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Publics, Meanings & the Privileges of Citizenship

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THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP. Kurt T. Lash.[1] New York: Cambridge University Press, 2014. Pp. xvii + 307. $99.00 (cloth).

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The Privileges or Immunities Clause has been a puzzle. It was probably more important to those who drafted the Amendment than the Equal Protection and Due Process Clauses, yet it has played almost no role in judicial enforcement of the Fourteenth Amendment. Even in the hands of originalists, the Clause eludes consistency, being described as everything from an inkblot to a guaranty of our most important liberties.[3] And, despite the urging of several scholars, the Supreme Court has refused to pull the Clause down from its attic of forgotten constitutional odds and ends.[4]

With *The Fourteenth Amendment and the Privileges and Immunities of Citizenship*, Kurt Lash hopes to solve this puzzle and give courts a "historically plausible and judicially manageable interpretation" (p. x). Lash has established himself as one of the foremost originalist scholars,[5] and in *The Fourteenth Amendment*

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1. Guy Raymond Jones Chair in Law, University of Illinois College of Law.

2. Leroy Highbaugh Sr. Research Chair and Professor of Law, Stetson University College of Law. I am grateful to Kurt Lash for his generous comments on an embryonic version of what I say here. I am also grateful to William Casey for his excellent research assistance on this essay.

3. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (inkblot); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–68 (2005) (guaranty of liberty).

4. McDonald v. Chicago, 130 S. Ct. 3020 (2010). *Cf.* Brief of Constitutional Law Professors, McDonald v. Chicago, 130 S. Ct. 3020 (2010).

5. *E.g.*, KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009); Kurt Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 101 (2008); Kurt Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007).

he develops a detailed and thorough originalist analysis of the Privileges or Immunities Clause of the Fourteenth Amendment. The book will no doubt become one of the principal works on the Clause and has already garnered high praise.[6]

The Fourteenth Amendment is also provocative. Originalist analysis, Lash argues, shows that the Clause was understood to apply the Bill of Rights to the states, but otherwise leaves issues of rights and privileges up to state courts and legislatures. Thus Lash is at once expansive in arguing that the Clause fully incorporates the Bill of Rights and restrictive in denying a role for the Clause in securing unenumerated fundamental rights. In establishing this thesis, Lash challenges some of the key conclusions of leading scholars. He also proposes what some have argued is not possible: a coherent public-meaning originalist analysis of the Reconstruction Amendments.[7] *The Fourteenth Amendment* makes a solid case that the privileges and immunities of citizens of the United States was an antebellum legal term-of-art conceptually distinct from other privileges and immunities of citizenship. Lash also presents an impressive study of John Bingham's views on the privileges of United States citizenship and their relationship to natural rights and equality. In addition, Lash nicely uses press and campaign materials to highlight the election of 1866 as a critical constitutional moment. Through each of these steps Lash firmly establishes that the Bill of Rights was meant (by drafters and the public) to be applied to the states by the Amendment.

It is in the second half of his thesis—that the Privileges or Immunities Clause was understood to do *no more than* apply the Bill of Rights to the States—that *The Fourteenth Amendment* reveals its weaknesses. *The Fourteenth Amendment* suffers from a flaw not uncommon in originalism: in order to give a fixed meaning to facially vague constitutional language, *The Fourteenth Amendment* imposes a false precision and clarity on a historical record that is ambiguous and conflicted. At each stage of his analysis, Lash makes important choices—of emphasis, selection,

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6. *See* Michael Ramsey, *New Book: Kurt Lash's "The Fourteenth Amendment and the Privileges and Immunities of American Citizenship"*, THE ORIGINALISM BLOG, (Apr. 14, 2014, 6:24 AM), http://originalismblog.typepad.com/the-originalism-blog/2014/04/new-book-kurt-lashs-the-fourteenth-amendment-and-the-privileges-and-immunities-of-american-citizensh.html.

7. Barry Friedman, *The Second Founding: Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009).

and interpretation—that are questionable and undermine his eventual thesis.

More fundamentally, however, *The Fourteenth Amendment* reflects the failure of current versions of originalism to address the complexity of the concept of "public" as it existed in the nineteenth century. In his effort to apply the theory of public-meaning originalism, Lash presents a limiting and historically inaccurate concept of the "public." Lash's public, it turns out, was comprised of the voting population as of November 1866. This ignores important contemporaneous perspectives of African-Americans and feminists—the people for whom inclusion or exclusion from the privileges of citizenship was most important. When combined with Lash's marginalization of voices within the Republican Party who at times articulated some of the perspectives of African-Americans and women, the "public" meaning that results is, not surprisingly, restrictive and limited.

Lash describes a public meaning for the Clause that excludes any unenumerated fundamental rights and shifts equality concerns away from citizenship and toward the Equal Protection Clause. Although such a view is a plausible description of the views of conservatives and moderates in 1866, it cannot be described as *the* public meaning. A far more robust idea of the Clause, and of the Reconstruction Amendments, was articulated by radical white Republicans, African-Americans, and feminists. This view encompassed a forward-looking, natural-rights constitutionalism that potentially led in quite different directions than Lash's interpretation permits. There was no singular meaning for the Clause among its drafters, or the voters in the fall of 1866, or the ratifiers in 1867-68, and certainly not among all the citizens of the United States. Indeed, there was not even a singular "public" among these groups, given the widespread exclusions from politics, law, and the (mainstream) press at the time. Because *The Fourteenth Amendment* does not engage such complexity in the historical structure of the public and public meaning, it cannot capture the hermeneutic range and potential for the Privileges or Immunities Clause or the Amendment as a whole.

This Essay proceeds in three parts. In Part One I summarize *The Fourteenth Amendment.* The book is far richer and more nuanced than any short summary can capture, and my hope is merely to set out the main points of Lash's original and thought-provoking analysis. Part Two presents what might be described as an internal critique. Lash's analysis is subject to criticism from

within an originalist framework, particularly in his determination that open-textured natural or fundamental rights are not relevant to the meaning of the Clause. Unlike originalist critiques, however, I conclude not by suggesting that Lash is wholly wrong and some other interpretation wholly right, but by pointing out that multiple interpretations were available and were important to drafters and the legal and voting publics. Part Three sets forth the more fundamental critique, which is that the very conception of the "public" and public meaning is flawed and that such flaws operate to exclude important meaning communities, such as African-Americans and feminists. I conclude with some thoughts on how such perspectives can be incorporated into a richer, and more accurate, idea of public meaning originalism.

I.

Originalists have disagreed significantly about the scope of the Privileges or Immunities Clause. On the one hand some scholars contend that the Clause merely ensures equal treatment for citizens of the privileges states may provide.[8] Other scholars argue that the Clause protects and nationalizes natural or fundamental rights beyond those listed in the Bill of Rights.[9] And still others declare the Clause a "riddle" or an "inkblot" with no inherent content at all.[10]

Lash stakes out a middle ground in this debate. According to him, the Privileges or Immunities Clause had a specific and circumscribed meaning that included the Bill of Rights and any other right specifically listed in the Constitution (including interstate equality from the Comity Clause), but excluded unenumerated fundamental (or natural) rights, left intrastate equality concepts to the Equal Protection Clause, and retained a substantial portion of antebellum federalism (pp. xi, 232 n.3, 300). This is a relatively unusual view of the Clause, since most interpretations that support Bill-of-Rights incorporation also

8. Philip Hamburger, *Privileges and Immunities*, 105 NW. U. L. REV. 61 (2011) (interstate equality); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (intrastate equality).

9. Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 254–55 (2011) (natural rights to life, liberty, and property); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351 (1997).

10. BORK, *supra* note 3; George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007).

contend that other fundamental rights, such as rights to contract and to own property, were also included.[11]

Lash supports this interpretation by analyzing both antebellum legal usages and the Amendment's drafting history. First, analyzing antebellum referents for the Clause, Lash rejects the belief of "almost all current" scholars that the Fourteenth Amendment's Privileges or Immunities Clause was based on the Privileges and Immunities Clause of Article IV (the Comity Clause) and the exposition of that Clause by Justice Washington in *Corfield v. Coryell*.[12] Instead he argues that the privileges and immunities *of United States citizenship* (as opposed to state citizenship or citizenship generally), operated as a legal term-of-art rooted in United States territorial cession treaties where residents of the transferred territories transitioned from being subjects of foreign sovereigns to citizens of the United States (pp. 47-52). This treaty language ("the enjoyment of all the rights, advantages, and immunities of citizens of the United States") was, according to Lash, consistently identified with the protections of the Constitution and distinguished from state privileges or natural rights (pp. 52-59).

Lash also challenges the conventional readings of key cases, particularly *Corfield*. Lash suggests that the vast majority of cases analyzing the Comity Clause adhered to a consensus view "that the privileges and immunities of citizens in the states differed from state to state," that only a subset of those privileges would qualify for interstate protection of visitors, and that the privileges were only those secured or conferred by states, not ones determined by natural law and subject to a more general recognition (pp. 20-47). In particular, Lash contends that *Corfield* followed this consensus view and did not support the idea of federal or national privileges based on natural rights. Other cases followed this reading of *Corfield*, and it was only with the debates among Republicans in the Reconstruction congress that *Corfield* came to represent a nationalized fundamental rights position (p. 47).

Lash's second support for his limited Bill-of-Rights reading is also boldly unconventional: he argues that the primary author of Section One of the Fourteenth Amendment, Representative John Bingham, intentionally changed his draft to invoke this

11. *E.g.*, BARNETT, *supra* note 3; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 389–90 (2005).

12. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

antebellum term-of-art and to distinguish it from both state-based privileges and natural rights.[13] Lash argues that Bingham probably realized after the congressional debates surrounding his draft that, because many radical Republicans read the Comity Clause privileges and immunities language to include fundamental and civil rights, he needed language that avoided that interpretation, both to preserve the enumerated rights-reading and to keep moderate and conservative Republicans on board supporting the Amendment (pp. 153-54). Bingham altered his draft, choosing "privileges or immunities of citizens of the United States" rather than the Comity Clause's "privileges and immunities of citizens in the several states" to better capture his more limited meaning (pp. 72-73).

Lash skillfully identifies a consistent viewpoint in Bingham's speeches.[14] His interpretation respects Bingham's ability (a respect that eluded an earlier generation of originalists)[15] and provides a plausible explanation of seemingly disparate themes. Still, up to this point *The Fourteenth Amendment* reads much like many other originalist and historically based analyses of the Privileges or Immunities Clause: extensive analysis of antebellum cases and legal materials and detailed combing of congressional drafting debates from 1866. Lash adds depth and original analysis, but in his use of source materials he is on familiar ground.

With chapter four we see that we have been reading an extended prelude. A careful reader would understand this, for early on Lash tells us that "the goal of this book is to illuminate the original public meaning of the Privileges or Immunities Clause" (p. xiv). He disclaims reliance on an older form of originalism that focused on the drafters' intent, and instead adopts Lawrence Solum's view that originalism should be based on the likely understanding of the words used by competent speakers at

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13. Other scholars read Bingham as firmly grounded in natural rights constitutionalism. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181–87 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64 (1990); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 719, 742 (2003).

14. *But see* Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 47–60 (2013) (Lash fails to overcome the conflicting evidence of Bingham's views).

15. *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 145 (1977); Harrison, *supra* note 8, at 1404 n.61. *See also* Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-1867*, 68 OHIO ST. L.J. 1509, 1536–37 (2007) (discussing reception of Bingham by scholars).

the time of ratification.[16] Lash's focus in the first half of the book on antebellum legal usage, and on specific usages of Members of Congress in 1866, establishes the linguistic context for how the public generally understood the words used in the Amendment. In a sense, chapter four is where his rubber meets the road; this is where Lash connects the antebellum meaning that he claims was chosen by Bingham to the public understanding of those who would ratify the Amendment.

Lash is certainly not the first to focus on the ratification period.[17] But, as Lash notes, the records of ratification debates are rather thin, especially regarding the meaning of Section One. Lash rightly recognizes that the election of 1866 is an alternative source of public meaning, since a focal point of the election involved the Republican Party's proposed Amendment and the opposition to it by President Johnson and his Democratic and conservative Republican allies. It is here that Lash does some of his most valuable work, discussing in detail the essays, press reports of speeches, and other materials that reflect the public debate.

Lash first observes that the congressional debates about the Amendment were widely covered and reprinted in the press. Lash then argues that Andrew Johnson's choice to wage a national campaign against the Amendment and the Republican Party brought the language of the Amendment, including the Privileges or Immunities Clause, to the fore. Then, when former confederates initiated violent and brutal attacks against blacks in Memphis in May and attacked a biracial political convention in New Orleans in July, the need for protecting citizens' rights became a central election issue. Lash argues that in response to the violence and Johnson's campaign against the Amendment, advocates of ratification began including statements about how the Amendment would protect speech and assembly rights (pp. 204-210). This, he says, indicated a clear understanding that the

16. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). This is a definitional shift for Lash, who, in the articles on which the book is based, described public meaning as placing a "special emphasis . . . on those with the authority to ratify the text and make it an official part of the Constitution." Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 339 (2011).

17. William Nelson's work remains among the authoritative works on the history surrounding the Fourteenth Amendment. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). *See also* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984).

Amendment ensured application of the Bill of Rights to the states.

For Lash, the election of 1866 represents the apotheosis of the original public meaning of the Amendment and its Privileges or Immunities Clause. Because it was a campaign document, drafted in order to secure the support of moderate Republicans, the Amendment is, for Lash, a relatively modest effort to enforce the Bill of Rights against state governments:

> . . . Section One was, literally, a moderate proposal. The text did not federalize common law civil rights, and it avoided nationalizing the rights of suffrage. Advocates presented the Privileges or Immunities Clause as doing nothing more than securing those rights already announced in the federal Constitution. This reading of "privileges and immunities of citizens of the United States" had a history stretching back into statutes and treaties of the early nineteenth century, such as the Louisiana Cession Act of 1803. The key proponents of the Fourteenth Amendment brought this antebellum understanding of national privileges or immunities into the public consciousness through their explanations of the Privileges or Immunities Clause.
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> . . . A far more radical proposal would have been to federalize the list of "fundamental" rights described by Justice Bushrod Washington in *Corfield v. Coryell*. As much as this might have been the preference of radical Repub[licans], such a proposal had no chance of passage in the Thirty-Ninth Congress and would have significantly undermined Republican efforts in the elections of 1866 (p. 227).

Lash concludes *The Fourteenth Amendment and the Privileges and Immunities of Citizenship* with two chapters on post-ratification interpretations. While acknowledging that this is less persuasive for originalists, especially since it can involve post-hoc efforts to implement interpretations that were previously rejected, he believes that the consistency of the interpretation supports his analysis of the public meaning.[18]

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18. This portion of the book is also valuable and I will consider it below. But since Lash sees this evidence as less significant and his presentation of it is meant to merely confirm the Bill-of-Rights-but-no-fundamental-rights interpretation of the original meaning, I will not spend time here summarizing it.

II.

Lash's case for a Bill-of-Rights-only view of the Privileges or Immunities Clause rests on a series of choices—selection, emphasis, and interpretation. These choices are neither so clear nor so unladen as he would have us believe. And because his ultimate theory of original public meaning rests on the sequential structure of these choices, his major thesis is far weaker than it may initially seem. More importantly, the flaws in this analysis raise fundamental questions about originalism itself.

A. ANTEBELLUM CITIZENSHIP

Lash argues that the antebellum usages of the term privileges and immunities of citizenship set the context for how the public understood the term in Section One during Reconstruction. The term, however, had a variety of overlapping and inconsistent uses, encompassing everything from organizational membership rights to local and state legal rights to basic rights of national citizenship. "Privileges" could even refer to the anti-democratic and illegitimate award of special favors to wealthy or connected persons (p. 19). Like the idea of citizenship, privileges and immunities contained both egalitarian and exclusionary strands.[19]

This multifarious background would appear to make it hard to locate a single public meaning for the term. Lash attempts to work around this by sketching two more precise *legal* meanings for the privileges and immunities of citizenship: the Comity Clause's privileges and immunities of citizens in the several states, which protected equal access to a limited set of state-conferred rights while traveling, and the wholly separate privileges and immunities of citizens of the United States, which focused on constitutionally enumerated rights (p. 26).

The problem is that one cannot so easily read free-standing natural rights out of these sources, nor can one so nicely trace the clear separation of state-based rights from federal rights. This is especially evident in Lash's reading of the pivotal case of *Corfield v. Coryell*. Although Lash correctly observes that Justice Washington's discussion of the content of privileges and immunities protected by Article IV was dicta, it is very hard to read Washington's language as *not* based on natural rights:

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19. On the complexity of citizenship concepts, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[20]

Washington proceeded to list illustrative examples of these fundamental rights, including government protection, the enjoyment of life, liberty, property, the right to pursue happiness and safety, the right to travel and engage in trade, the right to use the courts, and the right to vote.[21] Lash argues that Washington wrote descriptively, not normatively: he only meant that states had granted these rights historically, not that they *had to* grant the rights because they were inherent in the nature of men or free government. Radical Republicans, argues Lash, mistakenly read natural rights into the opinion, which caused Bingham to switch tracks to the privileges and immunities of United States citizenship language instead.

This gives far too little credit, however, to the radical Republicans and requires a rather cramped reading of Washington's text that is contrary to most scholarly views. To the contrary, a natural rights reading of the concept of privileges and immunities was common in the antebellum period.[22] Moreover, commentators such as Joseph Story, Chancellor Kent, and Joseph Pomeroy each argued for natural rights limits on state power.[23]

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20. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

21. *Id.* at 551–52.

22. *See, e.g.*, AMAR, *supra* note 13, at 177–78; NELSON, *supra* note 17, at 24–27; G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 765–66 (2014). *See also* David Upham, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1512–17 (2005) (suggesting that *Corfield* relied on a combination of natural and positive rights).

23. Story wrote:

> It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and transfer to B by a mere legislative act. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that any State legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional

And such a view, which posits pre-existing rights that states protect but do not confer, comports well with Washington's text. The point, however, is not that either a natural rights reading or a state-conferred reading is necessarily correct, but that both interpretations existed together and that each interacted with ideas of federalism and dual sovereignty. It is essential to any hermeneutics of "public" meaning to account for these overlaps and multiplicities, and Lash's effort to interpret them away is largely unsuccessful.

Lash also fails to capture alternative meanings for the term "privileges and immunities of United States citizenship." Lash relies heavily on antebellum treaties for evidence that "privileges and immunities of citizens of the United States" referred only to rights enumerated in the Constitution and did not include the general privileges and immunities granted by states or any general fundamental rights protected by states. The sources, however, do not support this fine of a distinction.

The antebellum treaty language Lash cites provided these new residents "the rights, advantages, and immunities of citizens of the United States" (p. 48). The treaties did not specify what these privileges were and did not expressly limit them to those enumerated in the Constitution.[24] Indeed, contract and property rights were often key rights for these residents. The protection of property claims of former Mexican citizens, for example, was a crucial aspect of the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War in 1848, and the treaty specifically referred to the protection of property and contract rights of the citizens who transferred and those who remained Mexican citizens. The treaty also connected those rights of contract and property to the protections afforded "citizens of the United

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> delegation of power. The people ought not be presumed to part with rights so vital to their security and well being, without very strong and positive declarations to that effect.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1393, at 268–69. The Constitution of John Bingham's Ohio included similar natural rights language. *See* Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 598–99 (2003). *See also* BARNETT, *supra* note 3, at 53–86 (exploring the natural rights influences in the founding and antebellum periods). *See also* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 166 (1977) (describing Story's view of Article IV as creating a general, or national, citizenship); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 245 (1984) (discussing Kent); Smith, *supra* note 9, at 371–77 (discussing Kent and Pomeroy).

24. *See* Boyce, *supra* note 14, at 46.

States."[25] The rights and privileges of these new residents were contested and legally ambiguous, and the treaties cannot serve as reliable sources for deriving specific meaning for such intentionally general language.[26]

Moreover, there is some evidence that the concept and language of national privileges *could* refer to state-based privileges. John Jay, in *Federalist* 2, stated that "To all general purposes we have uniformly been one people. Each individual citizen everywhere enjoying the same national rights, privileges, and protection."[27] Similarly, Attorney General William Wirt, in his 1821 opinion concluding that free blacks from Virginia could not be United States citizens, emphasized that the constitutional concept of "citizens of the United States" necessarily was limited to "those only who enjoyed the full and equal privileges of white citizens in the State of their residence."[28] Both Jay and Wirt connected United States citizenship with the traditional state-based privileges and rights, thus contradicting Lash's distinction between the two.

As these admittedly brief examples suggest, historical usages of the concept of the "privileges and immunities of citizens" and "privileges and immunities of citizens of the United States" contained uncertainty and ambiguity. This creates a building block problem. Recall that Lash argues that Bingham intentionally used the term "citizens of the United States" for the

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25. Treaty of Guadalupe Hidalgo, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 922. Lash cites Article IX of the treaty, which included a version of the language based on the Louisiana Cession Treaty, Article III (p. 50). Nothing in the Hidalgo treaty indicates that the rights associated with United States citizenship were limited to enumerated rights, and Article VIII indicates that the rights included full protection of property and contract (protections that Congress eroded through implementing legislation). On the treaty and its legacy, see RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT (1992); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201 (1996).

26. The new inhabitants began under United States jurisdiction with the basic laws of contract and property of their former sovereigns (France and Spain) and only transferred to the legal regime of the United States over time, as was common under international law in such cases. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 174–75 (2003). They attained basic rights, including contract and property rights, through territorial governments (that is, under federal law), and essential questions like whether people could be enslaved or own slaves were highly controversial. *Id.* at 189–91.

27. THE FEDERALIST NO. 2 (John Jay).

28. Rights of Free Negroes in Virginia, 1 Op. Att'y Gen. 506, 506–07 (1821). This position was then adopted by Wirt's successor and not reversed until the Civil War. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 513–14, 525 (2013). *See also* Boyce, *supra* note 14, at 40 n.65.

purpose of distinguishing enumerated rights from state-based fundamental rights. But since Bingham never actually said this, Lash must rely on the fact that the term was an antebellum "term-of-art" with a specific and discrete meaning. If, instead, there were multiple meanings or the terms at issue were intentionally vague, their antebellum "meaning" does not do the work Lash needs them to do when he analyzes the public meaning of the proposed Amendment in 1866.

B. FOURTEENTH AMENDMENT DEBATES

A similar issue arises in Lash's presentation of the debates surrounding the Fourteenth Amendment. Lash's analysis rests on the proposition that John Bingham changed the text of the draft of the Amendment from his initial parroting of the language of the Comity Clause to language invoking the antebellum term-of-art "privileges and immunities of citizens of the United States." Bingham did this, according to Lash, in order to have the Clause encompass the Bill of Rights but still exclude other fundamental rights not enumerated in the Constitution (p. 174).

Unfortunately for Lash, however, there is simply too much competing evidence that the fundamental rights view often associated with *Corfield* retained interpretive force throughout these debates.[29] The most glaring evidence of this is Senator Jacob Howard's references to the case in his speech introducing the Amendment to the Senate in May 1866.[30] As Lash notes, Howard, who was also on the Joint Committee on Reconstruction that drafted the text along with Bingham, gave the speech that became most closely associated with the Amendment during the congressional elections later that year (and even earned it the nickname of "the 'Howard Amendment'") (p. 227).

Howard's clear and deliberate listing of each of the Bill of Rights has made the speech a standard source for Fourteenth Amendment incorporationist arguments.[31] But it is his discussion of the other source of citizenship privileges that is most problematic for Lash. Howard began his speech by informing the Senate that Section One of the Amendment "relates to the privileges and immunities of citizens of the several states,"

29. *See* BARNETT, *supra* note 3; REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 57 (2006).

30. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866).

31. *E.g.*, CURTIS, *supra* note 13, at 88–89.

equating the Fourteenth Amendment phrase "privileges or immunities of citizens of the United States" with the Comity Clause. Thus, from the opening bell, Howard drew precisely the connection that Lash suggests Bingham intended to avoid in adding the phrase "citizens of the Unites States." Howard then stated that the purpose of the Comity Clause was "to put the citizens of the several States on an equality with each other as to all fundamental rights. . . ."[32]

This is already an enthusiastic embrace of the radical Republican view of the Comity Clause and American citizenship. But Howard continued, citing the very language from *Corfield* that had been a staple of radical Republican arguments and which Lash contends had been abandoned months before.[33] Howard's quote of *Corfield* included the language where Justice Washington defined the privileges and immunities protected under the Comity Clause as those that "are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union."[34] Howard then continued reading the opinion and Justice Washington's list of specific rights, including life and liberty, transactions in property, the pursuit and obtaining of happiness and safety, the conduct of trade and business, and even suffrage.[35] Howard asserted that these rights, along with the Bill of Rights, encompassed "a mass of privileges, immunities and rights" and were part of the substance of rights the Fourteenth Amendment sought to protect and empower Congress to enforce.[36]

Curiously, Lash says that Howard believed the content of Article IV privileges was "of little current importance" (p. 156).

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

33. At one point Lash becomes overly enthusiastic in his reading of the evolution of the usage of *Corfield*, stating that, "Radical Republican leaders in the Thirty-Ninth Congress ultimately stopped referring to *Corfield* altogether" (p. 114). Lash later acknowledges, albeit by downplaying it, that Howard's pivotal speech in late May quoted *Corfield* (p. 157).

34. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866) (quoting Corfield, *supra* note 12).

35. *Id.* Howard later in the speech expressly excluded suffrage from his list, consistent with the agreement of Republicans not to push for that right in 1866. *Id.* at 2766.

36. *Id.* at 2765. *See* AMAR, *supra* note 13, at 178 ("*Corfield* was . . . read broadly by Jacob Howard in his influential speech on section 1, which invoked both Washington's ode and the Bill or Rights as exemplifying 'privileges and immunities of citizens of the United States.'"). Howard also noted that the fundamental rights covered by Article IV "are not and cannot be fully defined in their entire extent and precise nature," CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866), suggesting that there are unenumerated rights even beyond those listed in *Corfield*.

Lash here misreads Howard's rhetorical understatement as essentially erasing Howard's reference to "fundamental rights." If Howard had believed that the list of specific rights in *Corfield* were unimportant, he would not have read the quote into the record, nor would he have immediately referred to them as the very rights included in the Privileges or Immunities Clause, and given them equal weight to the Bill of Rights. Despite Lash's attempts to reinterpret Howard's speech, it plainly embraced the radical Republican view of fundamental rights.[37] As with Lash's reading of antebellum law and *Corfield*, the point is not that the natural or fundamental rights interpretation of Howard and others was correct, but that throughout 1866 it was sufficiently prominent that it held some status in the "public" or general understanding of the language of Section One.[38]

C. CIVIL RIGHTS BILL

A similar flaw runs through Lash's treatment of the Civil Rights Bill and its relationship with the Amendment. The Civil Rights Bill was debated and drafted simultaneously with the Fourteenth Amendment. Its language bears strong similarities to Section One, and for these reasons it is a standard piece of Fourteenth Amendment history to read them in parallel.[39] And because it was supported with citations to *Corfield* and more of the fundamental rights analysis that Lash rejects, its links to the Amendment present potential problems for Lash's analysis.

Lash contends that the two should not be read together because "the texts were proposed by different men and for different purposes" and because John Bingham did not support

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37. Lash's attempt to downplay Howard's speech is one of the weaker sections of his book. He re-characterizes Howard's speech as adopting the non-fundamental rights reading of the Comity Clause, which Lash had earlier suggested was the standard antebellum reading. Lash then says that "nothing in Howard's speech" supports the claim that he advanced a fundamental rights view of the privileges of federal citizenship (p. 158). It seems to me impossible to read Howard's discussion of the Comity Clause and *Corfield* and their connection to Section One as "nothing."

38. *See* NELSON, *supra* note 17, at 123 (the framers and ratifiers expressed "conflicting commitments" about whether and how the Amendment secured fundamental or absolute rights and about the content of those rights; originalist analysis cannot resolve this issue).

39. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. For scholars who read the Civil Rights Act as important for understanding the Amendment, see, e.g., AMAR, *supra* note 13, at 194–97; GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 70–92 (2013); ZIETLOW, *supra* note 29, at 41–42; White, *supra* note 22, at 772–76. Seeing the Act as interpretively helpful is not the same as seeing it as limiting or identical to the Amendment, a mistake Amar identifies in earlier originalists, such as Raoul Berger.

the Act (pp. 113-114).[40] He also argues that the Bill was rewritten to conform to a more moderate view of Article IV and congressional powers, "likely" in response to Johnson's veto of the Freedmen's Bureau Bill (p. 135).

Once again, however, there is a sizable record pointing the other way. First, the initial sentence of the Amendment—the Citizenship Clause—was modelled after the first sentence in the Act. As Ryan Williams has recently pointed out, the Citizenship Clause was proposed by Senator Howard, who, referring to the debates over the Civil Rights Act and its veto, simply stated that "the question of citizenship has been so fully discussed in this body as not to need any further elucidation. . . ."[41] This direct incorporation of the Civil Rights Bill debates makes it implausible that we should read the two separately.

Later that summer, after the Amendment had been submitted for ratification, Lyman Trumbull, drafter and main sponsor of the Civil Rights Act, said in a widely published speech that Section One

> 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 . . . .[42]

Similarly, in describing the Civil Rights Act, Trumbull stated that

> [I]ts great feature was to confer upon every person born upon American soil the right of American citizenship, and every thing belonging to the free citizen of the Republic. [Cheers] In other words, it was 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.[43]

An even more detailed exposition of the fundamental rights defense of the bill was made in response to Johnson's veto in the House, where Representative Lawrence described the rights of

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40. *See also* Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 349 (2010).

41. Williams, *supra* note 28, at 544 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2890 (May 30, 1866)).

42. Senator Trumbull, Speech at the Chicago Opera House (Aug. 2, 1866), *in* SPEECHES OF THE CAMPAIGN OF THE 1866 ELECTION, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 6 (The Cincinnati Com. 1886).

43. *Id.*

"national citizenship" as the inalienable rights of men and as "existing anterior to and independently of all laws and all constitutions."[44] Lawrence went on to describe a theory of citizenship rights that linked the specific protections of the Civil Rights Bill with the commonly described fundamental rights of life, liberty, and property as their necessary corollaries.[45]

Lawrence presented a sophisticated justification for the Bill grounded in a fundamental rights view of national citizenship. Like Senator Howard, Lawrence cited the *Corfield* dicta to support the point. Lawrence's speech, and a similar one by Trumbull, was the primary defense for overriding Johnson's veto and enacting the Bill. So, although it is certainly fair for Lash to note the multiple possible justifications for the Bill and the fact that the Bill and the Amendment were not identical, it is equally fair for many other scholars to suggest that a fundamental rights view of citizenship and of the privileges of United States citizenship influenced both the drafters of the Amendment and the public who read these speeches. Lash fails to give this view the weight it deserves.[46]

Lash makes one other point in favor of de-linking the debates about national citizenship and its rights and privileges in connection with the Civil Rights Act from the Amendment: John Bingham's opposition to the Act. Lash argues that the Bill, and the fundamental rights views expressed by many of its supporters, should not be read into the section of Amendment drafted by Bingham. But Bingham was addressing the problems of the Bill *prior to* the Fourteenth Amendment. He opposed the Bill with *and* without the "civil rights" language, and he withheld his vote when Congress overrode Johnson's veto.[47] Even more importantly, in 1870 Bingham *voted in favor of the re-enactment of the Civil Rights Act after ratification of the Fourteenth Amendment* (a point not mentioned by Lash).[48] The best explanation for all of these votes is that Bingham—as he himself

44. CONG. GLOBE, 39th Cong., 1st Sess. 1832–33 (Apr. 7, 1866).

45. *Id.* at 1833.

46. Lash downplays Lawrence's speech, discussing it briefly in footnotes and missing its natural rights theme (p. 142 n.309).

47. Bingham "paired" his vote, meaning that he agreed not to vote, pairing with Representative Hubbard, who would have voted in favor of the override but was unavoidably absent. CONG. GLOBE, 39th Cong., 1st Sess. 1861 (Apr. 9, 1866).

48. CONG. GLOBE, 41st Cong., 2d Sess. 3884 (May 27, 1870) (House approval of report of committee of conference recommending approval of the Enforcement Bill which included the re-enactment of the Civil Rights Act of 1866). *See* Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140.

said—felt Congress lacked power to pass it absent constitutional amendment, and that the ratification of the Amendment resolved this issue.[49]

D. BLACK CODES

One of the most curious aspects of *the Fourteenth Amendment* is its failure to discuss the Black Codes. Historian Paul Finkelman admonished us several years ago that

> [t]o understand the meaning of the Fourteenth Amendment we must get beyond the debates in Congress, and attempt to understand the context in which the Amendment was framed and ratified. . . . An understanding of the Fourteenth Amendment begins, not in Congress, but in the history leading up to the Amendment.[50]

Finkelman added that understanding the Black Codes and the deep violence visited upon southern blacks is crucial to understanding how white Republicans in Congress understood their actions and words in the spring of 1866.

The Black Codes were intended to retain a coercive, race-based labor system by denying or restricting blacks from contract rights, property ownership, legal recourse and access to courts, freedom of travel, control over their own labor, and rights of family and relationships.[51] These attempts by southern whites to establish a subordinating legal system as a way of implementing the end of slavery infuriated northern Republicans. One of the primary activities of the Joint Committee on Reconstruction—the Committee that drafted the Amendment—was to investigate the Black Codes and the level of violence and abuse being waged by former Confederates on freed blacks.[52] It was an investigative as well as drafting committee, and its investigation informed everything Congress did on matters of Reconstruction.[53] When

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49. GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 120 (2013).

50. Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 390 (2004).

51. *See* DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA 178–84 (2014); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 199–210 (1988).

52. *See* Finkelman, *supra* note 50, at 400–02. *See generally* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess (1866) (hereinafter "REPORT OF THE JOINT COMMITTEE").

53. The vast bulk of its 800-plus page report that summer consisted of evidence gathered by the subcommittees on activities in the South. *See generally* REPORT OF THE JOINT COMMITTEE, *supra* note 52.

Representative Trumbull introduced the Civil Rights Bill, he specifically highlighted the need to "destroy all these discriminations" found in Black Codes.[54] The listing of rights in the Bill reflected those rights that had been deemed so valuable to the white South that they needed to be denied to blacks.[55]

This background is critical for understanding how Congress, and the nation, understood the powers being created by the Committee. Lash suggests that Bingham did not intend the Privileges or Immunities Clause to cover general "civil rights," because such rights were long the province of state governments (pp. 128-129). Yet the Black Codes that the Committee and Republicans intended to prohibit described themselves as "Civil Rights" acts.[56] The Committee received testimony about the importance to blacks of securing rights to property and contract, and about the violent efforts of whites to suppress such assertions of freedom and citizenship.[57] In reporting on its work in June, the Joint Committee considered it "impossible to abandon [the freedmen], without securing them their rights as free men and citizens" and that "[h]ence it became important to inquire what could be done to secure their rights, civil and political."[58] The Committee's answer was the Fourteenth Amendment.[59] The Committee further stated that, in the face of such violence, disorder, and denial of rights, Congress could not readmit Southern states without "providing such constitutional and other guarantees as will tend to secure the civil rights of all citizens of the republic" and that this could only happen through "such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic . . . ."[60] Congress and the public were well aware that the rights being denied Southern blacks, and which it intended to protect both in

54. CONG. GLOBE, 39th Cong., 1st Sess. 474. Several of the Black Codes were subsequently collected by the Freedmen's Bureau at the request of Congress. *See* LAWS IN RELATION TO FREEDMEN, S. EXEC. DOC. NO. 6, at 170–230 (2d Sess. 1867).

55. *See* White, *supra* note 22, at 773.

56. *See, e.g.*, Finkelman, *supra* note 50, at 403 n.83 (citing Act of Nov. 25, 1865, ch. 4, 1865 Mississippi Laws 82 ("an Act for conferring Civil Rights on Freedmen, and for other purposes")).

57. *Id.* at 404–09.

58. REPORT OF JOINT COMMITTEE, *supra* note 52, at xiii.

59. Although many the members of the Committee did not believe Section One covered voting rights, they addressed suffrage in a more circumspect, but potentially important, manner in Section Two. The Fifteenth Amendment and its Enforcement Acts rendered Section Two moot.

60. REPORT OF JOINT COMMITTEE, *supra* note 52, at xviii, xxi. Bingham signed this Report.

legislation and the new Amendment, were considered "civil rights."[61]

One of the hazards of mapping antebellum legal meanings onto the 1866 debates is that we miss the evolutionary nature of legal, political, and cultural meaning, especially in times of fundamental changes and re-ordering. Citizenship was shifting from an amorphous concept ill-defined in law, to a definite status directly connected to the nation as a whole. With this change came a new idea of federal powers and duties—protection of citizens within states. And with these shifts came changes to ideas of the privileges and immunities of citizenship and to civil rights. As George Rutherglen has recently observed, the term "civil rights" itself transitioned from referring to private common law rights before the war to a more public concept of access to the essentials of civil society.[62] The privileges of federal citizenship were merging with those of state citizenship, but the extent of that merger and its effect on the relative powers of federal and state governments over them remained unclear and in flux. Lash's relatively static approach to public, political, and legal meaning misses such changes.

E. ELECTION OF 1866

Lash suggests that the elections of 1866 provide strong evidence of public understandings, because the Amendment and its debates had been reported in the press extensively in the first half of the year, and also because President Johnson made the Amendment a focal point of the election and his effort to unseat Republicans from Congress (pp. 189-191). This is certainly true; the elections have been under-studied by constitutional law scholars and *The Fourteenth Amendment* goes a long way to help remedy this neglect.

But these elections also highlight some fundamental difficulties for public meaning originalism. Public understandings are rarely precise and the sea of arguments and rhetoric in which elections are held contain currents and cross-currents shallow and deep, none of which can be said to overtake all others. For instance, what are we to do with the statements of the drafters

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61. *E.g.*, Carl Schurz, Major-General, The State of the Country, Speech at the National Hall (Sept. 8, 1866), *in* THE PHILADELPHIA INQUIRER, Sept. 10, 1866, at 2, *available at* http://en.wikisource.org/wiki/The_State_of_the_Country (last visited May 21, 2015) (describing the Amendment and asking "Is it wrong that the civil rights of American citizens should be placed directly under the shield of the National Constitution?").

62. RUTHERGLEN, *supra* note 39, at 4; *see also* White, *supra* note 22, at 770–80.

from earlier that year? Lash discusses how Senator Howard's speech introducing the final Amendment to the Senate in May was widely published and cited (pp. 187-188). Yet Lash focuses on only one part of Howard's speech: the incorporation of the Bill of Rights (p. 189). As discussed above, Howard's speech included an extended quote from *Corfield* and equated the privileges of citizenship with the fundamental rights listed by Justice Washington in that case. Howard's speech, unlike Bingham's earlier speeches, set forth the more radical understanding of privileges and immunities, one that combined the Bill of Rights and state-based rights and which left room for unenumerated rights. By the same token, Bingham's speeches—which did not so clearly embrace open-ended fundamental rights—had also been widely published. But so had Senator Trumbull's speeches. Indeed, much of the debate surrounding both the Civil Rights Act (and especially the veto override) and the drafting of the Amendment had been covered by, and often reprinted in, the press.

This proliferation of overlapping meanings continued into the fall campaign. As Lash notes, many speeches "expressly tied Section One of the Fourteenth Amendment to the Civil Rights Act" (p. 194). What could the public have possibly taken from such references? On the one hand, these speakers indicated a position contrary to Bingham's that identified the substantive rights in the Act and the broad fundamental rights justifications of its supporters with the purposes of the Amendment.[63] On the other hand, the Act focused on the equality of those rights and the Amendment and its advocates also emphasized equal rights principles. And what does one make of speeches such as that of Speaker Colfax defining Section One as "the Declaration of Independence placed immutably and forever in our Constitution?"[64] Certainly the position of Johnson's allies—that the Act and the Amendment should be opposed because they were a dangerous centralization of power wrongly favoring blacks over whites—was rejected by the voting public. But just what did they reject? Did they disagree with his characterization of the Amendment and see it as a more moderate proposal? Or did they

63. Speech of Representative Colfax, Aug. 7, 1866, *in* SPEECHES OF THE CAMPAIGN OF THE 1866 ELECTION, *supra* note 43, at 14 (the Civil Rights Act "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.").

64. *Id.*

agree that it was a radical text and nonetheless embrace the expansion of national power to protect equal access to citizen rights?

The difficulty in trying to find a precise meaning for such generalized concepts is that politicians, especially during the election, favor rhetoric over precision. Political rhetoric inspires people to vote, while the ambiguity and vagueness help avoid disagreement over details. While it is possible to find references in the speeches and writings to some specific rights—the rights to speech, press, and assembly were some of the most common—these materials simply do not support Lash's broader claim that the Privileges or Immunities Clause encompassed *only* specifically enumerated rights (and did not include the fundamental rights interpretations of the Comity Clause or of citizenship rights generally).[65] The discussions during the election, to the extent they addressed citizenship and its privileges, were most often feats of high rhetoric, with occasional suggestive (not limiting) examples most likely to catch the public's emotions.[66]

The election debates are also unreliable evidence for Lash's type of public meaning originalism because much of the debate over the election focused not on Section One, but on Sections Two, Three, Four, and the general conflict between Congress and the President. The Report of the Joint Committee on Reconstruction devoted only one paragraph of its fifteen page substantive report of its activities to the issues covered by Section One, and even there the focus was on the connections between securing civil rights and the hope that Section Two could secure political rights for blacks to better enable their ability to protect their civil rights.[67] The Committee focused the rest of the report on the powers of Congress, the obstructionism of the President, the illegality of secession, and the illegitimacy and injustices of Southern governments. The report thus concentrated on justifications for other sections of the Amendment, for the refusal to seat Southern representatives, and, ultimately, for Congress's

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65. *See* FONER, *supra* note 51, at 257–58 (in the election of 1866 Republicans expressed differing views of the Amendment, but even moderates "understood Reconstruction as a dynamic process, in which phrases like 'privileges and immunities' were subject to changing interpretation").

66. William Nelson has a made a similar point in explaining conflicting Republican rhetoric regarding fundamental rights, equality, and states' rights. See NELSON, *supra* note 17, at 123 ("Members of Congress and the state legislatures were more concerned with the articulation of rhetorical principles that might inspire sound civic behavior than with the elaboration of precise doctrine that could be used to control faulty conduct.").

67. REPORT OF THE JOINT COMMITTEE, *supra* note 52, at xiii.

right to take a greater role in Reconstruction. The same can be seen in many of the campaign speeches, where the question of whether former Confederates should sit in the next Congress took center stage.[68] And, tellingly, President Johnson, in his series of speeches around the North that fall, "never mentioned the Fourteenth Amendment."[69]

The election of 1866 was certainly fought on the ground of how best to address Reconstruction, and the Amendment was a key component of that debate. But the issues were far too intertwined to identify one particular strand as having the focus and attention to rise above the others. These political debates included many differing "understandings" and representations about the Amendment, Section One, citizenship, rights, and privileges. The election did not reflect support for a particular interpretive position or for clearly defined, legalistic distinctions for the words used in the Amendment, and it could not have provided specific support for the idea that that the Privileges or Immunities Clause referred to ideas derived from antebellum treaties.[70]

Moreover, it is entirely plausible that the "meaning" of the election centered as much around the *direction* that Republicans were obviously headed as on the past out of which abolitionists and moderates had come. Consider, for example, the question of black suffrage. Although some radical Republicans in Congress supported black suffrage, many Republicans—especially those courting the votes of racist whites in border and western states and counties—believed it politically necessary to deny that Section One included political privileges. But it was also well-known that the party, and especially the radicals, wanted to go further.[71] During the campaign, the more radical Republican supporters argued that Congress should require black suffrage prior to the readmission of Southern states.[72] And it was common

68. Speech of Governor Morton, July 27, 1866, in SPEECHES OF THE CAMPAIGN OF THE 1866 ELECTION, *supra* note 43, at 3. *See also* Speech of Representative Shellabarger, Aug. 16, 1866, in *id.*, at 11–12; Speech of Representative Garfield, Aug. 22, 1866, in *id.*, at 18; Speech of Representative Ashley, Aug. 22, 1866, in *id.*, at 18.

69. FONER, *supra* note 51, at 265.

70. *See also* Boyce, *supra* note 14, at 62–63 (discussing ambiguous evidence about the amendment from the 1866 election campaign).

71. *E.g.*, Speech of Representative Garfield, Aug. 22, 1866, in SPEECHES OF THE CAMPAIGN OF THE 1866 ELECTION, *supra* note 43, at 18 (supporting black suffrage).

72. *See, e.g.*, VICTOR B. HOWARD, RELIGION AND THE RADICAL REPUBLICAN MOVEMENT, 1860-1870 140–44 (1990) (religious organizations, journals, and preachers who supported radicals advocated for suffrage during campaign and viewed it as a natural right).

for discussions about whether white rebels should regain political power and seats in Congress to refer to the political privileges of voting and representation as privileges of citizenship.[73] By voting for Republican candidates, voters would have expressed not only approval of their actions from spring 1866 but also support for the reasonable assumptions about their policies going forward. If significant movement in the direction of black suffrage was expected in fall 1866 should Republicans increase their majorities, this raises the possibility that the "public meaning" of the privileges of citizenship was that it *could* include political privileges.[74]

Similarly, the 1866 election could easily be read as approving the Republican version of constitutional interpretation that enabled them to pass the Civil Rights Act as part of their enforcement power under the Thirteenth Amendment (and so *rejecting* Bingham's view of congressional powers). Theirs was a generous, but certainly plausible, interpretation of the enforcement power in the Thirteenth Amendment, and one that allowed Congress significant leeway in interpreting the Amendment through enforcement. By approving that example, the public's understanding of the enforcement power (a power also included in the Fourteenth Amendment) could be seen as sufficiently broad to enable Republicans to interpret Section One of the Fourteenth Amendment just as the Democrats and Johnsonians proclaimed they would.

F. RATIFICATION

In focusing on the importance of the neglected 1866 election on our understanding of the Fourteenth Amendment, Lash downplays the ratification period itself. Of the over 300 pages of a book whose subject is the public meaning of the Fourteenth Amendment, only three pages address the ratification period after March 4, 1867 (the last day of the 39th Congress) through July 1868. The disproportionate focus on the period prior to

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73. *E.g.*, Address of Lorenzo Sherwood, Southern Loyalists' Convention, in REPORT OF THE COMMITTEE ON UNRECONSTRUCTED STATES 30 (1866).

74. *See, e.g.*, JAMES ALEX BAGGETT, THE SCALAWAGS: SOUTHERN DISSENTERS IN THE CIVIL WAR AND RECONSTRUCTION 179 (2004) (Southern loyalists viewed black suffrage as an important aspect of the Republican victory in 1866). Although Lash is firmly convinced that Section One was understood not to include a right to suffrage, historian William Nelson has shown that suffrage was one of the many unresolved aspects of the Amendment. NELSON, *supra* note 17, at 6, 124–33. As Nelson observes, even Bingham argued that the Amendment gave Congress power to require equal suffrage rights in the readmitted states. *Id.* at 130.

March 1867 is justified, for Lash, because of the dearth of evidence of the ratification debates in state conventions and legislatures.

The problem is that the ratification period extended for another seventeen months. In that time not only would the additional eight states necessary for ratification issue their support, but all those states came from the South, each having voted *against* ratification in the period surrounding the election.[75] At the end of February 1867, twelve states had rejected the Amendment, more than enough to defeat it.[76] Only with African-American political activism and participation in southern conventions and legislatures, which had been mandated by congressional Reconstruction Acts, would ratification eventually be secured.

Several scholars view the fact that ratification of the Fourteenth Amendment occurred only through military occupation of the South as undermining its political legitimacy. Some, like Bruce Ackerman, see this as evidence that Reconstruction was an extraordinary constitutional moment, and argue that in such moments the "normal" rules do not apply.[77] Other see the ratification "problem" as evidence that originalism cannot have purchase on claims of democratic "legitimacy"; rather, the true legitimacy of the Amendment lies in its acceptance over time in law, politics, and society.[78] Lash acknowledges the supposed legitimacy problem, but suggests that the public debates from 1866 are nonetheless a sufficient basis for finding reliable public meaning behind the text.

What these views share is an almost dismissive approach to the ratification process in the 1867-68 Southern states. Considering that Southern ratification engaged and included African-American men in the constitutional process far more significantly than at any point in American history to that time, that black participation was unquestionably central to the success of ratification, and that one of the purposes of the Amendment was to secure freedom and full citizenship for the formerly enslaved and nominally free black citizens, it is deeply

75. FONER, *supra* note 51, at 269.

76. EGERTON, *supra* note 51, at 220.

77. BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 6–7, 45–46 (1991).

78. Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013) (the fourteenth amendment "was a purely partisan measure, drafted and enacted entirely by Republicans in a rump Reconstruction congress," and was ratified "at gunpoint").

problematic to exclude this period from the analysis. *The Fourteenth Amendment*, by substituting the 1866 election (in which a relatively few blacks could participate) for the full period of ratification, shifts the focus away from the more radical activities of Congress and the states in 1867 and 1868 and overlooks the possible impact of understandings of the Amendment and its principles by black members of the ratifying public.[79]

To the contrary, it could be argued that the structure of congressional reconstruction in the South, and especially its biracial aspect, is an even *more* appropriate basis for investigating public understandings of the Amendment which would not be ratified until July 1868. To focus on such evidence, however, would require a shift in the type of materials and the interpretive approach taken by originalists. Rather than looking for references to the specific words used in the Amendment, the focus would need to shift to the actions taken by Congress and state legislatures as part of radical Reconstruction, and the debates and discussions about the more general principles animating the Amendment. It would also benefit from considering the views and actions of African-Americans who made ratification possible, and who pressed white Republicans toward suffrage and full citizenship rights. Unfortunately, this type of an approach to public meaning is missing from *The Fourteenth Amendment*.

III.

The failure of *The Fourteenth Amendment* to address how the Amendment was a response to the Black Codes and its shift away from the late-ratification period in favor of the 1866 election are both symptoms of a larger problem with originalist approaches to the Fourteenth Amendment: the tendency to ignore the voices and perspectives of those not already embedded within the political and legal process.[80] African-Americans play almost no role in *The Fourteenth Amendment*, despite the fact that they were

79. On the importance of black participation in post-1866 southern politics, including ratification, see STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 163–215 (2003); FONER, *supra* note 51, at 281–345.

80. *See* Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518–9 (2011); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012). Liberal or progressive originalists fare little better in this respect. *See, e.g.*, JACK BALKIN, LIVING ORIGINALISM (2014). On this problem, see James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. (forthcoming 2016).

essential to its ratification, important actors in pressing white Republicans to a more radical and progressive view, participants in the initial state and federal implementations of the Amendment's principles, and the initial intended beneficiaries of the Amendment. Similarly, feminists, who actively advocated for a broader interpretation of the Amendment—having been excluded from drafting, ratifying, and implementing it—make only a brief appearance in *The Fourteenth Amendment*, and that mainly as a foil for better explaining the views of John Bingham on a more general point about the Privilege or Immunities Clause. As we will see, this exclusion of alternative voices assumes a particular yet unspoken view of public meaning as a unitary concept formed by the very people who are benefiting from the exclusions. By adopting this restrictive view of the "public" and "public meaning," originalists risk embracing the very problem of democratic illegitimacy that many originalists seek to overcome.[81]

A. LEGAL TEXT AS EXCLUSION

It is a common feature of originalism to explore the legal meanings for constitutional terms at the time they were adopted. *The Fourteenth Amendment* follows this method by presenting an extensive analysis of antebellum uses of the terms "rights," "privileges," and "immunities" from cases, statutes, treaties, and congressional debates. But this focus on antebellum legal text and discourse excludes precisely those people who were barred from the "public" at the founding. This raises two related problems.

First, because women and blacks were not able to participate in the construction of the meaning of antebellum citizenship, those meanings lack an important level of procedural democratic legitimacy. Antebellum legal constructions of "privileges and immunities" and "citizenship" were the product of an exclusionary legal system and legal culture. An interpretive process that overlays antebellum legal meanings onto the Reconstruction Amendments is not likely to solve the procedural legitimacy problem confronting originalism. It is possible that one could explore the ways in which antebellum concepts were understood and used by excluded groups, and from that study

81. On the legitimacy problem of originalism, see Greene, *Fourteenth Amendment Originalism*, *supra* note 80; Greene, *Originalism's Race Problem*, *supra* note 80; Mark S. Stein, *Originalism and the Original Exclusions*, 98 KY. L.J. 397 (2009-10). For recent originalist responses, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010).

come to a fuller view of a meaning that is more broadly democratic. That, however, is not the aim of most originalists and is not the focus of *The Fourteenth Amendment.* Without that effort, reliance on common antebellum legal interpretations replicates the problems of democratic legitimacy.

Second, and more fundamentally, antebellum legal constructions of citizenship and its privileges were themselves tied to and constitutive of the continued oppression of those excluded persons. Not only were women, blacks, and Native Americans unable to affect the discourse, the discourse itself operated substantively to preserve white male dominance. The concept of citizenship in the antebellum period is notorious for its role in defining the lines of power and layers of privilege that secured the position of white men.[82] One of the reasons for keeping the "fundamental" privileges of property ownership within the control of states was to maintain Southern slavery, Northern Jim Crow, and coverture. It was critical to white male dominance to prevent the *political* discourses of liberty and democracy from merging with *legal* discourses of property rights, slavery, contracts rights, etc. To argue that natural rights were not understood to be encompassed by the Fourteenth Amendment Privileges or Immunities Clause because such rights were seen as connected to state, not federal, citizenship, is to replicate the very distinction that served to limit freedom and citizenship for excluded groups.[83]

The process through which antebellum legal culture created meanings for citizenship that defined and circumscribed race and gender can be seen in the opinions in one of the cases so pivotal to the framing of the Amendment, *Dred Scott.*[84] Justice Taney's opinion in that case is part of the anti-canon in constitutional law, and Justice Curtis's dissent is often praised for its more accurate treatment of both history and democratic principles. But, on the question of citizenship, both opinions reflect an exclusionary idea of citizenship.

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82. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 165–96 (1997).

83. I should be clear that I think this is the effect of Lash's approach but not his intent. Lash does excellent work establishing that this distinction between state and federal privileges and immunities was likely intended by John Bingham and that it was at least available to members of the ratifying public. My argument here is that the more restrictive methodological and interpretive choices Lash makes have the effect of re-implementing an antebellum view of citizenship and liberty that is ultimately inconsistent with an inclusive interpretive view and is incoherent compared to other values and meanings of the Reconstruction amendments, including those values that were advanced in public discourse at the time.

84. Scott v. Sanford, 60 U.S. 393 (1857).

Taney (following a position articulated by his predecessor as Attorney General, William Wirt) argued in favor of an egalitarian version of citizenship in which all who held the status were granted the same rights and privileges. For Taney, this was precisely why blacks could not be citizens, since they did not and could not possess the privileges of citizenship.[85] Curtis, on the other hand, would have recognized African-Americans as citizens. But citizenship for Curtis was not a zone of equality. It was tiered citizenship of separate status, differential privileges, and second-class membership; it was citizenship as understood in the Jim Crow North. Curtis accepted that citizenship privileges such as suffrage or even civil rights could be allocated based on race, even among citizens.[86] Curtis supported this argument with an analogy to women's second-class citizenship:

> One [State] may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.[87]

Women, and African-Americans by analogy, held a legally subordinated citizenship status on par with children and mentally ill white men.

This tension between citizenship as a male, whites-only egalitarianism, and citizenship as a set of differentiated, subordinating layers, ran throughout antebellum law. When advocates of the Civil Rights Act and the Fourteenth Amendment argued for a semi-egalitarian citizenship that included black men, in some ways they combined the two strands of Taney's and Curtis's opinions. Yet they, like Curtis, were caught betwixt and between, arguing for racial and gendered restrictions on suffrage as a means of securing and explaining the extension of other citizenship privileges to black men.

Full citizenship itself required the subordination of others. This can be seen in how states to the West often defined themselves as lands of opportunity for free white men and at the

85. *Id.* at 423.
86. *Id.* at 583 (Curtis, J., dissenting); *see also id.* at 587.
87. *Id.* at 583 (Curtis, J., dissenting).

same time excluded blacks. This problem came to a head with the admission of Oregon, which barred free blacks from entering the territory.[88] In 1850 Congress had passed a homestead act that gave land in the Oregon Territory to white and "half-bred Indian" citizens who settled there, but barred blacks.[89] The territory enacted racial exclusion laws banning free blacks from migrating there, and placed in its constitution in anticipation of statehood the migration exclusion, a ban on black ownership of property, a bar on black contract rights, and a denial of the right to sue.[90] The very creation of places of freedom and economic opportunity—places where the privileges of citizenship could bring the most benefit—depended on the subordination of black citizens, even to the point of physical and legal exclusion.

This symbiosis between privileged citizenship and legal and political subordination was most extensively evident in the law and practice of gender. As legal historian Laura Edwards has observed, "[M]en's legal status depended on the subordination of women. They held the civil and political rights necessary to fulfill their roles as heads of households, a position that also gave them rights over their wives and over all women to a lesser extent."[91] The exclusion of women from citizenship rights, and the demarcation of their citizenship role as uncompensated household labor, enabled men to claim the very citizenship from which women were barred.[92]

The Civil War and Reconstruction exposed the tensions inherent in the political rhetoric of democratic, egalitarian citizenship and the legal language and structure that helped create and enforce subordinations. But it was largely through the voices of those excluded from official or legal speech and writing that this tension was exposed most clearly. The language of law did not itself provide a way to understand these contradictions; indeed, law generally seeks to stabilize contradictions by explaining exclusions, not by resolving them. Traditional approaches to originalism that attempt to define fixed meanings from

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88. OR. CONST. of 1857, art. I, § 35. *See* RUTHERGLEN, *supra* note 39, at 23.

89. Oregon Donation Land Act, 9 Stat. 496 (1850).

90. Elizabeth McLagan, *The Black Laws of Oregon, 1844-1857*, BLACKPAST.ORG, http://www.blackpast.org/perspectives/black-laws-oregon-1844-1857 (last visited Apr. 23, 2015). Many Republicans, including John Bingham, opposed admission of Oregon because of these provisions.

91. LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 138 (2015).

92. *Id.*; *see generally* LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980).

contemporaneous legal and formal political culture and texts simply have no means of accessing alternative hermeneutics.

This exclusionary problem runs throughout *The Fourteenth Amendment*. Chapter Two frames the question of citizenship and its privileges within antebellum legal battles. That focus then restricts how Lash evaluates the framing debates, ratification, and post-ratification implementations. Congressional investigations of the situation of blacks in the South play little role in the analysis, which hones in on the debates over the "legal term-of-art" identified earlier. Ratification debates collapse into debates in which the words of the text (rather than its principles) are discussed, which, it turns out, were during the 1866 election rather than the subsequent southern ratification. Thus we are left, at the end of the day, with an interpretive landscape devoid of some of the key tensions and potential reinterpretations that were at issue even at the time of the Amendments.

B. FREDERICK DOUGLASS & VICTORIA WOODHULL

The two episodes where *The Fourteenth Amendment* addresses the views of blacks and women each reveal this problem. In his brief discussion of the full ratification period, Lash quotes an important essay by Frederick Douglass from the *Atlantic Monthly* in January 1867 (p. 216). Lash uses the essay to highlight Douglass's discussion of speech, press, and religion, which supports Lash's general point about the Bill of Rights as privileges of citizenship. But the speech—titled *An Appeal to Congress for Impartial Suffrage*—was primarily a forceful case for the centrality of suffrage and political rights as the essential means of fighting the slave power and eliminating caste.[93] By pulling the Bill of Rights paragraph out of context, Lash misses the heart of Douglass's point that the vote was the most important right of citizenship. Significantly, Douglass published this just after the Republican victory of 1866, during ratification of the Fourteenth Amendment, and prior to the Reconstruction Acts. It was a point that he and other African-American leaders had been making consistently and urgently for over two years. And it was the direction that the newly elected Republicans would eventually take, in no small part because of the constant demands of black Republicans.

93. Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, THE ATLANTIC MONTHLY (Jan. 1, 1867), *available at* http://www.theatlantic.com/magazine/archive/1867/01/an-appeal-to-congress-for-impartial-suffrage/306547/.

Consider what Douglass writes in the paragraph immediately following the one Lash quotes about First Amendment freedoms:

> This evil principle [slavery and master-class ideology] again seeks admission into our body politic. It comes now in shape of a denial of political rights to four million loyal colored people. The South does not now ask for slavery. It only asks for a large degraded *caste*, which shall have no political rights. This ends the case. Statesmen, beware what you do. The destiny of unborn and unnumbered generations is in your hands. Will you repeat the mistake of your fathers, who sinned ignorantly? or will you profit by the blood-bought wisdom all round you, and forever expel every vestige of the old abomination from our national borders? As you members of the Thirty-ninth Congress decide, will the country be peaceful, united, and happy, or troubled, divided, and miserable.[94]

Throughout the essay, Douglass argues for suffrage as an essential privilege of republican government, the denial of which produces a caste society that is the antithesis of democracy and the vestige of slavery. His invocation of rights of speech and press and religion are meant to show how terrible slavery ideology can and must be, and to bring home the point that broad-based suffrage is the essential right to protect all other rights.

It is notable also that this was the second of two post-election essays Douglass wrote for the *The Atlantic Monthly*. In December 1866, he first took up the question of what Congress should do with its victory.[95] That essay reflects Douglass's understanding of the complexities of American society and government. He argued both for a more aggressive policy, especially in favor of suffrage, and that total centralization of powers is wrong and impractical. Indeed, the problems inherent in federalism themselves speak loudly in favor of full voting rights, according to Douglass, for universal suffrage is how state and local governance can be merged with protection of basic human rights and elimination of caste. But there is no question for Douglass that the purpose of all government was the protection of human rights. As he wrote in his concluding paragraph:

> Fortunately, the Constitution of the United States knows no distinction between citizens on account of color. *Neither does it know any difference between a citizen of a State and a citizen of the United States*. Citizenship evidently includes all the rights of

94. *Id.*

95. Frederick Douglass, *Reconstruction*, THE ATLANTIC MONTHLY (Dec. 1866), *available at* http://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561/.

> citizens, whether State or national. If the Constitution knows none, it is clearly no part of the duty of a Republican Congress now to institute one. The mistake of the last session was the attempt to do this very thing, by a renunciation of its 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. This unfortunate blunder 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.[96]

Douglass rejected the idea of separate citizenships and privileges. For him such distinctions were contrary to the Constitution (here he espoused the radical version of the pre-Amendment Constitution) and amounted to a perpetuation of caste-based slave society. He also argued that the election—which itself wrongly excluded four million loyal black citizens—showed that

> the people have emphatically pronounced in favor of a radical policy. . . . [T]hey have everywhere broken into demonstrations of the wildest enthusiasm when a brave word has been spoken in favor of equal rights and impartial suffrage. Radicalism, so far from being odious, is now the popular passport to power.[97]

This is a very different view of the election and the structure and relationship of rights than presented in *The Fourteenth Amendment*. Rather than being a confirmation of a moderate position, Douglass argued the election embraced the radicals. Rather than supporting the fine distinctions among levels and types of citizenship based in antebellum legal terms-of-art, Douglass saw a unified citizenship where rights of state and United States citizenship combined as basic human rights. Where suffrage was deferred and carved out of constitutional citizenship, Douglass saw it as the pinnacle of basic rights and essential to republican government.

Much of what Douglass wrote was consistent with positions of many white radical Republicans with whom he worked. But it would be limiting to see only those connections, for these were positions argued by African-Americans writing and meeting in

96. *Id.* (emphasis added).
97. *Id.*

conventions for many years, and particularly from 1864 through 1867. African-Americans pressed these views into the public debate and engaged their white friends and advocates to support the positions. Frederick Douglass's writings were but the tip of an iceberg of African-American views on citizenship, freedom, and equality.[98]

The other moment in *The Fourteenth Amendment* where excluded perspectives make an appearance is where Lash discusses congressional debates over Victoria Woodhull's petition for Congress to pass legislation mandating women's suffrage (pp. 234-242). Lash quotes briefly from the petition, highlighting its references to the Fifteenth Amendment and the Privileges or Immunities Clause of the Fourteenth. At that point, however, Lash switches to a discussion of the arguments of Albert Riddle, Woodhull's attorney, and the debates among members of the House Committee on the Judiciary, which received the petition. Riddle cited *Corfield* to support suffrage as being a privilege of citizenship, and the committee responded with a conservative reading of the Clause that aligned it with the Comity Clause (pp. 235-238).[99] Lash sees the report as limited mainly to acknowledging the widely accepted point that the Privileges or Immunities Clause did not protect suffrage and otherwise as not a helpful episode in considering the Amendment's public meaning.

Unfortunately, Lash's focus on the legal debates stretching backwards to the antebellum period appears to cause him to miss other aspects of the public discourse. Woodhull's own petition is largely passed over in favor of the legalistic arguments of her counsel.[100] Such legal argument necessarily tracked prior arguments about the privileges of citizenship, but it also narrowed

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98. For example, see *Proceedings of the National Convention of Colored Men* (Syracuse, NY), Oct. 1864; *Proceedings of the Colored People's Convention of the State of South Carolina* (Charleston, SC) Nov. 1865, *reprinted in* 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865, 288–302 (Philip S. Foner & George E. Walker eds., 1980); JOHN MERCER LANGSTON, FREEDOM AND CITIZENSHIP (1883) (reprinting his earlier essays). *See also* EGERTON, *supra* note 51, at 182 ("African American journalists pioneered many of the arguments later employed by Washington politicians and even by the most progressive white Republicans, who had to answer to the more moderate white voters in their home districts.").

99. *See also* HOUSE REPORT ON MEMORIAL OF VICTORIA C. WOODHULL, CONG. GLOBE, 41st Cong., 3d Sess., H.R. REP. NO. 22 (1871).

100. A.G. Riddle was a former congressman, a prominent Washington lawyer, and an advocate of women's suffrage. He worked closely with suffrage proponents such as Woodhull. *See* JILL NORGREN, BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT 58–59 (2007).

the frame to exclude Woodhull's broader claims.[101] There is much more going on here than traditional originalist approaches usually acknowledge. First, there is the distinct possibility that the stated arguments and views of male Republicans shifted depending on the subject. Republicans such as Bingham were expansive on issues of suffrage and citizenship and federal powers when addressing the claims of white males and eventually those of black men. But when the topic shifted to women's rights, so too did the rhetoric and interpretive posture.

Victoria Woodhull challenged Bingham on precisely this point. In a (at the time)[102] well-known public speech she gave after the Committee rejected her petition and which she also published, Woodhull took Bingham to task for his hypocrisy in supporting an aggressive use of congressional power over suffrage with the Enforcement Act of 1870, which he authored, and his dismissal of her petition. As she said, "It is almost impossible to conceive that the author of this report was the same person who drew the XIV. Amendment, and AN ACT to enforce the rights of citizens of the United States to vote in the several States of the Union, and for other purposes, approved May 31, 1870."[103] Then, after quoting the Enforcement Act, she continued:

> Thus we find Mr. Bingham, in the XIV. Amendment, declaring that *all persons are citizens*; in an Act approved May 31, 1870, making it a penal offense for any officer of election in any State to refuse to permit *all citizens* the *same* and *equal* opportunities to perform the prerequisites to become qualified to vote; less than a year afterward informing us that women are *not citizens*, and on January 30, 1871—less than two months thereafter—very decidedly expressing a contrary opinion, and adding that Congress had no power to enforce their rights as citizens in the

101. Lash also downplays the minority's report, which was about three times as long as Bingham's and engaged in a full defense of voting as a necessary privilege of citizenship. It cited extensively from antebellum sources—domestic and comparative—to show that voting had long been seen as the essential and defining right of citizenship. VIEWS OF THE MINORITY ON MEMORIAL OF VICTORIA C. WOODHULL, CONG. GLOBE, 41st Cong., 3d Sess., H.R. REP. NO. 22, pt. 2, at 2–12 (1871).

102. Woodhull rose to prominence as a women's rights advocate in 1870 when she announced her candidacy for president in 1872. She was a well-regarded speaker, and her speeches after the petition to Congress were given at the height of her popularity. *See generally* LOIS BEACHY UNDERHILL, THE WOMAN WHO RAN FOR PRESIDENT: THE MANY LIVES OF VICTORIA WOODHULL (1995).

103. Victoria C. Woodhull, A Lecture on Constitutional Equality, Delivered at Lincoln Hall, Washington, D.C. (Feb. 16, 1871), *available at* http://memory.loc.gov/cgi-bin/query/h?ammem/nawbib:@field(NUMBER+@band(rbnawsa+n1569)).

> States, which is a complete stultification of the Act of last May.[104]

Moreover, Woodhull's constitutional argument was based not on a backward-looking common law analysis but on a progressive natural-rights constitutionalism. As she said

> Those who look upon woman's status by the dim light of the common law, which unfolded itself under the feudal and military institutions that establish right upon physical power, cannot find any analogy in the status of the woman citizen of this country, *where the broad sunshine of our Constitution has enfranchised all.*[105]

Her argument was essentially that women, as people and citizens, always held an inalienable right to sovereignty and therefore suffrage, and that the denial of suffrage had been a long error and a bald assertion of illegitimate power by men ("it is by usurpation only that men debar [women] from their right to vote"[106]). The language of the Fourteenth and Fifteenth Amendments—especially when read together—recognized women as citizens and recognized the right of citizens to vote as a basic requirement of citizenship.

She further argued that the basic fundamental rights protected by the Constitution support political rights as well: "Women have the same inalienable right to life, liberty, and the *pursuit of* happiness that men have. Why have they not this right politically, as well as men?"[107] She listed the citizenship contributions of women—property ownership, tax payment, raising children (including men), and commerce—and challenged the Committee to explain how these recognitions of citizenship supported a denial of the basic right to vote.[108] Indeed, her argument tracked, in many ways, the political rhetoric of Republicans when they argued for civil and political rights for black men, especially in the way she tied together grand principles

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104. *Id.* at 26. When Woodhull had first approached Bingham as Committee Chair about her petition, he replied that she was not a citizen. On that particular point she convinced him otherwise by quoting Section One of the Fourteenth Amendment. See UNDERHILL, *supra* note 102, at 99. This seems to me to support the argument that when the topic of women's rights came up, men had trouble thinking straight about even their own handiwork.

105. Victoria C. Woodhull, Address on Constitutional Equality to the Judiciary Committee of the Senate and the House of Representatives (Jan. 2, 1871).

106. *Id.*

107. *Id.*

108. *Id.*

to general constitutional language and contrasted that with the practical failure to implement the ideals.

Bingham's response for the Committee, when contrasted with Woodhull's Memorial, is strikingly devoid of the high-flying Republican rhetoric that he and others used when speaking of male rights. It reads much more like a retreat into the dark recesses of restrictive and cramped legalese, defining the Amendments and congressional power narrowly. Bingham's report even becomes internally contradictory, citing the long, natural rights and pro-suffrage passage from *Corfield* only to argue that the passage supports the committee's narrow, anti-suffrage, equality-only reading.[109] The minority jumped on this point, calling this "an exceedingly unfortunate citation" for the majority since the quote actually supported seeing suffrage as a fundamental right.[110]

Woodhull presented a more developed, and publicly oriented, version of her arguments in her speech in February, arguments differing significantly from the Committee's view (although she incorporated some positions set out by the Committee minority[111]). For example, she argued that suffrage flowed directly as a natural right from the right to both liberty and the pursuit of happiness, since people are not free who cannot participate in governance and they were also prevented from pursuing their own happiness.[112] She also argued for a constitutionalism of principles, not applications. Just as the fact of slavery did not undermine the principles of equality and freedom set forth by the founding fathers, so too the history of gender prejudice did not negate the true principles of equal political powers.[113] Where the committee had argued that the Fourteenth Amendment had changed nothing regarding the privileges of

109. HOUSE REPORT ON MEMORIAL OF VICTORIA C. WOODHULL *supra* note 99, at 2. It is odd that Bingham cited *Corfield*, given his aversion to using it in 1866, and given the obvious ammunition it gave the minority.

110. VIEWS OF THE MINORITY ON MEMORIAL OF VICTORIA C. WOODHULL, *supra* note 101, at 7.

111. This is not surprising. Woodhull had sought out and befriended Representative Benjamin Butler after declaring as a presidential candidate, since he was a known advocate for women's suffrage, and he had been instrumental in arranging her appearance. They probably collaborated on the strategies and arguments surrounding the memorial. UNDERHILL, *supra* note 102, at 97–103.

112. A Lecture on Constitutional Equality, *supra* note 103, at 4–5 (pursuit of happiness) and 9–10 (liberty).

113. *Id.* at 10. Although Woodhull's work is not used by them, its themes—and especially its emphasis on principle over application—fits well with Calabresi and Rickert's analysis of anti-caste principles and the Fourteenth Amendment's relation to sex discrimination. *See* Calabresi & Rickert, *supra* note 81.

citizenship, Woodhull argued that the Amendments had corrected the long failure of reality to match principle.[114]

Woodhull's arguments drew important parallels with the claims made by African-American men about suffrage as an inherent citizenship privilege, especially on the point of suffrage and political rights being the most important rights which secure all others. But she also tapped into the political theory and rhetoric of the women's movement. Ideas about citizenship privileges and gender had been part of feminist thinking since at least the Seneca Falls Declaration of Sentiments in 1848, and by 1869 women such as Virginia Minor (whose assertion of the right to vote the Supreme Court would reject in 1875[115]) were arguing for women's suffrage as a right of citizenship under the Fourteenth Amendment.[116] Thus, like Douglass, Woodhull wrote within a context of an engaged community seeking access to full citizenship. Her rhetoric invoked common themes and ideas, ones which her audiences—her alternative "public"—would have known well, even if many in the dominant public, like John Bingham, retreated at the thought.

C. RETHINKING PUBLIC MEANING

Unfortunately, traditional originalism misses these texts and arguments. Lash's treatment of Douglass and Woodhull is fleeting and largely instrumental—Douglass for the purpose of supporting the Bill of Rights as privileges of citizenship, Woodhull for analyzing what John Bingham and his Committee said about the Privileges or Immunities Clause. Even though Douglass and Woodhull themselves wrote and spoke extensively on issues of citizenship, rights, liberty, equality, citizenship privileges, and the Constitution, and even though both reflected and engaged with larger "publics," neither plays much of a role in Lash's effort to unearth the public meaning of the Fourteenth Amendment.

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114. Her lecture also included a common argument of post-war suffragists that women were more entitled to suffrage than blacks, so black suffrage necessitated women's suffrage. A Lecture on Constitutional Equality, *supra* note 103, at 12. On the problem of racism and this period in feminism, see generally FAYE E. DUDDEN, FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA (2011); PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 64–74 (1984).

115. Minor v. Happersett, 88 U.S. 162 (1875).

116. The Declaration declared suffrage the most important inalienable right. It also demanded access to a full range the rights and privileges of citizenship, including occupation, religion, and education. Declaration of Sentiments, Seneca Falls Convention (1848). On Minor, Woodhull, Belva Lockwood, and other women's suffrage activists, see NORGREN, *supra* note 100 at 53–66 (2007).

This failure to capture excluded perspectives presents two major obstacles for traditional originalism. First, originalism has been subject to the critique—first leveled by Paul Brest in 1980—that it privileges the views of a minority of the public comprised of white males who held political power at the time of the framing, even though our current Constitution, and our current understanding of democratic legitimacy, reject such political subordinations.[117] While this critique is usually made against founding-era originalism, for originalism to *also* do this with the Reconstruction Amendments, which themselves expanded citizenship and for which there are extant records of the views and ideas of African-Americans and women, only makes the exclusionary critique even more trenchant.

Second, this problem reveals a conceptual misperception of the very thing that originalists advance as a legitimating principle: public meaning. Lash grounds his approach on public meaning. Yet the "public" from which he constructs historical meaning is consistently exclusionary. In relying on antebellum legal meanings for the ideas of citizenship privileges Lash adopts meanings created by lawyers, judges, members of congress, treatise authors, and treaty drafters. Women, blacks, and other racial minorities were almost entirely excluded from these groups. Moreover, the very concepts at issue—citizenship and its privileges—were among the key legal tools with which law and the legal system perpetuated the exclusion and subordination of women and blacks. African-Americans, and to a lesser degree women, did gain some influence, at least politically, during the War and Reconstruction, both by voicing their own views and through the political actions and speeches of their white Republican friends. Yet Lash defines the "public" of Reconstruction as the moderate Republicans, highlighting a consensus view among white men, including conservatives, and marginalizing competing views of the more radical white men who worked with blacks and women in developing political and legal arguments. Lash's operational "public"—the group from whom he derives interpretive force—is in fact a subgroup of the actual public.

The justification for this is that the people who ratified the amendments are the ones who constitute the public. But even there Lash runs into problems, since he largely ignores the

117. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 (1980); Stein, *supra* note 81. *See also* Greene, *supra* note 80.

Southern ratification and post-ratification Reconstruction, in which African-Americans had a significant role. It also ignores the possible arguments and ideas being generated among feminists, who still had no political role in ratification.

The fragmentation of the nineteenth-century public—often, but not exclusively through legally enforced restrictions—renders any attempt to find *a* public meaning inherently flawed. Too often originalists assume a *single* public from which meaning can be determined. But in fact the assumption of a historically singular public is itself an exclusionary practice, one that defines away dissenting voices and marginalizes the alternative "publics" that were formally excluded from public forums such as Congress, courts, and the press. Public meaning originalists operate under a dual myth that first assumes that they can identify a consensus of meaning among dominant speakers and writers, and second that this purported consensus reflects the meanings adopted by those who were systematically excluded from public forums. Without a deliberate effort to recapture lost voices, however, the "public" in public meaning originalism remains both exclusionary and historically erroneous.

To some degree this error stems from another commitment of traditional originalism, that of fixed meaning. Lawrence Solum has described the "Fixation Thesis" as a core unifying principle of originalism.[118] Even within originalist methods this fixation idea runs into difficulty, since important constitutional terms, not to mention their cultural meanings, are ambiguous, vague, and contested. This problem is even more acute during times of change and transition (which are often precisely the times when constitutional creation takes place). This is why we see Lash struggling in *The Fourteenth Amendment* to manage the disputes among Republicans with a resulting Procrustean Bed that cuts off strong evidence of a fundamental rights view and leaves a more conservative enumerated rights perspective on the table as the singular meaning.[119]

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118. Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011).

119. Lash attempts to avoid this charge by suggesting that his study only defines a floor and a ceiling (pp. 279–280). Lawrence Solum has recently cited Lash's analysis as illustrative of his own view of fixation as representing a range of meanings. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning* 75–76 (unpublished manuscript) (on file with Georgetown University Law Center), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559701. Yet Lash's range of meaning is quite narrow. Even within traditional originalism he excludes both of the other main originalist readings, the equal rights and the fundamental rights theories (pp. 280–287).

The fixation problem also shows itself in Lash's tendency to treat the language of the Amendment as isolated phrasings reflecting distinct concepts. He concludes that privileges of citizens of the United States must be different from those of state citizens, while each must differ from due process, and in turn all differ from equal protection. Although this is certainly one valid interpretive approach, it is not the only one, and it is not the one most plausible within a public meaning framework. It is unlikely that the ratifying public, let alone those excluded from ratification, understood this type of textual precision and separation. The search for fixed meanings prevents Lash from exploring the ways in which the Amendments spoke through duplication, overlapping and intertwining the meanings of phrases and clauses. It may well be that the language of the Reconstruction Amendments interconnects in ways that resist legal precision and the type of fixed clarity Lash searches for (which may explain why the texts have been so maddening for judges and lawyers ever since).[120]

The fixation problem becomes even clearer when one considers that there was a much wider range of "publics" speaking about and experiencing the problems of liberty and citizenship. By circumscribing the very concept of public in a way that adopts historical exclusions, Lash has created a false public and a false range. The weight he gives to the fundamental rights approach, for instance, would be quite different were he to take more account of African-American and feminist views of citizenship and its basic privileges.[121] Neither blacks nor feminists accepted the fine distinctions regarding rights and privileges, and both groups read terms like "citizenship," "privileges," and "equality" capaciously and as mutually supporting. As people who were excluded from power—political, economic, and social—they perceived most clearly what was actually considered fundamental in practice. They also understood the importance of those rights and privileges as an interlocking bundle, secured by suffrage.

120. *See* Richard Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CON. L. 1295, 1306–07 (2009); Boyce, *supra* note 14.

121. In a forthcoming work, I suggest that the perspectives of African-Americans and feminists deserve even greater weight than other groups (and certainly greater weight than the defeated slave power), precisely because black men and then all women were subsequently incorporated into the constitutionally recognized public. That is, originalist perspectives on the historical public should, to function as valid interpretations of *our* constitution, do *more* work in recovering and giving meaning to the historically excluded perspectives. One need not, however, agree with this particular extension of my analysis to accept the criticism of originalism's concept of the public.

Anything short of that meant continued subordination, whether in education or local government or business or family or any number of arenas.[122]

The question is whether there is any possibility of a public meaning originalism given the fact of a fractured historical public. Developing a theory of public meaning originalism is beyond the scope of this review, but a few thoughts are perhaps in order.[123] First, rather than seeking a fixed and singular view of usage and meaning it will be important to give more weight to competing or overlapping meanings. Lawrence Solum's idea of a range of meanings remains relevant here.[124] There will no doubt be different views about how tightly to draw the accepted range, with candidates including everything from a more restrictive effort to identify the broadest possible consensus set of usages to a far more open idea of a range of available meanings. However, if resolution of the exclusionary problem is taken seriously, there must be some significant inclusion of excluded voices in whichever version one adopts.

Second, there should be some effort to recognize how excluded groups, when arguing and acting for inclusion, often reformulate received meanings in ways that dramatically reconfigure the terms at issue. As we have seen, ideas of citizenship and civil rights were shifting and being redefined throughout this period. Reformist publics often take the language of dominant publics, extracting reformist principles to reconfigure and reapply those terms as consistent with reformist ideas and goals. Not only is such reconfiguration part of the overall public discourse, it is often essential. This is why one cannot, as does Lash, privilege traditional usages of terms such as "civil rights" without at the very least also accounting for a range of reconfigured meanings; and quite possibly one may need to privilege the reformulated meaning ahead of the traditional meanings, especially where the traditional meanings themselves served to perpetuate the very problem (*e.g.*, racial and gendered exclusions) that the constitutional changes appear to address.

Third, recognition of the role of excluded publics may also require a more forward-looking approach to meaning formation.

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122. For feminists, part of the critique involved the questioning of the emerging legal construction of the "public-private" distinction. Just as John Bingham assumed Victoria Woodhull was not a citizen, so did most men—and the law they wrote—assume that most women were not properly part of the "public." Feminism has long challenged that trope.

123. For more development of this idea, see Fox, *supra* note 80.

124. *See* Solum, *supra* note 119.

As discussed above, the question of suffrage as a privilege of citizenship under the Fourteenth Amendment can be seen, as Lash sees it, as plainly decided (in the negative) by the expressions of drafters and at least some of the Amendment's advocates in the 1866 election campaign. But this excludes the views of many African-Americans, including Frederick Douglass, who saw suffrage as an essential aspect of citizenship and who, along with white radical Republicans, implemented universal male suffrage on the ground in the South in 1867 and 1868. The extent to which the reformist meanings or the conventional meanings are employed becomes part of the choice we make today, whether under originalism or under other forms of historically based interpretive inquiry. Due regard for the views of excluded groups would suggest, at the very least, that one need not adopt the meaning expressed by those legislators most anxious about their election prospects as they competed in a white male suffrage environment where they needed to cater to white racism.

These and many other things may follow from recognition of multiple publics and the legitimacy problem inherent in historical excisions. The point here, however, is more to identify the problem and see how it hinders an otherwise impressive work on the constitutional history of the Fourteenth Amendment.

CONCLUSION

With *The Fourteenth Amendment*, Kurt Lash gives us perhaps the most thorough investigation of the background for the Privileges or Immunities Clause. It is well worth the praise it has received. But in the quality of its execution it also reveals the deeper flaws of originalism, and in particular of the developing field of public meaning originalism.

The Reconstruction Amendments—having been ignored or poorly engaged by originalism prior to Lash and other recent scholars—is precisely the point at which originalism has the potential to move beyond the exclusionary approach that many consider a fatal flaw. As Lash's research shows, originalism, because it takes historical materials seriously, can advance our own thinking about the possible meaning(s) of constitutional text and can expand our historical knowledge of the period surrounding the ratification of its provisions.

In particular, the move to a focus on public meaning is a promising one, since, unlike the framers or ratifiers, the concept of "public" opens the door to a robust and more democratic

approach to constitutional history and interpretation. Where *The Fourteenth Amendment* falls short is in its failure to expand its historical lens to recognize the scope of the "public" and to see that there were in fact multiple, overlapping publics from which constitutional meanings can be gleaned. Doing so will require a version of originalism far more receptive to competing ideas, ambiguous and contradictory meanings, and an open (and often squirrelly) world of public and political rhetoric. But it will also help bring the long-excluded ideas and perspectives of our democracy into the field of debate over the meaning of the Constitution.