE, 39th Cong., 1st Sess. 1087 (1866) (statement of Rep. Davis).

217 *Id.* at 1088 (statement of Rep. Bingham).

218 *Id.*

Continuing to stress the proposal's 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."<sup>219</sup>

Repeating his "ellipsis" understanding of Article IV's Privileges and Immunities Clause, Bingham chided his colleagues for resisting an amendment that would allow Congress to enforce the Bill of Rights:

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.<sup>220</sup>

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."<sup>221</sup> 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."<sup>222</sup> 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 . . ."<sup>223</sup>

219 *Id.* at 1089.

220 *Id.*

221 *Id.* (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

222 *Id.* at 1090 (quoting *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833)).

223 *Id.*

As far back as 1859, in his speech opposing the admission of Oregon,<sup>224</sup> John Bingham had insisted that states had a preexisting 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.”<sup>225</sup> “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.”<sup>226</sup>

Focusing on the enumerated right to due process, Bingham noted that states “elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property.”<sup>227</sup> 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.”<sup>228</sup> “Why should it not be so?”<sup>229</sup> Bingham demanded, “Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter?”<sup>230</sup>

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 Federal 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.”<sup>231</sup>

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224 See CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham); see also *supra* note 114 and accompanying text.

225 CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (quoting, with minor variations, Daniel Webster, *The Constitution Not a Compact Between Sovereign States* (Feb. 16, 1833), in 3 THE WORKS OF DANIEL WEBSTER 448, 471 (Boston, Little, Brown & Co. 9th ed. 1856)).

226 *Id.*

227 *Id.*

228 *Id.* (emphasis added). As we have seen, Bingham had long insisted that the Due Process Clause necessarily contained an implied principle of equal protection. See *supra* text accompanying note 113.

229 CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham).

230 *Id.*

231 *Id.* at 1093 (quoting THE FEDERALIST NO. 45 (James Madison)). The *Congressional Globe* here either misquotes Bingham or Bingham misquotes Federalist No. 45. Although

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.’”<sup>232</sup> 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.<sup>233</sup> Rejecting the implied powers doctrine of *Prigg v. Pennsylvania*, as well as expansive interpretations of Section 2 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.”<sup>234</sup>

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.<sup>235</sup>

Bingham’s singular focus on empowering Congress to enforce constitutionally enumerated rights is unmistakable. Over and over again, Bingham insisted that his proposal did 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

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the text in the Globe reads “Federal,” Madison actually wrote “The powers reserved to the several States.” THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

232 CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham).

233 *Id.*

234 *Id.*

235 *Id.* at 1094 (emphasis added).

power to enforce the enumerated rights of due process. Before Congress could act, it would have to pass a constitutional amendment.

Portions of Bingham's speech were published by the *New York Times* and other major newspapers.<sup>236</sup> No paper appears to have repeated Bingham's apparent inclusion of Article IV in the Bill of Rights. 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."<sup>237</sup>

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 enumerated constitutional rights.

### G. *Objections and Postponement*

Following Bingham's final statement, his colleague on the Joint Committee, Roscoe Conkling (who in committee had voted against Bingham's 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.<sup>238</sup> 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."<sup>239</sup> If that was all the amendment secured, Hotchkiss would have voted in support.<sup>240</sup> 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."<sup>241</sup> Hotchkiss was "unwilling that Congress shall have any such power."<sup>242</sup> 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."<sup>243</sup>

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236 *House of Representatives: The Constitutional Amendment*, N.Y. TIMES, Mar. 1, 1866, at 4. An almost verbatim account was published in *The President's Veto*, *supra* note 191.

237 *The Debate in Congress*, Bos. Daily Advertiser, Mar. 1, 1866, at 1.

238 EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 39 (1990).

239 CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss).

240 *See id.*

241 *Id.*

242 *Id.*

243 *Id.*

Hotchkiss did not oppose enforcing the rights of Article IV, rights that 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.”<sup>244</sup> His concerns were focused on giving Congress power to establish “uniform laws throughout the United States” relating to the protection of life, liberty and property.<sup>245</sup> 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.”<sup>246</sup> 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.”<sup>247</sup> 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.”<sup>248</sup>

Hotchkiss’s objections posed a problem for Bingham in three different ways. First, they 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. This fell far short of Bingham’s announced goal of enforcing the absolute rights enumerated in the Bill of Rights. Finally, Hotchkiss was right about the framing of the amendment: as drafted, the proposal might be read as granting Congress power to establish uniform laws on the subjects of life, liberty, and property.<sup>249</sup> 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.”

Having failed to gain the support of even moderate Republicans, Bingham bowed to the inevitable. Upon Representative Roscoe Conkling’s motion, the discussion of the amendment was postponed until April.<sup>250</sup> By the time the proposal was reintroduced, Bingham had removed the language of Article IV and replaced it with language expressly declaring the privileges or immunities *of citizens of the United States*. Before discussing that second and

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244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.*

249 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. Barnett & Bernick, *supra* note 3, at 543. What they leave out is 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.

250 CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (voting on the postponement).

final draft of the Joint Committee, it is important to first address the debates and passage of the 1866 Civil Rights Act.

#### *H. The Civil Rights Act*

Barnett and Bernick insist that “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.”<sup>251</sup> Because the enumerated-rights reading of the Privileges or Immunities Clause does not appear to authorize the Civil Rights Act, Barnett and Bernick claim that this *cannot* be the correct reading of the Clause.<sup>252</sup> The obvious problem with this argument is that there are *other* provisions in Section 1 besides the Privileges or Immunities Clause that members of the Thirty-Ninth Congress would have understood 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.<sup>253</sup> Bingham opposed the Civil Rights Act because passing such legislation first required passing an amendment giving Congress power to enforce the Due Process Clause. That, of course, is exactly what Bingham and his colleagues accomplished by passing an amendment with a Due Process Clause and a provision empowering Congress to enforce “the provisions of this article.”<sup>254</sup>

#### *I. The 1866 Civil Rights Bill and the Rights of Due Process*

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.<sup>255</sup> 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 amend-

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251 Barnett & Bernick, *supra* note 3, at 504.

252 *See id.*

253 *See* discussion *infra* text accompanying notes 265–72.

254 U.S. CONST. amend. XIV, § 5; *see id.* § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”); *id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

255 Chaired by Lyman Trumbull, the members of the Senate Judiciary Committee included Harris (N.Y.), Poland (Vt.) (replacing the deceased Collamer), Johnson (Md.), Clark (N.H.), Stewart (Nev.), and Hendricks (Ind.). *See* CONG. GLOBE, 39th Cong., 1st Sess. 25 (1865) (statement of Sen. Doolittle) (naming the members of the committee). Harris was the only member who was also on the Joint Committee. *Compare id.* (naming members of the Senate Judiciary Committee), *with* KENDRICK, *supra* note 7, at 38 (naming members of the Senate who served on the Joint Committee).

ment.<sup>256</sup> The Chair of the Senate Judiciary Committee, Senator Lyman Trumbull of Illinois, 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 bills were meant to prohibit the racially discriminatory "Black Codes," and contained the same set of nondiscrimination 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.<sup>257</sup>

Introducing both bills at the same time, Senator Trumbull explained that the Freedmen's Bill should be viewed as a continuation of all the power Congress had exercised during the war.<sup>258</sup> The authority to pass the Civil Rights Bill, Trumbull claimed, was found in Section 2 of the Thirteenth Amendment:

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 to 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.<sup>259</sup>

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256 See CONG. GLOBE, 39th Cong., 1st Sess. 422–35 (1865) (statement of Rep. Bingham) ("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 . . .").

257 *Id.* at 211 (statement of Sen. Trumbull).

258 *Id.* at 320.

259 *Id.* at 322. 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 empowering Congress to pass the two bills.



According to Trumbull, both the Freedmen's Bill and the Civil Rights Bill simply advanced policies 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."<sup>260</sup>

Republican Senator Edgar Cowan of Pennsylvania viewed Trumbull's bills as an effort to enforce the due process rights of life, liberty, and property, but Cowan insisted that such 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.<sup>261</sup>

Cowan was just one of a number of members of the Thirty-Ninth Congress who viewed the rights protected in the Freedmen's Bureau and Civil Rights Bills as efforts to enforce rights enumerated in the Due Process Clause. Representative M. Russell Thayer of Pennsylvania, for example, insisted that the Due Process Clause all by itself authorized legislation like the Civil Rights Act:

[I]n 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.

. . . 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.<sup>262</sup>

In the House, Representative John Bingham had recently proposed an amendment that empowered Congress to enforce the rights of the Due Process Clause. Nodding to Bingham's effort, Thayer "approve[d] 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,

260 *Id.* at 322 (quoting President Andrew Johnson's annual message to Congress).

261 *Id.* at 340 (statement of Sen. Cowan).

262 *Id.* at 1152-53 (statement of Rep. Thayer) (emphasis added).

though, according to my best judgment, it is not necessary to do so.”<sup>263</sup> Freedmen, according to Thayer, had “a right to demand the protection of your flag and the immunities *guarantied to every freeman by your Constitution.*”<sup>264</sup>

John Bingham disagreed. When the House debated the proposed Civil Rights Act, Bingham opposed the bill. His opposition sheds important light both on the constitutional theory informing the final version of Section 1 and the relationship between the Due Process Clause and the Civil Rights Act.

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

On March 9, 1866, John Bingham delivered a speech detailing his objections to the proposed Civil Rights Bill recently introduced by Representative James Wilson.<sup>265</sup> Bingham began by assuring 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.<sup>266</sup>

Like Cowan and Thayer, 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. According to Bingham,

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.<sup>267</sup>

In addition to insisting Congress lacked the power to enforce the due process legislation like the Civil Rights Bill, Bingham also objected to the fact that the bill protected only *citizens*. As we know from studying Bingham’s antebellum speeches, he believed that the rights of due process were natural rights held by every person, not just citizens.<sup>268</sup> Bingham therefore insisted

263 *Id.* at 1153 (second alteration in original).

264 *Id.* at 1154 (emphasis added).

265 *Id.* at 1291 (statement of Rep. Bingham); *see also id.* at 1367 (statement of Rep. Wilson).

266 *Id.* at 1291 (statement of Rep. Bingham).

267 *Id.* (alteration in original).

268 *See supra* note 113 and accompanying text.

that the Civil Rights Bill was wrongfully underinclusive. “If this is to be the language of the bill,” Bingham objected, “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?”<sup>269</sup> According to Bingham, protecting the due process rights of citizens and not all persons “is forbidden by the Constitution of your country,” which “says ‘no person,’ not ‘no citizen,’ ‘shall be deprived of life, liberty, or property,’ without due process of law.”<sup>270</sup>

Bingham’s due process understanding of the Civil Rights Bill thus raised two serious problems. 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.<sup>271</sup> 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:

[W]hen 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.

. . . “[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 dis-

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269 CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham).

270 *Id.*

271 *Id.* at 1291 (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’”).

crimination 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.<sup>272</sup>

To the consternation of supporters of the Civil Rights Act, Bingham's speech was "extensively published."<sup>273</sup> 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, therefore, 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:

[Rep. Bingham] 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."

. . . .

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is 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.

. . . .

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."<sup>274</sup>

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272 *Id.* at 1292–93 (emphasis added).

273 *See id.* at 1837 (statement of Rep. Lawrence).

274 *Id.* at 1294–95 (statement of Rep. Wilson). Barnett and Bernick make much of the fact that supporters of the Civil Rights Act sometimes described it as protecting "absolute" natural rights. *See* Barnett & Bernick, *supra* note 3, at 562. This is true, but the term referenced an understanding stretching all the way back to Blackstone's *Commentaries* that explained that all men had the natural "absolute" right not to be deprived of life, liberty, or property except according to the law of the land. *See, e.g.*, 1 BLACKSTONE, *supra* note 23, at \*134 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). Thus, when Lawrence and others spoke of the natural absolute rights of life, liberty, and property, this was just another way of referring to the rights of the Due Process Clause. Indeed, Lawrence cites to Kent's *Commentaries*, when Chancellor Kent explains these absolute rights cannot be deprived except

Wilson expressly 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 in the Bill of Rights. Wilson 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 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.<sup>275</sup> 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. It was this claim of implied unenumerated power that Bingham could not accept.

The congressional debates on the Civil Rights Act were published in national newspapers on an almost daily basis.<sup>276</sup> Those following the debates knew that the bill was being promoted 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 guaranties 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 Constitution law, or of a shameless effort to impose upon the ignorant.<sup>277</sup>

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by the law of the land, meaning "due process of law." See CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence); 1 KENT, *supra* note 29, at 599–648.

275 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 569 (1842).

276 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 in the Constitution was the want of the Republic." *Thirty-Ninth Congress, First Session: The Civil Rights Bill*, N.Y. TIMES, Mar. 10, 1866, at 1.

277 S.S. Nicholas, *The Civil Rights Act: A Brief Comment*, DAILY NAT'L INTELLIGENCER (D.C.), May 8, 1866, at 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 agreed with Wilson and Bing-

Like Bingham, Nicholas insisted that Congress—at that point—had no power to enforce the Fifth Amendment of the Bill of Rights. 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. There is no doubt that Bingham himself held that view. It is not surprising, therefore, that Bingham joined his colleagues in voting to repass the Civil Rights Act in 1871, after the ratification of an amendment empowering Congress to the enforce the rights of due process and equal protection.<sup>278</sup> Not only did Congress repass the Civil Rights Act in 1871, they extended most of its provisions to protect "all persons," not just "citizens." This extension would have been constitutional if the Privileges or Immunities Clause is the *only* provision in Section 1 that authorizes nondiscrimination legislation like the Civil Rights Act.

Despite the inescapable link between the repassed Civil Rights Act and the due process reading of the 1866 Act, Barnett and Bernick nevertheless insist that the 1871 extension of the Civil Rights Act poses a problem for my reading of the Act. This is because the extension grants to noncitizens all of the rights of the original 1866 Act *except* the right to purchase and convey real estate.<sup>279</sup> Barnett and Bernick's reasoning here is somewhat complicated. First, Barnett and Bernick assume that in 1870, Congress would have wanted to give aliens the right to buy and sell real estate if they had the constitutional power to do so. The fact that Congress did not do so must mean that they believed that neither the Due Process nor the Equal Protection Clauses authorized such legislation. Because we must read Section 1 as authorizing all of the 1866 Civil Rights Act, and not just most of the Act, then this means we must read the Privileges or Immunities Clause as authorizing the Act's protection of the equal right of citizens to purchase and convey real estate. Since there is no such right enumerated in the Constitution, this must mean that the enumerated-rights reading of the Privileges or Immunities Clause is incorrect. So, believe Barnett and Bernick.<sup>280</sup>

There are multiple problems with this extended chain of reasoning. To begin with, we are talking about the unstated beliefs of members of a different Congress acting five years after the Thirty-Ninth Congress passed the original Civil Rights Act and the Fourteenth Amendment. All postratification "evidence" is problematic as a source of original ratifier understanding, and its especially problematic here where Barnett and Bernick attempt to discern the unstated mental operations of a later Congress. And whatever weight such evidence might have, it must be balanced against the far weightier

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ham that the bill was an attempt to enforce the Due Process Clause of the Fifth Amendment. Nicholas's essay is much stronger evidence in support of the due process understanding of the Civil Rights Act than I had previously recognized.

278 Congress repassed the 1866 Civil Rights Act as part of the 1871 Enforcement Bill. *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (enforcing the provisions of the Fourteenth Amendment to the U.S. Constitution).

279 Barnett & Bernick, *supra* note 3, at 562–63.

280 *Id.* at 562–64.

express comments of the Congress and people who participated in the ratification of the Fourteenth Amendment between 1866 and 1968.

But most problematically for Barnett and Bernick, this particular postratification evidence has no discernable weight whatsoever. There are *many* reasons why politicians in 1870 might have chosen to extend some, but not all, of the rights of the 1866 Civil Rights Act to aliens. It is possible, for example, that members believed that the Due Process Clause authorized the 1866 Act's protections of *citizens'* property rights, but also believed that *noncitizens did not have the same due process rights* when it came to the purchase and conveyance of real property. In fact, there is good reason to think this was exactly the case.<sup>281</sup> If so, then this would explain how John Bingham could support a bill that gave noncitizens most, but not all, of the rights granted to citizens in the Act. Such an explanation would be perfectly consistent with Bingham's due process understanding of the Act.

Conceding that the above is a possible explanation, Barnett and Bernick nevertheless insist my reading remains problematic since I have failed to *prove* that Congress believed noncitizens had different due process property rights than citizens.<sup>282</sup> I bear no such burden. They are the ones insisting that the nonextension of real property rights can only be explained by an enumerated-rights reading of the Privileges or Immunities Clause. The mere possibility that there exist plausible alternative explanations consistent with the enumerated-rights reading is sufficient to negate their argument.

In fact, there are additional alternative explanations for not extending real property rights to noncitizens that are also consistent with the due process reading of the 1866 Civil Rights Act. Members, for example, may have believed they had power to enforce the equal due process real property rights of noncitizens, but they simply chose not to do so. At the time of the Forty-First Congress, the most commonly discussed group of noncitizens who would benefit from an extension of the Civil Rights Act were Chinese immigrants in the West. Not every member of Congress (and not every member's constituents) particularly wanted *this* group to purchase real property and become permanent residents of the United States.<sup>283</sup> In fact, that same session, Congress rejected efforts to allow Chinese immigrants to become American citizens.<sup>284</sup> It is altogether possible (indeed, likely), that some members

281 I have explored this possibility elsewhere. See Lash, *supra* note 131, at 1464.

282 Barnett & Bernick, *supra* note 3, at 564 ("Lash's claim," even if possible, "remain[s] unproven.").

283 See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. app. at 475 (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 that the Senate will at this time confine itself to the subject which it has before it—the consideration of the bills to enforce the fifteenth amendment." (alterations in original)).

284 In 1870, Congress rejected efforts to amend the naturalization laws and allow Chinese to become American citizens. See CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870)

would have opposed extending equal real estate purchasing rights to noncitizens groups like the Chinese *even if* those members believed Section 5 enforcement of the Due Process Clause granted them such power. Even if John Bingham himself had no animosity toward immigrant groups, he might have had his own constitutional doubts (as discussed above) or simply understood that nothing beyond a limited extension of the Civil Rights Act was politically possible at that time.

Barnett and Bernick do not explore any of these possibilities. In the end, they have nothing more than an argument based on an omission, and a weak one at that. Whatever reasons Congress may have had in extending only some equal due process property rights to noncitizens, there is nothing about this postratification omission that poses a problem for the due process reading of the Civil Rights Act—or for the enumerated-rights reading of the Privileges or Immunities Clause.

### K. *The Final Draft of the Privileges or Immunities Clause*

Back to the Thirty-Ninth Congress. Despite months of work, by April of 1866, the Joint Committee had not managed to produce a single successful amendment. The House managed to pass an apportionment amendment but the proposal failed in the Senate, blocked by a coalition of conservative and radical Republicans.<sup>285</sup> Bingham's civil rights amendment faced heavy resistance and was withdrawn and further debate postponed until April. At this point it appeared that the Joint Committee would not succeed in getting any of its amendments passed.

The log jam broke on April 21, 1866, when Thaddeus Stevens submitted to the Joint Committee a draft multisectioned amendment he had received from Robert Dale Owen.<sup>286</sup> This omnibus amendment combined a number of popular amendments (for instance, a prohibition on paying rebel debt) with more difficult issues (limiting the political power of the returning southern states). Section 1 of Owen's proposal 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."<sup>287</sup> Owen's Section 5 granted Congress power to enforce "the provisions of this article."<sup>288</sup>

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(voting to reject Trumbull's amendment, which would have permitted Chinese citizenship).

285 See CONG. GLOBE, 39th Cong., 1st Sess. 1275, 1281–89 (1866).

286 See *A New Proposition*, CHI. TRIB., Apr. 16, 1866, at 2 (reporting the Joint Committee's receipt of a multisectioned amendment submitted by Robert Dale Owen).

287 KENDRICK, *supra* note 7, at 83.

288 *Id.* at 84. 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.



As written, a combination of the proposed first and fifth sections would authorize legislation like the Civil Rights Act. It also met the objections of members like Giles Hotchkiss who supported a nondiscrimination provision but who insisted that Congress not be given authority to establish uniform laws on the subjects of life, liberty and property.<sup>289</sup> It did not, however, include language that could be read as enforcing the Bill of Rights against the states—Bingham’s particular objective. Bingham remedied that problem by convincing a majority of the committee to delete Owen’s proposed Section 1 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 1 discussed by the Joint Committee, and their various votes, are interesting in themselves, but are well discussed elsewhere.<sup>290</sup> 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 (which Bingham also drafted). Here are the two proposals: February Draft:

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.<sup>291</sup>

Final Joint Committee Draft:

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 of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>292</sup>

Some aspects of the two drafts are the same. In both, Bingham separated the rights of “citizens” from the rights of “all persons.” This, as we

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Sec. 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.

*Id.* at 83–84.

289 See *supra* note 241 and accompanying text.

290 See MALTZ, *supra* note 238, at 82–89.

291 CONG. GLOBE, 39th Cong., 1st Sess. 1083 (1866).

292 KENDRICK, *supra* note 7, at 106.

know, reflects Bingham's longstanding view that some rights are natural rights belonging to all persons, while others are privileges or rights belonging only to citizens. Although the statement of congressional power has been moved out of Section 1, it reappears as Section 5. This was Hotchkiss's recommendation—the amendment should first specify the rights being protected and *then* empower Congress to enforce those rights.

The biggest difference between the drafts is Bingham's decision to replace "of citizens in the several States" with the phrase "of citizens of the United States." Bingham had abandoned the express language of Article IV and replaced it with language that Bingham had previously claimed was *implied* in Article IV. In his speeches before the Civil War, and during his defense of his original draft, Bingham had argued that the language of Article IV should be read as if it contained an "ellipsis" referring to the rights of "citizens of the United States"—rights Bingham insisted included those enumerated in the Bill of Rights. By expressly defining the protected privileges and immunities to be those held by "citizens of the United States," Bingham now made explicit what he had previously claimed was implicit. This new language relieved Bingham of the burden of having to convince his colleagues to see words that were not actually in the text of Article IV.

*L. Bingham's Speech Introducing the Second and Final Draft  
of the Privileges or Immunities Clause*

On May 10, 1866, John Bingham explained his new draft 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 preexisting obligation was the "want" of the country. His efforts were directed at producing an amendment enabling the enforcement of constitutionally enumerated privileges and immunities—and "no more." Although the language of Section 1 had been somewhat reworked in response to his colleagues' suggestions, as far as Bingham was concerned the new draft was simply a polished version of his original proposal. As Bingham explained to his colleagues:

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.<sup>293</sup>

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293 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

These words echo Bingham's speech of February 26, where he explained that "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,"<sup>294</sup> and Bingham's declaration on March 9: "I know that the enforcement of the bill of rights is the want of the Republic."<sup>295</sup>

Prior to the Civil War, Bingham had argued that a combination of the language of Article IV and the Supremacy Clause obligated the states to follow the Bill of Rights—therefore, binding the states to that obligation did not interfere with any of their reserved rights. In his speech on February 26, 1866, Bingham had made the same claim. Now, in May, Bingham again stressed the same point:

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.<sup>296</sup>

This is the same point Bingham made on February 26, 1866, 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."<sup>297</sup> In May, Bingham again reminded his colleagues that state officials had engaged in

flagrant violations of the guaranteed 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.<sup>298</sup>

This lack of power to enforce constitutional rights against state abridgement had to be remedied:

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 . . .<sup>299</sup>

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294 *Id.* at 1034.

295 *Id.* at 1291.

296 *Id.* at 2542.

297 *Id.* at 1034.

298 *Id.* at 2542. Compare *id.*, with *id.* at 1034 (Bingham's speech of February 26, 1866).

299 *Id.* at 2543.

As he had done in February regarding his initial draft, Bingham again assured his colleagues that the proposal enforced only those rights already announced in the Constitution: “That is the extent that it hath, no more.” Likewise, on February 28, Bingham explained 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.’”<sup>300</sup> Bingham’s 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.

Barnett and Bernick insist that there was a “dog” in Bingham’s speech “that did not bark.”<sup>301</sup> At one point in his speech, Bingham explained why the proposed amendment could not reasonably be read as giving freedmen the right to vote.<sup>302</sup> If Bingham held the enumerated-rights reading of the Privileges or Immunities Clause, why didn’t he simply state that the right of suffrage was not a constitutionally enumerated right and therefore could not be considered a privilege or immunity of citizens of the United States?

Arguments from silence are necessarily weak, since one cannot read the minds of speakers to determine why they used one argument and not another. In this case, the argument is so weak it collapses. Not only do Barnett and Bernick wrongly assume that the rights of suffrage cannot be drawn from the constitutionally enumerated rights in the Constitution, they are also wrong about Bingham’s argument. Bingham believed that there *were* enumerated rights that, in certain circumstances, authorized federal enforcement of the right to vote. Therefore the “easy” argument that voting was not an enumerated privilege or immunity was unavailable. Instead, Bingham needed to explain why the exceptional circumstances in which enumerated rights triggered federal enforcement of the right to vote were not in play. Here is the critical passage in his speech:

The second section [of the proposed amendment] 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?<sup>303</sup>

Section 2 of the proposed amendment allowed states to deny otherwise qualified males the right to vote, but reduced the states’ representation in Congress proportionately if they chose to do so.<sup>304</sup> According to Bingham,

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300 *Id.* at 1088.

301 Barnett & Bernick, *supra* note 3, at 545.

302 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

303 *Id.*

304 *See* U.S. CONST. amend. XIV, § 2.

this section all by itself forecloses the idea that Section 1 somehow established a national right to vote.

The reason Bingham does not use the enumerated-rights argument to deny the existence of an unenumerated right to vote is because Bingham believed there *were* enumerated texts like the Republican Guarantee Clause that, on certain occasions, gave rise to congressional authority to regulate voting in the states. Bingham noted, for example, 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 remedying a violation of this enumerated right by passing laws guaranteeing the rights of suffrage.

In other words, this dog barked. Bingham’s argument about the right to vote 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.

Bingham’s greatest concern, of course, involved requiring the states to protect the “guaranteed privileges of citizens of the United States” enumerated in the Bill of Rights:

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 guaranteed 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.<sup>305</sup>

From the opening days of the Thirty-Ninth Congress to this final speech supporting the amendment, John Bingham transparently and consistently pursued the goal of securing an amendment empowering Congress to enforce the enumerated rights of the federal Constitution and *only* the enumerated rights of the Constitution. In placing this final draft of the Privileges or Immunities Clause before his colleagues, Bingham once again assured members “[t]hat is the extent that it hath, no more.”<sup>306</sup>

#### *M. The Speech of Jacob Howard*

It is a matter of historical irony that then-Senator Jacob Howard’s speech introducing the Fourteenth Amendment to the Senate has played such a sig-

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305 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) (emphasis added).

306 *Id.* at 2543.

nificant role in scholarly efforts to determine the original meaning of the Privileges or Immunities Clause. The original plan was to have the chair of the Joint Committee, William Pitt Fessenden, introduce the amendment to the Senate. Unfortunately, Fessenden was ill and Howard was chosen as his last-minute replacement. The irony is that, in the Joint Committee discussions, Jacob Howard had repeatedly voted *against* this draft of Section 1.

Howard had supported Bingham's failed February draft, which used the language of Article IV and the Fifth Amendment.<sup>307</sup> When the Joint Committee considered Robert Dale Owen's draft five-part amendment on April 21, 1866, Howard supported Owen's antidiscrimination-only draft of Section 1, 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."<sup>308</sup> 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."<sup>309</sup> On April 21, Howard briefly joined the committee in voting to add Bingham's proposed language as Section 5 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.<sup>310</sup>

Four days later, however, Howard joined the committee in voting to *remove* Bingham's language from the amendment.<sup>311</sup> Howard then voted against submitting Bingham's language as a separate amendment.<sup>312</sup> On April 28, Bingham convinced a majority to replace the purely nondiscrimination language of Section 1 with the broader language Bingham originally proposed (and the committee briefly adopted) on April 21. This final vote on Bingham's draft of Section 1 was ten to three, with Jacob Howard once again voting *against* Bingham's proposal.<sup>313</sup> This was the last committee vote on the language of Section 1.

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 broader amendment, which 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 provision added to the Constitution. Nevertheless, it fell to

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307 KENDRICK, *supra* note 7, at 61 (voting on Feb. 3, 1866, on the language); *id.* at 62 (voting on Feb. 10, 1866, to submit the draft to Congress).

308 *Id.* at 83.

309 *Id.* at 85.

310 *Id.* at 87.

311 *Id.* at 98.

312 *Id.* at 99.

313 *Id.* at 106.

Howard to explain to the Senate the meaning of a text he repeatedly opposed.

Howard began his May 23 speech by apologizing for Fessenden's absence and promising to present "in a very succinct way, the views and the motives which influenced that committee, so far as [he] understand[s] those views and motives."<sup>314</sup> Starting with Section 1, 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."<sup>315</sup> 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 the issue of national citizenship.<sup>316</sup> Because it had been possible that the original states might treat visitors from other 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."<sup>317</sup>

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."<sup>318</sup> Nevertheless, the Clause must have "some good purpose" or "it would not be found [in the Constitution]."<sup>319</sup> Howard then cited Justice Washington's discussion of Article IV privileges and immunities in *Corfield v. Coryell*<sup>320</sup> as representing the Supreme Court's likely understanding of Article IV, Section 2, and he quoted the same "fundamental rights" passage from *Corfield* that others in the Senate and House had repeatedly discussed over the past several weeks.<sup>321</sup> He concluded that "[s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution."<sup>322</sup>

At this point in his speech, Howard had done nothing more than associate the privileges or immunities of citizens of the United States with rights described in *Corfield*. His colleagues, having participated in weeks of debates that regularly included discussions of *Corfield*, would have been perfectly familiar with that case and the fact that it established nothing more than the "equal-rights" reading of the Comity Clause. Howard's colleagues in the Senate had recently heard Lyman Trumbull quote the *same passage* from Wash-

314 CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866) (statement of Sen. Howard).

315 *Id.* at 2765.

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.*

320 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

321 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). For an analysis of the role *Corfield* played in the Thirty-Ninth Congress, see LASH, *supra* note 2, at 162–68. Suffice here to say the consensus understanding of *Corfield* in 1866 was the same as the antebellum consensus described in the opening section of this Article—a fact Barnett and Bernick never mention, much less dispute.

322 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

ington's opinion<sup>323</sup> 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."<sup>324</sup>

After quoting *Corfield's* discussion of Article IV, Section 2, Howard then explained that rights protected under the Privileges or Immunities Clause also included those "guarantied and secured by the first eight amendments of the Constitution."<sup>325</sup> Howard named a number of these rights, including

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.<sup>326</sup>

Summing up, Howard concluded: "[H]ere 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."<sup>327</sup>

Notice Howard's textualism. The "mass" of rights protected by the privileges and immunities clause involves those "secured" by enumerated texts in the Constitution; some by Article IV, others by the first eight amendments. This echoes Bingham's own view that the privileges and immunities of citizens of the United States include all enumerated constitutional rights, whether in the Bill of Rights or elsewhere. In other words, Howard's discussion of Article IV and the Bill of Rights is perfectly consistent with the enumerated-rights reading of the Privileges or Immunities Clause.

Barnett and Bernick insist that Howard would not have used the phrase "here is a mass of privileges, immunities, and rights" unless Howard believed that both the rights of *Corfield* and the rights of the first eight amendments were the same *kind* of rights, and that Howard understood them to be "absolute" rights.<sup>328</sup> They cite no evidence in support of this claim, nor could they. Rights, then as now, come in different forms; some are absolute, some relative, some individual, some collective, etc. A "mass" or "bunch" of rights may contain several kinds of rights, just as Section 1 of the Fourteenth Amendment contains more than one kind of right (the rights of national citizenship, the due process rights of all persons, and the rights of equal protection), and the Bill of Rights contains various kinds of rights (absolute

323 See, e.g., *id.* at 475 (statement of Sen. Trumbull).

324 *Id.* at 600.

325 *Id.* at 2765 (statement of Sen. Howard).

326 *Id.*

327 *Id.*

328 Barnett & Bernick, *supra* note 3, at 551–52.



rights, procedural rights, and federalist-structural rights). There is no linguistic or historical reason to read the term “mass of rights” as referring to only one kind of right.

Moreover, to accept Barnett and Bernick’s reading, we must believe that Howard was making the startling claim that all of the rights discussed as equality rights in *Corfield* somehow were transformed by the Privileges or Immunities Clause into absolute unenumerated rights, with congressional power to enforce the same. Once again, there is neither linguistic nor historical evidence that such a transformative understanding of *Corfield* emerged during the Thirty-Ninth Congress, or that anyone understood Howard as making such an extraordinary claim. No matter how much Barnett and Bernick stress Howard’s quoting the fundamental-rights passage of *Corfield*, the fact remains that the consensus understanding of *Corfield* in the Thirty-Ninth Congress was that *Corfieldian* rights received no more than a degree of equal protection.

*Corfield* itself of course, was even more limited in that it applied only to out of state visitors and not in-state residents. Barnett and Bernick make much of this fact since, to them, such a reading of Howard’s description of the Privileges or Immunities Clause would not authorize legislation like the 1866 Civil Rights Act, which provided equal protection to all persons, including a state’s own residents.<sup>329</sup> But as we have already seen, there are *other* clauses in Section 1 that would authorize legislation like the Civil Rights Act. Bingham, of course, would have looked to the Due Process Clause—a critically important fact that Barnett and Bernick never acknowledge, much less discuss. Howard himself appeared to view both the Due Process and Equal Protection Clauses as authorizing nondiscrimination legislation like the Civil Rights Act. Here, for example, is Howard on the Due Process and Equal Protection Clauses of Section 1:

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.<sup>330</sup>

The “class legislation” that “subject[ed] one caste of persons to a code,” of course, are the Black Codes—the target of the 1866 Civil Rights Act.<sup>331</sup> According to Howard, it was “the *last two clauses* of the first section,” and not the Privileges or Immunities Clause, that prohibited racially discriminatory laws.<sup>332</sup> This suggests that, to Howard at least, power to enact anti-Black

329 See *id.* at 499–503.

330 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

331 A point acknowledged by Barnett and Bernick. See Barnett & Bernick, *supra* note 3, at 559.

332 Christopher Green argues that Howard did not mean to link power to prohibit the Black Codes with the “last two clauses” of Section 1. Green asserts that the word “this” in the above Howard quote actually refers to Section 1 as a whole and not to “last two clauses”

Code legislation like the Civil Rights Act is found somewhere in the “last two clauses” of Section 1 in combination with the powers granted by Section 5. Others held the same view. For example, here is how Howard’s colleague, Vermont’s Republican Senator Luke Poland, described the proposed Due Process and Equal Protection Clauses:

[T]he residue of the first proposed amendment [after the Privileges or Immunities Clause<sup>333</sup>] . . . is the very spirit and inspiration of our system of 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.<sup>334</sup>

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 echoed John Bingham and the House sponsor of the Civil Rights Act, James Wilson.

There is no reason, in other words, to stretch Jacob Howard’s words beyond their facial meaning. The Privileges or Immunities Clause protected enumerated rights such as those enumerated in Article IV and discussed in *Corfield* (equal “fundamental” rights for out of state visitors), and those enumerated in the first eight amendments. As for legislation like the Civil Rights Act, which prohibited racially discriminatory “codes,” such legislation would be authorized by the Due Process and Equal Protection Clauses in combination with Section 5.

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of Section 1. See CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION* 104–05 (2015); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 *GEO. MASON U. C.R.L.J.* 1, 27–31 (2008). Green’s attempt to break apart an otherwise perfectly coherent and easily 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.

333 Poland believed the Privileges or Immunities Clause itself did nothing more than protect the rights of Article IV. See *CONG. GLOBE*, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Poland). Unless Poland held an “ellipsis” view of Article IV, this renders the Clause as providing nothing more than a degree of equal treatment. Such a view may have been held by some members, but it is one that Barnett and Bernick, as well as myself, do not believe was the consensus understanding.

334 *CONG. GLOBE*, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Poland).

Regarding Howard's treatment of the right to vote, Barnett and Bernick once again try to make a "dog that did not bark" kind of argument. 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 basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." 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."<sup>335</sup>

Once again, however, the argument fails because the dog actually barks. Here is the *full* passage from Howard's speech:

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 depotism [sic].<sup>336</sup>

In the sentences just prior to the portion quoted by Barnett and Bernick, Howard explains that suffrage could not be considered a national privilege or immunity because it was not a right "secured by the Constitution" but was instead a matter of "positive local law." 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 did not equate "secured" with "enumerated." But this is a perfectly reasonable interpretation of what Howard actually said. Howard's insistence that denying the right to vote did not amount to reducing someone to slavery explains why Congress could not pass suffrage legislation claiming to enforce the Thirteenth Amendment—another enumerated right of citizens of the United States.

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

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335 Barnett & Bernick, *supra* note 3, at 51 (second omission and third alteration in original). (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard)).

336 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (emphasis added).

in the Joint Committee to vote down the Clause and replace it with a narrower version.<sup>337</sup>

### III. RATIFICATION

Unlike the secret debates in Philadelphia that produced the original Constitution, the debates that 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 summer of 1866, when Congress sent the Fourteenth Amendment to the states, anyone following the debates would already know a great deal about Section 1. 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.<sup>338</sup> They would know that John Bingham had *always* described the rights of citizens of the United States as rights enumerated in the Constitution. They also would know Bingham 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. Finally, they would know John Bingham was a member of the Joint Committee that drafted the final version of

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<sup>337</sup> Barnett and Bernick briefly mention Howard's handwritten notes for his speech. See Barnett & Bernick, *supra* note 3, at 50. It appears that Howard originally considered naming only Article IV as a privilege or immunity of citizens of the United States: pages with markings indicating they were inserted at a later point in time contain the reference to the first eight amendments. If, as these notes suggest, Howard originally considered naming only the equal protection rights of Article IV as "privileges or immunities," then this might reflect Howard's personal preference for such a limited clause (as reflected in his votes in the Joint Committee). Nothing about these handwritten notes, however, supports a fundamental-rights reading of the Privileges or Immunities Clause. Indeed, they seem to indicate that Howard received some last-minute pressure, perhaps from his committee colleague John Bingham, to say something about protecting the Bill of Rights—Bingham's major purpose for the Clause.

<sup>338</sup> Barnett and Bernick try to minimize the importance of published references linking privileges and immunities to the Bill of Rights, claiming that in 1866 the term lacked a standard meaning. See Barnett & Bernick, *supra* note 3, at 567–68. As demonstrated above, there is more than enough evidence that any reference to the federal Bill of Rights in 1866 would have been broadly understood as a reference to constitutionally enumerated rights and only constitutionally enumerated rights. See *supra* note 168 and accompanying text.

the Fourteenth Amendment and they likely would know (or would soon learn) that Bingham had personally drafted the Privileges or Immunities Clause.<sup>339</sup>

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*. When Howard mentioned *Corfield* in his speech, the case would have been familiar. They would know Howard considered both Article IV and the first eight amendments to be privileges and immunities of national citizenship. As far as the Civil Rights Act was concerned, 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, and most problematically for Barnett and Bernick, 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 the Privileges or Immunities Clause. Public discussion ranged from the legitimacy of proposing an amendment while the southern states remained excluded from Congress,<sup>340</sup> to arguments about whether the amendment established black suffrage (an idea unpopular at the time both North and South),<sup>341</sup> to the impact of the amendment on state rights and constitutional federalism,<sup>342</sup> to the need to protect basic

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339 See, e.g., Speech of Senator Wilson, of Mass., at Anderson, Madison Cty., Ind. (Sept. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY* 34, 34 (Cincinnati, Cincinnati Commercial 1866) [hereinafter *SPEECHES OF THE CAMPAIGN*] ("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.").

340 An issue raised by the President himself. See *CONG. GLOBE*, 39th Cong., 1st Sess. 3349 (1866) (message of transmission from President Andrew Johnson expressing concern about amending the Constitution before senators and representatives from the South had been readmitted).

341 See, e.g., E.A. Hibbard, Speech upon the Constitutional Amendment, Delivered in the House of Representatives of New Hampshire (June 26, 1866), in *UNION DEMOCRAT*, July 17, 1866, at 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").

342 See Thomas A. Hendricks, U.S. Senator from Ind., Speech at Indianapolis (Aug. 8, 1866), in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 9, 9 ("[I]t 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.").

constitutional rights like freedom of speech and assembly in the South.<sup>343</sup> With so many subjects on the table for discussion, it is no surprise that relatively little public discussion involved the precise meaning of the Privileges or Immunities Clause.

Although the amendment was a major subject for Republicans and Democrats on the campaign trail, the lengthy proposal was difficult to fully explore in a stump campaign speech. The amendment's proponents tended to briefly describe Section 1 in terms of equal rights and they regularly compared its protections to those provided by the Civil Rights Act.<sup>344</sup> On those rare occasions when speakers specified the rights protected by the Privileges or Immunities Clause, they often mentioned the constitutionally enumerated rights of freedom of speech, press, and assembly.<sup>345</sup>

Although there is a robust body of evidence suggesting that an attentive public would have understood that the privileges or immunities of citizens of the United States included enumerated constitutional rights,<sup>346</sup> 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 1 as providing basic rights of equal treatment, not substantive unenumerated rights.<sup>347</sup> 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.<sup>348</sup>

Barnett and Bernick do not dispute my claim that the historical record suggests that the Privileges or Immunities Clause protected enumerated con-

343 John A. Bingham, Speech at Bowerston, Harrison County, O.: The Constitutional Amendment Discussed by Its Author (Aug. 24, 1866), in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 19, 19.

344 This evidence is discussed at length in LASH, *supra* note 2, at 176–229.

345 *See id.* at 197–210.

346 *See id.* at 208–21, 224–26.

347 For example, in his speech describing Section 1 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.

Senator Lyman Trumbull, Great Speech Reviewing the Conflict Between Congress and the President Speech at His Reception at the Operahouse: The Constitutional Amendment—The Civil Rights Bill—Issues of the Fall Campaign, in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 6, 6.

348 *See, e.g.*, REVERDY JOHNSON, A FURTHER CONSIDERATION OF THE DANGEROUS CONDITION OF THE COUNTRY, THE CAUSES WHICH HAVE LED TO IT, AND THE DUTY OF THE PEOPLE 14 (Baltimore, Sun Job Printing Establishment 1867) (responding to Thaddeus Stevens' claims that the amendment would empower Congress to protect the rights of suffrage).

stitutional rights. They insist, however, that this same 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 incorrect. 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 is supported by the evidence. *Corfield* retained its antebellum meaning,<sup>349</sup> and we have already seen that a reference to the federal Bill of Rights—then, as now—would be understood as a reference to enumerated constitutional rights.

Barnett and Bernick correctly point out that proponents of the Fourteenth Amendment often associated the rights of Section 1 with the rights of the Civil Rights Act (indeed, they cite my work on this point).<sup>350</sup> Sometimes speakers associated the Act with the Citizenship Clause,<sup>351</sup> sometimes with the Due Process and Equal Protection Clauses,<sup>352</sup> and sometimes with Section 1 as a whole.<sup>353</sup> In every case, however, these speakers emphasized how Section 1 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 1 as protecting absolute unenumerated rights.

For example, in a speech supporting the proposed amendment, the Senate sponsor of the Civil Rights Act, Lyman Trumbull, explained that the Civil Rights Act 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.”<sup>354</sup> As for the Fourteenth Amendment,

[t]he 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

349 See LASH, *supra* note 2, at 162–68.

350 See Barnett & Bernick, *supra* note 3, at 569–70.

351 Senator 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.” W.W. Wines, Speech at the Union Party in Indiana, Great Republican Gathering: Senator Lane’s Great Speech, “My (Bread and Butter) Policy” (Aug. 18, 1866), in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 13, 14 (emphasis added).

352 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 Schuyler Colfax, Speech at Indianapolis: The Question of the Hour, Action of Congress Defended, “My Policy” Reviewed, Necessity of the Constitutional Amendment (Aug. 8, 1866), in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 14, 14.

353 Speech of John Sherman at Mozart Hall (Sept. 28, 1866), in *SPEECHES OF THE CAMPAIGN*, *supra* note 339, at 39, 39 (“What are the features of that amendment? Every thing that was radical which 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 . . .”).

354 Trumbull, *supra* note 347, at 6.

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.<sup>355</sup>

Portions of these speeches, if viewed out of context, might 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 Vice President 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. . . . 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.<sup>356</sup>

Colfax initially described 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.” A bit later in his speech, however, Colfax clarified that these are subjects that are granted no more than equal protection under the Civil Rights Act and section one. Colfax's speech illustrates why it is important to consider speeches or essays in their entirety, rather than focus on just one or two sentences. This is particularly true in regard to the “Madison” essays published by the *New York Times* in the fall of 1866. 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, agricul-

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355 *Id.*

356 Colfax, *supra* note 352.



ture, 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, 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.<sup>357</sup>

According to Barnett and Bernick, this paragraph provides “an unambiguous affirmation that the Privileges or Immunities Clause will provide absolute protection to *Corfield* rights.”<sup>358</sup> But this is no truer 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 relative (equal), not absolute, protection. Madison, by expressly quoting the “case” *Corfield* and its “long-defined” rights of equal treatment likely meant, and certainly would have been understood as saying, the same thing. If “Madison” 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 1 and the antidiscrimination provisions of the 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.<sup>359</sup>

“Madison” thus summarizes all of his remarks by invoking the language of equal protection, not absolute rights.

#### A. *Enumerated Rights in the Public Debate*

Throughout the ratification period, although primarily focusing on the rights of equal protection, supporters of the amendment also frequently described the proposed amendment as protecting enumerated constitutional rights, especially those listed in the original amendments to the Constitution. In other works, I have presented this evidence in detail.<sup>360</sup> For now, I present just a couple of key examples.

357 Madison, Letter to the Editor, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2 (emphasis added).

358 Barnett & Bernick, *supra* note 3, at 573.

359 Madison, *supra* note 357, at 2 (emphasis added).

360 See generally LASH, *supra* note 2, at 204–29.

In his January 27, 1867, speech before the House on the proposed “Cruel and Unusual Punishments Bill,” John Bingham 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.<sup>361</sup>

As he had done in 1866, here, Bingham links the pending amendment to the protection of enumerated constitutional rights, and nothing else.

Similarly, constitutional-treatise writer George W. Paschal published an essay in the *New York Tribune* soon after the ratification of the Fourteenth Amendment, explaining:

Nor is the remaining guarantee in this clause less important. “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 citizen of life, liberty, or property without the 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 under-rate 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 . . . .<sup>362</sup>

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361 CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867) (statement of Rep. Bingham).

362 George W. Paschal, Letter to the Editor, *The Fourteenth Article*, N.Y. TRIB., Aug. 6, 1868, at 2.

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?*

As mentioned earlier, Barnett and Bernick do not deny that the public understood Section 1 in general, and the Privileges or Immunities Clause in particular, as protecting enumerated constitutional rights. Instead, they claim that the evidence does not support a conclusion that the privileges or immunities clause *only* involved enumerated rights. The only evidence we have, however, associates the clause with nothing other than enumerated constitutional rights, whether the equal protection rights of Article IV or the rights enumerated in the 1791 amendments. This fact alone is sufficient to make the enumerated-rights reading more plausible than the fundamental-rights reading, even if we lack evidence of anyone expressly describing the Privileges or Immunities Clause as only protecting enumerated rights.

In fact, there is such evidence. Some Republicans criticized Section 1 precisely *because* it protected enumerated constitutional rights *and only* enumerated constitutional rights. In the 1867 report excerpted below, a majority of the Massachusetts Committee on Federal Relations described Section 1 as protecting enumerated constitutional rights like those found in Article IV and in the Bill of Rights. The majority then criticizes Section 1 as mere surplusage since states are *already* obligated to respect these constitutional rights. Here is that 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 of Amendment 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,) declares,—

“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 exceeds 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 seems 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.*

. . . .

*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.*<sup>363</sup>

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363 MAJORITY AND MINORITY REPORTS ON THE PROPOSED FOURTEENTH AMENDMENT BEFORE THE LEGISLATIVE COMMITTEE ON FEDERAL RELATIONS, H.R. 149, Gen. Ct., Reg. Sess. (Mass. 1867). Also reported (and substantially quoted) in *Massachusetts: The Constitutional Amendment—The Legislative Committee Divided Upon the Question of Adoption—The Minority and Majority Reports—The Colored Member, Mr. Walker, Against Adoption*, N.Y. TIMES, Mar. 2, 1867, at 5.

There is no way to understand 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 1, but by insisting that it was a good idea to add an amendment that expressly declares that states were obligated to protect enumerated constitutional rights. According to the editors of the *Boston Daily Advertiser*,

[t]o 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 objection of the committee is in effect that the section would be surplusage. . . . We hardly need to point out 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 judgment 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 mere matter of construction would probably have been judicially denied ten years ago and which the committee evidently fear would be so denied now.<sup>364</sup>

### C. *The Omission of the (Unenumerated) 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.<sup>365</sup> This was an unpopular idea in the North at this time, and Democrats hoped to inflame white objections to black political power in order to derail the proposed amendment.<sup>366</sup> 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.<sup>367</sup> As noted above, Barnett and Bernick point to Republican explanations as to why the amendment did not protect 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

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364 *On the Massachusetts Committee's Majority Report*, BOS. DAILY ADVERTISER, Mar. 4, 1867, at 2.

365 See LASH, *supra* note 2, at 195–96.

366 See MALTZ, *supra* note 238, at 123.

367 See LASH, *supra* note 2, at 195.

(see Bingham's speech),<sup>368</sup> and it wrongly presumes Republicans did not at times make the "easy" argument (see Howard's speech ).<sup>369</sup>

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 Immunities Clause,<sup>370</sup> sometimes the Citizenship Clause,<sup>371</sup> sometimes Section 2,<sup>372</sup> and sometimes Section 5.<sup>373</sup> In the face of these myriad claims, Republicans found it easiest to simply point out that there was nothing about the term "citizen" that necessarily

368 *Supra* note 305 and accompanying text.

369 *Supra* note 334 and accompanying text. My answer to Barnett and Bernick on this point applies equally to similar arguments made by Green. *See, e.g.*, Green, *supra* note 71, at 124 ("The enumerated-rights-only view of the Privileges or Immunities Clause was never offered during 1866 as an explanation why the Privileges or Immunities Clause did not apply to voting.")

370 *See* Hendricks, *supra* note 339, at 9 ("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 can not abridge if this amendment becomes a part of the Constitution?").

371 *See* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF INDIANA DURING THE FORTY-FIFTH REGULAR SESSION OF THE GENERAL ASSEMBLY 102 (Indianapolis, Alexander H. Conner 1867) ("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.")

372 *See* *Constitutional Amendment as Submitted to the State of Mississippi: Report*, WKLY. CLARION, Jan. 31, 1867, at 2 ("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."); *see also* JOURNAL OF THE SENATE OF THE STATE OF MISSISSIPPI 196 (Jackson 1867).

373 *See* PENNSYLVANIA LEGISLATIVE RECORD, app. at LII (1867) (statement of Rep. Kurtz) ("[I]t 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.' . . . 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 . . .").

involved the right to vote: women and children were citizens, but neither enjoyed the rights of suffrage.<sup>374</sup> 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 5.

Citing the work of James Fox, Barnett and Bernick criticize what they call a “selective” use of Frederick Douglass’s essays, and claim I have ignored portions where “Douglass gave voice to an understanding of . . . citizenship that was not exhausted by enumerated rights.”<sup>375</sup> The accusation illustrates a failure to understand Douglass’s views on the Fourteenth Amendment. Frederick Douglass criticized the Fourteenth Amendment precisely *because* it did *not* secure freedmen’s right to vote.<sup>376</sup> 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.<sup>377</sup> 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.”<sup>378</sup> 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.<sup>379</sup> He insisted that neither the Civil Rights Bill nor the pending Fourteenth Amendment could “reach the difficulty” facing the freedmen in the South until they were given the right to vote.<sup>380</sup> Rather than relying on the protection of the federal officials, blacks “must have the power

374 See, e.g., Colfax, *supra* note 352.

375 Barnett & Bernick, *supra* note 3, at 573. 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 James W. Fox Jr., *Publics, Meanings & the Privileges of Citizenship*, 30 CONST. COMMENT. 567, 597–99 (2015) (book review). But this is consequitur. 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.

376 See DAVID W. BLIGHT, *FREDERICK DOUGLASS* 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.”).

377 See Frederick Douglass, *Reconstruction*, ATLANTIC MONTHLY, Dec. 1866, at 761, 765 (“This unfortunate blunder [the Fourteenth Amendment] must now be retrieved, and the emasculated citizenship given to the negro supplanted by 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.”).

378 *Id.*

379 *Id.*

380 *Id.* at 761.

to protect themselves, or they will go unprotected, spite of all the laws the Federal Government can put upon the national statute-book.”<sup>381</sup>

Far from supporting Barnett and Bernick’s claim about the Fourteenth Amendment protecting unenumerated rights, Douglass clearly understood that the Amendment *did not* protect 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 Republicans dismissed Democrat claims that the proposed amendment established the rights of suffrage (thus, the overwhelming success of the Republicans in the elections of 1866).<sup>382</sup> This limited understanding of the Amendment was a matter of some frustration to radical Republicans,<sup>383</sup> 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 by a minority of radical Republicans prompted a response by Democrat Reverdy Johnson, a member of the Joint Committee that drafted Section 1. According to Johnson, Section 1 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*

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381 *Id.* at 762.

382 See LASH, *supra* note 2, at 215–21.

383 See *supra* notes 377–81 and accompanying text.



*third clauses [of Section 1].* 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.<sup>384</sup>

According to Reverdy Johnson, Section 1 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 did the Democrat Reverdy Johnson.

#### D. *John Bingham’s Speech of 1871*

Barnett and Bernick spend much time discussing postratification evidence—a telling choice that reveals the paucity of preratification evidence supporting their theory. I have discussed much of this evidence elsewhere,<sup>385</sup> and I am content to leave this issue as one of scholarly disagreement. My choice reflects both the necessary limits of a response Article and the fact that all postratification evidence is a suspect source of original meaning.

That said, I cannot resist ending this Article with one particular piece of postratification evidence: John Bingham’s speech of 1871. In this speech, Bingham defined, in great detail, the meaning of the Privileges or Immunities Clause. Barnett and Bernick concede that this particular speech supports the enumerated-rights reading,<sup>386</sup> but they warn that “we should not overread this speech,” and they insist that the speech is, “[a]t best . . . ambiguous.”<sup>387</sup> The speech, in fact, is not ambiguous at all. It presents both a clear rejection of Barnett and Bernick’s *Corfieldian* fundamental-rights reading of the Privileges or Immunities Clause *and* an unambiguous affirmation of the enumerated-rights reading. No wonder Barnett and Bernick seek to downplay its significance.

For my part, I believe Bingham’s 1871 speech is wholly unnecessary for the argument in favor of the enumerated-rights reading. The antebellum evidence along with the history of the framing and ratification of the Privileges or Immunities Clause is sufficient to establish the enumerated-rights reading as the most likely original understanding of the clause. It is only because Barnett and Bernick rely so heavily on postratification evidence that

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384 JOHNSON, *supra* note 348, at 14–15 (emphasis added).

385 See LASH, *supra* note 2, at 232–76 (discussing, among other things, the Petition of Victoria Woodhull, the House Committee report on Woodhull’s Petition, the *Slaughter-House Cases*, and the Blaine Amendment).

386 Barnett & Bernick, *supra* note 3, at 575.

387 *Id.* at 576–77.

they find themselves compelled to say *something* about this obviously conflicting piece of evidence.

Unfortunately, Barnett and Bernick never tell their readers what Bingham actually argued in that speech.<sup>388</sup> I close the substantive portion of this Article then with a brief presentation of a speech that Barnett and Bernick believe is an important piece of historical evidence supporting the enumerated-rights reading of the Privileges or Immunities Clause.

## 1. The Speech

On March 31, 1871, John Bingham addressed the proposed Ku Klux Klan Act. In his speech, Bingham provided a detailed account of both the history of the Privileges or Immunities Clause and its meaning. It 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 Representative Samuel Shellabarger, the proposed Act criminalized private conspiracies to violate the “rights, privileges, or immunities of another person.”<sup>389</sup> According to Shellabarger, by adding the Fourteenth Amendment to 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’ . . . and which inhere and belong of right to citizenship of all free Governments.”<sup>390</sup> 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 vs. Coryell*.<sup>391</sup>

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388 Barnett and Bernick claim that a prior committee report submitted by John Bingham on behalf of a majority rejecting the suffrage petition of Victoria Woodhull somehow impeaches Bingham’s speech. See Barnett & Bernick, *supra* note 3, at 577 & n.443. This is because the committee report bases its rejection of Woodhull’s claim on the grounds that the Privileges or Immunities Clause provides nothing more than the same limited degree of equal protection of state secured rights as did the Comity Clause of Article IV. To the extent that it has any relevance at all, the so-called “Woodhull Report” impeaches *both* the fundamental-rights reading *and* the enumerated-rights reading. Given their reliance on poststratification evidence, the report poses more of a problem to Barnett and Bernick’s view than it does to mine. As for whether the committee report somehow undermines the significance of Bingham’s speech, I do not think there is any doubt that Bingham’s speech is more indicative of his views than the reasoning of a committee report that necessarily reflects the consensus views of a majority of committee members. See also LASH, *supra* note 2, at 236.

389 CONG. GLOBE, 42d Cong., 1st Sess. app. at 67–68 (1871) (statement of Rep. Shellabarger) (discussing “the bill (H.R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes”).

390 *Id.* at 69.

391 *Id.*

Shellabarger then read the passage from *Corfield* that named the “protection by the Government; the enjoyment of life and liberty” etc. as “fundamental” rights guarded by the Comity Clause.<sup>392</sup>

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. 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.”<sup>393</sup> According to Farnsworth, “by the concerted action of the Republicans, [Bingham’s proposal] was given its quietus by a postponement for two months, where it slept the sleep that knows no waking.”<sup>394</sup>

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.”<sup>395</sup> Later that same day, when it came his time to speak on the bill, Bingham did exactly that.

Answering Farnsworth’s question of “why [he] change[d] the amendment of February, 1866,” Bingham explained, “I took counsel, sir, of that great man, John Marshall, foremost of all the judges.”<sup>396</sup> He also explained that 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.”<sup>397</sup>

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

392 *Id.* (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230)).

393 *Id.* at 115 (statement of Rep. Farnsworth) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss)).

394 *Id.*

395 *Id.* (statement of Rep. Bingham)

396 *Id.* at 84.

397 *Id.* (alteration in original) (quoting *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833)).

“secured . . . all the rights dear to the American citizen,” the Court could not rightfully read them as impliedly binding the states.<sup>398</sup> 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.<sup>399</sup>

Note that the above passage not only 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.”<sup>400</sup> 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.”<sup>401</sup> 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 wished 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.”<sup>402</sup> Therefore, explained Bingham:

Acting 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:

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398 *Id.*

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.* (quoting U.S. CONST. art. I, § 10).

“*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.<sup>403</sup>

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 insisted contained an implied “ellipsis” containing the words “of citizens of the United States.” In his second draft, Bingham simply declared: “No state shall make or enforce any law abridging the privileges or immunities *of citizens of the United States.*” These privileges, Bingham now explained, were altogether different from those protected by the bare language of Article IV:

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[.]

Bingham quoted the first eight amendments, then continued:

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.<sup>404</sup>

There are a number of important aspects about these passages. 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 that 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.*” These phrases refer to two distinct sets of “privileges and immunities.”

But Bingham was not finished explaining why we should not read the Privileges or Immunities Clause as referring to the kinds of rights protected under Article IV and listed as “fundamental rights” in *Corfield v. Coryell*. Shelabarger 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. Although Bingham had already impliedly

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403 *Id.* (emphases added).

404 *Id.* (emphasis added).

rejected that view, he went on to expressly reject Shellabarger's claims. According to Bingham:

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.*"

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."

*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 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?*<sup>405</sup>

As had members of the Thirty-Ninth Congress every time a member had tried to press a nontraditional reading of *Corfield* and Article IV,<sup>406</sup> Bingham in 1871 similarly responds with irrefutable caselaw and antebellum legal treatises. The "fundamental" rights of *Corfield* involved nothing more than a limited set of state-secured rights that, 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*.<sup>407</sup>

405 *Id.* (citations omitted) (first quoting U.S. CONST. art. IV, § 2, cl. 1; then quoting, with minor variations, 6 Daniel Webster, *The Bank of the United States Against William D. Primrose*, in THE WORKS OF DANIEL WEBSTER 106, 112 (Boston, Little, Brown & Co. 7th ed. 1853); and then quoting, with minor variations, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 605 (Boston, Little, Brown & Co. 3d ed. 1858)).

406 See LASH, *supra* note 2, at 162–63.

407 See CONG. GLOBE, 42d Cong., 1st Sess. app. at 26 (1871) (statement of 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); see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 66–67 (2004) (using Sherman's postadoption speech as evidence of the original meaning of the Privileges or Immunities Clause); Barnett & Bernick, *supra* note 3,

Over and over again, John Bingham stressed the enumerated nature of the privileges and immunities of citizens of the United States:

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 guaranteed 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 to 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 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.

. . . .

The people of the United States are entitled to have their rights guaranteed 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 denied trial by jury, and he 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?

. . . .

. . . It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Consti-

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at 506 n.46. 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* notes 196–98 and accompanying text (explaining the consensus understanding of the Ninth and Tenth Amendments in 1866).

tution and guaranteed by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. It is clear that if Congress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law.<sup>408</sup>

Without a single exception, Bingham describes the privileges or immunities of citizens of the United States as those rights enumerated in the Constitution but that 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 constitutional 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.

. . . .

“States 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 faculties, by which he ascends to God, to a future life, and to the unknown blessings of an invisible world.”

[Applause.]<sup>409</sup>

Even in this final passage, with his rhetoric stretching heavenward, 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.<sup>410</sup>

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408 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84–86 (1867) (statement of Rep. Bingham).

409 *Id.* at 86 (alteration in original) (internal quotation marks omitted) (quoting, with slight variations, 1 F. GUIZOT, THE HISTORY OF CIVILIZATION FROM THE FALL OF THE ROMAN EMPIRE TO THE FRENCH REVOLUTION 30 (William Hazlitt trans., New York, D. Appleton & Co. 1854)).

410 See CONG. GLOBE, 34th Cong., 1st Sess. app. at 124 (1856) (statement of Rep. Bingham); see also *supra* note 123 and accompanying text.



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.<sup>411</sup>

In this remarkable speech, Bingham explains why he abandoned the language of Article IV and embraced language expressly calling on the States to respect the enumerated rights of citizens of the United States. It explains how the amendment satisfied what Bingham for years had insisted was the “want” of the original Constitution—federal authority to enforce the Bill of Rights against the States. It also explains how someone as committed to constitutional federalism as was John Bingham would draft and support such a clause. Its scope was limited to protecting the enumerated rights of citizens of the United States. It hath that effect, nothing more.

#### CONCLUSION

I side with John Bingham. Not because we should follow this particular framers’ intent or any of his particular speeches. But because the historical evidence strongly suggests that the author of the Privileges or Immunities Clause best understood the original meaning of his handiwork. Bingham is a constitutional founder, one who should be studied and celebrated by us all. Few people better fit the times into which they were born—in Bingham’s case, a time that welcomed an indefatigable and unshakeable advocate of extending the constitutionally enumerated rights of American citizenship into every hamlet in every State in the Union.

Listen once more to John Bingham’s enumerated-rights theory of the privileges and immunities of citizens of the United States:

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 guaranteed by the amended Constitution and expressly enumerated in the Constitution.<sup>412</sup>

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411 See CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857) (statement of Rep. Bingham).

412 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1867) (statement of Rep. Bingham).