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Randy E. Barnett  
*Georgetown University Law Center*

Evan D. Bernick

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# THE ORIGINAL MEANING OF “PRIVILEGES OR IMMUNITIES”

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## THE PRIVILEGES OR IMMUNITIES CLAUSE, ABRIDGED: A CRITIQUE OF KURT LASH ON THE FOURTEENTH AMENDMENT

*Randy E. Barnett\** & *Evan D. Bernick\*\**

The Privileges or Immunities Clause of the Fourteenth Amendment reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>1</sup> Upon confronting this language, the first question most ask is what exactly are the “privileges or immunities of citizens of the United States”? It was this very question that Justice Ruth Bader Ginsburg put to attorney Alan Gura during oral argument in *McDonald v. City of Chicago*,<sup>2</sup> as he was urging the Court to revive the Privileges or Immunities Clause to protect the right to keep and bear arms.<sup>3</sup> “But I really would like you to answer the question that you didn’t have an opportunity to finish answering, and that is: What other . . . rights? What does the privileges and immunities of United States citizenship embrace?”<sup>4</sup>

On May 23, 1868, Jacob Howard, senator from Michigan, former attorney general of Michigan, and the designated sponsor of the Fourteenth Amendment in the Senate, delivered a comprehensive and widely reported address in which he addressed this question.<sup>5</sup> According to Howard, the

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\* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution.

\*\* Law Clerk to the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

1 U.S. CONST. amend. XIV, § 1.

2 *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

3 See Transcript of Oral Argument at 3–5, *McDonald*, 561 U.S. 742 (2010) (No. 08-1521).

4 *Id.* at 8.

5 HAMILTON GAY HOWARD, IN MEMORIAM: JACOB M. HOWARD OF MICHIGAN 1, 9 (1906).

“privileges or immunities” of U.S. citizens consisted of two categories of “fundamental guarantees.”<sup>6</sup>

In the first category were “the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”<sup>7</sup> Howard read a very lengthy passage from Justice Washington’s opinion in the 1823 case of *Corfield v. Coryell*,<sup>8</sup> in which Washington defined the “privileges and immunities” protected by Article IV, Section 2, as rights “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.”<sup>9</sup>

Washington went on to explain that privileges and immunities

may . . . be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.<sup>10</sup>

He then listed several “fundamental” rights that fell under these “general heads,” some of which rights are “[un]enumerate[d],” in the sense that they do not appear in the federal Constitution in itemized form—such as the rights to travel and to be free from discriminatory taxation.<sup>11</sup>

After reading from Washington’s *Corfield* opinion, Howard identified a second category of fundamental rights: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal

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

7 *Id.* at 2765. The Privileges and Immunities Clause appears at U.S. CONST. art. IV, § 2, cl. 1.

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

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

10 *Id.* at 551–52. Washington was here reiterating the canonical formulation of natural rights that was originally drafted in 1776 by George Mason for the Virginia Declaration of Rights:

THAT all men are born equally free and independent, and have certain *inherent natural rights*, of which they cannot, by any compact, deprive or divest their posterity; among which are, *the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*

*See Committee Draft of the Virginia Declaration of Rights and Edited by the Virginia Convention (May 27, 1776)*, CONSOURCE (emphasis added), <https://www.consource.org/document/committee-draft-of-the-virginia-declaration-of-rights-and-edited-by-the-virginia-convention-1776-5-27/> (last visited Nov. 26, 2019). Mason’s formulation was adopted by several states for the declarations of rights in their own constitutions. *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 33–40, 67 (2016). In Washington’s words, these rights were “deemed to be fundamental.” *Corfield*, 6 F. Cas. at 552.

11 *See Corfield*, 6 F. Cas. at 551–52.

rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>12</sup>

Then, after providing a list<sup>13</sup> of enumerated personal rights, Howard summarized his understanding of the two categories of “privileges or immunities”: “Now, sir, here is a mass of privileges, immunities, and rights, *some of them secured by the second section of the fourth article of the Constitution*, which I have recited, *some by the first eight amendments of the Constitution . . .*”<sup>14</sup>

Howard explained that an amendment was necessary to protect these privileges and immunities because, at present, “[t]hey d[id] not operate in the slightest degree as a restraint or prohibition on State legislation.”<sup>15</sup> So, “[t]he great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these fundamental guarantees.”<sup>16</sup>

It would seem clear that Howard understood the “privileges or immunities of citizens of the United States”<sup>17</sup> to include (1) the set of unenumerated rights that *Corfield v. Coryell* associated with the “privileges and immunities” of Article IV, Section 2; and (2) the personal rights enumerated in the first eight amendments to the Constitution, and that none of the “fundamental guarantees” in this “mass” may be abridged by states.<sup>18</sup> This is the conventional way in which scholars have read Howard’s language.<sup>19</sup>

Howard’s role as spokesman for the Joint Committee on Reconstruction was a product of happenstance. William Pitt Fessenden, the chairman of the

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

13 *Id.* The list appears to be a partial one, as Howard prefaces it with the phrase “such as.” *Id.* Howard omitted the rights of criminal defendants to confront witnesses, to have compulsory processes for obtaining witnesses in their favor, and to have the assistance of counsel for their defense. *Id.*; see also U.S. CONST. amend VI. Howard’s list also did not refer to what we call the Establishment Clause as any kind of right. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). Lash has claimed that, though originally a federalism provision, by 1868, the Establishment Clause was thought to protect an individual right, but Howard’s omission undermines this claim. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1154 (1995) (“By 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution.”).

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

15 *Id.*

16 *Id.* at 2766.

17 U.S. CONST. amend. XIV, § 1.

18 See CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard).

19 See, e.g., EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 108–09 (1990); Richard L. Aynes, *Ink Blot or Not? The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1312 (2009); Christopher R. Green, *Incorporation, Total Incorporation, and Nothing but Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 108–09 (2015); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 21 (1998).

committee, had been ill, and Howard spoke in his place.<sup>20</sup> Indeed, Howard had voted *against* the language that he was charged with explaining—he preferred language of an earlier draft that was more expansive in certain respects and more narrow in others.<sup>21</sup>

Howard is difficult to pin down ideologically. Conventionally characterized as a “radical” because of his early and energetic support for black suffrage and his hard-line stance on the readmission of former Confederate states into the Union, he nonetheless “had a deep respect for the structure of federalism and was generally a stickler for constitutional regularity.”<sup>22</sup>

If Howard was a reluctant witness, however, there is no reason to doubt that he was a reliable one. His interpretation of the committee’s handiwork was not contested by any senator.<sup>23</sup> Indeed, so associated did the Fourteenth Amendment become with Howard’s interpretation of it in public discourse, it was often referred to simply as the “Howard Amendment.”<sup>24</sup>

It would, therefore, take a very bold advocate to claim that the original meaning of the “privileges or immunities” of U.S. citizens did *not* “restrain the power of the States” to abridge the unenumerated<sup>25</sup> rights of citizens that were listed by Washington and Howard or “compel [states] at all times to

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

21 See MALTZ, *supra* note 19, at 87, 88 tbl.6.2. That earlier draft, composed by former Congressman Robert Dale Owen, prohibited “discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude.” BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 296 (1914). This language was narrower in that it prohibited only discrimination, not generally applicable deprivations of civil rights, and thus would not protect white supporters of the Union against Southern retaliation. It was broader in that the term “civil rights” may have been fuzzier at the edges than “privileges or immunities.” Concerns that the phrase “civil rights” might be used to secure voting rights, the right to sit on juries, schooling rights, and the right to hold political office led to the phrase’s redaction from the Civil Rights Act of 1866. See MALTZ, *supra* note 19, at 67–69.

22 Earl M. Maltz, *Radical Politics and Constitutional Theory: Senator Jacob M. Howard of Michigan and the Problem of Reconstruction*, MICH. HIST. REV., Spring 2006, at 19, 24–26, 31.

23 See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 90 (1908) (noting the amendment was “agreed to without a division”).

24 See *id.*

25 In one sense, Lash is indeed claiming that constitutionally unenumerated rights are also protected by the Privileges or Immunities Clause. Lash clearly believes that the Privileges and Immunities Clause confers a privilege against parochial discrimination with respect to certain, textually unspecified fundamental rights that are among the “privileges and immunities of citizens of the several states,” and that the Privileges or Immunities Clause empowers the federal courts and Congress to prevent such discrimination. Are those “rights” “enumerated” because “privileges and immunities of citizens of the several states” is part of the constitutional text and they are among those privileges and immunities, or unenumerated because they are not specifically listed? Or are they unenumerated because they are only protected against parochial discrimination? Really, on Lash’s account, the Privileges and Immunities Clause enumerates a privilege to be free from parochial discrimination with respect to unenumerated rights.

With that being said, we think referring to Lash’s theory as an enumerated-rights-only theory is useful. On Lash’s account, unenumerated rights are not secured against discrimi-

respect these . . . guarantees.”<sup>26</sup> Were this claim accurate, it would follow either that Jacob Howard misunderstood the Privileges or Immunities Clause, or that scholars have long misunderstood what Jacob Howard said about the Privileges or Immunities Clause.

Professor Kurt Lash is so bold. In a series of painstakingly researched articles<sup>27</sup> that have culminated in a book,<sup>28</sup> Lash has proposed that the original public meaning of the Privileges or Immunities Clause protects enumerated personal rights—and *only* enumerated personal rights.<sup>29</sup> According to Lash, the Privileges and Immunities Clause of Article IV, Section 2 was, in antebellum jurisprudence, understood to be a mere “Comity Clause” that confers only a singular enumerated right of sojourning citizens of a given state to be free from discrimination with respect to their fundamental civil rights when traveling in another state.<sup>30</sup> And it was this singular right to which Howard was referring in his speech.

According to Lash, therefore, Howard’s two categories of “privileges or immunities”—unenumerated and enumerated—receive two different levels of protection against state abridgment. The enumerated rights listed in the first eight amendments (and elsewhere) are protected absolutely.<sup>31</sup> States are free, however, to abridge the unenumerated privileges and immunities identified by Justice Washington in *Corfield*, provided they do not discrimi-

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nation outside of the context of comity or against generally applicable restrictions, whereas enumerated rights are thus secured.

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

27 See, e.g., Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010) [hereinafter Lash, *The Origins of the Privileges or Immunities Clause, Part I*]; Kurt T. 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 (2011) [hereinafter Lash, *The Origins of the Privileges or Immunities Clause, Part II*]; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275 (2013).

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

29 *Id.* at xi (“[T]he original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution.”).

30 *Id.* at 158–59 (arguing that Howard’s view fit “with the antebellum understanding of ‘privileges and immunities of citizens of the United States,’” according to which “citizens of the United States had a right of equal access to a limited set of state-conferred rights when traveling to a state other than their home state[s]”). On Lash’s account, “enumerated” rights also include the right to vote for federal representatives and the right to the writ of habeas corpus. *Id.* at 148, 300.

31 *Id.* at 237. The “absolute” protection of a right is in contrast with a right solely being protected from discrimination. So, for example, the absolute protection of the right to keep and bear arms means that no one’s right to arms may be infringed, and neither can that of the citizenry as a whole. A discrimination-only protection would allow the entire population to be denied the right, so long as it was denied equally. As we explain elsewhere, “absolute” protection does *not* mean that a right may not reasonably be regulated. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

nate against out-of-staters when either extending or regulating the exercise of those privileges and immunities.

Crucially, on Lash's account, because the original meaning of the Privileges and Immunities Clause in Article IV allowed states to enact laws that discriminate with respect to the unenumerated rights of *their own* citizens, so too does the Privileges or Immunities Clause of the Fourteenth Amendment. On Lash's account, then, scholars are correct to concentrate their attention on Howard's explanation, as it provides "the most likely original meaning of the text."<sup>32</sup> But, scholars have generally misunderstood that explanation.

This has not always been Lash's view. Around the turn of the millennium, he expressed sympathy for the view that the Clause afforded absolute protection to both enumerated and unenumerated rights.<sup>33</sup> In 2009, he announced that he was "no longer convinced" that Representative John Bingham of Ohio—the Clause's principal framer—"read the Privileges or Immunities Clause to have nationalized more rights that [sic] those listed in the first eight amendments."<sup>34</sup> Today, he holds that the Clause nationalized *all* enumerated rights—not merely those in the first eight amendments—but *only* enumerated rights.

As we will explain, the credibility of any proposed interpretation of the Fourteenth Amendment must be measured, in part, by considering how well it accounts for the Civil Rights Act of 1866. This landmark legislation protected the unenumerated rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>35</sup>

It is generally accepted that the Fourteenth Amendment was designed to constitutionalize these rights so they could not be repealed by a future Congress; to empower the federal courts to enforce these rights; and to empower Congress to enact legislation designed to protect these rights. Indeed, in 1870, Congress reenacted the entire Civil Rights Act after adoption of the Fourteenth Amendment just to be sure.<sup>36</sup>

Lash's constricted reading of "the privileges or immunities of citizens of the United States" makes it hard for him to explain how the Fourteenth Amendment empowered the federal government to protect unenumerated rights and thus how it secured the constitutionality of the 1866 Act. The 1866 Act, after all, protected against far more than discrimination against

32 LASH, *supra* note 28, at 232.

33 See Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. RICH. L. REV. 485, 500 (1999) [hereinafter Lash, *Two Movements*] ("Th[e] Clause seem[ed] tailor-made for the recognition of nontextual fundamental freedoms."); see also Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 466 (2001) ("The Privileges or Immunities Clause . . . likely was intended to protect common law economic rights, as well as rights like freedom of speech and religion.").

34 Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 460 (2009).

35 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

36 Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (stating that the Civil Rights Act of 1866 "is hereby re-enacted").

citizens sojourning in another state—it guaranteed to all “citizens” the same bundle of listed rights “as [are] enjoyed by white citizens,”<sup>37</sup> full stop. The Enforcement Act of 1870<sup>38</sup> reenacted the 1866 Act *and* guaranteed the equal enjoyment of a slightly smaller bundle<sup>39</sup> of rights to “all persons.”<sup>40</sup> Unless he wants to deny the constitutionality of this legislation, Lash must either (a) identify an unenumerated right to be free from discrimination that citizens can invoke against their own states, or (b) locate the power to enact such civil rights legislation in some provision other than the Privileges or Immunities Clause.

Lash has struggled to do either. At different times, he has located the authority to enact the Civil Rights Act in each of the four operative clauses of Section 1 of the Fourteenth Amendment: the Privileges or Immunities Clause (2011),<sup>41</sup> the Citizenship Clause (2014),<sup>42</sup> the Equal Protection Clause (2015),<sup>43</sup> and, most recently, the Due Process of Law Clause (2018).<sup>44</sup>

37 Civil Rights Act of 1866, § 1, 14 Stat. at 27.

38 Enforcement Act of 1870, §§ 16, 18, 16 Stat. at 144.

39 The Enforcement Act omits the rights “to inherit, purchase, lease, sell, hold, and convey real and personal property.” *See id.* at § 16. We will discuss the significance of this omission, which, as Lash observes, seems to have been a consequence of the shift from “citizens” to “persons.” Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1464–66 (2018) (acknowledging common-law distinction between the ways in which citizens and noncitizens could “hold” real property, but denying that it entails the conclusion that the 1866 Civil Rights Act’s protection for property holding does not “protect [ ] a natural right of all persons”).

40 *Compare* Civil Rights Act of 1866, § 1, 14 Stat. at 27, *with* Enforcement Act of 1870, § 16, 16 Stat. at 144.

41 Lash, *The Origins of the Privileges or Immunities Clause, Part II*, *supra* note 27, at 407. “[E]nsuring that Congress had such power to enforce the equality principles of Article IV (and thus authorize the Civil Rights Act) was one of the concerns driving the adoption of the Fourteenth Amendment.” *Id.* John Bingham “*also* wanted to protect the substantive rights listed in the first eight amendments.” *Id.* Further, “[b]oth goals could be accomplished through an amendment which protected both the equality provisions of Article IV and the substantive liberties enumerated in the Bill of Rights.” *Id.* Lash’s discussion of Howard’s reference to the “the entire mass of rights, privileges, and immunities found in Article IV and the Bill of Rights” two paragraphs prior, which reference Lash rightly treats as a part of an exposition of the Privileges or Immunities Clause, makes plain Lash’s belief that the means through which these goals were accomplished was the Privileges or Immunities Clause. *Id.*

42 *See* LASH, *supra* note 28, at 171 (“[The Citizenship Clause is] the text that constitutionalized the Civil Rights Act of 1866.”).

43 *See* Kurt T. Lash, *Root Digs a Deeper Hole: The Equal Protection of Economic Privileges and Immunities*, LAW & LIBERTY (July 15, 2015), <https://www.lawliberty.org/2015/07/21/equality-and-the-civil-rights-act-of-1866-a-final-response-to-damon-root/> (arguing that “Bingham refused to support the Civil Rights Act because: 1) he believed Congress needed an amendment granting them power to pass such an act, and 2) he believed that *all persons* should enjoy the equal protection of the law, not just citizens”; and stating that “Bingham’s final draft of the Fourteenth Amendment fixed both problems by including an equal protection clause that protected all persons”).



In earlier writings, both of us<sup>45</sup> have expressed sympathy for the view that the Privileges or Immunities Clause affords absolute protection to unenumerated rights, such as those contained in the Civil Rights Act of 1866, and authorizes Congress to enact protective legislation.<sup>46</sup> Neither of us, however, has engaged with Lash's most recent and unique two-class interpretation of the original meaning of the Privileges or Immunities Clause in the depth that it deserves. Nor have we evaluated his recent efforts to demonstrate that the Fourteenth Amendment's Due Process of Law Clause empowers the federal courts and Congress to protect unenumerated rights like the right to make contracts, among others listed in the Civil Rights Act of 1866.<sup>47</sup> In this Article, we will do so.

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44 See Lash, *supra* note 39, at 1459 (“[T]he Due Process Clause of the Fourteenth Amendment carried a meaning that both critics and supporters would have recognized as authorizing legislation like the Civil Rights Act.”).

45 See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60, 194 (2004); Evan Bernick, *Yes, the Fourteenth Amendment Protects Unenumerated Rights: A Response to Kurt Lash*, HUFFPOST (July 13, 2015), [https://www.huffpost.com/entry/yes-the-fourteenth-amendm\\_b\\_7787926](https://www.huffpost.com/entry/yes-the-fourteenth-amendm_b_7787926).

46 For example, in an 1872 speech, Senator John Sherman of Ohio supported the constitutionality of what would eventually become the Civil Rights Act of 1875 by linking the Privileges or Immunities Clause to the rights affirmed as “others retained by the people” in the Ninth Amendment.

[T]he ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States . . . our fathers did not attempt to enumerate. They expressly said in the ninth amendment that they would not attempt to enumerate these rights; they were innumerable, depending upon the laws and the courts as from time to time administered.

CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman).

Those “innumerable” rights to which the Ninth Amendment refers include the individual natural rights that “make it possible for each person to pursue happiness while living in close proximity to others and for civil societies to achieve peace and prosperity.” BARNETT, *supra* note 45, at 4; see, e.g., Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006). Lash agrees, although he argues as well that, in addition to individual natural rights, the “rights . . . retained by the people” also include a collective right of the people to self-governance. Kurt L. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 910, 912 (2008).

That the courts and Congress must protect these rights does not tell us *how* they are to do so. In other work, we have maintained that this is done, not by defining and enforcing the rights themselves, but in defining and limiting the scope of governmental power. See Barnett & Bernick, *supra* note 31. But this issue is beyond the scope of this Article, in which we are solely concerned with the original meaning of the text of the Privileges or Immunities Clause. Getting that meaning right is simply the first step; giving that meaning legal effect is the second.

47 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. Compare Lash, *supra* note 46, at 927 n.120 (describing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) as having rejected “the *unenumerated* right to contract” (emphasis added)), with Lash, *supra* note 39, at 1440–41 (arguing that the Civil Rights Act of 1866, which protected the right to

We will contend that Lash has provided readers with an abridged version of the Privileges or Immunities Clause. In future writing, we will advance a competing account of the original public meaning of the Privileges or Immunities Clause. We will also develop a framework that can be used by judges *and* legislators to identify the rights protected by the Clause, to thwart state abridgments of those rights, and to evaluate congressional legislation that is purportedly designed to protect those rights.

Part I provides an exposition of Lash's thesis.<sup>48</sup> Because his arguments are complex, and rely on diverse evidence, our summary is lengthy. Given the multiplicity of his publications on the subject, we think an accurate summary of Lash's approach is both independently worthwhile and a necessary prelude to any critique.

Part II systematically critiques Lash's evidence and arguments. We find that Lash's enumerated-rights-only—or "ERO"—theory has little support in antebellum jurisprudence; that the evidence Lash offers to show that John Bingham, upon whose testimony Lash heavily relies, held Lash's ERO theory is equivocal at best; and that Lash's ERO theory was not widely shared by the Fourteenth Amendment's framers. We then explain why evidence from the debate over ratification does not indicate that the ERO theory was embraced by the public.<sup>49</sup>

Next, we canvass postratification jurisprudence and congressional debates over various pieces of civil rights legislation both prior to and shortly after the Supreme Court's fateful decisions in the *Slaughter-House Cases*<sup>50</sup> and *United States v. Cruikshank*<sup>51</sup>—decisions that are generally regarded as having rendered the Privileges or Immunities a "practical nullity."<sup>52</sup> We find that the interpretations of the Clause that are contained in these materials are, for the most part, inconsistent with Lash's ERO theory.

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"make and enforce contracts," "constituted an effort to enforce the *enumerated* due process rights of national citizenship, not the unenumerated civil rights of state citizenship" (emphasis added)).

48 We follow the plan of Lash's book for ease of exposition, with one exception. What Lash labels as Bingham's "second" draft of Section 1, we call his "third."

49 We will refer to "Lash's ERO theory" rather than "the ERO theory" to emphasize that Lash's theory is but one of several possible theories according to which only enumerated rights are absolutely protected by the Privileges or Immunities Clause. For instance, Justice Hugo Black famously argued that only the personal rights enumerated in the first eight amendments are absolutely protected by the Privileges or Immunities Clause. Black presented his view in *Adamson v. California*, 332 U.S. 46, 72–92 (1947) (Black, J., dissenting). See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 215–31 (1998) (defending "refined . . . incorporation" of the Bill of Rights, pursuant to which judges should ask whether an enumerated right "is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large" before identifying it as a privilege or immunity of citizenship).

50 83 U.S. (16 Wall.) 36 (1873).

51 92 U.S. 542 (1876).

52 LEGISLATIVE REFERENCE SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 82-170, at 965 (Edward S. Corwin ed., 1953).

Finally, we engage and respond to Lash's argument that the political dynamics during the relevant time period made it impossible for any constitutional amendment that delegated to Congress and the federal courts the power to enforce unenumerated rights to be ratified.

Part III concludes.

## I. LASH'S THESIS

### A. *Public Meaning Originalism and Terms of Art*

Our evaluation of Lash's originalist arguments is made easier by the fact that we share his originalist interpretative commitments. In the preface to his book, Lash summarizes those commitments:

The goal of this book is to illuminate the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. I define "original meaning" as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who were aware of the context in which the text was communicated for ratification. Determining original meaning requires investigating historical events and texts antecedent to the proposed amendment in order to understand the full historical context in which a proposed text is debated and ratified. This is not an effort to discover the "true" or even "best" meaning of antecedent events and texts. Instead the goal is to recover how these legal antecedents were broadly understood, correctly or not, at the time of the adoption of the Fourteenth Amendment.<sup>53</sup>

Lash's claim that widely held understandings of "legal antecedents" informed the original public meaning of the Privileges or Immunities Clause might seem counterintuitive. If Lash is concerned with *public* meaning, of what epistemic value are legal antecedents with which few members of the public might be familiar?

Consider the Ex Post Facto Clause of Article I, Section 10.<sup>54</sup> Scholars generally agree that the term "ex post facto laws" is a *term of art*—a phrase that was not part of ordinary discourse but that carried a particular meaning in legal settings in 1788.<sup>55</sup> During the ratification debates, however, the Constitution's supporters provided public explanations of the meaning of the term and repeatedly emphasized that, because ex post facto laws were criminal in nature, the Ex Post Facto Clause would not prevent state legislatures from adopting retroactive *civil* legislation.<sup>56</sup> Through such public explana-

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53 LASH, *supra* note 28, at xiv (footnote omitted).

54 U.S. CONST. art. I, § 10, cl. 1.

55 See Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 501–04 (2003) (tracing the term through Roman jurisprudence through the common law to the debate over ratification). We do not endorse this interpretation, but merely report it.

56 See *id.* at 517–22 (adducing evidence that "the majority of federalists addressing the issue treated ex post facto laws as criminal only" during the ratification debate and that this turned out to be "wise politically").

tions, terms that might otherwise be unintelligible to members of the public who lack antecedent legal knowledge can become associated with particular concepts.

More subtly, the concepts associated with legal terms of art may inform public meaning solely by means of deference on the part of laypeople to people with specialized legal knowledge.<sup>57</sup> Ordinary citizens might be prepared to support the ratification of a word or phrase into law, *knowing* that its meaning had previously been established in legal settings and that that meaning would bind the public upon ratification. If one has a high level of trust in the framers of a document, agrees with the terms that one does understand, and regards the status quo as intolerable, it may be reasonable to defer one's understanding to others in this way.

Showing that a division of linguistic labor has operated in either of these ways, however, is no easy task. To make credible his case that technical "legal antecedents" contributed to the original public meaning of the Privileges or Immunities Clause, Lash must establish both (a) that these legal understandings were widely accepted *and* (b) either that these understandings were communicated to the public, or that the public deferred to the understanding of those who were legally trained.

With these methodological preliminaries out of the way, we begin by summarizing Lash's attempt to make out this claim.

B. *"Privileges and Immunities of Citizens of the Several States" as a Term of Art: Bingham's First Two Drafts*

Lash begins by parsing antebellum jurisprudence concerning the Privileges and Immunities Clause of Article IV.<sup>58</sup> He draws an initial distinction between use of the single terms "privileges" and "immunities"—terms that he finds "in an almost bewildering array of contexts"—and use of the phrase "privileges and immunities"—which he finds was "generally reserved to a description of specially conferred rights" *rather than* "natural rights belonging to all people or all institutions."<sup>59</sup>

It is worth pausing to note that the choice between conceiving of privileges and immunities as specially conferred rights, on the one hand, or natural rights, on the other, might not be as sharp as Lash makes it out to be. Professor Eric Claeys has stressed the influence in pre-Civil War America of Sir William Blackstone's conception of privileges and immunities as the positive law protections that civil society affords to the natural rights of its own citizens.

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57 As Professor Lawrence Solum has put it, an ordinary citizen might read a phrase like *ex post facto laws* and think, "Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer." Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2008).

58 LASH, *supra* note 28, at 14; *see also* U.S. CONST. art. IV, § 2, cl. 1.

59 LASH, *supra* note 28, at 20.

As Claeys explains, in Blackstone's *Commentaries on American Law*, "'civil privileges' refer to entitlements that replicate in positive law the general substance of natural rights. 'Private immunities' refer to the domains of noninterference English subjects enjoy as residual rights to do that which is not prohibited by particular civil laws."<sup>60</sup>

Claeys stresses the need for Fourteenth Amendment scholars to determine how "privileges" and "immunities" were "understood in context as terms of art for the *civil rights* citizens were entitled to enjoy in a republican political community"<sup>61</sup> and presents evidence that "an understanding substantially similar to Blackstone's" was assumed throughout "the United States' colonial period, founding, and Reconstruction periods."<sup>62</sup>

Lash then investigates antebellum caselaw and commentaries on the Privileges and Immunities Clause.<sup>63</sup> His discussion of Justice Bushrod Washington's opinion in *Corfield v. Coryell*—which, as we have noted, played an important role during the framing of the Fourteenth Amendment<sup>64</sup>—warrants particular attention. Because it played so prominent a role in contemporary discussions of the meaning of "privileges or immunities," Justice Washington's discussion of the meaning of "privileges and immunities of citizens in the several states" in Article IV is worth quoting at length:

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60 Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 792 (2008) (emphases added).

61 *Id.* at 821 (emphasis added).

62 *Id.* at 820. Although Claeys does not study the framing of the Fourteenth Amendment in any great depth and thus does not reach a firm conclusion concerning the contribution of Blackstone's definition of civil rights to the original meaning of the Fourteenth Amendment, he notes Senator Lyman Trumbull's use, in a floor speech supporting the Civil Rights Act of 1866, of Blackstone's definition of civil liberty as "no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (quoting, with minor variations, 1 WILLIAM BLACKSTONE, COMMENTARIES \*121); see Claeys, *supra* note 60, at 797–98. We would add as well that Trumbull invoked Blackstone's definition a second time to describe "rights belonging to the citizen," *id.* at 1757 (statement of Sen. Trumbull), that Senator Richard Yates used Blackstone to define a "civil right" as "a limitation or extension of the natural right as is conferred by statute," CONG. GLOBE, 39th Cong., 1st Sess. app. at 101 (1866) (statement of Sen. Yates), that John Bingham drew upon Blackstone in arguing that there was no "colorable distinction" between "civil rights" and "political rights," CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham), and that Representative James Wilson drew upon Blackstone for "[t]he great fundamental rights [that] are the inalienable possession of both Englishmen and Americans," *id.* at 1118 (statement of Rep. Wilson). All of this suggests that Blackstone's definition of civil rights was "in the air" during the framing period. We will investigate the question of its influence in greater depth in our future work.

63 LASH, *supra* note 28, at 9.

64 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (citing Washington's opinion in *Corfield* with approval); *id.* at 1835 (statement of Rep. Lawrence); *id.* at 1118 (statement of Rep. Wilson); *id.* at 475 (statement of Sen. Trumbull); CONG. GLOBE, 39th Cong., 1st Sess. app. at 293 (1866) (statement of Rep. Shellabarger).

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . .<sup>65</sup>

Lash argues that Justice Washington's *Corfield* opinion was intended to communicate a comity-only view of the Privileges and Immunities Clause—one that required states “to grant [sojourning] citizens of other states *some* of the same privileges and immunities that the state conferred on its own citizens”<sup>66</sup>—and was understood to do so by legally educated readers. From his survey of antebellum cases and commentaries on the Privileges and Immunities Clause, Lash discerns “five possible approaches to Article IV, with one quickly emerging as the dominant interpretation.”<sup>67</sup> The dominant interpretation, he argues, was that the Privileges and Immunities Clause was a “Comity Clause.”<sup>68</sup>

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65 *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

66 LASH, *supra* note 28, at 23.

67 *Id.* at 22.

68 *See, e.g., id.* at x, 20, 47. We decline to adopt the term “Comity Clause,” despite the cumbersome nature of referring continuously to the “Privileges and Immunities Clause.” Labeling Article IV, Section 2, Clause 1 a “Comity Clause” threatens to bias evaluation of the evidence concerning how the Clause was understood by the framers and ratifiers of the Fourteenth Amendment. As Lash recognizes, even if the Privileges and Immunities Clause was understood in 1788 to protect only comity rights, the relevant questions where the original meaning of the Privileges or Immunities Clause is concerned do not involve whether the framers and ratifiers of the Fourteenth Amendment understood Article IV, Section 2, Clause 1 correctly but, rather, how they *did in fact* understand it and whether they understood Section 1 of the Fourteenth Amendment to incorporate that understanding. *Id.* at xiv.

What has antebellum Privileges and Immunities jurisprudence to do with the Privileges or Immunities Clause? The answer given by most scholars is that the wording of the latter Clause was modeled on the language of the former. For this reason, understanding the substantive rights protected (from discrimination) by the former ought to help us understand the substantive rights protected (absolutely) by the latter.<sup>69</sup> If any rights are absolutely protected by the latter, they ought to bear a substantial resemblance to the rights of sojourning citizens of other states that are protected by the former against parochial discrimination.<sup>70</sup>

Lash challenges this consensus. He advances the novel claim that the language of the Privileges or Immunities Clause is “*not* based on the language of Article IV” because of conflicts that emerged in the Thirty-Ninth Congress over one of Representative John Bingham’s initial drafts of the Clause—a draft that *was* based on the language of Article IV, Section 2.<sup>71</sup>

On December 6, 1865, Bingham proposed the following amendment to the Constitution: “Congress [shall have power] to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property . . . .”<sup>72</sup> After detailing systematic state violations of “the absolute guarantees of the Constitution,” Bingham referred his fellow representatives to the Privileges and Immunities Clause and provided the following interpretation of its meaning:

[G]o read, if you please, the words of the Constitution itself: “The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis “of the United States”) in the several States.” This guarantee is of the privileges and immunities of citizens of the United States *in, not of,* the several States.” This guarantee of your Constitution applies to every citizen of every State of the Union; there is not a guarantee more sacred, and none more vital in that great instrument.<sup>73</sup>

Rights of American citizens “in” the several states connoted the fundamental preexisting rights of U.S. citizens that traveled with them; rights “of”

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69 See, e.g., AMAR, *supra* note 49, at 177–79; JACK M. BALKIN, *LIVING ORIGINALISM* 208–09 (2011); BARNETT, *supra* note 45, at 208–09; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 114–15 (1986); MALTZ, *supra* note 19, at 106–07; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 69 (1993); Philip Hamburger, *Privileges or Immunities*, 105 *Nw. U. L. REV.* 61, 132–34 (2011).

70 See, e.g., AMAR, *supra* note 49, at 177–79; BALKIN, *supra* note 69, at 208–09; BARNETT, *supra* note 45, at 208–09; CURTIS, *supra* note 69, at 114–15; MALTZ, *supra* note 19, at 106–08; Aynes, *supra* note 69, at 69; Hamburger, *supra* note 69, at 132–34.

71 LASH, *supra* note 28, at xi (emphasis added).

72 CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865). This proposed amendment was introduced to the Joint Committee on Reconstruction on January 16. KENDRICK, *supra* note 21, at 49, 51.

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

the several states connoted state-conferred rights.<sup>74</sup> That Bingham understood the fundamental rights protected by the Privileges and Immunities Clause to include rights set forth in the 1789 amendments can be seen in Bingham's express reference to rights secured by the Fifth Amendment as being among the "privileges and immunities of citizens of the United States"<sup>75</sup> in prior speeches and in the subsequent evolution of the text of his proposed amendment.

Bingham's first draft amendment was submitted to the Joint Committee on Reconstruction, of which he was a member. On February 10, 1866, Bingham offered to substitute the following language:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).<sup>76</sup>

One can see how this second draft began to track the two categories of rights identified by Jacob Howard in his May 23 speech, although Bingham is obviously here limiting himself to expressly protecting a portion of just one of the first eight amendments. That same day, the committee adopted the new language and returned it for congressional consideration and debate.

On February 26, Bingham explained that his second draft was designed to enforce existing constitutional guarantees that were not being honored by ex-Confederate states rather than to impose new limits on state power. Here is Bingham:

[T]he amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, *is the language of the second section of the fourth article, and of a portion of the fifth amendment* adopted by the First Congress in 1789 and made part of the Constitution of the country. . . .

. . . .

. . . [I]t has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State,

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74 We will confront the textual distinction between "in" and "of" again when considering an alternative to the Fourteenth Amendment proposed by President Andrew Johnson. See *infra* text accompanying notes 413–17.

75 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham) (listing "the rights of life and liberty and property, and their due protection in the enjoyment thereof by law" among "the privileges and immunities of citizens of the United States"); see CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (statement of Rep. Bingham) (stating that "[t]he great privilege and immunity of . . . American citizen[s] to be respected everywhere in this land . . . is that they shall not be deprived of life, liberty, or property without due process of law").

76 KENDRICK, *supra* note 21, at 61.



by congressional enactment, to enforce obedience to these requirements of the Constitution. . . .

. . . .

. . . The House knows, sir, the country knows, the civilized world knows, that the legislative, executive, and judicial officers of eleven States within this Union within the last five years, in utter disregard of these injunctions . . . have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.<sup>77</sup>

Lash infers from this explanation that Bingham believed tracking existing constitutional language was “an important selling point to the moderates in the Thirty-Ninth Congress.”<sup>78</sup> However, Lash also finds that Bingham’s efforts to forge consensus were unsuccessful.

Democrats, encouraged by the recent Republican failure to override President Andrew Johnson’s veto of the Freedmen’s Bureau Bill, attacked Bingham’s amendment as too great an intrusion upon states’ reserved powers.<sup>79</sup> Lash reads some Republicans as responding by echoing Bingham’s claim that the proposed amendment did nothing more than to enforce the Privileges and Immunities Clause but averring that the Privileges and Immunities Clause protected only the rights of sojourning out-of-staters.<sup>80</sup>

Conservative Republican Robert Hale of New York, in a lengthy speech that would be reprinted in full by the *New York Times*, expressed concern that the proposed amendment was a “grant of power in general terms . . . to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.”<sup>81</sup> Hale went on to argue that since the “bill of rights”—which he took to encompass *all* of the 1789 amendments, including the Ninth and Tenth—already “limit[ed] the power of Federal and State legislation,”<sup>82</sup> Bingham’s proposed amendment was unnecessary and would serve only as an invitation to Congress and the courts to—as the *Times* summarized—“utterly obliterate State rights and State authority over their own internal affairs.”<sup>83</sup>

According to Lash, Bingham thus had to clarify that his amendment was broader in scope than certain of his supporters maintained while alleviating fears that it was so broad as to reduce the federalist system to rubble. On February 28, Bingham elaborated further the constitutional theory behind his proposed amendment. This time, he explained why the Supreme Court’s decision in *Barron*—contra Hale—made an amendment to provide for such enforcement necessary:

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

78 LASH, *supra* note 28, at 91.

79 *Id.* at 97.

80 *Id.* at 98–99.

81 CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale).

82 *Id.*

83 *Debate in the Senate on the Concurrent Resolutions*, N.Y. TIMES, Feb. 28, 1866, at 1.

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

. . . .

. . . A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights . . . had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

. . . I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of Barron [v.] The Mayor and City of Council of Baltimore . . . .<sup>84</sup>

Note that Bingham's "bill of rights" included both the Fifth Amendment's Due Process of Law Clause *and* the Privileges and Immunities Clause, which—as we have seen—he understood to absolutely protect certain national rights. This was not an idiosyncratic confusion on Bingham's part. It arose from the fact that the first ten (or eight) amendments were not commonly called "the Bill of Rights" until the twentieth century.<sup>85</sup>

As Lash points out, the success of Bingham's needle-threading efforts depended upon widespread acceptance of his premise that the Privileges and Immunities Clause of Article IV already required states to comply with his understanding of the "bill of rights." Lash argues that this premise was *not* widely accepted. In particular, Lash claims that it was vigorously and successfully attacked by Representative Giles Hotchkiss of New York in an influential speech.

Hotchkiss made plain his "desire to secure every privilege and every right to every citizen in the United States that [Bingham] desires to secure."<sup>86</sup> He argued, however, that Bingham's amendment failed to "provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another."<sup>87</sup>

Lash understands Hotchkiss to have argued that Bingham's language would likely be taken to protect only the rights of sojourning out-of-staters—that is, comity rights—and to have urged that the language should be made more "plain" in order to ensure absolute protection for national rights.<sup>88</sup> After what Lash deems an unsuccessful effort on Bingham's part to defend his proposed language, Hotchkiss held forth about the importance of clearly

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84 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham) (emphasis added).

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

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

87 *Id.*

88 See LASH, *supra* note 28, at 111.

establishing “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.”<sup>89</sup>

On Lash’s account, Bingham at this point recognized that no proposed amendment that tracked the language of the Privileges and Immunities Clause was likely either to be ratified or to be generally understood to protect more than comity rights and so chose to “go back to the drawing board.”<sup>90</sup> When he did, he looked for other language that would attract less opposition and better suit his bill-of-rights-protective purposes. Lash believes that Bingham found that language in the message President Johnson delivered when vetoing the Civil Rights Act of 1866.<sup>91</sup>

The Civil Rights Act of 1866 began by declaring “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are . . . citizens of the United States.”<sup>92</sup> President Johnson recognized that the Act directly conferred rights of federal citizenship upon people who had previously been denied those rights rather than altering state citizenship or rights that attached to state citizenship. He posed the following rhetorical question: “Can it be reasonably supposed that [people previously excluded from national citizenship] possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?”<sup>93</sup>

Lash hypothesizes that Johnson made a distinctive—and certainly unintended—contribution to the amendment project in which Bingham was mired by distinguishing between rights protected by the Privileges and Immunities Clause and “privileges and immunities of citizens of the United States.”<sup>94</sup> In Lash’s telling, Bingham used this locution to achieve the end for which the language of the Privileges and Immunities Clause proved unsuited—the communication of a concept of protected national rights that was neither too narrow to achieve enumerated-rights enforcement nor too broad to avoid an intracongressional veto by moderate and conservative Republicans.

C. *“Privileges or Immunities of the Citizens of the United States” as a Term of Art: Bingham’s Third and Final Draft*<sup>95</sup>

Lash’s most novel contribution to the body of scholarship on the Privileges or Immunities Clause is the product of his exploration of evidence con-

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

90 LASH, *supra* note 28, at 109.

91 *Id.* at 102.

92 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

93 CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866) (veto message from President Johnson).

94 See LASH, *supra* note 28, at 140 (crediting Johnson with “introduc[ing] the language of the rights of national citizenship into the legislative and public debate”). This is sheer speculation. Lash offers no direct evidence that Bingham actually took inspiration from Johnson’s language.

95 Lash discusses the two versions of Bingham’s proposed amendment that we examined in the previous Section: the version proposed to the Joint Committee on January

cerning the “privileges and immunities of citizens of the United States” from what seems at first to be an unlikely source: antebellum treaty jurisprudence.<sup>96</sup> Lash begins with Article III of the Louisiana Cession Act of 1803 (“Cession Act”).<sup>97</sup>

Article III promised the inhabitants of territory purchased from France that they would enjoy “all the rights, advantages and immunities of citizens of the United States” upon being fully admitted into the Union.<sup>98</sup> This language, Lash argues, was “the common language of contemporary international treaties, and . . . clearly influenced later American treaties involving territorial cession” through Reconstruction.<sup>99</sup>

To explain its meaning, Lash focuses on “[o]ne of the most extensive antebellum discussions involving the privileges and immunities of US citizens”—the debate produced by what were ultimately unsuccessful congressional efforts to secure a ban on slavery as a condition of admitting Missouri into the Union.<sup>100</sup> Opponents urged that such a ban would deny citizens of Missouri “the rights, advantages, and immunities of other citizens of the Union” recognized in the Cession Act.<sup>101</sup> Free-state advocates argued otherwise.<sup>102</sup>

Lash devotes particular attention to the free-state advocacy of Senators Daniel Webster and David Morrill of New Hampshire, both of whom distinguished the privileges and immunities of national citizenship from the privileges and immunities of state citizenship. Lash writes that, although Webster and Morrill provided “slightly different” lists of national rights, “[n]either list

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16 and the version that he moved to substitute on February 3. *Id.* at 84. But for reasons he does not provide, he labels the third and final version that Bingham proposed to the Committee on Reconstruction on April 21, 1866, as his “second draft.” *Id.* at 145. The latter was identical to the final amendment, save for the absence of the Citizenship Clause, which would be proposed by Jacob Howard on May 30 and adopted on the same day. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Because we think this necessarily imports confusion into a discussion of *three* of Bingham’s distinct formulations, we do not adopt Lash’s terminology. We instead refer to the April 21st version as his “third draft” or as the “final version.”

96 LASH, *supra* note 28, at 9. Lash is not the first to explore the relevance of this evidence to the original meaning of the Privileges or Immunities Clause. For what appears to be the earliest exploration of this evidence, see Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765, 783–80 (1985). As the title reflects, Guminski reaches different conclusions.

97 LASH, *supra* note 28, at 48; *see also* Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200, 202.

98 Treaty Between the United States of America and the French Republic, *supra* note 97, at 202.

99 LASH, *supra* note 28, at 49 (footnote omitted).

100 *Id.* at 52.

101 *Id.* at 53.

102 DANIEL WEBSTER ET AL., A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION 15–16 (Boston, Sewell Phelps 1819).

included any natural or common law liberties beyond those listed in the Federal Constitution, much less rights or immunities derived from state law.”<sup>103</sup> Rather, they included only constitutionally enumerated rights.

Lash also finds that some free-state advocates associated the privileges and immunities of national citizenship with the “rights, advantages, and immunities” of the Cession Act and the privileges and immunities of state citizenship with the Privileges and Immunities Clause. Webster maintained that the Privileges and Immunities Clause only “secures to the migrating citizen all the privileges and immunities of citizens *in* the State to which he removes,” not “all the privileges and immunities of the citizens of every other State, at the same time and under all circumstances.”<sup>104</sup> For that reason, Webster argued, “the citizens of Louisiana, upon their admission into the Union, in receiving the benefit of this clause, would not enjoy higher, or more extensive rights than the citizens of Ohio” to force slavery into other states, even though they were entitled under the Cession Act to the enjoyment of enumerated federal constitutional rights.<sup>105</sup>

Lash points out that certain of these free-state arguments were republished multiple times, including three years before the Civil War.<sup>106</sup> One way or the other, Lash contends that they came to the attention of John Bingham and “inform[ed] [his] final draft of the Privileges or Immunities Clause.”<sup>107</sup>

Precisely how Bingham happened to conclude that the language of privileges and immunities “of citizens of the United States” would serve his desired ends is not clear on Lash’s account. Nor does Lash adduce any evidence from antebellum jurisprudence in support of the free-state, ERO theory’s influence following the admission of Missouri as a slave state—despite his reliance upon antebellum jurisprudence when discussing how Republicans understood the Privileges and Immunities Clause.

On April 21, 1866, Bingham proposed that the Joint Committee on Reconstruction add the following language to the emerging Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>108</sup>

The language of the Privileges and Immunities Clause was now gone, replaced with that of “citizens of the United States.” After this language was approved ten to three by the Joint Committee following a frankly dizzying series of votes,<sup>109</sup> Bingham introduced the proposed amendment to the

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103 LASH, *supra* note 28, at 57–58.

104 WEBSTER ET AL., *supra* note 102, at 16.

105 *Id.* at 17.

106 LASH, *supra* note 28, at 60–61.

107 *Id.* at 61.

108 KENDRICK, *supra* note 21, at 87.

109 The votes are tabulated and summarized in MALTZ, *supra* note 19, at 87–92.

House on May 10.<sup>110</sup> He stated that it would “protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”<sup>111</sup> He then added that in doing so it “t[ook] from no State any right that ever pertained to it.”<sup>112</sup>

Bingham went on to describe “flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever,” such as the infliction of “‘cruel and unusual punishment[ ]’ . . . not only for crimes committed, but for sacred duty done.”<sup>113</sup> He drew attention to a South Carolina law that required “citizens of the United States as well, should abjure their allegiance to every other government or authority than that of the State of South Carolina.”<sup>114</sup> It was, said Bingham,

an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. *That is the extent it hath, no more . . .*<sup>115</sup>

Lash interprets Bingham’s statement that the proposed amendment did “no more” than to protect “citizen and stranger . . . from unconstitutional state enactments” to reflect a “moderate position that the states remained an important constituent part of American constitutional government.”<sup>116</sup> Bingham stressed that Congress’s power to protect privileges and immunities did not encompass the “regulat[ion] [of] suffrage in the several States” and insisted that his amendment supplied power to enforce existing constitutional obligations, as much as certain of his radical colleagues might have wanted to—in Lash’s words—“nationalize[ ] the subject of civil rights and place[ ] the entire matter under federal control.”<sup>117</sup>

Lash then confronts “[p]robably the most studied speech of the Thirty-Ninth Congress regarding the Fourteenth Amendment”—Jacob Howard’s introduction of the proposed amendment to the full Senate on May 23.<sup>118</sup> As we saw in the Introduction, Howard cited with approval Justice Washington’s exposition in *Corfield* of “the character of the privileges and immunities

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

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 2543 (emphasis added).

116 LASH, *supra* note 28, at 151–52.

117 *Id.* at 150, 153 (internal quotation marks omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham)).

118 *Id.* at 155.

spoken of in the second section of the fourth article of the Constitution.”<sup>119</sup> Howard then added, “[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first . . . amendments of the Constitution.”<sup>120</sup>

After providing a partial list of those personal rights, Howard recapitulated his understanding of the coverage of the Privileges or Immunities Clause: “Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . .”<sup>121</sup>

Although this recapitulation has been read by a number of scholars<sup>122</sup> as communicating that the Privileges or Immunities Clause would *absolutely* protect unenumerated fundamental rights associated with the Privileges and Immunities Clause, *as well as* the personal rights set forth in the first eight amendments, Lash reads it differently:

If you look closely at the quote, you will see that Howard’s reference to privileges and immunities that “are not and cannot be fully defined in their entire extent and precise nature” was a reference to rights “secured by the second section of the fourth article of the Constitution,” the Comity Clause. . . . There is nothing in Howard’s speech . . . that suggests Howard believed the Privileges or Immunities Clause transformed the equally protected state-secured rights of the Comity Clause into substantive nonenumerated rights of national citizenship. Instead, it appears that Howard simply included the equally protected “privileges and immunities” of the Comity Clause as part of the constitutionally secured rights protected under the Privileges or Immunities Clause, along with the other enumerated rights of the first eight amendments.<sup>123</sup>

In short, Lash claims that, by referencing Article IV and *Corfield*, Howard simply added to the personal guarantees enumerated in the first eight amendments, the sojourning citizens’ enumerated right to protection against parochial discrimination with respect to (unenumerated) fundamental rights. Lash thus reads Howard as communicating an understanding of the “privileges and immunities of citizens of the United States” that is consistent with the ERO theory that Lash attributes to Bingham, Webster, and Morril.<sup>124</sup>

Lash then turns to the public debate over the constitutional text that was sent to the states for ratification on January 13. But for the definition of U.S. citizenship set forth in the first sentence—the product of a May 30 proposal

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

120 *Id.*

121 *Id.*

122 See sources cited *supra* note 19.

123 LASH, *supra* note 28, at 158.

124 See *id.* at 158–59.

by Howard<sup>125</sup>—the language of Section 1 of the proposed Fourteenth Amendment is identical to that of Bingham's third draft:

All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>126</sup>

Lash begins his discussion of the public debate over the Fourteenth Amendment by focusing on newspaper coverage. He points out that both the *New York Times* and the *New York Herald* reported Bingham's February 26 speech introducing his second draft and lamented that the "immortal Bill of Rights"<sup>127</sup> had been neglected by the states, and that other papers recognized that Congress "was moving toward nationalizing constitutionally enumerated rights."<sup>128</sup>

Lash acknowledges that "it is difficult to gauge the degree of public awareness of the content of the proposal, much less public understanding of Bingham's particular theory of the Constitution," given that (says Lash) Bingham's congressional colleagues struggled to understand him.<sup>129</sup> Still, Lash maintains that "anyone following the debate . . . would have known that Bingham was attempting to nationalize the Bill of Rights,"<sup>130</sup> by which Lash means the first eight amendments.

Turning to the text that Congress submitted for ratification, Lash finds that Howard's introduction to the Senate was widely disseminated and well received across the political spectrum as a clear, good-faith articulation of the amendment's content.<sup>131</sup> He also highlights an essay in which Kentucky jurist Samuel S. Nicholas derided Congress's "recent attempt . . . to treat [the Bill of Rights] as guaranties against the State governments" as evidence either of "stolid ignorance of Constitutional law, or of a shameless effort to impose upon the ignorant."<sup>132</sup> Lash infers from this reporting and commentary that "the general idea of the Amendment seemed to be getting through."<sup>133</sup>

That idea was further clarified, on Lash's account, as a consequence of the Johnson administration's politically disastrous counteroffensive against the proposed Fourteenth Amendment. In October of 1866, Johnson arranged to have Secretary of the Interior O.H. Browning pen a letter attack-

125 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

126 *Id.*

127 LASH, *supra* note 28, at 184 (quoting *Thirty-Ninth Congress*, N.Y. TIMES, Feb. 27, 1866, at 1).

128 *Id.* Lash notes that the *Herald* was the most widely distributed paper in the country. *Id.*

129 *Id.* at 185.

130 *Id.* at 185–86.

131 *See id.* at 187–88.

132 *Id.* at 189 (quoting S. S. NICHOLAS, *The Civil Rights Act*, in 3 CONSERVATIVE ESSAYS, LEGAL AND POLITICAL 47, 48–49 (Louisville, Bradley & Gilbert 1867)).

133 *Id.*



ing the amendment.<sup>134</sup> Browning argued that the amendment was both unnecessary and destructive of federalism—that state constitutions already protected citizens’ constitutional rights, such as the right to due process of law, and that the true “object and purpose” of the amendment was to “totally annihilate the independence and sovereignty of State judiciaries in the administration of State laws, and the authority and control of the States over matters of purely domestic and local concern.”<sup>135</sup>

But just two months earlier, on July 30, a white mob organized by the New Orleans mayor massacred mostly black marchers outside of a reconvened Louisiana Constitutional Convention.<sup>136</sup> Coming in the wake of this state-sanctioned slaughter, Browning’s arguments appeared both callous and wholly unpersuasive. Lash finds that even papers “traditionally disposed to support the President”<sup>137</sup> published editorials describing Browning’s letter as not only a “huge political blunder”<sup>138</sup> but as wrong on the merits—as reflecting a failure to appreciate the need for the federal government to protect citizens from state-sanctioned mob violence.<sup>139</sup>

The landslide Republican victory in the November 1866 elections constituted a rejection of the Johnson administration’s Reconstruction policies, including its opposition to the Fourteenth Amendment.<sup>140</sup> Rather than

134 See *id.* at 211.

135 Letter from O.H. Browning to W.H. Benneson & H.V. Sullivan (Oct. 13, 1866), in *DAILY NAT’L INTELLIGENCER* (D.C.), Oct. 24, 1866, at 2.

136 See LASH, *supra* note 28, at 202. At least forty-eight were killed and over two hundred were injured in the massacre. For a recent history, see generally JAMES G. HOLLANDSWORTH, JR., *AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866* (2001). We refer to it as a “massacre” rather than a “riot” not only because the former term more accurately captures the indiscriminate and brutal slaughter that took place but also in recognition of the fact that the term “riot” was used within the South during Reconstruction to “[a]scrib[e] a tendency to riot to the freedmen.” See LEEANNA KEITH, *THE COLFAX MASSACRE*, at xiii (2008).

137 LASH, *supra* note 28, at 212.

138 *Secretary Browning’s Letter*, *EVENING POST* (N.Y.C.), Oct. 24, 1866, at 2.

139 See *Mr. Browning’s Letter*, *MASS. SPY*, Nov. 2, 1866, at 1 (“Th[e] liberty of the mob to trample upon the weak and helpless, and of the courts to complacently fold their hands while persons entitled to their protection are lawlessly doomed to death or to a living despair, is what Mr. Browning classes among the reserved rights of the states . . .”); *Secretary Browning’s Letter*, *SEMI-WKLY. WIS.*, Oct. 31, 1866, at 1 (urging that “Mr. Browning must remember the case of Mr. [Samuel] HOAR, of Massachusetts, who was sent to South Carolina for the purpose of persuading the haughty Legislature of that State to relax some of its barbarous laws for the imprisonment of colored seamen” and reminding readers that “Mr. Hoar was absolutely driven out of that State, and not permitted the right of domicil[e] or the right of free speech, though he was a citizen of the United States”). Hoar, a Massachusetts lawyer, was expelled from South Carolina in 1844. For accounts of his expulsion and its impact, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 140 (1977); Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 *MICH. L. REV.* 907, 915 n.32, 938 (1993); and David R. Upham, *The Meanings of the “Privileges and Immunities of Citizens” on the Eve of the Civil War*, 91 *NOTRE DAME L. REV.* 1117, 1135–36 (2016).

140 See Lash, *supra* note 28, at 214–15.

merely exult in their success, Republicans took the opportunity to emphasize the importance of completing the hard work of ratifying the Fourteenth Amendment. To that end, they continued to expound the amendment's meaning, and continued to stress the importance of securing the enumerated rights to freedom of speech, freedom of the press, and due process of law. Bingham, in the context of discussing a proposed antiwhipping bill, described the "pending constitutional amendment" as providing for "all the limitations for personal protection of every article and section of the Constitution."<sup>141</sup>

While Lash concedes that governors and state legislative assemblies "left little in terms of a historical record,"<sup>142</sup> he argues that specific references to freedom of speech, peaceable assembly and petition, and use of the press as privileges or immunities<sup>143</sup> as well as general references to Section 1's protection of "all . . . constitutional rights,"<sup>144</sup> and "all the rights which the Constitution provides for men,"<sup>145</sup> provide "clear evidence that at least some of the assemblies were well aware of the substantive nature of the rights protected under Section One, as well as of the textualist nature of the 'privileges or immunities of citizens of the United States.'"<sup>146</sup>

By contrast, he finds that "[n]one of [Section 1's] supporters described the Amendment as nationalizing the subject of civil rights in the states."<sup>147</sup> Lash includes among the sources of evidence that support his ERO theory a series of articles published in the *New York Times* under the pseudonym "Madison,"<sup>148</sup> speeches made and resolutions adopted by the Southern Loyalists' Convention,<sup>149</sup> and an essay published by Frederick Douglass in an 1867 issue of the *Atlantic Monthly*.<sup>150</sup> We will address these three sources below in our critique.

Lash also focuses attention on President Johnson's proposed "counter-amendment," offered after six states had voted for and an equal number had voted against ratification of the Fourteenth Amendment.<sup>151</sup> Lash considers

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

142 LASH, *supra* note 28, at 219.

143 *Id.* at 220.

144 *Id.* (emphasis omitted) (quoting PENNSYLVANIA LEGISLATIVE RECORD, app. at LVI (1867)).

145 *Id.* (quoting PENNSYLVANIA LEGISLATIVE RECORD, app. at XCIX (1867)).

146 *Id.* at 220.

147 *Id.* at 221.

148 *Id.* at 217; see Madison, Letter to the Editor, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, NOV. 10, 1866, at 2 [hereinafter Madison, *The National Question*]; Madison, Letter to the Editor, *The Proposed Constitutional Amendment—What It Provides*, N.Y. TIMES, NOV. 15, 1866, at 2 [hereinafter Madison, *The Proposed Constitutional Amendment*].

149 See, e.g., LASH, *supra* note 28, at 205; see *The Southern Loyalists' Convention*, TRIB. TRACTS NO. 2, Sept. 6, 1866, at 23, 25.

150 See LASH, *supra* note 28, at 217; Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, ATLANTIC MONTHLY, Jan. 1867, at 112, 117.

151 LASH, *supra* note 28, at 221–22.

it important that President Johnson felt comfortable replacing the Privileges or Immunities Clause with what Lash characterizes as “a passive restatement of Article IV’s Comity Clause.”<sup>152</sup> Here is an excerpt of the final version of Johnson’s counteramendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States in which they reside, and the Citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.<sup>153</sup>

Johnson’s counteramendment did not shift momentum away from ratification. On July 21, 1868, both houses of Congress issued a concurrent resolution declaring that “three fourths and more of the several States of the Union” had ratified the Fourteenth Amendment—thus satisfying the strictures of Article V—and Johnson acquiesced via his own proclamation of ratification the following week.<sup>154</sup>

Lash closes out his discussion of the ratification debate by taking note of a speech delivered, and a letter published, by Judge George W. Paschal. Judge Paschal was a former member of the Southern Loyalists’ Convention who helped found Georgetown University’s law department and was among Georgetown’s first professors of jurisprudence. In a speech before the Texas House of Representatives, Judge Paschal applauded Congress for “defin[ing] citizenship according to an universal standard” and for safeguarding citizens against the abridgment of national privileges or immunities.<sup>155</sup>

In a letter published in the *New York Herald-Tribune*, Judge Paschal again stated that “[t]he lines defining American citizenship will no longer be matter of doubt” and devoted additional attention to the Privileges or Immunities Clause.<sup>156</sup> Of the latter’s importance, he wrote that although “[l]aw readers are so accustomed to see similar provisions in the State Constitutions, . . . they should know that the national bill of rights has, by a common error, been construed not to apply to or control the States.”<sup>157</sup>

In Judge Paschal’s words, Lash finds a succinct summary of a “moderate proposal” that “did not federalize common law civil rights”—any such “radical proposal” to do the latter having “no chance of passage”—but did “secur[e] those rights already announced in the federal Constitution.”<sup>158</sup> The success of that proposal was, Lash argues, made possible through Bingham’s deployment of a term of art with “a history stretching back into stat-

152 *Id.* at 222. Lash argues that “it is wholly implausible to think that Johnson would have introduced [Article IV] language into his counter-amendment” if the 1867 public understood it to “authoriz[e] federal protection of unenumerated natural rights.” *Id.*

153 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 240 (1906).

154 15 Stat. 709, 710 (1868).

155 George W. Paschal, Speech in the Hall of the House of Representatives on the 14th Article of Amendment of the Constitution of the United States (July 27, 1868), in DAILY AUSTIN REPUBLICAN, July 30, 1868, at 4.

156 George W. Paschal, *The Fourteenth Article*, N.Y. TRIB., Aug. 6, 1868, at 2.

157 *Id.*

158 LASH, *supra* note 28, at 227.

utes and treaties of the early nineteenth century,” the “antebellum understanding” of which that was “brought . . . into the public consciousness through [Republicans’] explanations of the Privileges or Immunities Clause.”<sup>159</sup>

#### D. Postadoption Commentary

Lash is wary of relying upon postratification commentary as evidence of the original communicative content of the Fourteenth Amendment, owing to concerns about its reliability.<sup>160</sup> Instead, Lash uses original meaning to contextualize postratification commentary. He begins with judicial opinions, including Judge Luther Day’s opinion for the Ohio Supreme Court in *Garnes v. McCann*<sup>161</sup> and Justice Joseph Bradley’s circuit court opinion in *Live-Stock Dealers*<sup>162</sup> holding unlawful a Louisiana slaughterhouse monopoly, the constitutionality of which would later be upheld in the *Slaughter-House Cases*.

Lash finds that the former is consistent with “the moderate reading of the [Privileges or Immunities] Clause presented by John Bingham and Jacob Howard”<sup>163</sup> because it held that the Privileges or Immunities Clause “includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States.”<sup>164</sup> Lash acknowledges that Justice Bradley took “a more expansive approach” in *Live-Stock Dealers* but reads Bradley as distinguishing between Article IV “privileges and immunities” and Fourteenth Amendment “privileges or immunities,” just “[a]s would the majority in *Slaughter-House*.”<sup>165</sup>

Lash proceeds to discuss debates over women’s suffrage. Several months after the ratification of the Fifteenth Amendment in 1870, women’s rights advocate Victoria Woodhull submitted a memorial to both Houses of Congress in which she argued that denying the right to vote to women violated the Privileges or Immunities Clause.<sup>166</sup> When Woodhull presented her memorial before the House Committee on the Judiciary on January 11, 1871, Washington lawyer Albert Riddle drew upon Justice Washington’s opinion in *Corfield*.<sup>167</sup>

In a report (“Woodhull Report”) submitted by John Bingham, who chaired the committee, the House Judiciary Committee responded that the

159 *Id.*

160 *Id.* at 230; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 552–53 (1994) (describing postratification commentary as “the least reliable source for recovering the original meaning of the law”).

161 21 Ohio St. 198 (1871).

162 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408).

163 LASH, *supra* note 28, at 232.

164 *Id.* (quoting *Garnes*, 21 Ohio St. at 209–10).

165 *Id.* at 231–34.

166 *Id.* at 234–35; *see* S. Misc. Doc. No. 41-16 (1870).

167 *Id.*; *see* A.G. Riddle, Speech in Support of the Woodhull Memorial, Before the Judiciary Committee of the House of Representatives, in 2 *HISTORY OF WOMAN SUFFRAGE* 448, 453 (Elizabeth Cady Stanton et al. eds., Rochester, N.Y., Charles Mann Printing Co. 1881).

Privileges or Immunities Clause did not recognize any right to vote. Lash excerpts a key section of the report:

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

To remedy this defect of the Constitution, the express limitations upon the States contained in the first section of the Fourteenth Amendment, together with the grant of power in Congress to enforce them by legislation, were incorporated in the Constitution. The words “citizens of the United States,” and “citizens of the states,” as employed in the Fourteenth Amendment, did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution.<sup>168</sup>

The report went on to cite with approval Justice Washington’s opinion in *Corfield*.<sup>169</sup>

It is to Lash’s credit as a scholar that he presents the reader with the Woodhull Report because it seems flatly inconsistent with his interpretation of the Privileges or Immunities Clause. The report expressly states that the set of “privileges or immunities of citizens of the United States” is identical to—or none “other than”—the set of “privileges and immunities of citizens in the several states” and to the set described by Justice Washington in *Corfield*.<sup>170</sup> If “article 4, section 2,” was generally understood merely to be a “Comity Clause” and *Corfield* to be a comity-only opinion, as Lash would have it, quite obviously, the enforcement of this Clause by the Fourteenth Amendment would not provide citizens with an absolute security in their enjoyment of even their *enumerated* rights, much less the rights included in the Civil Rights Act.

Lash concedes that he can only speculate as to why Bingham signed off on this report. In the end, he dubs the highly inconvenient report a “historical oddity that tells us more about sloppy committee work than the original understanding of the Privileges or Immunities Clause.”<sup>171</sup> This piece of evidence should nevertheless be kept in mind when we turn to our critique of Lash’s ERO theory of the Clause.

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168 LASH, *supra* note 28, at 236–37 (emphasis added) (quoting H.R. REP. NO. 41-22, at 1 (1871)).

169 *Id.* at 237 (citing H.R. REP. NO. 41-22).

170 H.R. REP. NO. 41-22, at 1.

171 LASH, *supra* note 28, at 240.

Lash then turns his attention to Bingham's last, quite different words on the subject, delivered in defense of the Ku Klux Klan Act of 1871.<sup>172</sup> The Ku Klux Klan Act was introduced by Representative Samuel Shellabarger of Ohio and was directed not against hostile state action but against private conspiracies to violate the "rights, privileges or immunities of another person"—including by means of "murder, manslaughter, mayhem, robbery, assault and battery."<sup>173</sup>

Some representatives objected that Congress's Section 5 powers to enforce Section 1 did not encompass the prohibition of private violations of constitutional rights, being that the text of Section 1 forbade only "states" from abridging the privileges or immunities of U.S. citizens, depriving people of due process of law, or denying people the equal protection of the laws.<sup>174</sup> Shellabarger responded to these objections in part by invoking *Corfield* and averring that Justice Washington's opinion listed "fundamental rights of citizenship" that Congress had power to protect.<sup>175</sup>

On March 31, in a speech in which he appears to distance himself from Shellabarger, Bingham stated the reasons why he chose to abandon his original draft of the Fourteenth Amendment.<sup>176</sup> Bingham claimed to have been persuaded by Marshall's "great decision" in *Barron v. Baltimore* that the first eight amendments did not bind the states and to have recognized the need to supply language that specifically did so:

[I]t was decided, and rightfully, that these [first eight] amendments, defining and protecting the rights of men and citizens, were only limitations on the power of Congress, not on the power of the States.

In reexamining that case of *Barron* . . . after my struggle in the House in February, 1866, . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the power of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention."

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts["]; . . . I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows:

"No State shall . . . ."<sup>177</sup>

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172 *Id.* at 242; see Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

173 CONG. GLOBE, 42d Cong., 1st Sess. app. at 69 (1871) (statement of Rep. Shellabarger).

174 LASH, *supra* note 28, at 243.

175 CONG. GLOBE, 42d Cong., 1st Sess. app. at 69 (1871) (statement of Rep. Shellabarger).

176 *Id.* at 84 (statement of Rep. Bingham).

177 *Id.* (citation omitted) (first quoting *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833); and then quoting, with minor variations, U.S. CONST. art. I, § 10).

Bingham then articulated his own understanding of the Privileges or Immunities Clause. First, Bingham denied that *Corfield* meant anything more than that “in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.”<sup>178</sup> In short, *Corfield* equals comity. Second, he asked rhetorically: “Is it not clear that *other and different privileges and immunities . . .* are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment . . . ?”<sup>179</sup> Bingham then counseled the House to “follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guaranteed by the amended Constitution and *expressly enumerated* in the Constitution.”<sup>180</sup>

Lash finds “little reason to doubt the sincerity” of Bingham’s interpretation.<sup>181</sup> He points out that, during the framing process, Bingham “never once relied on *Corfield*, much less natural rights interpretations of *Corfield*.”<sup>182</sup> According to Lash, Bingham “[o]ver and over again . . . refer[red] to the privileges and immunities of citizens of the United States in a manner that reference[d] the express enumerated rights of the Constitution,”<sup>183</sup> consistently with his claim that Congress could pass laws to enforce “privileges and immunities of citizens . . . *expressly enumerated in the Constitution*.”<sup>184</sup>

Lash concludes by discussing the legal reception of the Privileges or Immunities Clause. Lash begins with the Supreme Court’s 1873 decision in the *Slaughter-House Cases*. In a majority opinion authored by Justice Samuel Miller, the Court denied that a Louisiana slaughtering monopoly that effectively put hundreds of local butchers out of business deprived those butchers of their “privilege or immunity” to pursue a trade.<sup>185</sup>

178 *Id.*

179 *Id.* (emphasis added).

180 *Id.* (emphasis added). Despite this limited reading of the Privileges or Immunities Clause, Bingham nevertheless thought the Ku Klux Klan Act was constitutional because groups of private actors were presently “trampling under foot the life and liberty, [and] destroying the property of the citizen.” *Id.* at 85. Bingham urged that Congress could “enforce the Constitution” by dispersing those groups by force, without thereby undermining the “dual system of government” he regarded as “essential to our national existence.” *Id.* at 84–85.

181 LASH, *supra* note 28, at 250.

182 *Id.* at 250–51.

183 *Id.* at 251.

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

185 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 60 (1873). For a deep-dive into the opinions in the *Slaughter-House Cases*, see Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994). For a summary of competing scholarly narratives concerning the case, see Randy E. Barnett, *The Three Narratives of the Slaughter-House Cases*, 41 J. SUP. CT. HIST. 295 (2016).

Lash applauds Justice Miller for distinguishing between the privileges and immunities protected by Article IV and those protected by Section 1. Although Justice Miller embraced Justice Washington's definition in *Corfield* of "fundamental" rights for Article IV purposes, Justice Miller denied that the Privileges and Immunities Clause did more than protect the right to comity.<sup>186</sup>

Turning to the Fourteenth Amendment, Justice Miller contended that interpreting the Privileges or Immunities Clause to transform the rights listed in *Corfield* into absolutely protected national rights would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."<sup>187</sup> Justice Miller reasoned that such an interpretation ought to be avoided "in the absence of language which expresses such a purpose too clearly to admit of doubt"—and he found no such language in Section 1.<sup>188</sup> Lash states that the results of his own inquiry "strongly suggest[ ] that . . . Miller was absolutely right."<sup>189</sup>

Lash denies that Justice Miller "clos[ed] the door on viewing the Privileges or Immunities Clause as protecting enumerated constitutional rights."<sup>190</sup> He points out that Justice Miller identified the enumerated right to peaceably assemble to petition the government, the privilege of the writ of habeas corpus, and the right to become a citizen of a state through bona fide residence in that state, as protected by the Privileges or Immunities Clause.<sup>191</sup> He laments, however, that Justice Miller's opinion "is not clear about which textual rights are protected or how they are protected."<sup>192</sup>

In Lash's narrative, the Privileges or Immunities Clause was rendered a virtual nullity, not by the *Slaughter-House Cases*, but, rather, by the Court's 1876 decision in *Cruikshank*.<sup>193</sup> The latter case involved the prosecution of the perpetrators<sup>194</sup> of the Colfax Massacre—what historian Eric Foner has described as "[t]he bloodiest single instance of racial carnage in the Reconstruction era"<sup>195</sup>—under the Enforcement Act of 1870. In *Cruikshank*, the

186 *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 75–76.

187 *Id.* at 78.

188 *Id.*

189 LASH, *supra* note 28 at 258.

190 *Id.* at 253.

191 *See id.* at 253 n.93; *see also Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

192 LASH, *supra* note 28, at 264.

193 *Id.*; *see United States v. Cruikshank*, 92 U.S. 542 (1876).

194 As Justice Samuel Alito would recount in his opinion for the Court in *McDonald*, William Cruikshank "allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed." *McDonald v. City of Chicago*, 561 U.S. 742, 757 (2010); *see also* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 106 (2008) (detailing how Cruikshank "ma[de] a sport out of lining" up two black men "so close to each other that he could kill them with a single bullet").

195 ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 437 (1988). For two compelling recent histories, published nearly simultaneously, *see generally* KEITH, *supra* note 136; and LANE, *supra* note 194. After noting disputes about the precise number, Lane estimates that between sixty-two and eighty-one black Republican candidates who



Court held that the right to assemble and petition was limited to the protection of assemblies, the purpose of which was to petition the *federal* government for redress of grievances.<sup>196</sup>

Accordingly, the Court concluded that members of a mob that slaughtered dozens of black Republicans could not be indicted for “prevent[ing] a meeting for any lawful purpose whatever.”<sup>197</sup> The Court also held that members of the mob could not be indicted for conspiring to prevent people from “bearing arms for a lawful purpose,” reasoning that the Second Amendment “has no other effect than to restrict the powers of the national government, leaving the people to look [to states and municipalities] for their protection against any violation by their fellow-citizens of the rights it recognizes.”<sup>198</sup> In sum, writes Lash, the Court “removed from the scope of the Privileges or Immunities Clause the very violation of life and liberty that fueled the ratification of the Fourteenth Amendment.”<sup>199</sup>

Lash concludes his discussion of the legal reception of the Privileges or Immunities Clause by examining several treatises—the second edition of Thomas Cooley’s *Constitutional Limitations*, published in 1871; John Norton Pomeroy’s 1868 *An Introduction to the Constitutional Law of the United States*; the second edition of Timothy Farrar’s *Manual of the Constitution of the United States*, published in 1869; and George Paschal’s 1868 *Annotated Constitution of the United States*.<sup>200</sup> He reports that all but Cooley—who doubted whether Section 1 “surround[ed] the citizen with any protections additional to those before possessed under the State constitutions”<sup>201</sup>—agreed “that the adoption of the Fourteenth Amendment would overturn the doctrine of *Barron v. Baltimore*.”<sup>202</sup>

## II. CRITIQUE

Lash’s research on the Privileges or Immunities Clause is almost overwhelming. One cannot but admire Lash’s energy, his attention to detail, his willingness to pursue the evidence, though it may take him into areas of law not previously considered relevant to his core interpretive goal, and the precision and clarity of his prose.

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peacefully occupied the Grant Parish courthouse after a county election were slaughtered by a white mob, many after surrendering. LANE, *supra* note 194, at 265–66. Keith points out that the state of Louisiana placed on historical marker on the site of the massacre in 1951 which celebrated the death of “150 negroes” and “the end of carpetbag misrule in the South.” KEITH, *supra* note 136, at xii. The number of whites killed—three—is not in dispute. LANE, *supra* note 194, at 265.

196 *Cruikshank*, 92 U.S. at 552.

197 *Id.* at 553.

198 *Id.*

199 LASH, *supra* note 28, at 267.

200 *Id.* at 273–74.

201 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 313 (Boston, Little, Brown & Co., 2d ed. 1871).

202 LASH, *supra* note 28, at 274.

Lash is presently under contract with the University of Chicago Press to produce a three-volume set of historical materials relating to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments—a much-needed follow-up to Phillip Kurland’s four-volume *The Founders’ Constitution*, which includes historical materials relating to the 1788 Constitution and 1789 amendments. Given his prodigious learning, we cannot think of anyone better for the job.

Before we proceed to commentary that will be primarily critical, it is worth singling out certain features of Lash’s analysis that we find persuasive.

First, we are persuaded that the Privileges and Immunities Clause of Article IV was generally understood in antebellum caselaw to guarantee sojourning citizens equality in the enjoyment of fundamental civil rights, not to “absolutely” guarantee to all citizens the enjoyment of such rights. Lash’s exegesis of leading antebellum cases is generally convincing.<sup>203</sup>

Second, we continue to share with Lash the view that the Privileges or Immunities Clause does not merely provide for the enforcement of the right to comity. Lash’s case against the comity-only view advanced by Philip Hamburger<sup>204</sup> is devastating. As Lash puts it, “[t]here is just too much historical evidence to the contrary.”<sup>205</sup> Further, Hamburger’s claim that freedmen “had little need for assurances of any particular substantive federal

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203 We are not, however, convinced by his analysis of *Campbell v. Morris*, 3 H. & McH. 535 (Md. Gen. Ct. 1797). As others have pointed out, the opinion’s author—likely Judge Jeremiah Chase rather than Justice Samuel Chase—used comity-only language and fundamental-rights language. Thus, Judge Chase stated that the Privileges and Immunities Clause

means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected.

*Id.* at 554 (emphasis added). David Upham has observed that “[t]hese two privileges corresponded perfectly to two of the main privileges of subjectship . . . : the right to acquire and hold real property and the freedom from aliens’ duties and restrictions.” David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1501 (2005). Chase’s language does not suggest that the first of these privileges has any relation to comity. See also Richard L. Aynes, *Article IV and Campbell v. Morris: Wrong Judge, Wrong Court, Wrong Holding, and Wrong Conclusion?* (Univ. of Akron Sch. Law, Akron Research Paper No. 09-13, 2009), <http://ssrn.com/abstract=1510809> (arguing that scholars have generally misunderstood *Campbell*, misidentified its author, and overstated its significance).

204 See generally Hamburger, *supra* note 69.

205 See LASH, *supra* note 28, at 283. Lash deals what appears to us to be a decisive blow to Hamburger’s specific claim that the language of a comity-protective privileges-and-immunities bill introduced by Shellabarger inspired Bingham. Lash points out, not only that Shellabarger’s bill was never debated or discussed, but that Representative James Wilson added an amendment to the bill which clarified that “the enumeration of the privileges and immunities of citizenship in this act contained shall not be deemed a denial or abridgment of any other rights, privileges, or immunities which appertain to citizenship under the Constitution.” *Id.* (quoting H.R. 437, 39th Cong. § 12 (1866)). Wilson’s amendment strongly suggests that “members of the Thirty-Ninth Congress did not believe the

rights” appears unsustainable on the basis of the evidence presented by Lash.<sup>206</sup> What good would the right to comity have done blacks who were massacred by local mobs in their own states?

Finally, we accept Lash’s claim that Republicans generally, and Bingham in particular, were concerned with securing certain fundamental rights associated with national citizenship without empowering Congress or the federal courts to act—as Justice Miller put it—as “perpetual censor[s] upon all legislation of the States.”<sup>207</sup> (Indeed, the dissenters in *Slaughter-House* denied the existence of any such implication of their more expansive reading of the Clause.)

We reach different conclusions concerning how the ultimate balance between individual-rights protection and state autonomy was struck. But we are persuaded by Lash’s arguments that “the more radical members of Congress” were unable to secure the ratification of an amendment that embodied their first-order preferences about the distribution of federal and state power.<sup>208</sup> The federalism of the founding survived to a greater extent than it otherwise might have.

In the end, however, we are unpersuaded that Lash’s core thesis is correct. In what follows, we will argue that “competent speakers of the English language who [we]re aware of the context in which the text was communicated for ratification”<sup>209</sup> likely did not understand the Privileges or Immunities Clause as Lash does.

#### A. *Lash’s ERO Theory Lacks Support in Antebellum Jurisprudence*

Lash’s case for the privileges or immunities “of citizens of the United States” as an antebellum term of art that was used in connection with enumerated constitutional rights (and *only* enumerated constitutional rights) is based primarily on evidence drawn from debates over the admission of Missouri.<sup>210</sup> There are two problems with Lash’s term-of-art case.

First, Lash does not demonstrate that any consensus developed during the Missouri debates concerning the distinction between Article IV rights of state citizenship and the privileges and immunities of national citizenship, or that anyone who participated in the Missouri debates held the ERO theory that is key to his thesis. Second, Lash neglects other evidence that renders improbable the general acceptance of his ERO theory during the antebellum period.

Careful scrutiny of the evidence Lash adduces from the Missouri debates reveals that slavery and free-state advocates held very different understand-

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rights of the Comity Clause were the only privileges or immunities of national citizenship.” *Id.* at 283.

206 Hamburger, *supra* note 69, at 71.

207 LASH, *supra* note 28, at 257 (quoting *Slaughter-House Cases*, 83 U.S. (15 Wall.) 36, 78 (1873)).

208 *Id.* at 69.

209 *Id.* at 277.

210 *Id.* at 47–66.

ings of the same treaty language; that they advanced a variety of arguments in support of their respective understandings; and that it is unlikely that any consensus understanding of the privileges and immunities of U.S. citizenship developed.

Slavery advocates, for their part, generally denied that Congress had the power to require Missouri to ban slavery because the “*rights, advantages and immunities* of citizens of the U[nited] States” included “the right to republican self-government or the right of an entering state to equal status with the original states of the Union.”<sup>211</sup> True, as Lash emphasizes, sometimes slavery advocates invoked constitutional text, such as the Guarantee Clause and the Tenth Amendment.<sup>212</sup> But Lash does not acknowledge that slavery advocates at other times relied instead upon general political-philosophical principles and invoked unenumerated rights.<sup>213</sup>

Nor does Lash recognize that some slavery advocates denied any distinction between the rights of state citizenship protected by Article IV and rights of national citizenship protected by the Cession Act. Indeed, as the debate raged, the General Assembly of Virginia issued resolutions expressly denying

211 *Id.* at 58 (internal quotation marks omitted) (quoting Louis McLane, Speech of Mr. McLane, of Delaware, on the Missouri Question (Feb. 7, 1820), in *AM. WATCHMAN* (Wilmington, Del.), Mar. 29, 1820, at 2)).

212 *See, e.g.*, 33 *ANNALS OF CONG.* 1196–97 (1819) (statement of Rep. Scott) (arguing that “the most valuable and prominent” of the “rights, privileges, and immunities” guaranteed by the Cession Act to the people of Missouri was that of “forming and modifying their own State constitution” and that the choice to decide whether to recognize property in people was guaranteed by the Guarantee Clause, the Ninth Amendment, the Tenth Amendment, and the Privileges and Immunities Clause).

213 *See, e.g.*, 37 *ANNALS OF CONG.* 563 (1820) (statement of Rep. Smyth) (describing “right of self-government” as “a natural inherent right of mankind” and claiming that Missouri became entitled to exercise it by recognizing slavery as soon as it “ceased to be governed as a Territory”); 36 *ANNALS OF CONG.* 1341 (1820) (statement of Rep. Rankin) (invoking “right [of inhabitants of Missouri] to form their own constitution, and shape their own municipal regulations,” drawing no connection to constitutional text); 35 *ANNALS OF CONG.* 1233 (1820) (statement of Sen. Barbour) (arguing that “[a] State, to be sovereign and independent, must govern itself by its own authority and laws” and questioning whether Missouri can “govern herself by her own authority and laws, in relation to the subject of slavery” if it is required to ban slavery as a condition of its admission); *id.* at 197 (statement of Sen. Leake) (rights guaranteed by Article III of the Cession Act include right of people of territories to “form a Constitution for themselves, upon republican principles”); 34 *ANNALS OF CONG.* 1231–32 (1819) (statement of Rep. McLane) (appealing to the “undoubted right of every people, when admitted to be a State, to become free, sovereign, and independent—free to make their own constitution and laws” and claiming that this right encompasses the right to hold slaves “if they please to do so”); *id.* at 1227 (1819) (statement of Rep. Walker) (arguing that the slavery ban would “tak[e] away from the people of [the Missouri] territory the natural and Constitutional right of legislating for themselves” and counting the latter right among “their privileges as freemen”). *But see* 35 *ANNALS OF CONG.* 245 (1820) (statement of Sen. Otis) (denying that “the right of self-government in the people, or the faculty of making a State constitution” belonged to any but the “people of the several old United States, vested in them by the laws of nature and nations”).

that distinction and rejecting the proposition that the “rights secured by the treaty are such only as are conferred by the federal constitution.”<sup>214</sup>

We emphasize that we are not endorsing the proslavery position. It is Lash who appeals to what he views as a consensus between antislavery and proslavery advocates concerning the distinction between Article IV rights and the “rights, advantages, and immunities of US citizens.”<sup>215</sup> Our point is that Lash overstates the consensus, and that this lack of consensus undermines Lash’s term-of-art case.

Of course, because slavery advocates were slavery advocates, there is no reason to think that Republicans in the Thirty-Ninth Congress would have cared what they thought. But *free-state advocates* do not seem to have shared the kind of ERO theory that Lash’s thesis depends upon. Yes, some free-state advocates argued that the “right” to hold slaves was unprotected by Article IV because it was not recognized in the Constitution’s text.<sup>216</sup> But those same advocates, as well as others, *also* argued that only rights that were uniformly held across the nation by similarly situated citizens were “rights, advantages, and immunities” of citizens of the United States;<sup>217</sup> that slaveholding was not “essential to constitute [United States] citizenship”;<sup>218</sup> that Article III of the Cession Act’s promise was limited to those rights in Louisiana in 1803, or to areas inhabited in 1803;<sup>219</sup> that the Cession Act served as a general guarantee of equal footing to newly admitted states but that the proposed restrictions were consistent with that guarantee;<sup>220</sup> that congressional power over the

214 H.R. 5, 1820 Gen. Assemb., (Va.), in *ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA* 113, 122 (Richmond, Thomas Ritchie 1820) (“Is there a class of people in this country, who are citizens of the United States, and not citizens of any state, or territory, or district in the union? If so, how have they become such, and what rights do they possess? There are no such people.”).

215 LASH, *supra* note 28, at 59.

216 *Id.* at 58–59.

217 *Id.* at 59; see 36 ANNALS OF CONG. 1379 (1820) (statement of Rep. Darlington) (inferring that the right to hold slaves is not a federal right from the facts that “the people of Missouri may, themselves, exclude slavery” and that “Congress may prohibit slavery in a territory”); RUFUS KING, *SUBSTANCE OF TWO SPEECHES, DELIVERED IN THE SENATE OF THE UNITED STATES, ON THE SUBJECT OF THE MISSOURI BILL* 15 (New York, Kirk & Mercein 1819) (“[F]ederal rights[] are uniform throughout the Union, and are common to all its citizens . . .”).

218 35 ANNALS OF CONG. 146 (1820) (statement of Sen. Morrill); see also *id.* at 206 (statement of Sen. Lowrie) (denying that “the toleration of slavery is necessary for the self-preservation of the people of Missouri”).

219 See *id.* at 215 (statement of Sen. Burrill) (Article III “cannot refer to persons already citizens of the United States who buy land and remove thither; such require no aid from the treaty.”); John Sergeant, *Speech of Mr. Sergeant on the Missouri Question in the House of Representatives* (July 22, 1820), in 18 NILES’ WKLY. REG. 367, 380 (1820) (Only “those who were inhabitants of the ceded territory, and subjects of the ceding power, at the time of the cession” can “call the treaty to their aid.”).

220 35 ANNALS OF CONG. 214–15 (1820) (statement of Sen. Burrill) (“Will [Missouri] not have her Senators, her Representative, her Electors, by the same rules as other States? Must not all the regulations of her commerce, all her relations to the Union, and to other States, be the same as those of Ohio or Vermont? Will she not, according to her popula-

admission of territories was absolute and trumped contrary treaty language;<sup>221</sup> and that slavery could not be a privilege of citizenship because “what is gained by the masters must be lost by the slaves.”<sup>222</sup>

Further, what arguments-from-enumeration free-state advocates *did* make do not reflect the influence of Lash’s distinctive ERO theory. Recall that Lash’s theory holds that *all* enumerated personal rights and *only* enumerated personal rights are among the privileges and immunities of U.S. citizenship. Although both Webster and Morrill listed federal rights that appear in the constitutional text, neither listed any of the personal rights set forth in the first eight amendments.<sup>223</sup>

Morrill, observes Lash, listed rights relating to federal representation and to the jurisdiction of the federal courts.<sup>224</sup> Webster listed rights to federal representation and the right to a republican form of government.<sup>225</sup> It is thus possible that both men understood the “rights, advantages and immunities” guaranteed by the Cession Act to encompass *only* what Lash describes as “constitutionally express structural guarantees”<sup>226</sup> related to participation in and access to institutions of the national government on equal footing with citizens of other states upon admission to the Union.<sup>227</sup> Lash does not con-

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tion, have the same power and weight as other States?”); 33 ANNALS OF CONG. 1209 (1819) (statement of Rep. Tallmadge) (“If the proposed amendment prevails, the inhabitants of Louisiana or the citizens of the United States can neither of them take slaves into the State of Missouri. All, therefore, may enjoy equal privileges.”).

221 35 ANNALS OF CONG. 216 (1820) (statement of Sen. Burrill) (“If, by the Constitution, ‘Congress have power to dispose of, and make all needful rules and regulations respecting, the territory and other property belonging to the United States,’ and might . . . prevent migration and importation into the territories and new States . . . , and if the treaty diminishes this power, then the treaty is contrary to the Constitution, and in that article void.”); *id.* at 149 (statement of Sen. Morrill) (“The power of Congress over this territory is sovereign and complete.”); 33 ANNALS OF CONG. 1209 (1819) (statement of Rep. Tallmadge) (“The Senate, or the treaty-making power of our Government, have neither the right nor the power to stipulate, by a treaty, the terms upon which a people shall be admitted into the Union. This House have a right to be heard on the subject.”); .

222 33 ANNALS OF CONG. 1182 (1819) (statement of Rep. Fuller).

223 We are not the first to make this observation. See Bret Boyce, *The Magic Mirror of “Original Meaning”: Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 47 (2013) (“[A]s Lash himself points out, Webster’s and Morrill’s discussions of federal constitutional rights involved ‘structural guarantees of federalism and access to federal courts,’ not the guarantees of the first eight amendments.” (footnote omitted) (quoting Lash, *The Origins of the Privileges or Immunities Clause, Part I*, *supra* note 27, at 1293)).

224 LASH, *supra* note 28, at 57; David Morrill, Remarks of Mr. Morrill in the Senate of the United States on the Missouri Question (Jan. 17, 1820), in HILLSBORO’ TELEGRAPH (Amherst, N.H.), Mar. 4, 1820, at 1.

225 WEBSTER ET AL., *supra* note 102, at 16.

226 LASH, *supra* note 28, at 58.

227 Other lists put forward by free-state advocates are similar in this regard. See, e.g., 35 ANNALS OF CONG. 245 (1820) (statement of Sen. Otis) (Inhabitants of Louisiana “shall be eligible to be Presidents, Vice Presidents, members of Congress, and capable of sustaining all offices under the Constitution, civil and military, and entitled to their fair and proportionate share of all the great contracts and little contracts, and to all sorts of privileges and

sider this possibility, even though it would be consistent with an equal-footing function of the Act that was identified by Secretary of State James Madison shortly before the Louisiana treaty's adoption;<sup>228</sup> by participants in the Missouri debate<sup>229</sup>; and by antebellum courts.<sup>230</sup> That is not the ERO theory to which Lash is attached.

We can, however, identify instances when the language of privileges or immunities "of citizens of the United States" was used in connection with certain enumerated personal rights as well, both during the Missouri debate and during the antebellum era more generally. During the Missouri debate, Representative Louis McLane of Delaware claimed that the right of states to choose whether to admit or exclude slavery was as much a right under Article III as "the right to be represented in Congress, or the right to a freedom of religious opinion, or the right to have the slaves accounted a part of their population."<sup>231</sup>

Lash also cites an 1835 letter from Attorney General Benjamin Butler, who wrote that citizens of the United States residing in Arkansas territory who sought to frame a constitution without a prior enabling act by Congress "possess[ed] the ordinary privileges and immunities of the United States," including the right "peaceably to assemble and to petition the government for the redress of grievances."<sup>232</sup>

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advantages enjoyed by any other citizen of the Union in that capacity."); *id.* at 183 (statement of Sen. Mellen) ("The new State shall be entitled to two Senators in Congress; to Representatives in Congress according to the established ratio; to Electors of President and Vice President; to the benefit of Federal Courts; the Constitutional guaranty of protection against invasion; and all other advantages and immunities which are of a federal nature."). For an earlier articulation of an equal-footing understanding, see 13 ANNALS OF CONG. 54 (1803) (statement of Sen. Tracy) ("The obvious meaning of [Article III] is, that the inhabitants of Louisiana are incorporated, by it, into the Union, upon the same footing that the Territorial Governments are, and, like them, the Territory, when the population is sufficiently numerous, must be admitted as a State, with every right of any other State.").

228 Madison's outline of the Louisiana treaty announced the purpose of "incorporat[ing] the inhabitants of the hereby ceded territory with the citizens of the United States on an equal footing" and thereby "constituting them a regular and integral portion of the union." EVERETT SOMERVILLE BROWN, CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812, at 66 (1920) (quoting Letter from James Madison to Robert Livingston & James Monroe (Mar. 2, 1803), *in* 12 ANNALS OF CONG. app. at 1096, 1101, 1106 (1803)).

229 See 35 ANNALS OF CONG. 215 (1820) (statement of Sen. Burrill) ("The true meaning of the clause must be, that the inhabitants shall be put on the same footing as other citizens of the United States, as to their political rights, and to the same extent as if native-born . . .").

230 See *City of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 235 (1835) (concluding that the treaty provision was designed to ensure "that Louisiana shall be admitted into the union as soon as possible, upon an equal footing with the other states").

231 34 ANNALS OF CONG. 1233 (1819) (statement of Rep. McLane).

232 Letter from Benjamin Butler, U.S. Attorney Gen., to John Forsyth, U.S. Sec'y of State (Sept. 21, 1835), *in* 21 TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ARKANSAS, 1829–1836, at 1082, 1087 (Clarence Edwin Carter ed., 1954).

This evidence does not help Lash very much. Lash does not merely claim that the privileges or immunities of U.S. citizens *included* some enumerated rights. We agree it does. Rather, Lash advances the much more difficult-to-prove claim that the language of privileges and immunities of U.S. citizenship was understood during the antebellum period to include *all* enumerated rights and *only* enumerated rights. We cannot infer that an all-and-only-enumerated-rights understanding was widely held from isolated references to particular enumerated rights.

McLane cited no constitutional text for the proposition that states enjoy the right to choose whether to admit or exclude slavery, resting instead on general principles of popular sovereignty.<sup>233</sup> To say, as Butler did, that the right to peaceable assembly and petition is “among” the privileges and immunities of U.S. citizens is not to imply that the federal enumeration of a right is either necessary or sufficient to make it such a privilege or immunity of U.S. citizenship.

The right to peaceable assembly and petition might well be “among” those rights that belong in the family of “rights, privileges, and immunities” because they were uniformly deemed fundamental to citizenship by states, federally enumerated or not; it might be among them because it is in fact fundamental to citizenship, even if it was not uniformly deemed fundamental by states. Lash neglects these possibilities.

The caselaw concerning the Cession Act, both prior and subsequent to the debate over the Missouri question, does not suggest that an ERO theory was widely held.<sup>234</sup> To discuss all of the cases in which antebellum judges interpreting such treaty language made no reference to any ERO theory would add considerable length to an already lengthy critique.<sup>235</sup> We will focus on four cases.

233 35 ANNALS OF CONG. 1149–50 (1820) (statement of Rep. McLane).

234 For criticism along the similar lines, see Green, *supra* note 19, at 111 (adducing “evidence . . . which Lash does not confront, that the 1803 promise of the rights of citizens of the United States was understood as a promise of the rights of *other similarly situated* citizens of the United States”).

235 See, e.g., *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 133 (1835) (identifying “the perfect inviolability and security of property” as a right of citizenship); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 376 (1840) (Baldwin, J., concurring) (stating that former noncitizens have “the same constitutional right [as citizens] to invoke the protection of the judicial power of the state or Union, against the invasion of [their] rights of person or property, wherever [they] might be located”); *People ex rel. Attorney Gen. v. Naglee*, 1 Cal. 232, 242, 250–51 (1850) (upholding a mining tax that was imposed on noncitizens and indicating that both the Treaty of Queretaro between the U.S. and Mexico and the Privileges and Immunities Clause might prohibit such a tax on naturalized citizens); *Ward v. Broadwell*, 1 N.M. 75, 85 (1854) (referring to the right of “exercising the paternal and marital powers and the like”). For an extended discussion of these and other cases, see Upham, *supra* note 139, at 1124–27. Upham concludes that “in the decades before the Civil War, there was largely a convergence in the interpretations of the respective ‘privileges and immunities’ secured by the treaties and Article IV (according to *Corfield*).” *Id.* at 1127.



Less than a decade after the acquisition of Louisiana, the Louisiana Supreme Court in 1812 held that a Saint Domingue refugee named Jean Baptiste Desbois who failed to report his arrival to federal officials in 1806, and thus never began the naturalization process, had nevertheless acquired citizenship through the admission of Louisiana into the Union.<sup>236</sup> As a consequence, Desbois was held to be entitled to “all the rights and privileges of a citizen of the United States”—including the federally unenumerated privilege of practicing law in Louisiana.<sup>237</sup>

The same year, a Louisiana district court decided a case involving an Irishman known only as Laverty who was ordered by a federal marshal to move forty miles from the Mississippi River, pursuant to an ordinance applicable to enemy aliens.<sup>238</sup> Laverty argued that he, like Desbois, had acquired American citizenship through the Cession Act, and thus could not be subjected to such alienage-based disabilities.<sup>239</sup> A state court ruled in Laverty’s favor, and the Louisiana Supreme Court refused to review the decision.<sup>240</sup> The courts made no effort to ground the right to be free from alienage-based disabilities in constitutional text. Lash does not examine these cases.

In the very year that Butler penned his letter identifying an enumerated personal right as one of the privileges of national citizenship, the Supreme Court of the United States strongly implied that certain unenumerated rights were also among those privileges. *New Orleans v. De Armas*<sup>241</sup> concerned a dispute over a lot in New Orleans that the city claimed was part of a quay and was dedicated to the city’s use in the original plan of the town. Those who currently possessed the lot sought to confirm their rights and enjoin the city from disturbing them.<sup>242</sup> After a district court ruled in the possessors’ favor and the Louisiana Supreme Court upheld the decision, the Supreme Court heard the city’s appeal under section 25 of the Judiciary Act of 1789.<sup>243</sup>

In determining that the Court lacked jurisdiction over the controversy, Chief Justice John Marshall discussed the “objects” of Article III of the Cession Act:

One, that Louisiana shall be admitted into the union as soon as possible, upon an equal footing with the other states, and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property and religion.<sup>244</sup>

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236 Desbois’ Case, 2 Mart. (o.s.) 185, 185, 201–02 (La. 1812).

237 *Id.* This is the very right that the Supreme Court would later deny was a privilege or immunity of U.S. citizens on the day after its decision in the *Slaughter-House Cases* was announced. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138–39 (1873).

238 *United States v. Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a).

239 *Id.* at 876.

240 *Id.* at 876–77.

241 34 U.S. (9 Pet.) 224 (1835).

242 *Id.* at 234.

243 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85; *New Orleans*, 34 U.S. (9 Pet.) at 234; *De Armas v. Mayor*, 5 La. 132 (E.D. La. 1833).

244 *New Orleans*, 34 U.S. (9 Pet.) at 235.

Marshall then considered whether “[t]he right to bring questions of title decided in a state court, before this tribunal,” was among the “rights, advantages and immunities of citizens of the United States” and concluded that the answer was no.<sup>245</sup>

Importantly, Marshall did not rest his conclusion on the ground that the right to bring questions of title decided in state court before the federal Supreme Court was not constitutionally enumerated. In fact, he argued that “[t]he inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.”<sup>246</sup>

The clear implication is that the constitutionally unenumerated right to have titles decided by the tribunals of one’s own state *was* among the “rights, advantages and immunities of citizens of the United States.” It just was not a right that could be protected by a federal court (as the Republicans would later rue). Marshall’s language does not suggest any awareness of, let alone reliance upon, an ERO theory. Rather, it seems as if the “advantages of American citizens” are those that American citizens generally “enjoy . . . in common with their brethren in their sister states.”

Lash also does not explain why, if the language of privileges and immunities “of citizens of the United States” was widely used to denote enumerated rights, and only enumerated rights, Justices John McLean and Benjamin Curtis declined to use it for that purpose in their dissents in *Dred Scott* when responding to Justice John Catron’s concurrence. Justice Catron, drawing upon the Cession Act, maintained that “Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property.”<sup>247</sup> It therefore followed that the Congress could not “repeal the third article of the treaty of 1803, in so far as it secured the right to hold slave property” through the Missouri Compromise.<sup>248</sup>

Justice McLean responded by denying that any slavery-related guarantee extended “further than the protection of property in slaves at that time in the ceded territory,”<sup>249</sup> and by pointing out that that guarantee had been complied with.<sup>250</sup> Justice Curtis responded by arguing that Article III was “not intended to restrain the Congress from excluding slavery from that part of the ceded territory then uninhabited,”<sup>251</sup> and that it did not “secure to [inhabitants] the right to go upon the public domain ceded by the treaty, either with or without their slaves.”<sup>252</sup> Relying upon Marshall’s analysis in *Armas*, Justice Curtis described Article III as a “temporary stipulation . . . in behalf of French subjects who then inhabited a small portion of Louisiana”

245 *Id.*

246 *Id.*

247 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 524 (1856) (Catron, J., concurring).

248 *See id.* at 525–26 (emphasis omitted).

249 *Id.* at 557 (McLean, J., dissenting).

250 *Id.*

251 *Id.* at 631 (Curtis, J., dissenting).

252 *Id.*

rather than “a permanent restriction upon the power of Congress to regulate territory then uninhabited.”<sup>253</sup>

Of particular relevance here, however, is the fact that neither dissenting Justice claimed that the right to hold slaves was unprotected by Article III *because that right was not enumerated* in the federal Constitution and so could not be among the “rights, advantages, and immunities of citizens of the United States.” Such an argument would have been expected, had the antebellum legal meaning of “privileges or immunities” been limited to enumerated guarantees.

The silence is deafening. Lash does not identify a *single case* in which an antebellum judge relied upon an ERO theory when interpreting treaty references to the privileges and immunities of U.S. citizenship. Indeed, Lash does not show that any judge was even aware of the existence of such a theory.

Recall that Lash’s term-of-art thesis depends, first, upon the alleged existence of a *widespread* acceptance of his ERO theory of the privileges and immunities of citizenship within the legal community. Then either (a) this legal understanding must have been effectively communicated to the ratifying public by the Fourteenth Amendment’s supporters or (b) the public consciously deferred to legal understanding. The absence of *any* support in pre-Civil War jurisprudence for Lash’s ERO theory makes the first step needed to get this theory off the ground highly improbable.

Thus, we cannot put much credence in the existence of an antebellum consensus that the language of privileges or immunities of “citizens of the United States” was widely used to denote a different set of rights than the “privileges and immunities of citizens in the several states,” and we give even less credence to a claim of a widely held ERO theory of that language. The failure of Lash’s term-of-art argument is not, however, necessarily fatal to the ERO theory.

Bingham may have deployed a distinction between the privileges and immunities of U.S. citizens and those of citizens in the several states in 1866 that was *sometimes* used during the antebellum period to distinguish enumerated rights that were protected absolutely from unenumerated rights that were protected only against parochial discrimination. At which point, debate in the Thirty-Ninth Congress might have led to the development of a consensus *within Congress* that the set of privileges and immunities of U.S. citizens that would be protected by Section 1 consisted only in enumerated rights, and that those rights would be protected absolutely. After which, that consensus understanding might have been communicated to the public.

To be clear, this is not the argument that Lash makes on behalf of his ERO theory. Nonetheless, it is plausible enough to be worth considering in the next Section.

B. *Lash's ERO Theory Was Not Widely Held by the  
Fourteenth Amendment's Framers*

As we have explained, Lash presents Bingham's use of the language of "privileges or immunities of citizens of the United States" as a solution to a twofold political problem. According to Lash, Bingham *always* wanted to empower Congress and the federal courts to absolutely secure enumerated rights.<sup>254</sup> Over time, however, he perceived a concern on the part of fellow Republicans that the language of "privileges and immunities of citizens in the several states" was too broad and would destroy federalism.<sup>255</sup> According to Lash, Bingham also became worried that, because his reading of the Privileges and Immunities Clause was not widely shared, the language of his first proposed amendment would be understood to protect only the right to comity.<sup>256</sup>

Due to these two concerns, Bingham searched for a Goldilocks solution, which he found in the term-of-art meaning of "privileges or immunities" that we critiqued in the previous Section. But Lash produces not one scintilla of *direct* evidence that, when Bingham opted for "privileges or immunities of citizens of the United States" rather than "privileges and immunities of citizens of the several states" when advancing his second proposal, he took inspiration from antebellum treaty jurisprudence or sought to address the concerns about unduly broad and unduly narrow readings. Bingham never mentioned any treaty cases or commentaries or drew upon any treaty language in connection with privileges and/or immunities.

As we saw, Lash contends that Bingham's goals can be *inferred* from (a) Republicans' defenses of his second draft as merely protecting comity rights; (b) Hale's critique of his second draft as unduly broad; (c) Hotchkiss's critique of his second draft as both unduly broad and unduly narrow; (d) Bingham's express references to the "bill of rights" and to textually enumerated rights in his explanation of his third draft;<sup>257</sup> (e) his claim that it "hath that extent—no more";<sup>258</sup> and (f) the fact that Bingham's explanation of his third draft "satisfied the conservative side of the House."<sup>259</sup>

Lash singles out commentary from Representatives William Higby and Frederick Woodbridge, both of whom claimed that Bingham's second draft would provide for the enforcement of comity rights. Lash claims that they understood his Article IV-based language to do "nothing more" than protect comity rights.<sup>260</sup> This claim, however, is unsubstantiated.

That Woodbridge in particular did not understand Bingham's second draft to protect only comity rights is clear from a portion of the commentary

254 LASH, *supra* note 28, at 247.

255 *Id.* at 106.

256 *Id.* at 109.

257 *Id.* at 153–54.

258 *Id.* at 154 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham)).

259 *Id.* at 153.

260 *Id.* at 98.

that is presented and discussed by Lash. In this passage, Woodbridge avers that the proposed draft is “intended to enable Congress to give all citizens the inalienable rights of life and liberty, *and* to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.”<sup>261</sup> Thus, Woodbridge is *adding* comity rights to the absolute protection of other inalienable (natural) rights.

Nor do we perceive in either Hale or Hotchkiss’s critiques of Bingham’s second draft concerns related to Bingham’s use of the language of the Privileges and Immunities Clause. Recall that this draft read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>262</sup>

Hale appears to have been concerned that the language would grant to Congress a primary power to “legislate upon all matters pertaining to the life, liberty, and property” *as Congress deemed* “necessary and proper,” not merely to take action in response to state violations of the “bill of rights.”<sup>263</sup> Hotchkiss seems to have shared this concern.

Indeed, Hotchkiss made plain that he understood Bingham’s second draft “authoriz[ing] Congress to establish uniform laws throughout the United States” rather than as a means of “provid[ing] by laws of Congress for the enforcement of . . . rights.”<sup>264</sup> He then indicated that, while he was “unwilling that Congress shall have [the former] power” he would “go with [Bingham]” if he were to provide for the latter.<sup>265</sup> In short, Hale and Hotchkiss’s problem with this language might have more to do with *McCulloch v. Maryland*, than with *Corfield v. Coryell*.

Lash reads Hotchkiss to have “s[een] nothing in the Amendment that *implicated* the federal Bill of Rights” and to have “presumed the proposal was nothing more than an effort to authorize federal enforcement of the equal-access principle of the Comity Clause.”<sup>266</sup> This seems wrong. Here is Hotchkiss, just before the vote on the motion to postpone debate on Bingham’s first proposed amendment:

As I understand it, [Bingham’s] object in offering this resolution and proposing this amendment is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it to-day; but as I do not regard it as *permanently* securing those rights, I shall vote to postpone its consideration until there can be a further

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261 *Id.* at 98–99 (emphasis added) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge)).

262 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

263 *Id.* at 1065 (statement of Rep. Hale).

264 *Id.* at 1087, 1095 (statement of Rep. Hotchkiss).

265 *Id.* at 1095.

266 LASH, *supra* note 28, at 109–10.

conference between the friends of the measure, and we can devise some means whereby we shall secure those rights beyond a question.<sup>267</sup>

Lash presents this language as evidence that Hotchkiss understood Bingham's first draft to protect only the right to comity—that is, the equal protection of the rights of *out-of-state* sojourners within a state.<sup>268</sup> But a comity-only amendment would not prevent any state from discriminating between different classes of “*its* citizens”; it would only bar discrimination against sojourning citizens from other states. Thus, Hotchkiss seems to have regarded Bingham's amendment, not as failing to reach the necessary rights, but as failing to “*permanently secur[e]*” those rights because the decision of whether to protect them or not lay solely within the discretion of Congress.

We agree with Michael Zuckert<sup>269</sup> that Hotchkiss was troubled by the proposed amendment's omission of an express prohibition on states violating privileges and immunities—to, as Hotchkiss put it, “provide . . . that no State shall discriminate against any class of its citizens.”<sup>270</sup> Hotchkiss appears to have believed that Bingham's second draft “le[ft] it to the caprice of Congress” to prevent states from discriminating as a consequence of this omission.<sup>271</sup> Although Bingham maintained that the language of Article IV was sufficient to prohibit state discrimination, in Hotchkiss's view, the amendment ought to have made “plain” that citizens enjoyed a “constitutional right that cannot be wrested from [them]” and it did not do so.<sup>272</sup>

So, the real Goldilocks problem confronting Bingham appears to have been this: On the one hand, a “necessary and proper”-type amendment seemed to hand Congress a plenary power to legislate on all matters concerning civil rights. On the other hand, the amendment did not bar states from violating civil rights. It was a lose-lose proposition in both directions. We are thus unsurprised that Bingham's next draft included language that expressly prohibited states from abridging privileges or immunities. Ultimately this state prohibition in Section 1 would be conjoined with a congressional enforcement power in Section 5.

What of Bingham's May 10 explanation of his third version of the amendment, which Lash claims represented a substantive departure from the

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

268 Compare *id.*, with LASH, *supra* note 28, at 99 (arguing that “Woodbridge . . . assum[ed] that the Amendment would do nothing more than enforce Article IV as traditionally understood”).

269 See Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENT. 123, 138 (1986) (observing that “Bingham's draft . . . did not directly supply authority for the kind of action [he] wanted to take, nor did it, as Hotchkiss pointed out, directly forbid the states from doing that which Congress thought the states ought not to do” and crediting Hotchkiss with “showing exactly where Bingham's draft failed to secure its ends beyond the control of changeable congressional majorities”).

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

271 *Id.*

272 *Id.*

first two drafts? In his speech, Bingham stated that Section 1 would “protect by national law [(a)] the privileges and immunities of all the citizens of the Republic and [(b)] the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”<sup>273</sup> Lash says:

In this passage, Bingham continues his longstanding practice of distinguishing the natural rights of all persons from the rights of citizens of the United States. The rights of equal protection are “the inborn rights of every person,” whereas “citizens of the Republic” enjoy an additional set of national privileges or immunities.<sup>274</sup>

Lash apparently bases this “equal protection” characterization on the next paragraph, in which Bingham observes that “[n]o State ever had the right, under the forms of law or otherwise, [(a)] to deny to any freeman the equal protection of the laws or [(b)] to abridge the privileges or immunities of any citizen of the Republic.”<sup>275</sup> Presumably because the phrase “the privileges and immunities of . . . citizens of the Republic” is repeated in both paragraphs almost (but not quite) verbatim, Lash thinks “the equal protection of the laws” in the second paragraph must connect with the “inborn rights” mentioned in the previous sentence.

But this reading is inconsistent with Lash’s *current* theory of how the rights identified in *Corfield* were to be protected. According to Lash, these rights are protected as an “enumerated,” “Comity Clause” right not to be discriminated against as an out-of-stater, not by the Equal Protection Clause. Bingham may indeed be implying, contra Lash, that certain *Corfield* rights are protected, not by the Privileges or Immunities Clause but by the Equal Protection Clause. Or Bingham may simply be referring to the differing protections offered by the Equal Protection Clause and the Privileges or Immunities Clause. These two paragraphs, read together, are ambiguous.

What about Bingham’s references to the “bill of rights”? We have seen that the phrase “bill of rights” was not deployed by Bingham solely to refer to what Lash regards as enumerated rights. Thus, in the course of defending his initial proposal, Bingham had characterized the Privileges and Immunities Clause of Article IV—which he described in 1859 as affording protection to the (unenumerated) right to “work and enjoy the product of . . . toil”<sup>276</sup>—as part of the “bill of rights.”<sup>277</sup> We will see him later associate these rights with the Declaration of Independence.

273 *Id.* at 2542 (statement of Rep. Bingham).

274 LASH, *supra* note 28, at 150.

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

276 CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. Bingham). In that same speech, Bingham denied that “the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which . . . governments are instituted [among men].” *Id.*

277 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham).

True, Bingham discussed state violations of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>278</sup> But we cannot infer an ERO theory on Bingham's part from this reference to the "express letter" of the Constitution,<sup>279</sup> any more than we could infer an ERO theory on Attorney General Butler's part from his reference to the right to peaceable assembly and petition in his 1835 letter. The enumeration by Bingham and Butler of certain rights should not be construed as their denying the existence of others retained by the people.

The same goes for Bingham's assurance that the "extent" of his amendment encompassed only "protection by national law from unconstitutional State enactments. . . . That is the extent it hath, no more."<sup>280</sup> This statement should not be construed to imply that enumerated rights—and *only* enumerated rights—are protected "by national law" absent *additional* evidence that Bingham considered only violations of enumerated personal rights to be unconstitutional.

Put another way, an ERO interpretation of this sentence assumes what it purports to prove. Moreover, the last time that Bingham deployed what appears to be a quote from *Othello*<sup>281</sup>—on February 28—he held an understanding of the "bill of rights" that included the unenumerated rights protected by the Privileges and Immunities Clause.<sup>282</sup> If Bingham's view of the extent of the "bill of rights" changed so as to encompass only enumerated rights, he did not say so.

Yet another dog that did not bark was Bingham's failure, at any point, to dispel the persistent controversy over whether the right to suffrage was among the "privileges or immunities" of citizens by invoking an ERO understanding. It would have been easy enough for him to do so if that was the consensus public meaning of a term-of-art "privileges or immunities."

Bingham might simply have stated that the right to suffrage, *being unenumerated in the text of the Constitution*, was *obviously* not among the "privileges or immunities of citizens of the United States." Instead, Bingham advanced the considerably more complex argument that the "second section" of the proposed amendment—which contemplated that states could deny suffrage to blacks, so long as they were willing to incur the penalty of reduced congressional representation—"exclude[d] the conclusion that by the first section suffrage is subjected to congressional law."<sup>283</sup>

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

279 *Id.*

280 *Id.* at 2543.

281 WILLIAM SHAKESPEARE, *OTHELLO, THE MOORE OF VENICE* act 1, sc. 3, ll. 80–82 ("[T]rue, I have married her, / The very head and front of my offending, / Hath this extent, no more."); see also GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 48–49 (2013) (explaining that "[a] typical Bingham speech was filled with citations and scholarly allusions that few members of Congress could match" and that "[h]e was especially fond of history, Shakespeare, and poetry").

282 CONG. GLOBE, 39th Cong., 1st Sess. 1088–89 (1866) (statement of Rep. Bingham).

283 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).



Still, the language of the proposed amendment did change, and the fact that those changes apparently satisfied moderates and conservatives who had raised concerns about Bingham's initial proposal requires some explanation. We offer the following alternative to Lash's.

We have acknowledged that the comity-only view of the Privileges and Immunities Clause dominated antebellum caselaw. Alternative views, however, were "on the table," in the sense of being regarded as legally plausible.<sup>284</sup> One in particular became increasingly ascendant in public discourse in the context of debates over slavery. That view held that the Privileges and Immunities Clause established a floor of fundamental rights associated with American citizenship that states could not abridge.<sup>285</sup> We should not dismiss this view simply because its advocates often drew upon antebellum opinions that—as Lash has shown—are probably best read as expressing a comity-only view of the Clause. As we will see, that's not how they always were read by antislavery Republicans.

Both antislavery and proslavery advocates gravitated towards fundamental-rights views of the Privileges and Immunities Clause over the course of time. This convergence was driven in part by political imperatives. Antislavery advocates sought to secure the privileges of travel, economic pursuit, and speech against increasingly racist laws enacted by southern, midwestern, and western states. These laws were designed to exclude free blacks from state borders, deny them economic opportunities, and stifle any criticism of the "peculiar institution."<sup>286</sup>

Proslavery advocates sought security for their property in enslaved people against increasingly stringent antislavery laws enacted by northern states.<sup>287</sup> They attempted to reduce to absurdity arguments for black citizenship by claiming that, if blacks were to be recognized as citizens, they would be entitled under Article IV, Section 2 to vote and serve on juries everywhere, as well as to enjoy other privileges and immunities that many whites were determined to deny them.<sup>288</sup> Both sides thus had compelling practical rea-

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284 See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1733–35 (1997) (distinguishing between "off the wall" arguments that can be legally dismissed and "on the table" arguments that are "not yet enshrined in positive constitutional doctrine" but are within the bounds of acceptable legal discourse).

285 For early antislavery examples, see, for example, *REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT* 8 (Boston, Garrison & Knapp 1834); JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY* 84, 85–86 (Cleveland, J. Calyer 1849); and ROBERT C. WINTHROP, *The Imprisonment of Free Colored Seamen: A Report Made to the House of Representatives of the United States* (Jan. 20, 1843), in *ADDRESSES AND SPEECHES ON VARIOUS OCCASIONS* 343 (Boston, Little, Brown & Co. 1852). For early proslavery examples, see *Willard v. People*, 5 *ILL.* 461, 471–72 (1843); *Julia v. McKinney*, 3 *MO.* 270, 272 (1833); and *Lewis v. Fullerson*, 22 *VA.* 15, 23 (1821).

286 See Upham, *supra* note 139, at 1130–39 (providing an overview of state efforts to restrict the rights of blacks and antislavery whites during the 1840s and 1850s).

287 *Id.* at 1129.

288 *Id.* at 1145–50.

sons to develop constitutional arguments for a national floor of fundamental citizenship rights notwithstanding the comity-only reading of the clause prevailing in the courts.

Because the Thirty-Ninth Congress was dominated by Republicans, the antislavery, fundamental-rights interpretation of the Privileges and Immunities Clause merits closest attention. During the 1860 presidential campaign, Republicans frequently argued that the Privileges and Immunities Clause not only forbade southern states from abridging the freedom of out-of-staters but also from abridging the freedom of their own citizens. Thus, former Congressman Joshua Giddings, who was among the founders of the Republican Party and was John Bingham's friend and mentor,<sup>289</sup> proposed the following resolution at the National Republican Convention in May of 1860:

That we deeply sympathize with those men who have been driven, some from their native states and others from the states of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic party responsible for this gross violation of that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.<sup>290</sup>

As David Upham has noted, this resolution—which was adopted unanimously<sup>291</sup>—saw the Republican Party “formally endor[sing] an absolute-rights reading of the Clause, and one that would protect citizens *even in their own state*.”<sup>292</sup> The resolution's focus on the freedom to express “opinions” is understandable in view of the fact that southern censorship effectively prevented Republicans from campaigning in the South. But Republicans did not understand the Privileges and Immunities Clause to be limited in its coverage to freedom of speech. Antislavery governors, legislators, jurists, and editorialists affirmed that the rights to travel;<sup>293</sup> to engage in lawful pursuits;<sup>294</sup> to make contracts;<sup>295</sup> and to be secure in their life, liberty, and property,<sup>296</sup> were among the privileges and immunities of citizenship.

These antislavery advocates were not ignorant of the comity-only reading of Article IV. Rather, they *rejected* it in favor of a reading that they viewed as

289 MAGLIOCCA, *supra* note 281, at 42 (describing how Giddings took Bingham “under his wing” and “was his closest professional confidant”).

290 PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS (Minneapolis, Charles W. Johnson 1893) (emphasis added).

291 John Hutchins, *Reminiscences of the Thirty-Sixth and Thirty-Seventh Congresses: XVIII*, 13 MAG. W. HIST. 208, 208 (1890).

292 Upham, *supra* note 139, at 1153.

293 See, e.g., CONG. GLOBE, 36th Cong., 1st Sess. 1039–40 (1860) (statement of Rep. William Perry); W.A. Larned, *Negro Citizenship*, in 15 NEW ENGLANDER 478, 518 (1857); Alex. W. Randall, Governor's Message (May 15, 1861), JOURNAL OF THE SENATE OF WISCONSIN 4, 10 (May 1861); *What Shall Be Done with the Negro?*, THE NAT'L REPUBLICAN (Oct. 8, 1862), <https://chroniclingamerica.loc.gov/lccn/sn82014760/1862-10-08/ed-1/seq-2/>.

294 Randall, *supra* note 293, at 10.

295 See CONG. GLOBE, 35th Cong., 2d Sess. 975 (1859) (statement of Rep. Dawes).

296 See DANIEL GARDNER, INSTITUTES OF INTERNATIONAL LAW, PUBLIC AND PRIVATE 480–83 (New York, John S. Voorhies 1860).

more consistent with their understanding of U.S. citizenship<sup>297</sup> and for which they found *some* support in antebellum caselaw.<sup>298</sup>

For instance, in his monumental two-volume treatise on slavery, *The Law of Freedom and Bondage in the United States*, antislavery jurist John Codman Hurd dutifully recited cases in which courts “f[ound] the standard [of privilege and immunities] rather in the rights enjoyed by citizens domiciled in the forum of jurisdiction, than in a national standard of privilege.”<sup>299</sup> However, Hurd then invoked *Corfield*<sup>300</sup> and—hard though it may be to believe it—Chief Justice Taney’s dicta in *Dred Scott v. Sandford*<sup>301</sup> for the proposition that there existed a fundamental-rights floor that no state could fall below in its treatment of U.S. citizens.<sup>302</sup>

Hurd understood the Privileges and Immunities Clause to “continue the pre-existing common law of the colonies so far as it contained a standard of the rights of citizens of one locality appearing as domestic aliens within another jurisdiction.”<sup>303</sup> He therefore believed that there existed “some

297 See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 71–93 (1951) (coining and elaborating the concept of “paramount national citizenship,” according to which all U.S. citizens were bearers of fundamental rights that the federal government was obliged to protect in return for citizens’ allegiance and were entitled to equal treatment under the law vis-à-vis other citizens). For valuable discussions of the concept, see, for example, CURTIS, *supra* note 69, at 42–44, 81; Richard L. Aynes, *supra* note 69, at 69; Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 AM. U. L. REV. 331, 375–80 (2010); Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment,* 7 STAN. L. REV. 3, 5–18 (1954); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process,* 5 N.Y.U. J.L. & LIBERTY 115, 121–32 (2010); and Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship,* 36 AKRON L. REV. 717, 725–29 (2003). One of us has traced paramount national citizenship’s abolitionist roots. See Randy E. Barnett, *Whence Comes Section One?: The Abolitionist Origins of the Fourteenth Amendment,* 3 J. LEGAL ANALYSIS 165, 205–09, 224–29 (2011) (summarizing citizenship in the thought of Lysander Spooner and Joel Tiffany).

298 The Ohio Supreme Court embraced the fundamental-rights view in 1844. See Wm. H. Williams, *The Arrest of Non-Residents for Debt—Constitutionality of the Law,* 2 W.L.J. 265, 266 (1845). Judge Nathaniel Reed held that the Privileges and Immunities Clause was designed “not to secure to the non-resident the same rights and indulgence with the resident in every State, but simply to secure to the citizen of the United States, whether a State resident or not, the full enjoyment of all the rights of citizenship, in every State throughout the Union.” *Id.* at 267. In so doing, he used the ellipsis formulation that fellow Ohioan John Bingham would later deploy: “That ‘the citizens (of the United States) of each State,’ or belonging to each State, ‘shall be entitled to all the privileges and immunities of citizens (of the United States) in the several States.’” *Id.* at 266.

299 2 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 352 (Boston, Little, Brown & Co. 1862) (footnote omitted).

300 *Id.* at 351 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230)).

301 *Id.* at 291–92, 347 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416–17, 428 (1856)). Lash’s argument that Taney intended to communicate a comity-only view is persuasive. See LASH, *supra* note 28, at 40–42.

302 HURD, *supra* note 299, at 351.

303 *Id.* at 353.

national and quasi-international standard of rights which are ‘fundamental and belong of right to the citizens of free governments.’”<sup>304</sup> Hurd and other antislavery advocates<sup>305</sup> thus used judicial opinions that Lash regards as comity-only opinions to support a fundamental-rights view of the Privileges and Immunities Clause.

Lash nonetheless describes Bingham’s fundamental-rights view of the Privileges and Immunities Clause as idiosyncratic and contends that he was forced to alter the language of the second draft because his colleagues understood it to protect only comity rights. But the fundamental-rights view was not idiosyncratic amongst Republicans, and Bingham’s changes admit of a more plausible explanation.

In observing that Bingham’s changes satisfied his fellow Republicans, Lash draws upon the research of Professor Earl Maltz, who identifies five Republicans who “voiced federalism-based concerns regarding Bingham’s initial proposal”—Roscoe Conkling, Thomas Davis, Hale, Hotchkiss, and William Stewart.<sup>306</sup> We have already discussed the objections of Hale and Hotchkiss.

Conkling said little, other than that he objected to the amendment for reasons “entirely opposite to those[ ] given” by Hotchkiss and that he thought “no objection is to be made to this proposed amendment because it does not go far enough or because it is not sufficiently radical.”<sup>307</sup> Davis echoed Hale and Hotchkiss’s concerns that Bingham’s second draft would grant Congress the power to enact “original legislation.”<sup>308</sup> Stewart considered the language of privileges and immunities not to be “material” and instead focused his critical attention on how the first proposal empowered Congress to “make all the laws in all the States affecting the protection of either life, liberty, or property, precisely similar.”<sup>309</sup>

Like Hale, Hotchkiss, and Davis, Stewart understood this to be an effective grant of primary power that would enable Congress to “legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States.”<sup>310</sup> Thus, *all* of the concerned federalists in this group who elaborated upon their objections understood Bingham’s second draft to grant primary legisla-

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304 *Id.* at 351 (emphasis omitted) (quoting, with minor variations, *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230)).

305 *See, e.g.*, *Smith v. Moody*, 26 Ind. 299, 302–03, 306 (1866) (citing and quoting Taney’s dicta and holding void state constitutional provisions that forbade blacks from making contracts); CONG. GLOBE, 39th Cong., 1st Sess. 3032 (1866) (statement of Sen. Henderson) (citing Taney’s dicta when discussing “all the personal rights, privileges, and immunities” of U.S. citizenship); Larned, *supra* note 293, at 517–18 (endorsing Taney’s definition of the “privilege[s] of a general citizenship in the United States” and describing it as the “strongest portion of Judge Taney’s argument”).

306 MALTZ, *supra* note 19, at 94.

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

308 *Id.* at 1087 (statement of Rep. Davis).

309 *Id.* at 1082 (statement of Rep. Stewart).

310 *Id.*

tive power to Congress and objected on the basis of this understanding. *None* took issue with the language of privileges and immunities.

We have already suggested that the “primary power” problem with Bingham’s first two proposals stemmed from the grant of a capacious “necessary and proper” legislative power in Congress. We think the best interpretation of Bingham’s apparent success in satisfying Davis, Hale, Hotchkiss, and Stewart with his third proposal is that, by eliminating this grant of legislative power, it plainly no longer conferred primary legislative power upon Congress. In addition, the third proposal, by adding “No state shall,” now plainly *did* expressly prohibit states from engaging in discrimination, assuaging one of Hotchkiss’s concerns.

As to Conkling, his change in position may have had nothing to do with the changed language. He appears to have opposed even Bingham’s third and final draft until the very end of the Joint Committee’s deliberations, when it became clear both that Bingham’s final draft would be part of the proposed amendment and that the amendment would pass the House.<sup>311</sup>

To attribute Bingham’s success in satisfying concerned fellow federalists to the language of “privileges or immunities of citizens of the United States” is to blink the reality that none of those federalists raised concerns about the original language of “privileges and immunities of citizens in the several states” in the first place, and other changes in the language were responsive to the concerns that Davis, Hale, Hotchkiss, and Stewart actually *did* raise.

Suppose, however, that Lash is correct that Bingham’s language change was inspired by his concern that the language of Article IV would have been understood only to refer to comity rights. Lash would still need to demonstrate that Bingham’s *new* language was understood to secure absolute protection *only for* enumerated rights. We have seen that Lash’s case for the status of “privileges or immunities of citizens of the United States” as a term of art denoting all-and-only enumerated rights is weak. But, perhaps Lash’s ERO theory was somehow communicated in the course of congressional debate or during the ratification process.

We have already noted that Bingham never drew upon treaty jurisprudence when explaining his revised language. Lash adduces no evidence that *anyone* during the congressional debate made the connection between Bingham’s revised language and antebellum treaty jurisprudence. When legislators mentioned treaties, they did so in connection with the citizenship

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311 Zuckert, *supra* note 269, at 146 (“The evidence from the journal of the Joint Committee . . . shows that Conkling had opposed Bingham’s drafts all along, even after they were recast into the ‘no state shall’ form; and that he finally gave Bingham his support only towards the very end of the Committee’s deliberations, when it was well assured that Bingham’s draft would be part of the proposed amendment, and then, in the House, when it was clear that the amendment would pass easily.”).

declaration in the Civil Rights Act of 1866<sup>312</sup> and Howard's later-proposed Citizenship Clause, not the Privileges or Immunities Clause.<sup>313</sup>

Lash might reply that the connection was so obvious that no one considered it necessary to mention it. But, as we have seen, it is not obvious that the connection would have been obvious. Lash has failed to show that any enumerated-rights-based theory exerted a substantial influence on antebellum jurisprudence, to say nothing of the particular ERO theory on which he rests his thesis.

Which brings us, once more, to Howard's May 23 introduction of the third and final version of the Clause with which we began this Article. Nothing in this speech seems, on its face, to have been intended by Howard to communicate an ERO understanding. To the contrary, Howard's reference to "a mass of privileges, immunities, and rights" suggests no differentiation between those rights which are "secured by the second section of the fourth article of the Constitution"—which he mentions first—and those which are secured "by the first eight amendments of the Constitution."<sup>314</sup>

Lash reads Howard as drawing upon Justice Washington's discussion of Article IV privileges and immunities in *Corfield* only for the purpose of explaining that "citizens of the United States had a right of equal access to a limited set of state-conferred rights when traveling to a state other than their home state."<sup>315</sup>

Lash emphasizes that Howard concludes his quotation from *Corfield* by explaining that "[s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution" and only *then* states that "[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments."<sup>316</sup>

This framing, Lash contends, served to distinguish the right to comity protected by the Privileges and Immunities Clause from the enumerated rights protected by the first eight amendments and to communicate that only the latter rights would be absolutely protected.<sup>317</sup>

This reading is unpersuasive. To what did Howard intend that the "personal rights guaranteed and secured by the first eight amendments" be

312 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1756 (1866) (statement of Sen. Trumbull) (referring to treaties making citizens of the people of Texas and the people of Florida, a treaty with the Stockbridge Indians, and the Louisiana Cession Act); *id.* at 1832 (statement of Rep. Lawrence) (referring to a number of treaties, including the Louisiana Cession Act, indicating that "the nation may by solemn act of Congress, or even by treaty, declare that classes of people collectively, shall be citizens").

313 *Id.* at 498 (statement of Sen. Trumbull) (referring to treaties with Native American tribes).

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

315 LASH, *supra* note 28, at 159.

316 *Id.* at 157–58 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard)).

317 *Id.* at 159, xi.

“added,” if not to the family of “privileges and immunities” described by Justice Washington? Howard proceeded to describe a “mass of privileges, immunities, and rights, *some of them* secured by the second section of the fourth article of the Constitution . . . *some* by the first eight amendments” and to state as fact “that all these immunities, privileges, rights . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation.”<sup>318</sup>

Referring interchangeably to privileges, immunities, and rights, and grouping all such privileges, immunities, and rights—whether associated with Article IV or set forth in the first eight amendments—together in a “mass” strike us as incredibly obscure ways to communicate a critically important distinction between, on the one hand, state-conferred “privileges and immunities” protected solely against discrimination when sojourning in another state and, on the other hand, national “privileges or immunities” to be protected absolutely against state infringement.

Moreover, when one considers that Howard’s reference to the first eight amendments was apparently inserted into his speech as an additional passage—suggesting he originally was going to refer *only* to *Corfield* rights—it becomes even less likely that the extended discussion of *Corfield* was calculated only to explain the reach of *one* enumerated right: the “Comity Clause” right of nondiscrimination against sojourning citizens.<sup>319</sup> Indeed, after the inserted pages 2a and 2b, page 3 of Howard’s notes then continue: “By the first clause each state is prohibited from restricting these *fundamental* civil rights of citizens, whatever may be their nature or extent.”<sup>320</sup>

Assuming page 3 was originally written to follow page 2 on which *Corfield* is discussed, Howard was referring to the rights in *Corfield* as “these fundamental civil rights of citizens.” This inference is strengthened by his qualifying this by “whatever may be their nature or extent,” which in the published version of the speech is explicitly a reference to *Corfield* rights. That Howard characterized these as “civil rights” also explains how Republicans came to understand the Fourteenth Amendment in a manner that secured the constitutionality of the Civil Rights Act of 1866 under Section 5, and independently protected the rights listed therein in the event that the Act was repealed.<sup>321</sup>

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

319 *Corfield* is referenced on page “2” of his handwritten notes. The rights in the first eight amendments are then inserted on pages “2a” and “2b” before the speech resumes on page “3.” See Notes of Jacob Howard on the Fourteenth Amendment’s Privileges or Immunities Clause (1866) [hereinafter Notes of Jacob Howard], <http://www.tifis.org/sources/Howard.pdf> [<http://perma.cc/V6HA-X2YK>]. This observation was first made by Green. See Green, *supra* note 19, at 109 n.96.

320 Notes of Jacob Howard, *supra* note 319, at 3.

321 Indeed, at least one newspaper reported on Howard’s speech *as if* his discussion concerned only *Corfield* rights. The *Boston Daily Advertiser* told its readers:

The Senate having taken up the amendment, Mr. Howard explained it, section by section. The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government [sic]. There was now

Lash seeks support for his conclusion that Howard intended to communicate an ERO understanding from his subsequent opposition to the placement of conditions on the admission of Nebraska to the Union. Howard opposed conditioning Nebraska's statehood on its granting blacks the right to vote.<sup>322</sup> But Howard explained that his opposition was based on his disagreement with the "principle" that "under that clause of the Constitution which declares that the Congress may admit new States into this Union, it is competent for Congress to annex as fundamental conditions *any requirements* that Congress may see fit . . . *to remain in force as law forever.*"<sup>323</sup>

Howard understood congressional power over admission more narrowly as a power to "invest [admitted] States . . . with every power, every faculty, every constitutional provision which pertains to any of the States in the Union under the Constitution."<sup>324</sup> The admission power did not include the power to prevent states from legislating in ways that Congress deemed inexpedient, indeed, to enact "entire code[s] of laws" in order to "mak[e] provision for every exigency that arises in society."<sup>325</sup>

In sum, Howard was opposing a principle that would grant Congress primary legislative power over newly admitted states. There is no tension between opposing that principle and supporting an amendment that would empower Congress to ensure that a limited set of enumerated and unenumerated rights sharing a certain family resemblance<sup>326</sup> are not violated by states—whether they be newly admitted or have been in the Union since the Founding.

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no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them, except by their own local constitutions and laws. The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful.

Dixon, *Reconstruction: The Debate in the Senate*, BOS. DAILY ADVERTISER, May 24, 1866, at 1. Moreover, this was decidedly not a comity-only reading of either Howard's speech or the Amendment itself.

322 LASH, *supra* note 28, at 160.

323 CONG. GLOBE, 39th Cong., 2d Sess. 219 (1866) (statement of Sen. Howard) (emphasis added).

324 *Id.*

325 *Id.*

326 See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65–71, at 35–38 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell Publishing, rev. 4th ed. 2009) (1953) (characterizing the similarities between "games" as "family resemblances" on the ground that "the various resemblances between members of a family—build, features, colour of eyes, gait, temperament . . . overlap and criss-cross in the same way"). Wittgenstein's general point is that "the instances to which a word or concept applies a[re] connected not by a common property but by 'relevant resemblances'" and that we should "look for meaning not in an inchoate intelligible essence, but in the use to which words are put in a discourse." Dennis M. Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671, 684–85 (1984) (discussing Wittgenstein).



Furthermore, there is also no evidence that Bingham and Howard were *understood* by their colleagues to be communicating an ERO understanding, whatever they may have privately *intended*. We can safely set Democrats' expansive interpretations of Bingham's language aside, given their compelling political incentives to misrepresent the meaning of that language in order to defeat the proposed amendment. But we also find no Republican supporters of Section 1 voicing a clear ERO understanding, even though it might have enabled them to refute Democratic arguments that the amendment would guarantee voting rights to blacks.

Howard, for instance, contended that the right to suffrage had been "always . . . regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism [sic]."<sup>327</sup> On Lash's account, we can only conclude that Republicans wasted a tremendous amount of time and courted unnecessary risk by failing to avail themselves of a comparatively cheap means of making plain that enumerated rights were categorically "in" and unenumerated rights categorically "out."

### C. *Coming to Grips with the Civil Rights Act of 1866*

Proponents of Section 1 frequently referred to the Civil Rights Act and claimed that it would be constitutionalized by Section 1.<sup>328</sup> On Lash's account, it is hard to see how the Privileges or Immunities Clause would have done so. Recall that the Act guaranteed the rights "to make and enforce contracts, to sue, be parties, and give evidence, . . . and to full and equal benefit of all laws and proceedings for the security of person and property."<sup>329</sup> None of these rights are enumerated as such in the first eight amendments or elsewhere in the text.<sup>330</sup>

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

328 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 599–600 (1866) (statement of Sen. Trumbull); *id.* at 1117 (statement of Rep. Wilson); *id.* at 2459 (statement of Rep. Stevens); *id.* at 2883 (statement of Rep. Latham). For additional references, see JACOBUS TENBROEK, EQUAL UNDER LAW 224 n.11 (1965). See also ANDREW KULL, THE COLOR-BLIND CONSTITUTION 75 (1992) ("It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992) ("Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866.").

329 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

330 Although Lash might balk at "unenumerated" because he now believes that these rights are protected by the enumerated right to due process of law, we can think of no better term to describe the fact that these rights are not listed, catalogued, or otherwise expressly mentioned in the text of the amended federal Constitution. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 759 (1966) (first definition of 'enumerate': "count"; second definition: "list"; first definition of 'enumeration': "catalog"; second definition: "numbering" or "counting"); *Enumerate*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010) (first

Moreover, the Act did not merely protect those unenumerated rights listed in the Act's text against parochial discrimination. It also guaranteed that all citizens would have "the same right . . . [to contract, property, security] as is enjoyed by white citizens," *regardless of state citizenship*.<sup>331</sup> On Lash's account, then, the Privileges or Immunities Clause was not understood in a way that would give this legislation constitutional safe harbor.

And yet, not only did members of Congress widely assert that Section 1 was meant to so empower Congress, but Congress reenacted the Civil Rights Act in 1870 to ensure its constitutionality.<sup>332</sup> As we noted above, in his notes for his speech, Jacob Howard appears to have referred to the rights identified in *Corfield* as "fundamental civil rights."<sup>333</sup>

Although Lash has questioned the connection between the Civil Rights Act of 1866 and Section 1, noting in particular that John Bingham opposed the former despite his central role in framing the latter,<sup>334</sup> he has never denied that Section 1 *did* constitutionalize the Civil Rights Act. Indeed, he has put forward no less than four theories of *how* Section 1 constitutionalized the Civil Rights Act since adopting the ERO understanding. The first three of these theories were not fully developed.

*Theory #1: The Privileges or Immunities Clause Authorized the Civil Rights Act.* In Lash's second article articulating his ERO theory, he wrote that "many members of the Thirty-Ninth Congress (though apparently not John Bingham) looked to the Fourteenth Amendment as establishing a source of federal authority to pass the Civil Rights Act" and affirmed that "[e]nsuring that Congress had such power to enforce the *equality principles of Article IV* (and *thus authorize the Civil Rights Act*) was one of the concerns driving the adoption of the Fourteenth Amendment."<sup>335</sup>

But again, a mere Comity Clause could not have authorized an Act that forbade states from discriminating against their own citizens. And Lash did not demonstrate that, by 1868, the Privileges and Immunities Clause had become associated with "equality principles" that forbade states from discrimination against their own citizens.

*Theory #2: The Citizenship Clause Authorized the Civil Rights Act.* In his book, Lash hedged on whether Bingham's third and final draft would have constitutionalized the 1866 Act. He points out that whereas the third draft "addressed substantive national 'privileges or immunities,' including the Comity Clause rights of visiting out-of-state citizens[, t]he Civil Rights Act . . .

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definition: "mention (a number of things) one by one"; second definition: "establish the number of").

331 Civil Rights Act of 1866, § 1, 14 Stat. at 27.

332 Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144.

333 Notes of Jacob Howard, *supra* note 319, at 3.

334 See LASH, *supra* note 28, at 114 (questioning the conventional wisdom that "the Fourteenth Amendment represented a consensus attempt to constitutionalize the Civil Rights Act" and highlighting Bingham's opposition to it).

335 Lash, *The Origins of the Privileges or Immunities Clause, Part II*, *supra* note 27, at 395, 407 (emphases added) (footnote omitted).

addressed equality rights that residents could assert against their *own* state.”<sup>336</sup> Lash also raised doubts about whether the Equal Protection Clause might cover the Act, citing Professor Christopher Green’s research for the proposition that the latter Clause “spoke of equal *protection* of laws, not equal laws.”<sup>337</sup>

Instead, Lash claimed that it was the Citizenship Clause of Section 1<sup>338</sup>—proposed by Howard on May 30, 1866, just shy of three weeks after Bingham’s presentation of his third draft to the House<sup>339</sup>—that “constitutionalized the Civil Rights Act of 1866.”<sup>340</sup> Lash did not, however, explain how the Clause’s “definition of national and state citizenship” incorporated equality principles that were broad enough to authorize Congress to forbid intrastate discrimination.<sup>341</sup>

*Theory #3: The Equal Protection Clause Authorized the Civil Rights Act.* In a 2015 essay, Lash responded to journalist Damon Root’s claim that the Privileges or Immunities Clause protects unenumerated economic rights.<sup>342</sup> Although Lash agreed that the “Fourteenth Amendment protects unenumerated . . . economic rights,” he claimed that Root “ignore[d] the difference between substantive rights and equal protection.”<sup>343</sup> Lash agreed with Root that economic rights—including those listed in the 1866 Act—were protected by the Fourteenth Amendment. But he now insisted that they were protected by means of an “equal protection clause that protected all per-

336 LASH, *supra* note 28, at 170.

337 *Id.* at 171 (first citing Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2008) [hereinafter Green, *Pre-Enactment History*]; and then citing Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219 (2009)).

338 U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

339 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

340 LASH, *supra* note 28, at 171.

341 *Id.* at 174. We hasten to add that other scholars have elaborated such arguments. See, e.g., Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 500 (2013); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 283 (2000). Lash does not engage with this scholarship.

342 Root’s view was presented in DAMON ROOT, *OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT* 27–30 (2014). The exchange was prompted by Lash’s critical two-part review of the book. For the review, see Kurt T. Lash, *Fighting Federalism: Damon Root’s Overruled (Part One)*, LAW & LIBERTY (July 9, 2015), <https://www.lawliberty.org/2015/07/09/fighting-federalism-damon-roots-overruled-part-one/>; and Kurt T. Lash, *A Tale of Two Clauses: Damon Root’s Overruled (Part Two)*, LAW & LIBERTY (July 10, 2015), <https://www.lawliberty.org/2015/07/10/a-tale-of-two-clauses-damon-roots-overruled-part-two/>. For Root’s initial response, see Damon Root, *Yes, the 14th Amendment Protects Economic Liberty*, REASON (July 13, 2015) (arguing for protection of “unenumerated economic rights”), <http://reason.com/blog/2015/07/13/yes-the-14th-amendment-protects-economic>.

343 Lash, *supra* note 43.

sors,” rather than by a Privileges or Immunities Clause that “absolutely” guaranteed the enjoyment of those rights.<sup>344</sup>

In effect, Lash treated the Equal Protection Clause as a generalized antidiscrimination guarantee. Lash omitted mention of a Comity Clause reading of the Privileges or Immunities Clause (Theory #1) and no longer referred to the Citizenship Clause (Theory #2). He also dismissed a suggestion—made by one of us<sup>345</sup>—that the Due Process of Law Clause might protect unenumerated rights.<sup>346</sup>

Although the Equal Protection of the Laws Clause is treated as a generalized antidiscrimination guarantee in contemporary constitutional jurisprudence, Lash’s originalist commitments required more support for his 2015 claims than he provided. A number of scholars have adduced evidence that the Equal Protection Clause was not originally understood as a generalized antidiscrimination guarantee but, rather, as a guarantee of equal access to the remedial functions of the courts and equal treatment by law enforcement.<sup>347</sup>

If these scholars are correct, the Equal Protection Clause might constitutionalize certain features of the 1866 Act—in particular, it might reach the right to “full and equal benefit of all laws and proceedings for the security of person and property”<sup>348</sup>—but it would likely not constitutionalize others, like the rights to “inherit, purchase, lease, sell, hold, and convey real and personal property,”<sup>349</sup> which do not relate to either the remedial functions of the courts or to treatment by law enforcement. Lash did not rebut this narrower view of the Clause’s coverage in either his book or his criticisms of Root.

*Theory #4: The Due Process of Law Clause Authorized the Civil Rights Act.* Having previously asserted the other three operative provisions of Section 1 as a constitutional authority for the 1866 Act, Lash has now shifted to a theory based on the fourth—a theory he had briefly dismissed in 2015. In 2018, after his book on the Privileges or Immunities Clause appeared, Lash published an article setting forth a more developed theory that, after all, the Act was constitutionalized by the Fourteenth Amendment’s Due Process of Law Clause.<sup>350</sup>

Lash adduced evidence that Republican supporters of the Act like Representative James Wilson and Senator Lyman Trumbull understood the Fifth

344 *Id.*

345 Bernick, *supra* note 45.

346 See Lash, *supra* note 43 (“My review did not address the Due Process Clause because not even Damon Root had the courage to try and resuscitate this broadly mocked doctrine.”).

347 See Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 415 (1966); Earl M. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 526 (1985); Harrison, *supra* note 328, at 1435–36; Green, *Pre-Enactment History*, *supra* note 337, at 220.

348 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

349 *Id.*

350 Lash, *supra* note 39.

Amendment's Due Process of Law Clause to embody the Declaration of Independence's references to "Life, Liberty and the Pursuit of Happiness" and to provide authority to protect "fundamental rights belonging to every man as a free man."<sup>351</sup> Lash emphasized that the Civil Rights Act originally provided for the protection of "all persons," not merely citizens, and argued that, although the Act's scope was altered because of moderate misgivings about Congress's constitutional authority to protect all persons, the Act was always understood to be a means of ensuring the due process of law.

Lash also detailed how, after the enactment of the Fourteenth Amendment removed any doubt about the constitutionality of protecting what Lash awkwardly describes as the "natural rights of due process,"<sup>352</sup> John Bingham—who had initially opposed the Act—voted for the Act's reenactment through the Enforcement Act of 1870.<sup>353</sup> The authority for this reenactment, Lash argues, was supplied by the Fourteenth Amendment's Due Process of Law Clause. As we will discuss below, section 18 of the Enforcement Act provided that the 1866 Act was "hereby re-enacted."<sup>354</sup> Section 16 of the Enforcement Act, in language that closely resembled that of the 1866 Act, extended to "all persons" many—though not all—of the rights protected by the 1866 Act.<sup>355</sup>

We agree with Lash that the Fourteenth Amendment's Due Process of Law Clause places limits on the content or substance of state legislation. We have elsewhere argued that state legislators are bound by the Clause to pursue constitutionally proper ends related to the protection of life, liberty, and property, and that federal judges are required by the Clause to evaluate whether legislation is designed to achieve such ends or is instead arbitrary.<sup>356</sup>

So, it seems obvious to us that the Civil Rights Act of 1866 protected *some* rights to life, liberty, and property that all people are entitled to enjoy and that the Due Process of Law Clause safeguards against arbitrary deprivation. It is unclear to us, however, why Lash finds it politically plausible that a Due Process of Law Clause that was understood to authorize the federal protec-

351 *Id.* at 1422–28 (emphasis omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Sen. Trumbull)).

352 *Id.* at 1448. This label appears to be his own innovation. We think that it is awkward because due process of law presupposes an operating government with judicial processes in which law is applied—something that does not exist in the "state of nature" and the absence of which is one of that state's primary inconveniences. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 125 (1689) ("In the State of Nature there wants a known and indifferent Judge, with Authority to determine all differences according to the established Law."). It is accurate to say that due process of law *protects* natural life, liberty, and property rights—it is, in our view, incorrect to say that it is itself a natural right. Rather, it is a *civil* right. See BARNETT, *supra* note 45, at 63.

353 Lash, *supra* note 39, at 1456.

354 Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 ("[T]he act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted . . .").

355 *Id.* § 16.

356 Barnett & Bernick, *supra* note 31, at 1605.

tion of the “fundamental rights belonging *to every man as a free man*”<sup>357</sup> somehow made it through the Article V process but a Privileges or Immunities Clause that was understood to protect constitutionally unenumerated rights that only citizens are entitled to enjoy would not have met with similar success.

Lash might respond by pointing to his caveat that “[t]he precise content and scope of due process during the antebellum and Reconstruction period remains . . . under scholarly dispute.”<sup>358</sup> He has hedged his constitutional bets, stating only that “there was [a] clear . . . core meaning” of due process of law that included the “*equal* right to due process” and “a judicially enforced set of fair procedures” prior to deprivation.<sup>359</sup> Yet, if the Due Process of Law Clause guaranteed *only* equal access to fair legal procedures, however, we do not see how Lash could claim that it provided constitutional authority for either the Civil Rights Act of 1866 or sections 16 and 18 of the Enforcement Act.

Just as the Civil Rights Act was concerned with more than comity, so, too, was it concerned with more than equal access to fair legal procedures. Consider the “Black Codes,” uncontroversially among the primary targets of the Act. The Codes were enacted in ex-Confederate states in mid-1865 to keep blacks in a state of constructive servitude.<sup>360</sup> To accomplish this, they denied blacks the freedom to travel, the freedom to engage in honest work on mutually agreeable terms, the freedom to marry across the color line, and even the freedom to leave home without permission.<sup>361</sup> Equal access to fair legal procedures would mitigate, but not provide for the elimination of, the evils associated with laws that required blacks to provide written evidence of employment, forfeited their wages if they broke the yearly contracts that were imposed upon them, or forbade them from leaving the South in the hopes of escaping social and economic oppression.<sup>362</sup>

That the 1866 Act was understood to be directed at more than unfair legal process is evident in its advocates’ description of it. When Trumbull characterized the Civil Rights Act as an effort to “destroy all the [ ] discriminations” in the Black Codes, he provided the following list of laws “in the late slaveholding States” that deprived people of the “privileges which are essential to freemen”:

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357 CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Sen. Trumbull) (emphasis added).

358 Lash, *supra* note 39, at 1400.

359 *Id.*

360 For discussions of the Black Codes, see, for example, W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 149–60 (2007); DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION (2014); FONER, *supra* note 195, at 189–208; JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY 45–61 (2006); and C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 22–25 (1955).

361 EGERTON, *supra* note 360, at 178–82.

362 *Id.* at 179.

They provide that if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for “exercising the functions of a minister of the Gospel free negroes and mulattoes, on conviction, may be punished by any number of lashes not exceeding thirty-nine on the bare back, and shall pay the costs.” Other provisions of the statute of Mississippi prohibit a free negro or mulatto from keeping a house of entertainment, and subject him to trial before two justices of the peace and five slaveholders for violating the provisions of this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes of the late slaveholding States.<sup>363</sup>

Certain of these laws—like the provision for blacks who kept houses of entertainment to be tried before slaveowners—could be targeted by guaranteeing equal access to fair legal proceedings. But it seems clear that others—like the prohibition against blacks keeping houses of entertainment in the first place—would not be.

Lash highlights the expansive, natural-rights-saturated language that Wilson, Trumbull, and others used in describing the rights that the Act would protect. But he does not seek to resolve the apparent tension between this language and the specific laws that the Act’s supporters sought to target, on the one hand, and a fair-legal-procedure-only reading of the Due Process of Law Clause, on the other. Nor does he articulate the theory of due process of law that they held.

The language used by the Act’s supporters in connection with the due process of law seems to us to be consistent with an understanding that the due process of law prohibited all legislation that deprived people of life, liberty, or property arbitrarily—that is, all legislation that was not designed to promote the public good by securing and enlarging people’s enjoyment of their natural rights.<sup>364</sup> But such an understanding would seem to require inquiry into content or substance of legislation, and Lash has dismissed “substantive” due process in the past.<sup>365</sup>

Lash also does not reckon with Republican responses to President Johnson’s veto of the Civil Rights Act, which focused on the rights of citizens rather than those of all persons. Consider Representative William Law-

363 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

364 See Barnett & Bernick, *supra* note 31.

365 See Lash, *Two Movements*, *supra* note 33; see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 482 (2010) (describing James Wilson’s statements in connection with the 1866 Act—including statements upon which Lash relies—as “express[ing] clear support for a substantive conception of due process rights”).

rence's speech—excerpted by Lash—calling upon Congress to overrule President Johnson's veto of the Civil Rights Act:

All the law-writers agree that every citizen has certain "absolute rights," which include—

"The right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and inalienable."—1 *Kent's Commentaries*, 599; *Federalist* No. 84.

. . . .

The bill of rights to the national Constitution declares that:

"No person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

. . . .

Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. *These are rights of citizenship.* As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.<sup>366</sup>

Even as Lawrence drew upon the Fifth Amendment's Due Process of Law Clause, with its reference to "person[s]," he emphasized the Act's connection to citizenship. Thus, he affirmed the existence of a "national citizenship" that "imply[d] certain rights which are to be protected" and stated that the Act merely declared "what is already the constitutional rights of every citizen in every State."<sup>367</sup>

Lawrence's most extensive discussion of the constitutional authority for the Civil Rights Act involved not the Due Process of Law Clause but the Privileges and Immunities Clause:

I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution, article four, section two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.

Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in *national citizenship*. The Constitution declares these *civil rights* to be inherent in every citizen, and Congress has power to enforce the declaration. If it has not, then the Declaration of Rights is in vain, and we have a Government powerless to secure or protect rights which the Constitution declares every citizen shall have. . . .

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

367 *Id.* at 1832, 1836 (emphasis added).



The Constitution declares that—

“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”<sup>368</sup>

Trumbull similarly responded to Johnson’s veto by focusing on the rights of citizens:

[W]hat rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.<sup>369</sup>

Trumbull did not so much as mention due process of law.

When Republicans *did* speak at length about due process of law in connection with the 1866 Act, their emphasis on what Lawrence called “natural, inherent, and inalienable” rights makes it difficult to believe that they understood due process of law to guarantee only fair legal proceedings. If a “substantive” understanding of due process of law was widely held and incorporated into the Fourteenth Amendment’s Due Process of Law Clause, the Clause would not only have constitutionalized the Civil Rights Act but empowered the federal government to ensure that states did not henceforth arbitrarily deprive people of a variety of unenumerated rights that had once been left in the care of the states.

This would be difficult to square with Lash’s account of what was politically possible in 1868. If Lash is right that Due Process of Law encompassed Lawrence’s “absolute rights,” then Lash seems less likely to be right about the Privileges or Immunities Clause being sellable to moderate Republicans only because it was understood to leave unenumerated rights to the states. Simply put, Lash cannot have a broad, unenumerated-rights-protective Due Process of Law Clause *and* a narrow, enumerated-rights-only Privileges or Immunities Clause *and* be right about Republican moderation.

Lash’s claim that the Due Process of Law Clause alone provided constitutional authority for the Civil Rights Act of 1866 *and* its subsequent repassage in the Enforcement Act also faces considerable difficulties. As noted above, section 18 specifically states that the 1866 Act is “hereby re-enacted.”<sup>370</sup> Section 16, however, confers a bundle of rights that are similar but not identical to those conferred by the 1866 Act. Compare the language of the 1866 Act to that of section 16 of the Enforcement Act:

1866: “[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to *inherit, purchase, lease, sell, hold, and convey real and personal*

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368 *Id.* at 1835 (emphases added).

369 *Id.* at 1757 (statement of Sen. Trumbull).

370 Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144.

*property*, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”<sup>371</sup>

1870: “[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.”<sup>372</sup>

The italicized language was redacted. Why?

There is a compelling reason to believe that the redaction was a product of the change from “citizens” in 1866 to “all persons” in 1870.<sup>373</sup> Lash acknowledges that “aliens” did not enjoy the same property rights as did “subjects” at common law,<sup>374</sup> thanks to a doctrine that tied certain rights to allegiance to the king.<sup>375</sup> Among other things, the former could acquire and possess land but not hold “full” fee simple title.<sup>376</sup>

Although the doctrine of allegiance was amended to fit the American context—“subjects,” for instance, became “citizens,” and allegiance to the king became allegiance to the state<sup>377</sup>—the linkage between allegiance and landholding rights was maintained in the decades following the Revolution,<sup>378</sup> endured throughout the antebellum period,<sup>379</sup> and persisted during the most open period of immigration in the nation’s history.<sup>380</sup> As Professor Polly Price has detailed, “exclusionary [landholding] practices . . . underl[ay] even . . . a period in which the opportunity to become an American citizen was available to all comers of the white race.”<sup>381</sup>

Lash claims that “distinguishing the real property rights of citizens and noncitizens f[ell] comfortably within the Reconstruction-era understanding of the rights of due process.”<sup>382</sup> Indeed, he states that this distinction

371 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

372 Enforcement Act of 1870, § 16, 16 Stat. at 144.

373 Lash, *supra* note 39, at 1455 n.244.

374 *Id.* at 1464–65.

375 See Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 157 (1999).

376 *Id.* at 156–57.

377 *Id.* at 157.

378 *Id.* at 159.

379 See *id.* at 196.

380 See *id.* at 204–05.

381 *Id.* at 208. Nothing in this discussion should be construed as an endorsement of the political theory that undergirded the doctrine of allegiance, nor of its exclusionary consequences.

382 Lash, *supra* note 39, at 1464.

“explains why the 1866 Civil Rights Act demanded citizens be granted the equal right to ‘hold’ real property, but the 1870 extension demanded only that all persons enjoy the general natural rights of ‘*person and property*.’”<sup>383</sup>

Lash draws upon Professor Ryan Williams’s scholarship, which argues that due process of law was originally understood to incorporate common-law distinctions and that the common law extended landholding rights to citizens that it did not extend to noncitizens. Because of this, Lash argues, members of the Thirty-Ninth Congress could have understood the Due Process of Law Clauses to require the protection of citizens’ landholding rights but not to require the protection of noncitizens’ landholding rights.<sup>384</sup>

If the 1870 redaction of the rights listed in the 1866 Act was indeed predicated upon the recognition that Congress *was not* obliged to guarantee to noncitizens equality with respect of *all* the rights listed in the 1866 Act but *was* obliged to guarantee equality with respect of *some* of them, Lash’s claim that the Due Process of Law Clause supplied authority for the 1866 Act would not necessarily be undermined by the Act’s inclusion of landholding rights. The Due Process of Law Clause could have been understood to constitutionalize the 1866 Act’s repassage *and* the extension of a smaller set of rights to noncitizens in 1870.

But, unless and until Lash clearly articulates the theory of the due process of law that he believes a critical mass of Republicans held, shows that they did in fact hold it, and explains how it constitutionalized the 1866 Act, his claim that it did so will remain unproven. As it stands, we have an 1866 Act that refers only to the rights of citizens; that was forcefully defended in terms of the right of citizens; that protects landholding rights that had traditionally been denied to noncitizens; that was repassed without alteration as part of legislation that also extended a nearly identical bundle of rights to noncitizens—landholding rights conspicuously excepted.

Further, William Stewart, who introduced the 1870 bill in the Senate in part to extend the equal protection of the laws to Asian immigrants, made clear that he understood the distinction between citizen and alien landholding rights to be constitutionally significant.<sup>385</sup> Consider the following exchange between Stewart and fellow Republican Senator Charles Pomeroy:

Mr. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understand him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?

Mr. STEWART. No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.

383 *Id.* at 1465 (footnote omitted) (first quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; and then quoting Enforcement Act of 1870, §16, 16 Stat. 140, 144).

384 *Id.* at 1443 n.196 (citing Williams, *supra* note 341, at 496).

385 *See* CONG. GLOBE, 41st Cong., 2d Sess. 3 (1869) (resolution requesting the Judiciary Committee to investigate whether legislation was required to enforce treaty obligations and the Equal Protection Clause); Harrison, *supra* note 328, at 1444 & n.240.

Mr. POMEROY. That is what I was coming to.

Mr. STEWART. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section [of S. 365].

Mr. POMEROY. They have the same civil rights in that regard. Does the property of a foreigner dying here descend under our laws? Most of the States appoint a public administrator who administers upon the estates of foreigners differently from what he does on the estates of citizens. Does this interfere with that?

Mr. STEWART. I think not.

Mr. POMEROY. Foreigners are not allowed to petition the Senate. If the bill passes, will the petitions of foreigners be received here?

. . . .

[Mr. STEWART.] It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here. The civil rights bill, then, will give the United States courts jurisdiction to enforce.<sup>386</sup>

Stewart thus communicated that the extension of a smaller bundle of rights to noncitizens rested upon two constitutional premises: (1) citizens have civil rights that noncitizens do not; (2) all people are entitled to the equal protection of the laws.<sup>387</sup> In contending that the 1866 Act was constitutionalized by a Due Process of Law Clause, the text of which draws *no* distinction between citizens and noncitizens—as John Bingham repeatedly emphasized—Lash faces an uphill battle.<sup>388</sup>

Why is it so important that Lash prove his Due Process of Law claim? It is important because he cannot explain how an enumerated-rights-including-comity-rights Privileges or Immunities Clause could supply the authority to prevent states from discriminating against their own citizens. If he is right about the Privileges or Immunities Clause and wrong about the Due Process of Law Clause, it follows that leading Republicans were wrong to claim that the Fourteenth Amendment would constitutionalize the Civil Rights Act of 1866. As the 1866 Act was widely supported by moderates and radicals and was believed to be central to the achievement of shared Republican goals,

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386 CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

387 *See id.*

388 *See, e.g.,* CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857) (statement of Rep. Bingham) (“The Constitution provides . . . that no person shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth . . .” (emphasis omitted)); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham) (“[I]n respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination.”).

and Republicans frequently claimed that Section 1 would secure the 1866 Act's constitutionality, the latter proposition is profoundly implausible.<sup>389</sup>

We are not demanding that Lash provide a comprehensive theory of the original meaning of the Fourteenth Amendment and refuse to budge from it. In the future, however, it would be helpful if he explained in greater detail how and why he has updated his prior beliefs about the Fourteenth Amendment, and if he both acknowledge and explain any changes in his views concerning how the 1866 Act was constitutionalized.

If in the end he concludes that the Due Process of Law Clause is limited to providing equal access to fair legal proceedings to all people, he should reconcile that conclusion with his 2018 belief that the Due Process of Law Clause constitutionalized the Civil Rights Act of 1866, which seems to guarantee more than fair legal proceedings and to secure rights that all people were not in 1868 understood to be constitutionally entitled to enjoy.

If, in the end, he concludes that its coverage is broader, he should reconcile that conclusion with his 2014 pessimism about the prospects of an unenumerated-rights-protective Privileges or Immunities Clause being ratified into law. It seems implausible that moderate Republicans who, Lash insisted, had federalism-related concerns about empowering the federal courts and Congress to secure the unenumerated rights of U.S. citizens would have signed off on a Due Process of Law Clause that empowered the federal government to secure unenumerated natural rights belonging to all people.

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389 Suppose Lash went one step further to claim that parts of *both* the 1866 Act *and* the Enforcement Act were unconstitutional, insofar as they protected unenumerated rights that were unconnected with legal process. Such a claim would be deeply implausible. We have mentioned repeated Republican representations that the Fourteenth Amendment would constitutionalize the 1866 Act and the shared Republican commitment to the abolition of the Black Codes, which did not—as we have seen—solely target legal process rights. Although the expected applications of constitutional text are not dispositive of original meaning, one should hesitate before attributing meaning to text that contradicts its framers' and supporters' public explanations of the text's implications for highly salient legislation and that would thwart the accomplishment of their public-articulated goals.

Further, Lash presents Bingham as an almost unerringly reliable source of interpretive information after his embrace of a comity-only view of the Privileges and Immunities Clause. On his account, if anyone would have been in a position to identify constitutional problems with, and willing to object to, legislation that—however normatively desirable—exceeded Congress's Section 5 powers to enforce Section 1, it would be Bingham. But Bingham enthusiastically supported the Enforcement Act despite its protection of unenumerated rights and despite the distinctions it drew between citizens and noncitizens. Lash also provides no evidence that Bingham objected to the 1866 Act because it protected unenumerated rights, and we have been unable to find any such evidence in the course of our own research. See Lash, *supra* note 39, at 1394 (arguing that Bingham “objected that Congress lacked power to enforce the rights of due process” and that he “also criticized Congress's failure to extend these rights to all persons”).

D. *Lash's ERO Theory Was Not Widely Held by the  
Fourteenth Amendment's Ratifiers*

To sum up to this point: we lack confidence in the accuracy of Lash's account of Bingham's decision to replace "the privileges and immunities of citizens in the several states" with "the privileges or immunities of citizens of the United States," and regard Lash's ERO interpretation of Howard's introduction of the third draft to the Senate to be implausible and unconvincing. Indeed, it seems to us that if Lash is right about the Privileges or Immunities Clause, then Howard must have been either wrong or careless with his speech when he included unenumerated rights in his "mass" of "privileges, immunities, and rights" without making plain that he had only comity rights in mind.

Given the weakness of Lash's arguments that Bingham's absolute-protection understanding of the Privileges and Immunities Clause was idiosyncratic and that his third draft was in fact a repudiation of it, we doubt that Howard was wrong. And, given that, as Christopher Green has observed, Howard "certainly explains himself more adequately than Bingham generally does," we doubt that Howard was careless with his speech.<sup>390</sup>

But Lash's ERO theory is not yet doomed. "[C]ompetent speakers of the English language *who were aware of the context in which the text was communicated for ratification*"<sup>391</sup> might have gleaned an ERO understanding from coverage of congressional debates in the newspapers, arguments presented by the Amendment's supporters and opponents in the course of the ratification fight, and statements in response to politically salient events. This Section explores these materials.

As we summarized in Part I, Lash's case for a shared ERO understanding on the part of the public depends on "[n]ewspapers and political commentaries" that provided "a constant flow of information about the activities of the Thirty-Ninth Congress";<sup>392</sup> Republican speeches and commentary in the late summer of 1866; urgent Republican calls for adoption of the Fourteenth Amendment in the wake of state-sponsored murder of mostly black citizens in New Orleans; President Johnson's failed October counteramendment; and continued Republican advocacy for the Fourteenth Amendment in the wake of the Republican landslide victory in the November elections.

Early newspaper coverage of the congressional debates is not helpful to Lash. Lash makes much of two facts: First, that Bingham's various affirmations that the emerging amendment was designed to enforce the "bill of rights" were widely reported. Second, that the "coverage of Jacob Howard's presentation to the Senate of the final draft of the Fourteenth Amendment was wide and deep" and praised even by papers with a conservative bias as

390 Green, *supra* note 19, at 110.

391 LASH, *supra* note 28, at xiv (emphasis added).

392 *Id.* at 182.

“clear and cogent.”<sup>393</sup> We doubt that it can be inferred from this coverage that readers understood the emerging amendment to protect only enumerated rights.

To begin with, recent scholarship has shown that the first eight or ten amendments to the Constitution were not commonly referred to as “the Bill of Rights” until well into the twentieth century.<sup>394</sup> Indeed, the scattered references to these amendments as “the bill of rights” by Republicans at this date is one of the very earliest applications of this label to the amendments. As Professor Gerard Magliocca has shown, this usage would not begin to gain steam until the debate over the acquisition of the Philippines in the late 1890s and the debate over Wilson-administration abuses of civil liberties in the 1920s. It would not become standard public usage until Franklin Roosevelt employed the label in defense of the constitutionality of the New Deal.<sup>395</sup>

Indeed, it was not until 1952 that “the Bill of Rights” was ensconced in the National Archives alongside the Declaration of Independence and the Constitution.<sup>396</sup> Before 1938, the original published version of the amendments—which were not labeled “the Bill of Rights”—that now resides there was hidden away in the basement of the State Department.<sup>397</sup> Attributing the post–New Deal meaning of “the Bill of Rights” to the pre–Fourteenth Amendment public is anachronistic. (Although we admit it was an understandable mistake to have made before this recent revisionist scholarship.)

Bingham’s own usage during the debate over the Fourteenth Amendment is evidence that “the Bill of Rights” lacked a standard meaning. We have seen that, at least early in the debates, Bingham used the “bill of rights” to encompass the Privileges and Immunities Clause of Article IV, Section 2, which he understood to protect unenumerated rights. Only years after ratification—in a speech that is unusual in several respects—did he expressly exclude rights protected by Article IV from the “bill of rights.”<sup>398</sup>

Among other things, the term “bill of rights” was most commonly associated with a prefatory statement of natural and fundamental rights such as found in the Virginia Declaration of Rights, authored by George Mason. A portion of Mason’s formulation was later incorporated into Justice Washington’s summary of the privileges and immunities of Citizens in the several

393 *Id.* at 187–88 (quoting Editorial, *The Reconstruction Committee’s Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4).

394 See MAGLIOCCA, *supra* note 85, at 6, 90; Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 593, 609–11 (2017) (finding that “Bill of Rights” became defined as the first ten amendments by the late 1920s and early 1930s); Pauline Maier, *The Strange History of the Bill of Rights*, 15 GEO. J.L. & PUB. POL’Y 497, 506–11 (2017) (finding that the “Bill of Rights” did not emerge as an icon until the 1930s).

395 See MAGLIOCCA, *supra* note 85, at 6–7.

396 *Id.* at 147.

397 *Id.* at 100. From 1938 to 1952, the federal copy of the first twelve amendments was housed at the National Archives, while the Declaration and Constitution were at the Library of Congress. *Id.*

398 See LASH, *supra* note 28, at 185–86.

states in *Corfield*. As Magliocca explains, the first ten amendments were not thought to constitute a bill of rights because they did not resemble such preambulatory affirmations of rights.<sup>399</sup>

With this in mind, it is unsurprising that, when Howard referred in his speech to “the personal rights guaranteed and secured by the first eight amendments of the Constitution,”<sup>400</sup> he did not label these amendments “the Bill of Rights.” As we have already discussed, we do not agree that Howard’s speech is best read as expressing an ERO understanding. And Lash acknowledges that at least one newspaper understood Howard to be referring only to rights protected by the Privileges and Immunities Clause.<sup>401</sup> It is wholly insufficient to say, as Lash does, that “the general idea of the amendment seemed to be getting through,” implying an ERO understanding as the general idea, given the importance of the details.<sup>402</sup>

Early Republican advocacy during the summer of 1866 also affirmatively undermines Lash’s case for a public ERO understanding. Lash notes that “[a] number of Republicans expressly tied Section One of the Fourteenth Amendment to the Civil Rights Act of 1866.”<sup>403</sup> By drawing a connection between Section 1 and the Civil Rights Act of 1866, Republicans made it more likely that members of the public would understand Section 1 to protect equality in the enjoyment of unenumerated rights to contract, property, and security—protection that, it bears repeating, Lash *cannot* account for in terms of the enforcement of an enumerated right to comity.

As they did in the course of congressional debates, Republicans denied that Section 1 would enfranchise blacks, but they did not rely upon the unenumerated status of the right to suffrage when doing so.<sup>404</sup> Indeed, they could hardly do so while simultaneously maintaining that Section 1 removed doubts about the constitutionality of civil rights legislation that protected

399 MAGLIOCCA, *supra* note 85, at 67 (observing that the 1791 amendments “lacked the formal traits of a bill of rights as understood since the Founding”).

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

401 LASH, *supra* note 28, at 189 & n.53.

402 *Id.* at 189. Lash is also mistaken to characterize Samuel Nicholas’s essay as post-ratification commentary on the Fourteenth Amendment. See S.S. Nicholas, *A Brief Comment on the Civil Rights Act*, LOUISVILLE WKLY. COURIER, June 6, 1866, at 4, <http://nyx.uky.edu/dips/xt7ffb4wj40w/data/0050.pdf>. The date of the article makes plain that Nicholas did not, as Lash claims, “wr[ite] not long after Congress passed the amendment,” LASH, *supra* note 28, at 154—the Amendment was not sent to the states until June 13. Indeed, the title of the article suggests that Nicholas was not even discussing the amendment. Although Bryan Wildenthal has argued that Nicholas *may* have been discussing both the Civil Rights Act of 1866 and the amendment in the passage highlighted by Lash, Lash cannot fairly assume without argument that Nicholas was doing so, or that Nicholas meant by “the bill of rights” only enumerated rights. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1593–94 (2007).

403 LASH, *supra* note 28, at 194.

404 Green, *supra* note 19, at 124 (“The enumerated-rights-only view of the Privileges or Immunities Clause was never offered during 1866 as an explanation why the Privileges or Immunities Clause did not apply to voting.”).



unenumerated rights. Lash further acknowledges that Republicans frequently emphasized “equal rights” without “exploring the precise content of those ‘equal’ rights,” even though it would have, on Lash’s account, been easy for them to supply that content by communicating an ERO understanding, as well as politically useful in alleviating concerns about suffrage.<sup>405</sup>

Lash’s thorough examination of the activity of Southern Loyalists, and Republican activists more generally, in the wake of the New Orleans massacre yields persuasive evidence that the rights to freedom of speech, freedom of the press, and freedom of peaceable assembly and petition were understood by supporters of the Fourteenth Amendment to be among the privileges and immunities of U.S. citizens. In particular, speeches made and resolutions adopted by the Southern Loyalists’ Convention, hosted in Philadelphia on September 3, 1866, expressed the view that the enumerated rights that had been recently violated would be among the privileges and immunities protected by the proposed Fourteenth Amendment.<sup>406</sup>

This evidence offers compelling support for the proposition that the Privileges or Immunities Clause was understood to protect certain enumerated rights. But it is entirely consistent with the proposition that unenumerated rights that could not “be fully defined in their entire extent and precise nature”<sup>407</sup> would *also* be protected by the Clause. That participants in the Convention emphasized that particular enumerated rights would be secured by the Fourteenth Amendment is understandable in the context of recent assaults upon those rights. We cannot infer from this that they understood the Amendment to secure *only* those rights, any more than we can infer from them that they understood the Amendment to include *all and only* enumerated rights, as Lash claims.

This last point is crucially important. Lash adduces evidence from a variety of sources referring to particular enumerated rights. He codes some of those references as evidence of a “common conception of the proposed Fourteenth Amendment as guarding against state-sponsored abridgment of constitutionally enumerated rights.”<sup>408</sup> But one could just as well code them as evidence of importantly different conceptions.

For example, Lash presents Texas Judge Lorenzo Sherwood’s address to the Southern Loyalists’ Convention as evidence for the ERO theory:

We stand on the constitutional rights of the citizen; those rights specified and enumerated in the great charter of American liberty, in the following form—

“Security to Life, Person, and Property. Freedom of the Press; Freedom of Opinion; and Freedom in the Exercise of Religion. Fair and impartial Trial by Jury under such regulations as to make the administration of justice complete. Unobstructed commerce between the States, and the right of the citizens of each State to pass into and sojourn in any other State, and to

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405 LASH, *supra* note 28, at 195–96.

406 *Id.* at 205.

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

408 LASH, *supra* note 28, at 208.

enjoy the immunities and privileges of the citizens of such other State. Exemption from any order of nobility or government through privileged class: The guaranty of Republican Government to every State and to all the People thereof, making the preservation and maintenance of the above enumerated rights, unless forfeited by crime, the constitutional test and definition of what is Republican Government.[<sup>409</sup>]

We have here a motley assortment of enumerated rights, and perhaps one unenumerated right—the Constitution does not enumerate a right to “[s]ecurity to life, person and property,” only a right not to be “deprived of life, liberty, or property without due process of law.” The references to enumerated rights are consistent with theories of the privileges and immunities of citizenship that include some but not all of the rights enumerated in the first eight amendments; theories that include both enumerated and unenumerated rights; and Lash’s distinctive ERO theory. This is not much help to Lash.

The same can be said for the “Appeal of the Loyal Men of the South to their Fellow-Citizens of the United States” adopted midway through the convention:

Statute books groaned under despotic laws against unlawful and insurrectionary assemblies, aimed at the constitutional guaranties of the right to peaceably assemble and petition for a redress of grievances. It proscribed democratic literature as incendiary, nullified constitutional guaranties of . . . free speech and a free press. It deprived citizens of the other States of their privileges and immunities in the States . . .<sup>410</sup>

Lash describes the appeal as “specifically point[ing] to the states’ abridgment of the privileges and immunities of citizens of the United States, *such as* the rights of speech and press.”<sup>411</sup> We agree that this is evidence that freedom of speech and of the press are among the privileges and immunities of citizenship. It is not, however, evidence of “the common conception of the proposed Fourteenth Amendment as guarding against state-sponsored abridgment of constitutionally enumerated rights.”<sup>412</sup> As with Lorenzo’s speech, it is consistent with a variety of theories of the privileges or immunities of U.S. citizenship that hold that at least some enumerated rights are protected—not evidence that lends support to Lash’s ERO theory in particular.

These are not the only partial lists of enumerated rights that Lash collects, but they are representative. Such lists make it more likely that reasonably informed members of the public generally would have understood at least some enumerated rights to be protected by the Privileges or Immunities Clause. But they do not make Lash’s distinctive theory that *all* enumerated rights and *only* enumerated rights were understood to be protected by the Clause more likely to be true.

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409 *The Southern Loyalists’ Convention*, *supra* note 149, at 25 (emphasis omitted).

410 *Id.* at 23.

411 LASH, *supra* note 28, at 206 (emphasis added).

412 *Id.* at 208.

Lash also makes too much of President Johnson's counteramendment. Lash describes it as a "a passive restatement of Article IV's Comity Clause";<sup>413</sup> touts it as evidence that Johnson found the language of Article IV unthreatening;<sup>414</sup> and claims that Johnson would certainly not have endorsed language that he believed would be understood to protect substantive national rights.<sup>415</sup> But Lash's characterization of the counteramendment is inaccurate.

The counteramendment does not merely "restate[ ]" the language of the Privileges and Immunities Clause—it alters it so as to implicitly repudiates the "ellipsis" theory propounded by Bingham. It does so by specifying that the protected privileges and immunities belong to "citizens *of* the several states" rather than to "citizens [of the United States] *in* the several states."<sup>416</sup> The effect is to tie the enjoyment of any privileges or immunities to state rather than to national citizenship.

Further, Lash acknowledges but fails to appreciate fully the significance of the fact that the amended language was "passive"—namely, that it did not confer upon Congress the power to enforce it, any more than did Article IV.<sup>417</sup> Taken together, these differences are sufficient to explain Johnson's comfort with the counteramendment, irrespective of what he believed the content of "privileges and immunities" to be.

Finally, postelection Republican advocacy—including advocacy highlighted by Lash—contradicts the ERO understanding. Consider the series of letters published in the *New York Times* under the pseudonym "Madison." Madison apparently did not get the memo that *Corfield* listed rights that attached to state rather than to national citizenship and that such rights would be protected only against parochial discrimination by the Privileges or Immunities Clause. In the first letter, Madison wrote:

What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; the enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue and obtain happiness and safety; the right to pass through and reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the Courts of the State; to take, hold and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.<sup>418</sup>

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413 *Id.* at 221–22.

414 *Id.* at 223.

415 *Id.* at 222–23.

416 1 FLEMING, *supra* note 153, at 240 (emphasis added).

417 See LASH, *supra* note 28, at 223 (acknowledging that the provision would "do nothing at all" because it "omitted both the 'no state shall' language and a final section granting Congress power to enforce the Amendment").

418 Madison, *The National Question*, *supra* note 148, at 2.

This is an unambiguous affirmation that the Privileges or Immunities Clause will provide absolute protection to *Corfield* rights. It uses language from *Corfield*. It groups enumerated and unenumerated rights together. It describes all of those rights as “rights of a citizen of the United States.” It does not recognize the alleged distinction between unenumerated natural and common-law rights that were protected against parochial discrimination by Article IV and enumerated national rights that were to be protected, period, by the Privileges or Immunities Clause, which Lash claims is the original public meaning of the term.

Above all, “[t]hese” rights do not look like comity rights. To read Madison as allowing that states *can* “constitutionally interfere” with the “rights of a citizen of the United States,” so long as they do not discriminate against out-of-staters when doing so, is counterintuitive to say the least.

In the second letter, Madison reiterates that the Privileges or Immunities Clause “is intended for the enforcement of the Second Section of the Fourth Article of the Constitution” and proceeded to recite the language of the latter.<sup>419</sup> Madison then referred readers to the first letter, stating that “[w]e have seen . . . what privileges and immunities were intended.”<sup>420</sup> After a discussion of the import of the Due Process of Law and Equal Protection Clauses and some disparagement of the “feeble” opposition, Madison concluded by declaring that the Amendment will be “coextensive with the whole Bill of Rights in its reason and spirit.”<sup>421</sup>

Lash presents Madison’s claims that the Amendment is necessary to enforce “the Bill of Rights”—claims made in numerous letters—as evidence of an ERO understanding.<sup>422</sup> But it is obvious in context that the author understands “the Bill of Rights” to include a variety of unenumerated rights associated with Article IV. We have here another example of the nonstandard use of that phrase before it became exclusively associated with the first eight or ten amendments.

Lash’s treatment of Frederick Douglass’s January 1867 *Atlantic* essay is similarly selective. Lash is certainly correct that Douglass “reminded readers of how the South had suppressed free speech, free press, and the free exercise of religion.”<sup>423</sup> But Professor James Fox has pointed out that Douglass did much more, both in that essay and in a prior essay published in the *Atlantic* in December of 1866 in the immediate aftermath of the Republican victory.<sup>424</sup> Douglass gave voice to an understanding of the privileges and immunities of citizenship that was not exhausted by enumerated rights.

419 Madison, *The Proposed Constitutional Amendment*, *supra* note 148, at 2.

420 *Id.*

421 *Id.*

422 LASH, *supra* note 28, at 217.

423 *Id.* at 216.

424 See James W. Fox Jr., *Publics, Meanings & the Privileges of Citizenship*, 30 CONST. COMMENT. 567, 597–99 (2015) (reviewing LASH, *supra* note 28) (showing that Douglass articulated “a very different view of the [1866] election and the structure and relationship of rights than presented in [Lash’s book]”). Fox also criticizes Lash for narrowing the scope

In portions of the January essay that Lash does not discuss, Douglass condemned the “denial of political rights” as an instantiation of master-slave ideology and describes suffrage as essential to citizenship.<sup>425</sup> In the December essay, Douglass denied that the Constitution knew “any difference between a citizen of a State and a citizen of the United States”; affirmed that “[c]itizenship . . . includes all the rights of citizens, whether State or national”; and argued that the Privileges and Immunities Clause guaranteed that “a legal voter in any State shall be a legal voter in all the States.”<sup>426</sup>

To focus only on Douglass’s references to enumerated rights is to narrow the breadth of his constitutional arguments and to fail to come to grips with the contestation concerning the nature of citizenship that was taking place. This contestation makes the determinate public meaning for which Lash contends still less likely.<sup>427</sup>

The rest of the evidence adduced by Lash consists of statements made by governors and representatives during the ratification process. Some of these identify particular enumerated rights as protected by the proposed amendment,<sup>428</sup> and some affirm that all “constitutional rights” or “rights which the Constitution provides” are protected.<sup>429</sup> Once again, statements that particular enumerated rights are among protected privileges and immunities cannot be taken to imply that *only* those rights, or *only enumerated* rights, are protected privileges and immunities, absent contextual enrichment that Lash does not provide.

General statements that all “constitutional rights” or “rights which the Constitution provides” underdetermine the question of enumeration. We have just seen that Madison understood the Privileges or Immunities Clause to protect those unenumerated rights “provide[d]” by the Privileges and Immunities Clause of Article IV, to which he or she referred as “the whole Bill of Rights.” To claim that these statements reflected an understanding of the “‘textualist nature’ of the ‘privileges or immunities of citizens of the

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of Victoria Woodhull’s constitutional claims and privileging the “legalistic arguments of her counsel.” *Id.* at 600–04.

425 Douglass, *supra* note 150, at 117.

426 Frederick Douglass, *Reconstruction*, ATLANTIC MONTHLY, Dec. 1866, at 761, 765.

427 While Douglass ultimately *opposed* the Fourteenth Amendment on the ground that it did not secure voting rights, it is clear from Douglass’s discussion of Article IV and his denial that there was “any difference between a citizen of a State and a citizen of the United States” that Douglass *did* believe that voting rights were among the privileges and immunities of U.S. citizens. *Id.* It was the contradiction between Section 1’s promise of citizenship and Section 2, which plainly contemplated that southern states *could* deny voting rights, so long as they were willing to pay a stipulated penalty, that inspired Douglass to oppose the Fourteenth Amendment. Thus, Douglass stated: “[T]o tell me that I am an equal American citizen, and, in the same breath, tell me that my right to vote may be constitutionally taken from me . . . , is to tell me that my citizenship is but an empty name.” Frederick Douglass, Letter to the Editor, *Letter from Frederick Douglass*, NAT’L ANTI-SLAVERY STANDARD, July 7, 1866, at 2.

428 LASH, *supra* note 28, at 218–19.

429 *Id.* at 220 (emphasis omitted) (first quoting PENNSYLVANIA LEGISLATIVE RECORD, app. at LVI (1867); and then quoting *id.* at XCIX).

United States’<sup>430</sup> is to raise the further question of whether those who made them understood the existing constitutional text as Lash does. Lash does not answer that question.

Thus, we have a mass of evidence that certain enumerated rights—most prominently the rights to freedom of speech, of the press, and of peaceable assembly—were publicly understood to be protected by the Privileges or Immunities Clause; some evidence that unenumerated rights were publicly understood to be protected; and *no* evidence that *all* and *only* enumerated rights were understood to be protected.

Lash is correct that none of the Amendment’s supporters “described the Amendment as nationalizing the subject of civil rights in the states, and many described the Amendment as requiring the states to protect rights listed in [what we now call] the Bill of Rights, especially speech and assembly.”<sup>431</sup> But a number of the Amendment’s supporters *did* describe it as protecting unenumerated rights—whether by cementing the constitutionality of the Civil Rights Act of 1866 or by authorizing Congress and the federal courts to prevent states from violating *Corfield* rights. And no supporters denied that it would do so, even though the ERO theory might have aided the Amendment’s “painfully slow movement toward ratification.”<sup>432</sup>

#### *E. Postratification Evidence Does Not Support the ERO Understanding*

We are surprised in two respects by the postratification evidence curated by Lash. First, we are surprised that Lash interprets this evidence as being generally consistent with his ERO theory. Second, we are surprised that Lash neglects a wealth of other evidence from the same timeframe, which suggests that the ERO understanding did not take hold.

We will begin by conceding that what Lash offers as the best piece of evidence in favor of his position does in fact offer some support for it. That evidence is John Bingham’s March 31, 1871, account of the constitutional thought behind the third draft of the Privileges or Immunities Clause, delivered in defense of the proposed Ku Klux Klan Act.

Lash is correct about this: Bingham praised *Barron* as correctly decided and needing to be reversed by a properly worded amendment; stated that the “privileges and immunities of citizens of the United States” are “chiefly defined in the first eight amendments,” which he went on to quote in their entirety; and most significantly described the rights protected by the Privileges or Immunities Clause as “other and different” than the “civil rights” that *Corfield* held that states “could not refuse to extend to citizens of other States.”<sup>433</sup>

Bingham seems also to be denying that the “privileges or immunities of citizens of the United States” effectively nationalized *Corfield* rights. It is diffi-

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430 *Id.*

431 *Id.* at 221.

432 *Id.*

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

cult to read this account as anything other than a denial that the set of rights protected by Article IV is identical to the set of rights protected by the Privileges or Immunities Clause.

On the other hand, this speech offers no support for Lash's current view that the Privileges or Immunities of U.S. citizens extends to enumerated rights *beyond those in the first eight amendments*.<sup>434</sup> Bingham here speaks only of the first eight amendments. There is, therefore, nothing in *this* speech that supports Lash's current claim that Bingham (or anyone else) viewed the comity-only reading of Article IV as an additional enumerated right.

Perhaps, however, we should not overread this speech—the *only* speech presented by Lash in which one of the framers of the Fourteenth Amendment clearly denies that *Corfield* rights are among the privileges and immunities of national citizenship.<sup>435</sup> To say, as Bingham does, that privileges or immunities are “*chiefly* defined” in the first eight amendments is to imply that they are not *entirely* defined in the first eight amendments.<sup>436</sup> Indeed, a few moments later, as Christopher Green points out,<sup>437</sup> Bingham himself offered the following caveat about his preceding remarks: “[I]n this discussion I have . . . referred only incidentally to the provisions of the Constitution guarantying rights, privileges, and immunities to citizens of the United States.”<sup>438</sup>

Bingham then asked “the House, when they come to deliberate upon this question, not to forget the imperishable words of our great Declaration [of Independence], ‘All men are created equal and endowed by their Creator with the rights of life and liberty.’”<sup>439</sup> He also asked “gentlemen not to forget those other words of the Declaration, that ‘to protect [sic] these rights’ (*not to confer them*) ‘governments are instituted among men.’”<sup>440</sup>

Then, just after this clear affirmation of natural rights, Bingham sings the praises of the unenumerated “liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil.”<sup>441</sup> And, lest we jump to the conclusion that he was here referring to some comity-only-protected natural rights, or rights protected only by the due process of law, Bingham equated these unenumerated liberties with “the right ‘to know, to argue, and to utter freely according to conscience’”<sup>442</sup>—natural rights that are protected by the First Amendment.

434 See Lash, *supra* note 34, at 460 (stating that he was “no longer convinced” that Bingham understood the Clause to “nationalize[ ] more rights tha[n] those listed in the first eight amendments”).

435 It is the also only congressional speech cited by Lash in which the Establishment Clause is included in a partial list of protected privileges and immunities of citizenship.

436 Green, *supra* note 19, at 134 (emphasis added).

437 *Id.*

438 CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. Bingham).

439 *Id.*

440 *Id.* (emphasis added). The Declaration uses “secure,” not “protect.”

441 *Id.*

442 *Id.*

At best, if Bingham's 1871 speech is not contradictory, then it is ambiguous. But that is not all. Bingham's Woodhull Report on women's suffrage—issued just two months previous—plainly *affirms* that the set of rights protected by Article IV is identical to the set of rights protected by the Privileges or Immunities Clause. Lash's dismissal of the Woodhull Report is unsatisfactory.<sup>443</sup>

Suppose we grant that Bingham's subsequent speech is a more credible expression of his own personal understanding of the Clause than his Woodhull Report, irrespective of whether anyone else shared it. It remains striking that neither the majority of committee members who signed onto the Woodhull Report, nor the minority who opposed it, endorsed the ERO theory, even though they disagreed about *which* rights the Privileges or Immunities Clause protected. Six of these ten committee members were members of the Thirty-Ninth Congress;<sup>444</sup> two were elected to office in November of 1866.<sup>445</sup> In short, the Woodhull Report makes Lash's interpretation of the Privileges or Immunities Clause less likely.

Unsatisfactory, too, is Lash's failure in his book to discuss Howard's post-ratification commentary on the Clause, given Lash's (justified, in our view) reliance upon Howard as a credible source of interpretive information. On February 8, 1869, Howard rebutted Republican arguments—advanced by Senators Charles Sumner and George Edmunds—that the Privileges or Immunities Clause secured voting rights as follows:

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to *secure absolutely* the citizens of the United States in the various States against an infringement of *their rights and privileges under the second section of the fourth article of the old Constitution*. That section declares that—

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

There it was plainly written down. Now, sir, it seems to me, that unless the Senator from Vermont and the Senator from Massachusetts *can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States*, they must give up the argument; and I assert here with confidence that no such construction was ever given to the second section of the fourth article of the Constitution.<sup>446</sup>

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443 In a trial, Bingham's Woodhull Report would be considered a prior inconsistent statement that could be used to impeach the credibility of his later claim.

444 Specifically, John Bingham, Burton Cook, Charles Eldridge, Giles Hotchkiss, Michael Kerr, and Ulysses Mercur. JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 170–73 (2005), <https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf>.

445 Specifically, Benjamin Butler and William Loughridge. *See id.* at 174–77.

446 CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Howard) (emphases added).



Had Howard held an ERO understanding, it would have been easy for him to simply state that the right of voting was unenumerated and thus unprotected against invidious discrimination. Given that he did not do so, we think he is best read as arguing that the Fourteenth Amendment was designed to “secure absolutely” the “rights and privileges” protected merely against parochial discrimination by Article IV against *all* invidious state discrimination. Accordingly, the right of voting is not thus secured because it is not among those “rights and privileges.”

It is also clear that Howard did *not* agree with Bingham’s sharp distinction between the rights protected by the Privileges and Immunities Clause and those protected by the Privileges or Immunities Clause. So, even if we grant that Lash has read Bingham’s 1871 speech correctly, there appears to be a postratification conflict between Bingham and Howard that Lash simply does not address.<sup>447</sup>

Turning now to postratification caselaw, Lash begins his study with two decisions: *Garnes v. McCann* and *Live-Stock Dealers*. In *Garnes*, the Ohio Supreme Court rejected a claim that the Fourteenth Amendment forbade segregated schools.<sup>448</sup> Lash reads Judge Luther Day’s opinion for the court in *Garnes* as “reject[ing] the effort to interpret the [Privileges or Immunities] Clause as protecting unenumerated rights.”<sup>449</sup> Lash excerpts the following language:

We are not aware that this has been as yet judicially settled. The language of the clause, however, taken in connection with other provisions of the amendment, and of the constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States. A broader interpretation opens into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the

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447 In a blog post, Lash interpreted Howard to be arguing that “[i]f the Comity Clause did not provide that right to anyone (visitor or resident), then neither did the Fourteenth Amendment.” Kurt Lash, *More than Equality, Less than Federalizing the Common Law: A Response to Christopher Green*, ORIGINALISM BLOG (Nov. 24, 2014), <http://www.originalismblog.typepad.com/the-originalism-blog/2014/11/more-than-equality-less-than-federalizing-the-common-law-a-response-to-christopher-green-kurt-lash.html>. It is not clear why Howard would have deployed such an argument against Sumner and Edmunds, who were not arguing that the Privileges or Immunities Clause protected the right to vote against merely parochial discrimination but, rather, against all invidious state discrimination. See CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Sumner) (arguing that a constitutional amendment “conceded to the States the power to discriminate against colored persons” when regulating the qualifications of voters “would not have passed the Senate had anybody attributed to it that meaning”); *id.* at 1002 (statement of Sen. Edmunds) (arguing that “it is one of the essential privileges of citizenship . . . to vote, to exercise political power” and implying that any state constitutional clause that “limits the right to vote to persons of a particular race” is “sweet away” by the Fourteenth Amendment).

448 State *ex rel. Garnes v. McCann*, 21 Ohio St. 198, 211 (1871).

449 LASH, *supra* note 28, at 232.

States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.<sup>450</sup>

This language does not support Lash's thesis. First, Judge Day is more tentative than one would expect, if indeed the ERO theory of "privileges or immunities of citizens of the United States" was widely held. He offers only "strong reasons" for his interpretation of the language, as if it were not obvious that the claimed right was unprotected by the Privileges or Immunities Clause. Second, for reasons that we have repeated, general statements to the effect that the privileges and immunities of U.S. citizens must be "derived from" the Constitution are ambiguous as to whether those rights must be enumerated in the sense claimed by Lash. At best, *Garnes* does not contradict Lash's account. It does not make that account more likely to be true.

In contrast, Justice Bradley's opinion in *Live-Stock Dealers* clearly contradicts Lash's account. Lash emphasizes Bradley's claim that the Privileges or Immunities Clause "embraces much more" than the Privileges and Immunities Clause of Article IV, and the latter only prohibited states from "discriminating in favor of [their] own citizens, and against the citizens of other states."<sup>451</sup> But in the very next paragraph after the language excerpted by Lash, Justice Bradley equates the rights protected by the two clauses and implies that they may not all be enumerated:

What, then, are the essential privileges which belong to a citizen of the United States, as such, and which a state cannot by its laws invade? It may be *difficult to enumerate* or define them. The supreme court, on one occasion, thought it unwise to do so. 18 How. 591.<sup>452</sup>

The citation is to *Conner v. Elliot*,<sup>453</sup> in which the Court discussed, but provided no definitive interpretation of, the Privileges and Immunities Clause of Article IV.<sup>454</sup>

Worse still for Lash, Bradley goes on to identify the unenumerated "privileges of every American citizen to adopt and follow . . . lawful industrial pursuit[s]" alongside the enumerated rights to due process of law and equal protection of the laws as privileges without indicating that enumeration has any significance.<sup>455</sup> It is the fact that these privileges "cannot be invaded without sapping the very foundations of republican government" that, for Justice Bradley, identifies them as "essential" and therefore protected by the Privileges or Immunities Clause.<sup>456</sup>

450 *Garnes*, 21 Ohio St. at 209–10.

451 *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8408).

452 *Id.* (emphasis added).

453 59 U.S. (18 How.) 591 (1856).

454 *Id.* at 593.

455 *Live-Stock Dealers*, 15 F. Cas. at 652.

456 *Id.*

We have examined every decision prior to the *Slaughter-House Cases* in which the Privileges or Immunities Clause was discussed.<sup>457</sup> We have found no case in which a court expressly distinguished the set of rights protected by the Privileges or Immunities Clause from those protected by the Privileges and Immunities Clause. We have found no case in which a court expressly endorsed Lash's ERO theory. We have found no case in which a court expressly rejected the proposition that the Privileges or Immunities Clause protects unenumerated rights.

To the contrary, we have found numerous cases in which courts endorsed the latter proposition, including not only *Live-Stock Dealers* but also the following:

- *Burns v. State*: the "rights conferred by citizenship" include the right of "suing any other citizen" and "the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation";<sup>458</sup>
- *United States v. Hall*: in which future Supreme Court Justice William Woods identified privileges or immunities as "those which may be denominated fundamental," citing *Corfield*;<sup>459</sup>
- *In re Hobbs*: stating that "[a]ny attempt . . . to enumerate or describe the fundamental rights" secured by the Privileges or Immunities Clause "would give but an unsatisfactory result";<sup>460</sup> and
- *Van Valkenburg v. Brown*: privileges and immunities include "the enjoyment of life and liberty, and the right to acquire and possess property, and to demand and receive the protection of the Government in aid of these," as well as "the right to sue and defend in the Courts, to have the benefit of the writ of habeas corpus, and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances."<sup>461</sup>

Given the scope of his research, Lash's failure to discuss the myriad authorities that rejected his position in the pre-*Slaughter-House* caselaw is hard to understand.

This brings us to Justice Miller's opinion for the Court in the *Slaughter-House Cases*, which Lash presents as a badly misunderstood affirmation of an ERO understanding. Lash is not alone in this revisionist view of Miller's

457 These cases include *In re Hobbs*, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6550); *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); *Live-Stock Dealers*, 15 F. Cas. 649; *Burns v. State*, 48 Ala. 195 (1872); *Van Valkenburg v. Brown*, 43 Cal. 43 (1872); *Ex parte Smith*, 38 Cal. 702 (1869); *State v. Stanton's Liquors*, 38 Conn. 233 (1871); *White v. Clements*, 39 Ga. 232 (1869); *State v. Gibson*, 36 Ind. 389 (1871); *Donnell v. State*, 48 Miss. 661 (1873); *Minor v. Happersett*, 53 Mo. 58 (1873); and *Lonas v. State*, 50 Tenn. 287 (1871).

458 *Burns*, 48 Ala. at 198.

459 *Hall*, 26 F. Cas. at 81. Woods included "among" these rights "those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments," such as "the right of freedom of speech, and the right peaceably to assemble." *Id.*

460 See *In re Hobbs*, 12 F. Cas. at 264.

461 *Van Valkenburg*, 43 Cal. at 48.

opinion. Now-Judge Kevin Newsom defended a similar view.<sup>462</sup> So has Professor Bryan Wildenthal.<sup>463</sup>

We do not find the revisionist view persuasive. Most of the specific rights that Justice Miller mentions in his opinion for the Court are based on citizens' interactions with the *federal* government.<sup>464</sup> The references to petition, assembly, and *habeas* are sandwiched between the right to protection by the federal government when traveling on the high seas or within the protection of a foreign government, the right to use the navigable waters of the United States, and the right to enjoy rights that have been recognized in treaties.<sup>465</sup> Only then does Justice Miller acknowledge that there “may be” rights protected by the Clause that are clearly good against the states—such as those specified in the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>466</sup>

The contrast between this language and Justice Bradley's unequivocal affirmations in dissent that a wide range of enumerated rights are protected by the Privileges or Immunities Clause against *state* interference<sup>467</sup> is stark. Justice Miller's omission to acknowledge this point of alleged partial agreement with Bradley cries out for an explanation that Lash does not provide.<sup>468</sup> We thus find it unsurprising that the Court in *Cruikshank* did not see any inconsistency between the reasoning of *Slaughter-House* and its own conclusion that the Privileges or Immunities Clause protected only the right to petition *Congress*.<sup>469</sup>

Turning, finally, to Lash's postratification commentary on the Clause, we again find that Lash overstates his case for consistency. It is true, as Lash claims, that John Norton Pomeroy, Timothy Farrar, and George Paschal all interpreted Section 1 as overturning *Barron*.<sup>470</sup> But these commentators also said things that are either in tension with, or outright contradict, Lash's ERO theory.

Farrar identified the set of rights protected by the Privileges and Immunities Clause with the set protected by the Privileges or Immunities Clause, and included among privileges and immunities those federally unenumerated rights specified in the Civil Rights Act of 1866. Farrar affirmed that Article IV “‘privileges and immunities,’ whether originally natural, personal, or common-law rights, or civil and political rights” are now “legal rights

462 Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000).

463 Bryan H. Wildenthal, *How I Learned to Stop Worrying and Love the Slaughter-House Cases: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241 (2001).

464 See James W. Fox Jr., *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 78–79 (2002).

465 *Id.* at 78; *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1873).

466 *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 80.

467 *Id.* at 118–19 (Bradley, J., dissenting) (listing rights “specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities” of U.S. citizenship).

468 Fox, *supra* note 464, at 80.

469 *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

470 LASH, *supra* note 28 at 273–74.

secured by the Constitution to every citizen of the United States,” citing “Am. 14, § 1.”<sup>471</sup> Pomeroy opined that the “broad, general principle of interpretation” adopted by the *Slaughter-House* dissenters was “correct” and predicted (incorrectly) that it would “in time be universally accepted.”<sup>472</sup>

Paschal’s view appears closest to Lash’s ERO theory. He took a comity-only view of the Privileges and Immunities Clause; stated that Section 1 “impose[s] upon the States” those “general principles, which had been construed to apply only to the national government”; and stated that those principles are embodied in the “guarant[ees]” of both the Privileges and Immunities Clause and “the thirteen amendments.”<sup>473</sup> Yet, this is awfully nonspecific language, and Paschal’s subsequent praise for Justice Stephen Field’s “very able” dissent in the *Slaughter-House Cases* raises questions about how broad Paschal understood those “general principles” to be.<sup>474</sup>

Finally, we are surprised that Lash does not discuss the Civil Rights Act of 1875 at any length.<sup>475</sup> It’s true that the further one gets from ratification of the Fourteenth Amendment, the less probative interpretation of constitutional provisions is of original understanding. Memories fade; political possibilities change; the expected costs to legislators of misrepresenting the meaning of constitutional clauses declines with the likelihood of detection; and departure from original meaning becomes less likely to be detected as time passes.

But, the four-year evolution of the Act from an initial proposed amendment to legislation that allowed former Confederates to serve in office into a stand-alone bill spans the postratification period canvassed by Lash. His failure to consider what legislators had to say about privileges, immunities, and citizenship in connection with it during that time frame seems to demand an explanation, which Lash does not provide.

471 See TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 199 (Boston, Little, Brown & Co., 3d ed. 1872); see also *id.* at 200 (stating that “on the 9th of April, 1866, a statute was enacted for executing [the Privileges and Immunities Clause]”).

472 JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 256e, at 178 (Cambridge, The Riverside Press, 9th ed. 1886).

473 GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 290 (Washington, D.C., W.H. & O.H. Morrison 1868).

474 GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 488 (Washington, D.C., W.H. & O.H. Morrison, 2d ed. 1876).

475 Civil Rights Act of 1875, ch. 114, 18 Stat. 335. Section 1 of the Act provided that all persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

*Id.* § 1. Section 4 forbade racial discrimination in jury service. *Id.* § 4. Section 1 was held unconstitutional by the Supreme Court in the *Civil Rights Cases*, 109 U.S. 3 (1883); section 4 was upheld in *Ex parte Virginia*, 100 U.S. 339 (1880).

We think that it is probative of the original meaning of the Privileges or Immunities Clause that Republicans overwhelmingly relied upon an interpretation of it that included unenumerated rights;<sup>476</sup> that they did so when arguing for *and against* the constitutionality of provisions of the evolving Act that guaranteed nondiscrimination in common carriers, places of public accommodation, public schooling, and jury selection;<sup>477</sup> and that only Democrats who opposed the Act relied upon something resembling Lash's ERO theory of the Clause.<sup>478</sup>

It is of course possible that the Act's supporters were wrong on the constitutional merits—although we do not think that they were.<sup>479</sup> It is also true that not all Republicans supported the Act—notable exceptions include Senators Lyman Trumbull, Matthew Carpenter, Orris Ferry, and Lot Morrill.<sup>480</sup> But even those Republicans who had constitutional misgivings about various incarnations of the Act did not make arguments from enumeration.

That the Privileges or Immunities Clause guaranteed the enjoyment of unenumerated civil rights associated with citizenship was common ground for Republicans.<sup>481</sup> Differences concerned whether particular rights that

476 At least, until the *Slaughter-House Cases* came down, at which point some of them shifted to the Equal Protection Clause. See CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 98–99 (2015) (discussing this move).

477 The public schooling provisions were included in Senator Charles Sumner's initial proposal. See Cong. Globe, 41st Cong., 2d Sess. 3434 (1870) (statement of Sen. Sumner) (explaining that the proposal would "secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State").

478 See, e.g., 2 CONG. REC. 342–43 (1874) (statement of Rep. Beck); 2 CONG. REC. app. at 233–44 (1874) (statement of Sen. Norwood); CONG. GLOBE, 42d Cong., 2d Sess. app. at 25–26 (1872) (statement of Sen. Thurman).

479 We will elaborate our position in a subsequent work.

480 Carpenter objected to a provision that forbade racial discrimination in jury selection; Ferry, Morrill, and Trumbull objected to the entire Act. An earlier version of the Act forbade discrimination in public schools—Ferry, Morrill, and Trumbull objected to this provision for different reasons than they objected to the common-carrier and public accommodation provisions. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1029–43 (1995). In brief, the latter three Republicans either conceded that rights of nondiscriminatory access to common carriers and public accommodations were civil rights but denied that federal intervention was necessary to protect them or questioned whether inns, theaters, and places of public amusement—all specified in the Act—were really places of public accommodation. By contrast, they denied that nondiscriminatory access to public schools was a civil right at all.

481 See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872) (statement of Sen. Trumbull) (asserting that "civil rights" belonging to citizens include "right to go and come; the right to enforce contracts; the right to convey his property; the right to buy property" and other "common law right[s], regarded as a right appertaining to the individual as a citizen"); *id.* at 843–45 (statement of Sen. Sherman) (stating that privileges of citizenship include those that "belong to American citizens, under the common law, which prevails all

were to be secured by the Act were in fact “civil rights” that Congress had the constitutional authority to protect, as well as whether it was necessary for Congress to protect them.<sup>482</sup>

If Lash’s ERO theory were correct, it would seem that all of these Republicans were confused about the basic nature of the Privileges or Immunities Clause—which seems extraordinarily unlikely. It should give him pause that the only advocates of an ERO theory were members of the party that opposed the Fourteenth Amendment’s ratification in the first place and who had compelling political incentives to abridge its scope as much as possible to thwart civil rights legislation. With friends like these, Lash’s ERO theory becomes still less plausible as an interpretation of the Amendment’s original meaning.

We do not offer here a theory of the discount rate that should be used in assessing the credibility of postratification evidence.<sup>483</sup> It is clear, however, that evidence generated during the postratification period does not make Lash’s interpretation of the Clause more likely to be true. There is little evidence that the ratified language was understood by most Republicans or by courts and commentators during this timeframe to protect only enumerated rights and much evidence that suggests otherwise.

The *only* unambiguous advocacy of an ERO theory during this timeframe appears to have come from Democratic opponents of the Civil Rights Act of 1875, upon whom Lash is understandably loath to rely for credible interpretations of an amendment that they opposed, or for credible claims concerning the authority it provided for legislation they also opposed. This is not good company for Lash to keep, and he wisely declines to do so.

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over this country, inherited from England” including common-carrier access and the “immunities of citizens’ . . . defined” in the 1866 Civil Rights Act (quoting U.S. CONST. amend. XIV, § 1); *id.* at 762 (statement of Sen. Carpenter) (including “the privilege of practicing law, if a man can meet the test and pass the necessary examination in the courts; the right of preaching the gospel, if employed and settled according to the usages of any particular church; the right of giving instruction in the public schools” among the “privileges of an American citizen” protected “under the fourteenth amendment”); CONG. GLOBE, 42d Cong., 2d Sess. app. at 4 (1872) (statement of Sen. Morrill) (privileges and immunities are “those common privileges which one community accords to another in civilized life”).

482 *See, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 827 (1872) (statement of Sen. Carpenter) (describing right to sit on jury as a federally unprotectable “political right[ ]”); *id.* at 3190–91 (statement of Sen. Trumbull) (denying that the right to go to school is a federally protectable “civil right”); *id.* at 3257 (statement of Sen. Ferry) (acknowledging that black citizens have a “right” not to be excluded from inns, theaters, or common carriers but denying that segregated public schools present constitutional concerns); CONG. GLOBE, 42d Cong., 2d Sess. app. at 4 (1872) (statement of Sen. Morrill) (privileges and immunities include those specified in the Civil Rights Act of 1866 and rights of access to common carriers but not rights of access to theaters and inns).

483 We will stipulate that it ought not be zero.

F. *Lash's Pessimism About the Enactment of an Unenumerated-Rights-Protective Amendment Is Unwarranted*

Lash is relentlessly bearish about the prospects of any amendment that was understood to protect unenumerated rights being proposed and ratified during the Thirty-Ninth Congress. Again<sup>484</sup> and again,<sup>485</sup> he denies that moderates and conservatives would have signed off on a Privileges or Immunities Clause that would “nationalize natural and common law civil rights in the states.”<sup>486</sup> Lash repeatedly insists that radicals who might have hoped for the latter simply did not have the votes.

We agree that the Thirty-Ninth Congress would not likely have proposed an amendment that was widely understood to leave the specification of “privileges or immunities” *entirely* to Congress, owing to widespread Republican attachment to some version of federalism, fear of a future Democratic Congress, and deep, widespread racism within both northern and southern society.<sup>487</sup> But Lash offers no compelling reason to believe that a proposed amendment that was understood to protect *some* unenumerated rights that had been long and widely deemed fundamental to U.S. citizenship would have met the same fate.

This was not, after all, a Congress that was unprepared to enact *legislation* that expressly covered such unenumerated rights. The Civil Rights Act of 1866 expressly protected unenumerated rights, and Lash acknowledges that numerous Republicans affirmed during the ratification process that Section 1 would secure the Civil Rights Act’s constitutionality.

We agree with Lash that evolution of the Civil Rights Act of 1866 from an initial proposal that generally forbade “discrimination in civil rights or immunities”<sup>488</sup> to a final text which specified only particular citizenship rights was in part the product of Republican concerns about the preservation of federalism.<sup>489</sup> But its final text discloses a Republican consensus concerning the need to protect certain fundamental rights associated with citizenship—federalism concerns notwithstanding—whether or not constitutionally enumerated.

Lash might respond that a Congress prepared to enact legislation that protected unenumerated rights against state discrimination might not have

484 LASH, *supra* note 28, at 104 (“[Bingham’s initial draft] had nothing to do with radical efforts to nationalize the countless common law and natural rights traditionally regulated by the states.”).

485 *Id.* at 285 (“[M]oderates opposed on federalist grounds any effort to nationalize the substance of civil rights in the states.”).

486 *Id.* at 78.

487 See Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 417, 419 (1986) (acknowledging “extreme racism” in the North but emphasizing that while “economic and social conditions for northern blacks were generally deplorable,” there was “a clear trend in the direction of granting greater legal rights and protections to free blacks”).

488 CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

489 See Lash, *supra* note 39, at 1430–34.



been prepared to constitutionalize absolute protection for those same rights. Such a response, however, would be unpersuasive. Although the 1866 Act has accurately been described as antidiscrimination legislation, it *effectively* secured absolute protection for fundamental rights belonging to all citizens by using the rights enjoyed by white citizens as a standard. The Act's language—"as is enjoyed by white citizens"—contemplates that whites were generally enjoying the specified rights and presumably would continue to do so.<sup>490</sup> If the Act does not expressly forbid states from denying those rights to *all* citizens—whites and blacks alike—that particular possibility was deemed remote.<sup>491</sup>

Therefore, whatever qualms Republicans allegedly had about protecting these rights absolutely would have attached as well to the formulation that was actually enacted. If there was any reason to think that those who believed that the Act was constitutional *also* believed that there was a constitutionally salient distinction between forbidding discrimination with respect to the listed rights, on the one hand, and absolutely protecting them, on the other, Lash does not offer it.

More generally, Lash's argument appears to rest upon unwarranted confidence in his capacity to specify the range of possible outcomes of a highly complex collective decision-making process. According to Lash, *if* an amendment that gave Congress and the federal courts a blank check to define and protect unenumerated rights would have been rejected, *then* any amendment that succeeded must have been understood to exclude unenumerated rights *entirely*.

That Lash's conclusion does not follow from his premise may be illustrated by a hypothetical. Suppose, counterfactually, that Bingham emerged from his deliberations with a version of Section 1 containing the language in brackets:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge [any rights of citizens of the United States that are expressly enumerated in the text of the Constitution of the United States]; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>492</sup>

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490 The phrase "as is enjoyed by white citizens" was added by James Wilson, who explained that "it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, *whether male or female*, majors or minors." CONG. GLOBE, 39th Cong., 1st Sess. app. at 157 (1866) (statement of Rep. Wilson) (emphasis added). The explanation suggests that he did not understand the change to transform the Act in any significant way; the lack of comment suggests that no one else did.

491 See MALTZ, *supra* note 19, at 67 (describing it as "so farfetched that no speaker even considered it").

492 U.S. CONST. amend. XIV, § 1 (modified hypothetically).

We think it plausible that this hypothetical Section 1—a more specific articulation of what Lash understands the enacted Section 1 to mean—would have been defeated. Democrats, of course, would have opposed it, as they would have opposed *any* proposed amendment. We suspect that not only radicals but even *moderate* Republicans would have opposed it because it would not clearly secure the constitutionality of the Civil Rights Act of 1866. Obviously, an enumerated-rights-only Privileges or Immunities Clause would not have secured the Act’s constitutionality, and Lash has not developed a persuasive theory of how the original meaning of the Due Process of Law, Equal Protection, or Citizenship Clauses would have done so. Of course, given that this is a counterfactual, it is difficult to say.

*If* the above hypothetical amendment would have been defeated, *then* does it follow logically that the enacted amendment *must* have afforded absolute protection to unenumerated rights or safeguarded citizens against other-than-parochial discrimination? It does not. The enacted amendment may have been underdeterminate as to some or all of those questions, in the sense that there may be no one answer to them in which the ratifiers would have placed a higher credence than any other.<sup>493</sup> Underdeterminacy, in turn, may have resulted from a failure on the part of the framers to reach agreement concerning them and the failure of subsequent public debate to produce such agreement.

In future work, we will argue that the Privileges or Immunities Clause *did* clearly authorize Congress and the federal courts to protect enumerated and unenumerated civil rights that shared a family resemblance. At the same time, it did *not* confer upon Congress plenary power to regulate the full panoply of these rights. For his argument-from-implausibility to work, Lash needs to show that an amendment that threaded this needle would likely have not made it through the relevant veto gates. This he does not do.

Instead he relies—as did Justice Miller in the *Slaughter-House Cases*—upon tendentious characterizations of unenumerated-rights-protective theories of the Privileges or Immunities Clause as effectively turning Congress into a “perpetual censor” upon all state legislation and expressing doubt that such a Clause could have been ratified. We share his doubts on that score. But we have similar doubts about a differently worded amendment that clearly embodied his ERO theory.

We also doubt that—assuming his account of the political dynamics is accurate—a Due Process of Law Clause that empowered the federal courts and Congress to secure people’s natural rights through such means as the Civil Rights Act of 1866 would be seen as any less threatening to “moderate” Republicans than a Privileges or Immunities Clause that absolutely protected the kinds of rights of citizenship listed by Justice Washington in *Corfield*.

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493 Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing determinacy, indeterminacy, and underdeterminacy). In brief, the constitutional text is underdeterminate with respect to a given question “if and only if the set of results . . . that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.” *Id.*

Given these doubts, Lash's argument-from-implausibility fails.

#### CONCLUSION

We would not blame readers for being disappointed in our conclusion that the original meaning of the Privileges or Immunities Clause is considerably more complicated than Kurt Lash makes it out to be. The pull of parsimony is strong. And Lash's account of the Clause's meaning—enumerated rights and nothing but<sup>494</sup>—seems to promise originalists who are concerned about the abuse of judicial discretion that they can have their original meaning and eat their judicial restraint, too.

Alas, this promise is false. Despite its appeal, it should not be adopted, either by scholars and citizens who seek a comprehensive understanding of the Clause's original meaning, or by public officials who are oath-bound to interpret and implement the Clause.

We are aware that it takes a theory to beat a theory, and that we have only begun to sketch one of our own.<sup>495</sup> We urge those who are skeptical of unenumerated rights to bear with us. As Justice Clarence Thomas put it when calling for the Privileges or Immunities Clause's revival in his landmark concurrence in *McDonald v. City of Chicago*<sup>496</sup>:

The mere fact that the [Privileges or Immunities] Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited. . . . To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer.<sup>497</sup>

The Privileges or Immunities Clause raised hard questions that led even those present at its enactment to speak of its "euphony and indefiniteness of meaning"<sup>498</sup> and to express uncertainty about its "effect."<sup>499</sup> Kurt Lash's dili-

494 See Green, *supra* note 18 (reviewing Lash's book). Lash objects to the "incorporationist" label, and so we do not apply it. See Lash, *supra* note 447 (objecting that the term suggests that Lash holds Justice Hugo Black's view that the Privileges or Immunities Clause "protects nothing more than the rights of the first eight amendments"). We, too, reject "incorporation" as an unhelpful way of conceiving of the panoply of fundamental rights protected from abridgment by the Privileges or Immunities Clause.

495 THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77 (2d ed. 1970) (observing that "once it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternative candidate is available to take its place"). Kuhn's central point is that "anomalies abound in all theories, but we are prepared to live with them if we find the theory to be more useful than the best alternative." Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?*, J. APPLIED CORP. FIN., Fall 2009, at 8, 12.

496 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring).

497 *Id.* at 854–55.

498 2 GEORGE S. BOUTWELL, 2 *REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS* 41–42 (1902) (writing that the Clauses's "euphony and indefiniteness of meaning was a charm to

gent research and serious engagement with these questions has borne tremendous fruit that we have been able to gather at a considerably lower cost than we might have otherwise incurred, thanks to his assiduous efforts, for which we sincerely commend him. We have learned much even from what we have concluded are his mistakes. We will bring to bear more of what we have learned when we present an interpretation that better fits the available evidence.

But, in the end, we must side with Jacob Howard.

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[Bingham]”); CONG. GLOBE, 39th Cong., 1st Sess. 2765 (statement of Sen. Howard) (stating that the privileges and immunities of citizenship “are not and cannot be fully defined in their entire extent and precise nature”). For evidence of postratification uncertainty, see, for example, CONG. GLOBE, 42d Cong., 1st Sess. 607 (1871) (statement of Sen. Pool) (acknowledging that the “[t]he full scope of the rights incident to citizenship may not be easy to define” and looking to English common law for guidance); CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman) (observing that “[t]here may be sometimes great dispute and doubt as to what is the right, immunity, or privilege conferred upon a citizen of the United States”); 3 CONG. REC. 1870 (1875) (statement of Sen. Edmunds) (admitting that “it may be that you cannot make a precise definition” of the privileges or immunities of citizenship but affirming that “what belongs to a man in his character as a citizen has been long in a great many respects well understood”).

499 See CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (statement of Sen. Johnson) (objecting to and moving to redact the Privileges or Immunities Clause because of his uncertainty about its “effect”). The lone Democrat on the Joint Committee on Reconstruction, Senator Reverdy Johnson was “[a] noted constitutional authority” who “remained a respected figure in the Senate.” Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 957 (1984).

