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Reversing Incorporation

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REVERSING INCORPORATION

Ilan Wurman*

It is originalist gospel that the Fourteenth Amendment's Privileges or Immunities Clause was intended, at a minimum, to incorporate the Bill of Rights against the states. This Article revisits forty years of scholarship and concludes that this modern consensus is likely mistaken. Reconstructing antebellum discourse on fundamental rights reveals that the historical players assumed that every state must, as all free governments had to, guarantee and secure natural rights to their citizens. But that did not mean the states regulated these rights in the same way, nor did that dictate what the federal government's role would be in guaranteeing and securing such rights. The record reveals that the antislavery and Republican concern, both before and after the adoption of the Fourteenth Amendment, was equality in civil rights however defined and regulated under state law. In making this claim, this Article identifies a significant conceptual error pervasive in the literature: conflating the rights the first eight amendments secure with the first eight amendments themselves. Merely identifying the freedom of speech or the right to bear arms as a privilege or immunity of United States citizenship tells us nothing about how various constitutional provisions would guarantee and secure them.

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INTRODUCTION

Since the publication of Michael Kent Curtis's book on the Fourteenth Amendment in 1986,¹ and subsequently Akhil Amar's book on the Bill of Rights over a decade later,² essentially all the leading scholars of the Fourteenth Amendment have agreed or assumed that the Fourteenth Amendment was intended to incorporate the Bill of Rights against the states.³ The Privileges or Immunities Clause,⁴ the argument goes, guarantees the "privileges" and "immunities" of "citizens of the United States," which is a reference (at a minimum) to constitutionally enumerated rights.⁵ And if a state violates those rights it can be said to "abridge" them, just as the First Amendment provides that Congress may not "abridg[e]" the freedom of speech or press.⁶

Although taken for granted now, the argument for incorporation is surprisingly weak. As an initial matter, most originalists agree that the Privileges or Immunities Clause must guarantee equal civil

1 MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

2 AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

3 RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 292 (2008) ("There is now a scholarly consensus that the original meaning of 'privileges or immunities' include[s] the Bill of Rights."); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *STAN. L. REV.* 1005, 1052 (2011) ("The academic consensus is that . . . the Fourteenth Amendment does indeed incorporate the Bill of Rights against the states, but that it is the Privileges or Immunities Clause, not the Due Process Clause, which (primarily) effects the incorporation."); *see also, e.g.*, KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 72 (2014); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 107–53 (rev. & updated ed. 2013); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 113–18 (1990); AMAR, *supra* note 2, at 163; CURTIS, *supra* note 1, at 112; Steven G. Calabresi, *On Originalism and Liberty*, 2015–2016 *CATO SUP. CT. REV.* 17, 39; 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, 1514 & n.10 (2007) (observing emerging scholarly consensus); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 647–48 (2000); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 60–61 (1993). For the earlier literature agreeing with this proposition, *see, for example*, Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 *HARV. J. ON LEGIS.* 1, 2–3 (1968); and William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 *U. CHI. L. REV.* 1 (1954).

4 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

5 *See* AMAR, *supra* note 2, at 163–80; CURTIS, *supra* note 1, at 22–25; LASH, *supra* note 3, at 65, 85–108.

6 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

rights. The argument follows from the proposition that the amendment must, at a minimum, constitutionalize the Civil Rights Act of 1866.⁷ The Civil Rights Act declared that “citizens of the United States,” of every race and color, “shall have the same right” to, among other things, make and enforce contracts and to acquire and possess property, “as is enjoyed by white citizens.”⁸ It therefore required equality in civil rights under state law.⁹ Yet the constitutional basis for the act was unclear; and, even if Congress had the power to enact such a law, nothing would prevent future Congresses from repealing it. Thus twelve of the fifteen members of the House of Representatives to speak about the final language of the Fourteenth Amendment connected the amendment with supplying a constitutional basis for the Civil Rights Act or enshrining that Act in the fundamental law.¹⁰ And John Bingham, the principal author of the Fourteenth Amendment’s first section, had earlier insisted that the amendment was necessary because the Civil Rights Act was otherwise unconstitutional.¹¹

7 This argument is advanced in my recent book, ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 93 (2020).

8 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (declaring persons born in the United States, with certain exceptions, to be “citizens of the United States,” and providing that “such citizens, of every race and color . . . 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 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”).

9 For arguments that the Civil Rights Act guaranteed more than just equality, and for why such arguments are unpersuasive, see *infra* subsection IV.B.4.

10 See CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 44 (2015); see also JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 125–31 (1956). For a collection of some statements in the debates over the final draft of the Fourteenth Amendment, see *infra* subsection IV.C.1.

11 *Infra* subsection IV.B.3. As noted, it was not sufficient to supply a basis for congressional power; it was also necessary to enshrine the civil rights bill in the Constitution itself to prevent its repeal by future majorities. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (observing that because the Civil Rights Act “will cease to be a part of the law whenever the sad moment arrives when” the Democrats come to power, it was necessary “to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution”). For other statements to this effect, see *id.* at 2459 (statement of Rep. Stevens) (noting that the Fourteenth Amendment was necessary because the Civil Rights Act “is repealable by a majority” and “the first time that the South with their copperhead allies obtain the command of Congress it will be repealed”); *id.* at 2465 (statement of Rep. Thayer) (stating the necessity of the Fourteenth

Although the Equal Protection Clause¹² sounds to modern ears as a plausible candidate for constitutionalizing the Civil Rights Act, it is highly unlikely that it does the necessary work. “Protection of the laws” was merely a guarantee against private interference with private rights, and principally a guarantee of judicial remedies and protection from private violence.¹³ Originalist scholars today therefore widely recognize that the Privileges or Immunities Clause must be the amendment’s equality guarantee with respect to civil rights.¹⁴ The privileges and immunities of United States citizens are those fundamental rights like contract and property, or self-defense and search-and-seizure rights, traditionally secured under state law and that all free governments had to secure. A state “abridges” those rights when it discriminates in their provision, thereby giving an abridged set of rights to one class of citizens vis-à-vis a favored class of citizens.¹⁵

Amendment so “the principle of the civil rights bill” will be “forever incorporated in the Constitution”); *id.* at 2498 (statement of Rep. Broomall) (similar).

12 U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).

13 WURMAN, *supra* note 7, at 40–46; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 44–72 (2008); see also Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 224–54 (2009) (showing that this was the prominent understanding of the Equal Protection Clause after enactment). Blackstone described the “protection of the law” as the “remedial part of” the law, for “in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded.” 1 WILLIAM BLACKSTONE, COMMENTARIES *55–56 (emphasis omitted). And Chief Justice Marshall explained, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

14 DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 347 (1985); GREEN, *supra* note 10, at 4–8, 97–102, 117–19; WURMAN, *supra* note 7, at 101–03; see also Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1409; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 999–1000 (1995).

15 As John Harrison has explained, the Fourteenth Amendment demonstrates that one can speak of “abridging” a right without having to define the content of that right. Harrison, *supra* note 14, at 1420–22. Section 2 provides that a state that denies “or in any way abridge[s]” the right of a male citizen over twenty-one years of age to vote will have its representation in Congress proportionally reduced. U.S. CONST. amend XIV, § 2. Yet the states themselves still determine the *content* of the right to vote. A state could still decide whether to have elections every two years, or three years, or four years; establish voter registration deadlines; and the like. Moving from a two-year system to a four-year system of elections or changing a registration deadline would not “abridge” the right to vote. The right to vote is “abridged” only when a *lesser* set of voting rights is given to any male

Can the Privileges or Immunities Clause, while guaranteeing equality in civil rights, also guarantee certain fundamental rights absolutely? It is textually possible, so a historical inquiry is necessary to investigate the question. This Article undertakes that inquiry and concludes that the evidence for incorporation is significantly weaker than traditionally believed. It demonstrates that proponents of incorporation tend to make crucial conceptual and contextual errors when evaluating the historical evidence. The consensus scholars take any reference to the personal and natural rights secured by the first eight amendments as a reference to the first eight amendments themselves. Any time the “right to bear arms,” the “freedom of speech,” or the “freedom of the press” is mentioned in Congress or among the abolitionists, it is taken as evidence that the speaker wanted to nationalize these rights, something on the order of making the relevant amendments applicable to the states.

This is an error. It was widely understood that these rights were antecedent to the first eight amendments. These were personal rights that derived from the state of nature, or were fundamental positive rights considered essential for the preservation of those natural rights. When read carefully, most of the cited statements refer not to the first eight amendments, but rather to the antecedent rights that the first eight amendments also happen to secure. In other words, merely identifying the antecedent natural rights tells us nothing about how a particular constitutional provision—Article IV, the Republican Guarantee Clause, the First Amendment, or the new Privileges or Immunities Clause—would secure them. This point may seem obvious once it is stated, but in the literature the conflation of the antecedent rights with the amendments themselves is pervasive.¹⁶

citizen twenty-one years of age and over. Christopher Green has also collected examples of Reconstruction-era members of Congress using the term “abridge” to mean unequal. GREEN, *supra* note 10, at 84–86.

16 There are many examples of this error throughout this Article. But for now, consider the statement that the incorporation question

could be framed as follows: [were] the substantive rights (freedom of speech, free exercise, the right to keep and bear arms) set out in the Bill of Rights ‘privileges or immunities citizens of the United States’ . . . at the time of the framing and adoption of the Fourteenth Amendment?

Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 418 (2009). Or consider the proposition (made in support of incorporation) that “[c]ivil rights’ may have been widely understood to encompass, at a minimum, rights guaranteed by the Bill of Rights.” Wildenthal, *supra* note 3, at 1595–96; see also HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153–54 (1908) (“There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be inferred that this was recognized to be the logical result by those who thought that the

It is nearly universal when it comes to interpreting Senator Jacob Howard's important introductory floor statement.¹⁷

A few notes of clarification about the argument to come. First, none of this is to say there is no evidence for incorporation. Nor does this Article examine the entire universe of evidence on the question, nor has the author read every book and article that has ever been written on the subject. The aim is rather to reconstruct nineteenth-century fundamental rights discourse on the basis of the sources that have been commonly discussed and to demonstrate that this evidence rarely compels an incorporation reading. With few exceptions, it is consistent with the proposition that states must treat their citizens equally. While this does not prove the equality reading, neither does the evidence prove the incorporation reading. That claim is itself an important contribution to the historical debate.

Second, the argument is not that the amendment's framers would have rejected a federal power to ensure a national baseline of fundamental rights had they thought about the issue. Nor that states were free to abolish rights, so long as they did so equally; the claim is only about whether the federal government, given the specific grants of power in the Constitution, could have done anything if a state had abolished rights (say, prohibited guns or authorized general warrants). The claim is only about the meaning of a specific textual provision drafted with a different purpose (equality) in mind, and on the assumption that all the states in fact would otherwise guarantee natural rights to their citizens.

Third, the daylight between incorporation and the view advanced here diminishes but does not disappear if the first eight amendments are interpreted through a more originalist lens. As Judd Campbell has argued, the Founding generation thought that the rights in the first eight amendments may have had a core defined by the common law, but governments otherwise had wide leeway to regulate these rights in the public interest.¹⁸ And unequal laws respecting these rights would not be in the public interest. Thus the Bill of Rights itself has important equality components and would have allowed government experimentation with related policies. Still, this account of the Bill of Rights includes a core that the government cannot infringe, and it is at least unclear that the Privileges or Immunities Clause would prohibit states from making such infringements. More still, it is important to understand the case against

freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.”).

17 See *infra* subsection IV.C.3.

18 See, e.g., Judd Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

incorporation because future Supreme Courts and Congresses might misconstrue those rights. The equality reading of the Privileges or Immunities Clause is thus like any other federalism backstop. That is worth knowing even if the implications narrow upon a proper interpretation of the first eight amendments.

Fourth, the present approach differs markedly from Professor Fairman's famous 1949 article arguing against incorporation.¹⁹ Fairman's article failed to account for antislavery legal theory, and it gave pride of place to the statements of Democrats, on whom he heaped almost obsequious praise while denigrating Republicans.²⁰ What the present reevaluation demonstrates is that Republican antislavery thinkers did have a legal theory, specifically about Article IV, that was coherent even if legally unorthodox; but, contrary to William Crosskey's claim in defense of incorporation,²¹ that legal theory does not compel incorporation and is in fact consistent with the wide variety of statements about the need for equal civil rights. As Pamela Brandwein has suggested, both Fairman and Crosskey adopted frames—sets of assumptions—that determined what evidence they found important and how they interpreted that evidence.²² I, of course, may be applying my own set of assumptions; the point is only that the present approach differs from both Fairman and Crosskey in that it accepts many of Crosskey's assumptions but arrives at results similar, albeit not identical, to Fairman's.²³

19 Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

20 As Michael Kent Curtis has correctly observed. See CURTIS, *supra* note 1, at 100, 109; Fairman, *supra* note 19, at 18 (stating that Democrat Senator Saulsbury made “hard-hitting points,” and Senator Reverdy Johnson was an “outstandingly qualified” lawyer); *id.* at 19 (stating that Republican senators who voted to acquit President Johnson in his impeachment trial were “men of character and standing”). He generally treated the Republicans as confused and at times ridiculed John Bingham. CURTIS, *supra* note 1, at 109.

21 See Crosskey, *supra* note 3, at 6.

22 See PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 99, 105 (1999).

23 A critical error in Crosskey, moreover, is that he assumed that all discussion of equality and the Civil Rights Act must have been references to the Equal Protection Clause, but as noted above, that is not correct, and this error led Crosskey to misinterpret much of the evidence. It is also widely accepted that both Fairman and Raoul Berger—the other celebrated anti-incorporationist of the twentieth century—“mishandled the evidence” to a “truly shocking and inexcusable extent.” Wildenthal, *supra* note 3, at 1518; see also Crosskey, *supra* note 3, at 10. The now-negative reputations of Fairman and Berger, and the criticisms about their historical work, may explain why so many originalists now accept incorporation as gospel, and why this reexamination is necessary. My hope in this Article is to reexamine the case that Fairman and Berger made with the benefit of contextualization, the additional scholarship that has been produced in the past few dec-

Part I begins with the first principles without which it is impossible to understand antebellum fundamental rights discourse. It examines how antebellum Americans believed that all “free governments” had to secure natural and civil rights. But not all governments did so in exactly the same way. In the words of St. George Tucker, all persons in “civilized nations” enjoyed civil rights “according to the laws, customs, and usages of the country.”²⁴ All the state constitutions, or state common law, did in fact guarantee as a general matter the same rights guaranteed in the first eight amendments against the federal government. Finally, antebellum Americans believed that citizenship in a republic implied equality in civil rights. Importantly, these concepts—that all free governments had to secure natural rights, and that republican citizenship required equality—existed harmoniously with the antebellum federal structure in which rights were defined, regulated, and protected in different ways in the different states.

Part II addresses relevant evidence from antebellum to abolition. Although occasionally we see indications of “*Barron* contrarianism”—the belief that, contrary to *Barron ex rel. Tiernan v. Mayor & City Council of Baltimore*,²⁵ the first eight amendments were binding on the states—often the discussions make clear that the relevant references were to similar guarantees under state constitutions. Further, a lot of the evidence that Amar, Curtis, and others have put forward for the proposition that the Republicans were hoping to nationalize rights comes from discussions of abolition. In context, however, these statements do not support incorporation. Many Republicans believed that the suppression of speech and press was an incident of the slave system; they did not, however, conclude that the First Amendment should therefore be incorporated. All of the state constitutions already guaranteed speech and press freedoms. They believed that once slavery was abolished, these freedoms, whose suppression was incident to slavery, would be restored and once again observed.

Part III addresses the debates over readmission and the Freedmen’s Bureau. Many Republicans argued that because the rebellious states did not guarantee free speech and press to all citizens, they should not be readmitted into the Union. None of these statements is evidence for the nationalization of rights, yet the proponents of incorporation regularly cite them as such. Part IV tackles the draft Fourteenth Amendment, the Civil Rights Act, and the final debate

ades, and of course modern technology and its enabling of wider access to original sources.

24 *Infra* notes 31–34 and accompanying text.

25 32 U.S. (7 Pet.) 243, 250–51 (1833).

over the amendment. It examines statements from John Bingham and Jacob Howard and explains how their statements about the “bill of rights” and the “first eight amendments” do not compel incorporation. Part V makes similar claims with respect to post-enactment evidence, focusing particularly on an important document from the Massachusetts ratifying convention and on contemporaneous treaties.

Part VI concludes. In summary: Most of the evidence is consistent with an equality-only reading of the Privileges or Immunities Clause. And, even if some evidence points to a fundamental rights reading, that looks nothing like incorporation as we know it. At most, the clause would guarantee only those rights that “all free governments” had to secure—much like Justices Cardozo and Frankfurter (and Charles Fairman) once argued that the Fourteenth Amendment guarantees against the states only those rights central to the concept of ordered liberty.²⁶ Under any plausible account of the evidence, the conventional wisdom at least partly unravels.

I. FIRST PRINCIPLES

To make sense of the historical materials, we must transport ourselves to a past way of thinking. In antebellum rights discourse, it was widely accepted that all free governments had to secure natural rights. All the states, in their respective constitutions or common law, did in fact guarantee most (if not quite all) of the same rights the federal Bill of Rights guaranteed against the federal government, although that left room for variation in how such rights were determined and regulated. Antebellum Americans also believed that republican government implied the equality of rights of citizens. Both ideas coexisted with the basic federal structure of the Union.

A. *Free Governments*

Early Americans believed that all free governments had to secure natural rights. The Declaration of Independence states this expressly: that governments are instituted to *secure* the inalienable rights to

26 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.) (stating that the Fourteenth Amendment guarantees rights “implicit in the concept of ordered liberty”); *Adamson v. California*, 332 U.S. 46, 62–63 (1947) (Frankfurter, J., concurring) (stating that the Fourteenth Amendment invalidates only those state practices “inconsistent with a truly free society”); Fairman, *supra* note 19, at 139. Thus, although some core of the first eight amendments would be “incorporated” as reflecting such fundamental rights, the states would be allowed to vary in their regulations of these rights, leading to different doctrinal results today. See *infra* note 134 (discussing potential First Amendment implications).

life, liberty, and the pursuit of happiness.²⁷ John Locke had written that the “great and *chief end*” of government was “*the Preservation of . . . Property*,” which he defined as including “Lives, Liberties and Estates.”²⁸ Blackstone wrote “that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals,” and therefore “the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights.”²⁹

That did not mean, however, that each government secured these rights in the same way. St. George Tucker, a law professor at William & Mary, a jurist on the state courts of Virginia, and a highly influential legal thinker in the first two decades after ratification,³⁰ makes the point explicitly in his commentaries on Blackstone. Tucker defined natural rights as those that “appertain to every man . . . independent of any social institutions, or laws.”³¹ “Social rights,” in contrast, “comprehend whatever natural rights a man hath not abandoned by entering into society,” including “[t]he right of holding lands” and “transmitting property.”³² “[I]n all civilized nations,” Tucker wrote, “all free persons, whether citizens or aliens . . . have their respective social rights, *according to the laws, customs, and usages of the country.*”³³

27 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

28 JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 265, 350–51 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).

29 BLACKSTONE, *supra* note 13, at *120–21 (emphasis omitted).

30 See W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA, 1779-1979: A BIOGRAPHICAL APPROACH 682 (1982) (stating that Tucker’s commentaries on Blackstone were unchallenged as reference texts until the 1850s and were used often by lawyers and judges, including direct mention in the respondent’s brief in *Gibbons v. Ogden*); Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS, at vii (Liberty Fund, Inc. 1999) (1803) (“Published in 1803 by a distinguished patriot and jurist, it was for much of the first half of the nineteenth century an important handbook for American law students, lawyers, judges, and statesmen.”); Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1111 (2006) (“St. George Tucker was one of the more influential jurists, legal scholars, and legal educators of late-eighteenth- and early-nineteenth-century America.”); Chad Vanderford, Rights of Humans, Rights of States: The Academic Legacy of St. George Tucker in Nineteenth-Century Virginia 56 (Aug. 2005) (Ph.D. dissertation, Louisiana State University) (ProQuest) (noting that Tucker’s essays exercised considerable influence).

31 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES *145 n.42 (Philadelphia, William Young Birch & Abraham Small 1803).

32 *Id.*

33 *Id.* (emphasis added). Written in the aftermath of the Alien and Sedition Acts controversies with the aim of disproving the existence of a federal common law of crimes, Tucker’s commentary emphasizes that the municipal and common laws of the state vary greatly one from another. See, e.g., 5 *id.* app. at 8.

In *Ogden v. Saunders*, Justice Trimble explained that “when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government.”³⁴ It was admitted to be true that “men derive the right of private property, and of contracting engagements, from the principles of natural, universal law,” rather than from society, he said; “yet, it is equally true, that these rights, and the obligations resulting from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactments of municipal law.”³⁵ All free governments guaranteed such rights, but the regulations varied from government to government.

Interpretations of Article IV, Section 2, Clause 1³⁶ of the Constitution support this proposition. That clause provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁷ In the antebellum period, this clause was understood to guarantee to a citizen of State A, when travelling through or residing in State B, the same privileges and immunities that State B accorded its own citizens.³⁸ In a highly influential opinion interpreting this clause, Justice Bushrod Washington explored what privileges and immunities it guaranteed. He limited the clause to those rights that were “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.”³⁹ These included the rights to “the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”⁴⁰ Justice Washington certainly did not suggest that the laws defining, regulating, and securing life, liberty, and property in all the states were *identical*, which of course they were not. Each government, he suggested, could prescribe regulations for the general welfare and public good.

34 25 U.S. (12 Wheat.) 213, 319 (1827) (Trimble, J., dissenting).

35 *Id.* at 319–20.

36 This Article shall usually refer to this clause as “Article IV.”

37 U.S. CONST. art. IV, § 2, cl. 1.

38 For a summary, see LASH, *supra* note 3, at 25–26.

39 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (stating that the comity clause extends to “[p]rotection by the government” and “the enjoyment of life and liberty, with the right to acquire and possess property of every kind”).

40 *Id.* at 551–52.

The point was also made by one of the most influential treatises in the nineteenth century, Thomas Cooley's *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*,⁴¹ published in 1868 as the Fourteenth Amendment was being ratified. Cooley made clear that what constituted a valid police-power regulation for the public good rested with the legislature. In discussing regulations such as the prohibition on lotteries or alcohol that entirely destroy the value of property or employment, Cooley explained that "[a] statute which can do this must be justified upon the highest reasons of public benefit; *but, whether satisfactory or not, they rest exclusively in the legislative wisdom.*"⁴² Further, he said it

would be quite impossible to enumerate all the instances in which [the police] power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and in variety.⁴³

This is a recognition that state laws will also be of an "infinite" variety, and is all the more remarkable given Cooley's treatise was intended to mark out the constitutional *limitations* on state authority.

Cooley also summarized Article IV: "[T]his provision secures in each State to the citizens of all other States the right to remove to and carry on business therein," as well as "the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts

41 THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 584 (Boston, Little, Brown, & Co. 1868). On Cooley's influence, see, for example, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 342 (1999) (describing Cooley as "the most influential constitutional writer of the late nineteenth century"); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 233 n.71 (2009) (describing Cooley's treatise as "the most influential constitutional law treatise in the nineteenth century"). Alan Jones has explained that the treatise "went through six editions, and had a broader circulation, greater sale, and was more frequently cited than any other book on American law published in the last half of the nineteenth century." Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 759 (1967). And Clyde Jacobs has explained that "Cooley's treatise surpass[ed] even those of Kent and Story in prestige and authority" because it "was the first systematic work of merit in the field of state constitutional law," brought "order out of the confusion inherent in having a large number of separate, although basically similar, constitutional systems," and "soon became the ready-made reference work, the hand-book, of lawyers and judges." CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 29–30 (1954).

42 COOLEY, *supra* note 41, at 584, 583–84 (emphasis added).

43 *Id.* at 594.

and the enforcement of other personal rights.”⁴⁴ “To this extent, at least, discriminations could not be made by State laws against” citizens of other states, he wrote.⁴⁵ Cooley’s conventional reading of Article IV thus recognized that state laws respecting fundamental rights could vary from state to state; Article IV merely required that such state laws not discriminate against citizens of other states.

The variety of state regulations could extend to matters of free speech and press. It is well known that the Founding generation debated whether these freedoms were mere prohibitions on prior restraints, or whether in a republican government more protection was required.⁴⁶ Thomas Jefferson objected to the enactment of the infamous Sedition Act on the ground that regulations of speech and press were reserved to the states; thus each state had “the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed.”⁴⁷ Even if all “free governments” guaranteed speech and press freedoms, there is room for legitimate variation among free governments as to just what extent is protected.

Professor Jud Campbell has perhaps best stated the antebellum view. Antebellum Americans recognized “a *common* set of rights, applicable against the state and federal governments alike,” Campbell has explained, but they thought those rights were “regulable” by a state’s police power; therefore, this recognition of a common set of rights “did not necessarily mean that those rights had the same *legal* boundaries.”⁴⁸ Thus one could think the Second Amendment declaratory of a right shared by all jurisdictions, but each jurisdiction could regulate that right differently according to its own police power and its own understanding of the public good.⁴⁹ These first principles of natural right and free government were repeated again and again by members of the Reconstruction Congresses.⁵⁰

44 *Id.* at 397.

45 *Id.*

46 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 260–63 (1997); *see also The Report of 1800*, in 17 *THE PAPERS OF JAMES MADISON* 303 (David B. Mattern et al. eds., 1991).

47 *The Kentucky Resolutions of 1798*, in 30 *THE PAPERS OF THOMAS JEFFERSON* 529, 551 (Barbara B. Oberg ed., 2003).

48 Jud Campbell, *Constitutional Rights Before Realism*, 2020 *U. ILL. L. REV.* 1433, 1441.

49 *Id.* at 1441–42.

50 CONG. GLOBE, 39th Cong., 1st Sess. 3031 (1866) (statement of Sen. Henderson) (discussing “rights that attach to citizenship in all free Governments”); *id.* at 2798 (statement of Sen. Stewart) (similar); *id.* at 1319 (statement of Rep. Holmes) (discussing “the blessings and privileges of free governments”).

B. *State Constitutions*

All the state constitutions in fact guaranteed most of the rights in the first eight amendments. This is significant because some evidence that has been cited in favor of incorporation refers to state constitutional rights. Another key emphasis of the fundamental-rights account is the battles over free speech and press; but all state constitutions in the antebellum period guaranteed these rights. The issue was the selective denial of these rights to the free blacks⁵¹ and to abolitionists.

Cooley's 1868 treatise discusses the several constitutional protections in the state constitutions and their parallels in the federal constitution.⁵² When discussing the common-law right to be secure against unreasonable searches and seizures, Cooley observes that "it has not been deemed unwise to repeat in the State constitutions, as well as in the national, the principles already settled in the common law upon this vital point in civil liberty."⁵³ He proceeds to describe dozens of state-court cases interpreting state constitutional law on this point.⁵⁴ On the Third Amendment provision against quartering, Cooley notes that this provision is "incorporated in the constitution of nearly every State."⁵⁵ Trial by jury, public and speedy trials, habeas corpus, and the presumption of innocence are also protected in every state, and unreasonable bail and double jeopardy prohibited.⁵⁶

Interestingly, Cooley writes, "It is also a *constitutional* requirement that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted."⁵⁷ And: "With us it is a universal principle of *constitutional* law, that the prisoner shall be allowed a defence by counsel."⁵⁸ In these paragraphs Cooley uses the term "constitutional requirement," and "constitutional law," in reference not to the Federal Constitution, but to the various state constitutions. Cooley then moves on to the rights of assembly and petition,⁵⁹ the right to bear arms,⁶⁰ and due process⁶¹ before reaching "the freedom of speech or

51 In using this term here and elsewhere, I seek to be faithful to the way in which the historical sources distinguish between enslaved and free African Americans and to the historical debate, definitively resolved by the Fourteenth Amendment itself, over whether freed black people were "Americans" in the sense of having citizenship.

52 Part of this discussion appears in WURMAN, *supra* note 7, at 63–67.

53 COOLEY, *supra* note 41, at 303 (footnote omitted).

54 *Id.* at 303–08.

55 *Id.* at 308.

56 *See id.* at 309–12, 347.

57 *Id.* at 328 (emphasis added).

58 *Id.* at 334 (emphasis added).

59 *Id.* at 349.

60 *Id.* at 350.

of the press,” which “is almost universally regarded a sacred right, essential to the existence and perpetuity of free government.”⁶² Here, too, Cooley observes that “a provision of similar import has been embodied in each of the State constitutions, and a *constitutional principle* is thereby established which is supposed to form a shield of protection to the free expression of opinion in every part of our land.”⁶³

Neither Cooley nor the modern scholars⁶⁴ who have investigated these state constitutions appear to have examined the pre-Reconstruction constitutions. Doing so is important because it is possible that the Reconstruction-era governments inserted fundamental guarantees into their constitutions that had been absent prior to the Civil War. An examination of the pre-Reconstruction and pre-secession constitutions confirms that all eleven seceded states had always guaranteed the freedom of the press,⁶⁵ an important fact considering that the antebellum debates over this freedom form the core of the pro-incorporation argument.⁶⁶ In nine of these states, the freedom of speech and of press were guaranteed together, with only South Carolina and North Carolina not specifically guaranteeing the right to “speak” as opposed to the right to publish.⁶⁷ And all but South Carolina expressly guaranteed the right to bear arms,⁶⁸ alt-

61 *Id.* at 351, 351–52 n.2. He could not find an explicit due process provision in three constitutions; he nevertheless believed this principle to be guaranteed in these states, too, as a matter of common law.

62 *Id.* at 414.

63 *Id.* (emphasis added).

64 See, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 72 (2008).

65 ALA. CONST. of 1861, art. I, § 8; ALA. CONST. of 1819, art. I, § 8; ARK. CONST. of 1861, art. II, § 7; ARK. CONST. of 1836, art. II, § 7; FLA. CONST. of 1861, art. I, § 5; FLA. CONST. of 1838, art. I, § 5; GA. CONST. of 1861, art. I, § 8; GA. CONST. of 1789, art. IV, § 3; LA. CONST. of 1861, tit. 6, art. 106; LA. CONST. of 1852, tit. 6, art. 106; MISS. CONST. of 1832, art. I, §§ 5–7; N.C. CONST. of 1776, Declaration of Rights § 15; S.C. CONST. of 1861, art. IX, § 6; S.C. CONST. of 1790, art. IX, § 6; TENN. CONST. of 1834, art. I, § 19; TEX. CONST. of 1861, art. I, § 5; TEX. CONST. of 1845, art. I, § 5; VA. CONST. of 1851, art. I, § 12 (press); *id.* art. IV, § 15 (speech and press).

66 *Infra* Sections II.A–B.

67 See *supra* note 65 (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Tennessee, Texas, and Virginia guaranteeing freedom of speech and press together). South Carolina courts appear to have assumed that the freedom of speech was a restraint on the states. *Mayrant v. Richardson*, 10 S.C.L. (1 Nott & McC.) 347, 350 (S.C. Const. Ct. App. 1818) (“[F]reedom of speech . . . is the necessary attribute of every free government, and is expressly guaranteed to the people of this country by the Constitution.” (emphasis omitted)).

68 Virginia’s constitution provided “[t]hat a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free

hough Florida, Louisiana, Arkansas, and Tennessee specifically limited this right to white persons.

For present purposes, it is enough to observe that most states already guaranteed most federal constitutional rights as a matter of state constitutional law. Although not all states guaranteed all the same rights found in the Federal Bill of Rights, most of them did secure most federal constitutional protections as a matter of their own law. As shall become clear, the problems of this period were not attributable to the absence of fundamental rights guarantees in the states. They were instead attributable to the selective denial of such state constitutional guarantees, as the four southern state constitutional provisions limiting the right to bear arms to white persons made clear. As the General Court of Virginia recognized in 1824:

Notwithstanding the general terms used in the Bill of Rights [of the state constitution], it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? . . . The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.⁶⁹

Put another way, all the states of the union did guarantee the same kinds of rights secured by the Federal Constitution. But not all of them extended those guarantees to their free residents of color.

None of this is to say that no one took the position that the Federal Bill of Rights bound the state governments. At least one

State,” VA. CONST. of 1830, art. I, § 13, which presumably guarantees the right to bear arms although it is not explicit. Georgia provided for this right in its constitution of 1861, *see* GA. CONST. of 1861, art. I, § 6, although the prior constitution of 1789 had not provided for this right. The Georgia courts had assumed, however, that the right to bear arms was fundamental and could not be restrained by state legislation. *See* *Nunn v. State*, 1 Ga. 243, 249 (1846). For the other state constitutional provisions (pre-1861), *see* ALA. CONST. of 1819, art. I, § 23; ARK. CONST. of 1836, art. II, § 21; FLA. CONST. of 1838, art. I, § 21; LA. CONST. of 1852, tit. III, art. 59; MISS. CONST. of 1832, art. I, § 23; N.C. CONST. of 1776, Declaration of Rights, § 17; TENN. CONST. of 1834, art. I, § 26; and TEX. CONST. of 1845, art. I, § 13.

69 *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (Va. Gen. Ct. 1824).

antebellum treatise took that view.⁷⁰ Most other legal thinkers were more careful. As Akhil Amar has argued,⁷¹ and as Jason Mazzone has confirmed in more detail,⁷² the Federal Bill of Rights was understood to declare natural rights that the state courts could then independently apply against their own state legislatures as a matter of state common or constitutional law.⁷³ This was a standard application of the principle that all free governments guaranteed certain rights. As Justice Brewer declared while he was still on the Supreme Court of Kansas about that *state's* bill of rights, it contains “axioms of civil and political liberty upon which all free governments are founded.”⁷⁴

C. *Republican Citizenship*

Another important antebellum principle was republican citizenship. It was common ground that citizenship in a republic generally required equality. Ryan Williams has explained, “The idea that American citizenship necessarily implied equal citizenship was commonplace in American political and legal writing of the late eighteenth and early nineteenth centuries.”⁷⁵ He cites numerous examples.⁷⁶ To add to his, in 1784 Thomas Tudor Tucker of South Carolina described a constitution as “a social covenant entered into by express consent of the people, upon a footing of the most perfect equality with respect to every civil liberty.”⁷⁷ “No man,” he said, “has any privilege above his fellow-citizens.”⁷⁸ In 1791, James Madison opposed the incorporation of a bank because it “involves a monopoly, which affects the equal rights of every citizen.”⁷⁹ Chief Justice Jay wrote in 1793 that Americans “are equal as fellow citizens, and as

70 See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1203–04 (1992) (discussing WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120–30 (Philadelphia, H.C. Carey & I. Lea 1825)).

71 See Amar, *supra* note 70, at 1205–12.

72 See Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 49–50 (2007).

73 See also Campbell, *supra* note 48, at 1440–43 (arguing that state and federal courts applied a general law of fundamental rights).

74 State *ex rel.* St. Joseph & Denver City R.R. Co. v. Comm’rs of Nemaha Cnty., 7 Kan. 542, 555 (1871) (Brewer, J., dissenting).

75 Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 504 (2013).

76 *Id.* at 504 & n.48. I have provided additional examples in the above passage.

77 PHILODEMUS (THOMAS TUDOR TUCKER), CONCILIATORY HINTS, ATTEMPTING, BY A FAIR STATE OF MATTERS, TO REMOVE PARTY PREJUDICE (Charleston, 1784), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 606, 612 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

78 *Id.*

79 2 ANNALS OF CONG. 1950 (1834).

joint tenants in the sovereignty.”⁸⁰ In 1801, the Pennsylvania Supreme Court explained that a “just equality . . . ought to prevail amongst the citizens of a free government.”⁸¹ An 1832 treatise observed, “As men are naturally equal in their rights,” they would only organize into civil society “on an equal footing with others, as to all the rights secured to him in the social compact, or constitution of the society.”⁸²

Numerous thinkers connected this idea of citizenship to republicanism specifically. St. George Tucker argued, “It is indispensably necessary to the very existence of . . . democracy, that there be a perfect equality of rights among the citizens.”⁸³ “By equality,” he explained, is meant “equality of civil rights, and not of condition.”⁸⁴ Alexander Hamilton, writing as “Catullus” in 1792, used similar language, suggesting that “republican theory” required “perfect equality of rights among citizens.”⁸⁵ Representative Andrews of New York, in a speech on the Lecompton Constitution, exhorted in 1858 that “‘republican’ means the equality of all men.”⁸⁶

The notion of republican citizenship and equality was repeated over and over during Reconstruction and the antebellum struggles over discriminatory black codes. The 1851 Address to the Constitutional Convention of Ohio by the Convention of Colored Men declared their understanding of these principles: “That governments are instituted for the protection of the rights of—not of a set of men—but of the ALL men spoken of,” and that “the government which does not protect the rights of all men, is not just.”⁸⁷ An 1840 Colored Convention in Albany “[r]esolved, [t]hat one of the distinctive and peculiar features of republicanism, is, that rights are to be guaranteed and extended, without arbitrary or unnatural distinctions,” and that “whenever in the administration of such a government, a portion of its citizens are deprived (from any such invidious causes) of an equal participation of the privileges and

80 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793).

81 *Wilkins’s Lessee v. Allenton*, 3 Yeates 273, 278 (Pa. 1801).

82 BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 51 (Boston, Marsh, Capen & Lyon 1832).

83 I TUCKER, *supra* note 31, app. at 28.

84 *Id.*

85 Alexander Hamilton, *Catullus No. 3*, *GAZETTE OF THE U.S.*, Sept. 29, 1792, at 138, reprinted in 12 *THE PAPERS OF ALEXANDER HAMILTON* 498, 505 (Harold C. Syrett ed., 1967).

86 *CONG. GLOBE*, 35th Cong., 1st Sess. 825 (1858).

87 *ADDRESS TO THE CONSTITUTIONAL CONVENTION OF OHIO, FROM THE STATE CONVENTION OF COLORED MEN* 4 (n.p., E. Glover 1851).

prerogatives of citizenship, the principles of republicanism are manifestly violated.”⁸⁸

The Joint Committee on Reconstruction’s Final Report declared that the southern states ought not to be admitted until “[i]t should appear affirmatively that they are prepared and disposed” to extend “to all classes of citizens equal rights and privileges, and conform [] to the republican idea of liberty and equality.”⁸⁹ Senator Charles Sumner, in a speech in 1866, stated, “What is Liberty without Equality? What is Equality without Liberty? One is the complement of the other. The two are necessary to round and complete the circle of American citizenship.”⁹⁰ He continued, “They are the two vital principles of a Republican Government, without which a Government, although republican in name, cannot be republican in fact.”⁹¹

* * *

As we examine the historical materials to come, the question will be whether the fundamental-rights discourse of antebellum thinkers and the proponents of the Fourteenth Amendment challenges these background principles or is in fact consistent with them. It will be the burden of the remaining parts to demonstrate that that discourse was, by and large, consistent with the principles that all free governments—and all the state governments—had to secure natural rights; and had wide leeway to define and regulate life, liberty, and property; but had to treat their citizens equally, without arbitrary distinctions.

II. ANTEBELLUM AND ABOLITION

Akhil Amar, Michael Curtis, and Kurt Lash tend to emphasize two antebellum and pre-abolition themes in their work. First, they argue that prominent members of the antebellum legal community already believed the first eight amendments bound the states, or that their statements in the Thirty-Ninth Congress suggest their intent to overturn the contrary Supreme Court precedent of *Barron v. Baltimore*.⁹² Second, they emphasize the debates over how slavery required the diminishment of civil liberties generally, implying the need to nationalize those civil liberties.⁹³ This Part addresses these claims. Section II.A examines disputes over abolitionist literature, to which

88 MINUTES OF THE STATE CONVENTION OF COLORED CITIZENS 18 (New York, Piercy & Reed 1840).

89 JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT 16 (1866).

90 CONG. GLOBE, 39th Cong., 1st Sess. 687 (1866).

91 *Id.*

92 See AMAR, *supra* note 2, at 145–56; CURTIS, *supra* note 1, at 83; LASH, *supra* note 3, at 85.

93 See, e.g., AMAR, *supra* note 2, at 160.

proponents of incorporation often point as evidence, and shows that the fundamental rights or “constitutional” discourse surrounding abolitionist literature focused on state constitutional equivalents. Section II.B examines the later debates over abolition itself. Antebellum Americans believed that slavery required the suppression of civil liberty; but with the abolition of slavery, civil liberty would naturally be restored. Section II.C rounds out this Part with a discussion of John Bingham’s 1859 speech on Oregon’s proposed constitution.

A. *Suppression of Literature*

The most important antebellum debate over speech and press centered on the suppression of abolitionist literature. In the late 1820s and early 1830s, manumission societies and independent publishers engaged in “the great postal campaign” to circulate abolitionist literature throughout the United States, including in the South.⁹⁴ The constitutional dispute flared in 1835 when the Postmaster of Charleston, South Carolina, requested an opinion from Postmaster General Amos Kendall about whether he had to distribute abolitionist literature. Kendall sought the views of President Andrew Jackson, who recommended that Congress prohibit the distribution of abolitionist literature in the South.⁹⁵

This proposal was defeated by an odd combination of Southerners led by John C. Calhoun and Northerners on the ground that it was an abridgement of the freedom of speech and that it violated the states’ police powers. The Southerners worried that if the federal government could prohibit abolitionist literature on the ground that it was incitement to insurrection then it could also decide that this same literature was not incitement, a risk the southern governments were unwilling to take.⁹⁶ South Carolina, Georgia, Virginia, and Alabama, however, demanded that the *northern* states censor antislavery publications, associations, and meetings.⁹⁷ So did Calhoun in an important committee report.⁹⁸ The report argued that although Congress lacked the power to interfere with abolitionist literature, it was incumbent on the northern states to do so.⁹⁹ In response to this report, Senator William Plumer, writing as Cincinnatus, published a

94 See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 172–73 (1977). The next few paragraphs are adapted from WURMAN, *supra* note 7, at 83–85.

95 WIECEK, *supra* note 94, at 175.

96 See *id.* at 175–77.

97 *Id.* at 179–80.

98 S. Doc. No. 24-118, at 1 (1st Sess. 1836).

99 *Id.* at 7, 10–11.

pamphlet excoriating the report's reasoning.¹⁰⁰ Both Michael Kent Curtis and Akhil Amar cite this pamphlet in their work. "The pamphlet asserted that First Amendment rights of speech and press were protected against both federal and state interference," writes Curtis.¹⁰¹ Amar writes that Plumer's pamphlet declared "that freedom of speech and of the press were reserved to the people from both state and federal interference."¹⁰²

Far from espousing a contrarian view, however, the pamphlet argues that Calhoun's proposal would violate *state* constitutions:

As to the practicability of the plan recommended in the Report, it may be duly appreciated, if we inquire whether any laws passed by the non-slave-holding states, "abridging the freedom of the press," would be in agreement with the Constitutions of *those States*. If I am not mistaken, there is in every State Constitution at the North an express article as strictly prohibiting the passage of such a law by the State legislature as the first article of amendments in the U.S. Constitution prohibits the passage of a like law by Congress.¹⁰³

Plumer then examines the various constitutional provisions from Massachusetts, New Hampshire, and Ohio, before concluding that "[t]he Constitutions of the other States contain similar provisions" and noting that even South Carolina had a provision that would prohibit the suppression of antislavery publications were it honored.¹⁰⁴ "Other slave-holding States have like provisions," too.¹⁰⁵ "So, as we have shown that the Constitutions of the several States forbid the abridgment of the freedom of the press by the State Legislatures," Plumer writes later in the pamphlet, "this invaluable right is 'placed beyond the possible encroachment' of any STATE government or of the General Government."¹⁰⁶

Plumer goes on. "The freedom of speech and of the press is not a right reserved from Congress and vested in a State Legislature," he adds, "but is reserved both from Congress and all State Legislatures, by the United States Constitution and by the Constitutions of the States, to the PEOPLE; for it is a right which eternally belongs to the

100 CINCINNATUS, *FREEDOM'S DEFENCE: OR A CANDID EXAMINATION OF MR. CALHOUN'S REPORT ON THE FREEDOM OF THE PRESS* (Worcester, Dorr, Howland & Co. 1836).

101 CURTIS, *supra* note 1, at 30.

102 AMAR, *supra* note 2, at 358 n.98.

103 CINCINNATUS, *supra* note 100, at 10 (emphasis added).

104 *Id.*

105 *Id.* at 11.

106 *Id.* at 18.

people.”¹⁰⁷ Standard fare: all free governments must protect this right because it is a natural right that “belongs to the people.” That is why it is protected in the state constitutions as well as in the federal. “An article in the United States Constitution, which prevents CONGRESS from enacting a certain law, prevents equally, when found in the Constitution of a State, the State Government from enacting a like law,” Plumer concludes.¹⁰⁸ “The landmarks of our liberties are well defined in the National and State Constitutions, and the people have only to acquaint themselves with these and *to require that their rulers abide by them*, in order to preserve to themselves and for their posterity the blessings of freedom.”¹⁰⁹ The problem was not the absence of protections for speech and press, but rather the failure to honor them in service of the slave system.

Thus when the Vermont legislature adopted a joint resolution declaring that “neither Congress nor the State Governments have any constitutional right to abridge the free expression of opinions, or the transmission of them through the public mail,”¹¹⁰ there is no reason to think, as Curtis and Amar seem to,¹¹¹ that it was expressing a contrarian point of view. Presumably the legislature was familiar with its own state constitution.

B. *Slavery and Abolition*

The debate over suppression of literature was one species of a more general debate over the irrepressible conflict that the slave system created with liberty. The awareness of this conflict supplies one of the central arguments for the proposition that the antislavery Republicans sought to nationalize rights. “The structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too,” Akhil Amar has written.¹¹² “Slavery bred repression. Speech and writing critical of slavery, even if plainly religious or political in inspiration, was incendiary and had to be suppressed in southern states, lest slaves overhear and get ideas.”¹¹³

107 *Id.* at 20.

108 *Id.*

109 *Id.* at 24 (emphasis added).

110 H.R. Res. 53, 1836 Gen. Assemb., October Sess. (Vt. 1836), reprinted in ACTS PASSED BY THE LEGISLATURE OF THE STATE OF VERMONT, AT THEIR OCTOBER SESSION, 1836, at 44 (Montpelier, E.P. Walton & Son 1836).

111 See CURTIS, *supra* note 1, at 30 (relying on this resolution); AMAR, *supra* note 2, at 358–59 n.98 (same).

112 AMAR, *supra* note 2, at 160.

113 *Id.*

Michael Kent Curtis similarly writes, the “conviction that an aggressive slave power had been bent on nationalizing slavery and destroying liberty was a widely shared Republican view.”¹¹⁴ Thus, for example, Senator Isaac Arnold “shared the prevailing Republican view” when he stated in 1864 that “[l]iberty of speech, freedom of the press, and trial by jury had disappeared in the slave States.”¹¹⁵ The burden of a large part of Curtis’s argument is to demonstrate that speeches by Republicans in the Thirty-Eighth Congress that abolished slavery “reflect the Republican view that slavery destroyed constitutional rights” and that “[i]mplicit, and often explicit, in these declarations was their view that the Bill of Rights secured the rights of citizens and protected these rights against interference from any quarter.”¹¹⁶

It was, indeed, common ground that slavery required the suppression of liberty.¹¹⁷ That does not lead to the conclusion, however, that antislavery Republicans sought to nationalize rights. It suggests the opposite: that once slavery was *abolished*, liberty would be restored. Once the slave system passed away, there no longer would be any need for freedom of speech and of the press to be abridged by any state. The restoration of freedom would happen naturally. To be sure, history turned out differently: to guarantee this equality in civil liberty, the Fourteenth Amendment was required. But in 1864, that was not yet on the horizon.

114 CURTIS, *supra* note 1, at 37.

115 *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 114 (1864)).

116 *Id.*

117 “A house divided against itself cannot stand,” Lincoln famously said. “I believe this government cannot endure, permanently half *slave* and half *free*.” Abraham Lincoln, Speech to the Illinois Republican State Convention (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy B. Basler ed., 1953). He was not referring only to freedom from slavery; he meant freedom generally, describing the policy of the Slave Power to be “[t]hat if any *one* man, choose to enslave *another*, no *third* man shall be allowed to object.” *Id.* at 462. The founders of the New York State Anti-Slavery Society declared in 1835, “the time has come to settle the great question, whether the north shall give up its liberty to preserve slavery to the south, or the south shall give up its slavery to preserve liberty to the whole nation.” PROCEEDINGS OF THE NEW YORK ANTI-SLAVERY CONVENTION, HELD AT UTICA, OCTOBER 21, AND NEW YORK ANTI-SLAVERY SOCIETY, HELD AT PETERBORO’, OCTOBER 22, 1835, at 16 (1835). And the abolitionist James Birney wrote in a letter that same year, “The contest is becoming—has become,—one, not alone of freedom for the *black*, but of freedom for the *white*. . . . The antagonist principles of liberty and slavery have been roused into action and one or the other must be victorious.” Letter from James G. Birney to Gerrit Smith (Sept. 13, 1835), in 1 LETTERS OF JAMES GILLESPIE BIRNEY, 1831–1857, at 243 (Dwight L. Dumond ed., 1938).

1. General Evidence

Senator Arnold's speech is but one example of the belief that with abolition freedom would be restored. "The vengeance of the slaveholder against the man who spoke or published in behalf of liberty was sharp, speedy, and unrelenting. . . . In the slave States of this Union a freeman had no rights which a slaveholder felt bound to respect," he said.¹¹⁸ "The degeneracy and barbarism produced by slavery are strikingly illustrated by Virginia," he continued:

[W]hen we look upon her to-day, and see to what slavery has reduced the proud old Commonwealth, it is indeed the saddest spectacle of the war. She is being purged as with fire; she will pass through this agony, and come out of it restored, emancipated, disenthralled, and regenerated. Once more shall she be hailed as the mother of States—free States—and statesmen. Mount Vernon and Monticello will again become the Meccas of the American patriot. Through the dark clouds which now envelop her the bow of promise shall reappear; that bow shall rest upon liberty.¹¹⁹

In 1866, Representative Plant of Ohio reflected on the causes of the war and observed that "until the Government settles into one or the other of these forms"—despotic or republican—"there will be no permanent peace."¹²⁰ The slave system "would not be secure if men in the slave States were permitted to discuss the matter in any form, and hence the freedom of speech and the press must be suppressed as the highest of crimes."¹²¹ "[C]an any one fail to see," he asserted, "that this conflict had progressed until the contending forces were brought face to face, and that only one of two things remained possible—either the utter destruction of slavery or the total extinguishment of freedom."¹²² "[I]f free speech and a free press and popular education are permitted, the very existence of slavery will be endangered, and they must therefore be suppressed."¹²³ Hence "the contest could not stop until either slavery or freedom found its eternal tomb! And, thank God, it was slavery that died, and in its death has made the progress of freedom possible, and the glory of our country and the redemption of a race a certainty in the future."¹²⁴

118 CONG. GLOBE, 38th Cong., 1st Sess. 115 (1864).

119 *Id.*

120 CONG. GLOBE, 39th Cong., 1st Sess. 1011 (1866).

121 *Id.* at 1013.

122 *Id.*

123 *Id.* at 1014.

124 *Id.*

Curtis also cites Representative Ebon Ingersoll, Representative John Kasson, and Senator Daniel Clark for the proposition that they “espoused a theory fully protecting freedom of speech against state infringement.”¹²⁵ Ingersoll, however, believed that the *Thirteenth Amendment* would restore this freedom because once slavery was abolished, there would no longer be a need to abridge free speech and press in the former slave states:

The freedom of speech that I am in favor of is the freedom which guaranties to the citizen of Illinois, in common with the citizen of Massachusetts, the right to proclaim the eternal principles of liberty, truth, and justice in Mobile, Savannah, or Charleston with the same freedom and security as though he were standing at the foot of Bunker Hill monument; *and if this proposed amendment [the Thirteenth Amendment] to the Constitution is adopted and ratified, the day is not far distant when this glorious privilege will be accorded to every citizen of the Republic.*¹²⁶

It is true, as Curtis writes, that Representative Kasson “referred to the denial of constitutional rights that had resulted from slavery,”¹²⁷ including freedom of speech and press.¹²⁸ Yet this conflates a reference to the antecedent rights that the Constitution guarantees with the constitutional guarantees themselves. Kasson believed that abolition would end these violations and made no specific claim about the Bill of Rights. Referring to the treatment of Samuel Hoar in South Carolina—Hoar had travelled to South Carolina to institute suits on behalf of imprisoned free black sailors, and was run out of town¹²⁹—Kasson asked, “Would that have been done if slavery had not existed?”¹³⁰

Similarly, Senator Clark argued, “[Slavery] has denied often-times in those States to citizens of other States their rights under the Constitution. She has shut up to them the liberty of speech and the press. She has assaulted them, imprisoned them, lynched them”¹³¹ Clark is clearly referencing Article IV’s nondiscrimina-

125 CURTIS, *supra* note 1, at 39; *see also* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 115–186 (2021) (citing the same speeches).

126 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (emphasis added).

127 CURTIS, *supra* note 1, at 38.

128 Kasson said that slavery “denie[d] the constitutional rights of our citizens in the South, suppresses freedom of speech and of the press, throws types into the rivers when they do not print its will, and violates more clauses of the Constitution than were violated even by the rebels when they commenced this war.” *Id.* at 38 (quoting CONG. GLOBE, 38th Cong., 2d Sess. 193 (1864)).

129 WIECEK, *supra* note 94, at 140.

130 CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

131 CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864).

tion requirement. More to the point, the abridgments of speech and press freedoms were examples of the numerous evils of the slave system. Clark believed that the Thirteenth Amendment would “plant new institutions of freedom, and a new or regenerated people shall rise up.”¹³² There are numerous other examples of this antislavery view that, with the passing of the slave system, civil liberties would generally be restored.¹³³ None of these members of Congress said anything remotely approximating the proposition that the First Amendment was or would someday be made applicable to the states.¹³⁴

2. James Wilson’s Speech

Randy Barnett and Evan Bernick,¹³⁵ Akhil Amar,¹³⁶ and Michael Kent Curtis¹³⁷ all rely on an important speech from James Wilson on March 19, 1864, upon the introduction of resolutions to amend the

132 *Id.*

133 In introducing the proposed Thirteenth Amendment, Senator Trumbull noted, “If the freedom of speech and of the press, so dear to freemen everywhere . . . has been denied us all our lives in one half the States of the Union, it was by reason of slavery.” *Id.* at 1313. With the abolition of slavery, the implication was, such freedoms would be restored. *See also id.* at 1439–40 (statement of Sen. Harlan) (“[A]nother incident of *this institution* [slavery] is the suppression of the freedom of speech and of the press” because “[s]lavery cannot exist where its merits can be freely discussed”; if “none of these necessary incidents of slavery are desirable, how can an American Senator cast a vote to justify its continuance for a single hour, or withhold a vote necessary for its prohibition?” (emphasis added)); *id.* at 2615 (statement of Rep. Morris) (slavery “waged war against free speech”; “I say destroy this monster at once, root out this noxious plant, leave not a fiber to again sprout and choke the tree of liberty planted by our fathers”).

134 The possible exception from Curtis’s survey of this period is the abolitionist Owen Lovejoy, whom Curtis cites for the proposition that Lovejoy believed the Bill of Rights applied against the states. CURTIS, *supra* note 1, at 50. In a speech devoted to how slavery required the suppression of speech, Lovejoy said that he claims “the right of discussing this question of slavery anywhere, on any square foot of American soil over which the stars and stripes float, and to which the privileges and immunities of the Constitution extend. Under that Constitution, which guaranties to me free speech, I claim it, and I demand it.” CONG. GLOBE, 36th Cong., 1st Sess. app. at 205 (1860). This passing remark is certainly not a specific claim that the Bill of Rights applies against the states, although it can certainly be interpreted that way. Lovejoy appears to be claiming the right to freedom of speech generally, including by invoking the First Amendment. The overall tenor of his speech is on par with the other abolitionists who believed that once slavery was extirpated, freedom would be restored. “[B]efore free discussion and all the rights of free citizens are to be sacrificed to that Moloch of slavery,” he declared, “Moloch must be immolated at the shrine of liberty, free speech, free discussion, and all those rights that cluster around an American citizen.” *Id.*

135 BARNETT & BERNICK, *supra* note 125, at 115–16.

136 AMAR, *supra* note 2, at 184–85.

137 CURTIS, *supra* note 1, at 37–38.

Constitution to abolish slavery.¹³⁸ Barnett and Bernick argue that Wilson's speech is evidence of a fundamental-rights reading of Article IV, by which it guaranteed a floor of fundamental rights in all the states.¹³⁹ Amar and Curtis argue that this speech is evidence for incorporation because it reveals that Wilson was a "*Barron* contrarian." The idea is that Wilson believed that Article IV—which, again, traditionally was understood to be an interstate-comity provision—made the first eight amendments already applicable in all the states.

Neither reading is compelled by the speech. Wilson never denied that civil rights are generally defined and regulated under state law and vary from state to state. He did argue that the slave states had routinely violated Article IV, but his speech makes clear that they did so by discriminating—by denying rights to citizens of other states, which would violate the conventional reading of Article IV, or by denying rights to abolitionist or antislavery citizens in their own states. This latter claim certainly constitutes an unorthodox reading of Article IV, but it does not require the nationalization of rights: it merely requires the extension of the clause's antidiscrimination work to discrimination internal to a particular state. Because Wilson is an important figure in the debates and in the current literature, it is worth examining his speech at some length.

The subject of Wilson's speech was "the incompatibility of slavery with a free Government"¹⁴⁰—standard irrepressible conflict talk. He begins by illustrating how the slave system is inconsistent with each of the objects in the Constitution's preamble.¹⁴¹ He then claims that slavery "has confronted the Constitution itself, and prevented the enforcement of its most vital provisions,"¹⁴² of which he cites two: the Supremacy Clause and Article IV, Section 2, Clause 1.¹⁴³ The latter, specifically, is a provision of "vital importance to every citizen."¹⁴⁴ "How has it been observed? What has been the conduct of slavery toward it?" he asks.¹⁴⁵ "Let us turn again to the Constitution for practical aid in the solution of *these questions*," he says, and he then quotes the First Amendment.¹⁴⁶ He continues:

Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every

138 CONG. GLOBE, 38th Cong., 1st Sess. 1199–1204 (1864).

139 BARNETT & BERNICK, *supra* note 125, at 115–16.

140 CONG. GLOBE, 38th Cong., 1st Sess. 1200 (1864).

141 *Id.* at 1199–1202.

142 *Id.* at 1202.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* (emphasis added).

American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together. How have these rights essential to liberty been respected in those sections of the Union where slavery held the reins of local authority and directed the thoughts, prejudices, and passions of the people?¹⁴⁷

Amar writes that Wilson's words "show that he deemed all rights and freedoms in the Bill—even those declared only against Congress—to be binding on state governments,"¹⁴⁸ and that Wilson "read the Bill through contrarian lenses."¹⁴⁹ Curtis uses this passage in support of his argument that "[i]mplicit, and often explicit, in [such] declarations was their view that the Bill of Rights secured the rights of citizens and protected these rights against interference from any quarter."¹⁵⁰ Those conclusions are possible but they are not compelled. Wilson's speech is on the "incompatibility" of slavery and freedom, and like the other speakers this Part has canvassed, Wilson seems to think that with abolition these freedoms would be naturally restored.

Moreover, Wilson appears to be using the First Amendment as an illustration of the rights that all free governments must secure. This relates to Article IV because, as Justice Washington had held, the clause secured to out-of-state citizens fundamental rights in each state, including the *kinds* of rights secured by the First Amendment. Wilson may be merely identifying the freedom of speech and of the press as fundamental rights that all free governments must secure and which are secured by Article IV. The First Amendment is an illustration—a "practical aid"—in determining the relevant rights. It still could be, however, that Article IV secures those rights in the traditional way by ensuring that however a state regulates those rights, it does so equally with respect to all citizens.

Discrimination was also the thrust of the remainder of Wilson's speech. For example, Wilson avers that Methodists have been discriminated against because "free exercise" can never be allowed "where slavery curses men and defies God."¹⁵¹ "The press," too, "has been padlocked, and men's lips have been sealed. Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in

147 *Id.*

148 AMAR, *supra* note 2, at 184.

149 *Id.* at 185.

150 CURTIS, *supra* note 1, at 37.

151 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

this country.”¹⁵² Proponents of slavery, however, were free to exercise all these rights: “Slavery could hold its assemblages, discuss, resolve, petition, threaten, disregard its constitutional obligations, trample upon the rights of labor, do anything its despotic disposition might direct; but freedom and freemen must be deaf, dumb, and blind.”¹⁵³ “An aristocracy” in the South, he elaborates, “enjoyed unlimited power, while the people were pressed to the earth and denied the inestimable privileges which by right they should have enjoyed in all the fullness designed by the Constitution.”¹⁵⁴ Wilson then declares that he has sufficiently “illustrate[d his] proposition: that slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several States.”¹⁵⁵

Before concluding, Wilson reiterates the point about inequality. “Slaveholders and their supporters alone were free to think and print, to do and say what seemed to them best on both sides of [the Mason-Dixon] line. They could think, read, talk, discuss with perfect freedom in each and every State.”¹⁵⁶ The people of the free states should therefore ensure ample protection so that a northern citizen “shall be as free to assert his opinions and enjoy all of his constitutional rights in the sunny South as he whose roof-tree is the magnolia shall to the same ends be free amid the mountains of New England and the sparkling lakes of the North and the West.”¹⁵⁷ “An equal and exact observance of the constitutional rights of each and every citizen, in each and every State, is the end to which we should cause the lessons of this war to carry us,” he concludes.¹⁵⁸

When Wilson argues that an “equal and exact observance of the constitutional rights of each and every citizen, in each and every State,” is the objective, it hardly follows that his meaning was that Congress and the federal courts were or ought to have been empowered to define and regulate all civil rights uniformly throughout the United States. Wilson’s statement is consistent with the entirely conventional antebellum understanding as articulated by Justice Washington that all free governments must secure natural rights. To the extent the southern states failed to secure these rights it was because they discriminated against citizens of other states or against certain of their own citizens. If Wilson was arguing that Article IV

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 1202–03.

157 *Id.* at 1203.

158 *Id.*

secured a state's own citizens against arbitrary discrimination within the state, that would have been, as noted, an unorthodox extension of Article IV. But even then it would not have nationalized the Bill of Rights.

C. *John Bingham on Oregon*

Another speech on Article IV is also taken as evidence for incorporation: John Bingham's 1859 speech on Oregon's proposed constitution. This speech is, at least arguably, exceptionally important because John Bingham was the principal author of Section 1. In my view, this speech is the best evidence that in the antebellum period a prominent thinker believed Article IV made the Bill of Rights applicable to the states or that the amendments otherwise already applied.

In 1859, Congress debated a proposed constitution that would have prohibited free black persons from emigrating to Oregon.¹⁵⁹ There was little question that, if free black persons were entitled to comity rights, the proposed Oregon constitution would violate Article IV.¹⁶⁰ But John Bingham, rising to oppose the proposed law, seems to have gone further, articulating his "ellipsis" theory of Article IV, by which it guaranteed the rights of "citizens of the United States in the several States." He stated as follows:

The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. . . .

. . . .

. . . I cannot, and will not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which . . . all good governments are instituted; and the failure to maintain which inviolate furnishes, at all times, a sufficient cause for the abrogation of such government¹⁶¹

This passage has been cited as evidence that Bingham believed that Article IV created a floor of fundamental rights in all the

159 BARNETT & BERNICK, *supra* note 125, at 84–85.

160 WURMAN, *supra* note 7, at 72–77 (canvassing this debate in the context of a similar provision in Missouri's proposed constitution of 1821).

161 CONG. GLOBE, 35th Cong., 2d Sess. 984–85 (1859).

states.¹⁶² Michael Kent Curtis and Richard Aynes argue from this and related passages that Bingham believed that Article IV applied the Bill of Rights against the states.¹⁶³ Aynes separately argues that Bingham's reading "implies the existence of substantive national rights which states may not deny."¹⁶⁴ These interpretations are of course possible, but two arguments militate against them.

First, in antebellum law political rights were excluded from the scope of Article IV because such rights belonged not to all citizens, but merely to electors, and each state could define who fit within that class of electors.¹⁶⁵ Thus political rights derived "exclusively from State authority or State legislation," whereas civil rights were common to the "citizens in the several states" because they derived from natural rights and were common to all *citizens*.¹⁶⁶ It is likely that Bingham was referring to this distinction between civil and political rights because just before the statement above quoted, Bingham granted "that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others."¹⁶⁷ What he denied was that a state "may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the 'privileges and immunities' of a citizen of the United States."¹⁶⁸

Second, even if Bingham were stating an unorthodox view, he never denied that it is was for the states to define and regulate civil rights. His argument was consistent with the proposition that all free

162 BARNETT & BERNICK, *supra* note 125, at 84–85.

163 CURTIS, *supra* note 1, at 61; Aynes, *supra* note 3, at 71.

164 Aynes, *supra* note 3, at 70.

165 A prominent 1860 legal dictionary explained that civil rights are all natural rights as modified by "civil law"; they "have no relation to the establishment, support, or management of the government," and include the "power of acquiring and enjoying property." 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION 484 (10th ed., Philadelphia, Childs & Peterson 1860). "Political rights," on the other hand, "consist in the power to participate, directly or indirectly, in the establishment or management of government," and include "the right of voting for public officers, and of being elected." *Id.* In other words, women and children could be citizens, even if they could not vote. Attorney General Caleb Cushing observed in 1857 that "the distinction between *citizen* and *elector* pervades our public law." Chickasaw Constitution, 8 Op. Att'y Gen. 300, 302 (1857). Numerous courts adhered to this distinction in their Article IV jurisprudence, maintaining that citizens of other states were entitled to civil rights when travelling to their states, but not to political rights. For a general discussion of these cases, see WURMAN, *supra* note 7, at 61–63; and LASH, *supra* note 3, at 25–26.

166 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

167 *Id.*

168 *Id.*

governments had to secure fundamental rights. The problem was that Oregon proposed to exclude *free blacks* from that protection. Bingham's demand was therefore equality. After restating that a state could exclude whomever it wanted from the exercise of political rights, Bingham declared, "The *equality* of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which [the] Constitution rests."¹⁶⁹ He did not deny that states defined and regulated civil rights; he objected only to "the interpolation into [the Constitution] of any word of caste, such as white, or black, male or female."¹⁷⁰ This was entirely conventional thinking about republican citizenship. Even if Bingham were advancing an unorthodox reading of Article IV to the effect that it reaches beyond discrimination against out-of-state citizens, he seems to have been advancing an equality reading of the clause that would have reached discrimination among a state's own citizens, as republican citizenship theory required.

Akhil Amar takes a different part of Bingham's 1859 speech as evidence for "*Barron* contrarianism." Bingham quoted the Supremacy Clause for the proposition that "these wise and beneficent guarantees . . . of natural rights to all persons" in the Fifth Amendment "may not be infringed."¹⁷¹ Thus, he concluded, "No State may rightfully, by constitution or statute law, impair any of these guaranteed rights, either political or natural."¹⁷² And earlier in the speech Bingham said that "whenever the Constitution guaranties to its citizens a right, either natural or conventional, such guarantee is in itself a limitation upon the States."¹⁷³ This may very well be evidence that Bingham believed the first eight amendments, or at least the Fifth Amendment, already applied against the States. But Bingham corrected himself in 1866,¹⁷⁴ and his earlier views do not definitively establish what Bingham hoped to accomplish with the Fourteenth Amendment.¹⁷⁵

Moreover, it is possible that Bingham thought Congress could not approve a state constitution that violated constitutional guaran-

169 *Id.* at 985 (emphasis added).

170 *Id.*

171 *Id.* at 983.

172 *Id.*

173 *Id.* at 982.

174 *See infra* subsections IV.A.2, IV.B.3.

175 As subsections IV.A.2 and IV.B.3 show, it appears that his aim was to apply against the states two specific provisions of the Bill of Rights—namely, the Due Process Clause and the Comity Clause, which he described as being included within the "bill of rights"—and to require the states to treat their citizens equally.

tees. In 1856, Bingham expressly stated that the First and Fifth Amendments were limits on congressional power in the territories.¹⁷⁶ Then, in an 1857 speech, Bingham argued that the Bill of Rights bound only *new* states after 1791; although the logic is not entirely clear, he seems to have believed that Congress could not admit states that would violate the rights in the Bill of Rights, and therefore the new states were constitutionally obligated to continue abiding by those rights.¹⁷⁷ The Northwest Ordinance and “the amendment incorporating its great principles in the Constitution,” he argued, “were ‘statute *restrictions* upon the institution of new States’ of perpetual obligation.”¹⁷⁸ Congress had the power, as a result, not only to exclude slavery from the territories, but “thereby [to] impose statute restrictions upon new States.”¹⁷⁹

What to make of this evolution from 1856 to 1859? It is possible that by 1859 Bingham was a “contrarian.” It is also possible that he thought Congress had the power to make new states observe the Bill of Rights. And it is still further possible that Bingham believed all such rights to be binding as a matter of natural law, even if not as a matter of the specific constitutional guarantees. In the 1859 speech just before the language Amar quotes Bingham stated that such rights were “natural or inherent, which belong to all men,” just as Justice Washington had noted that the rights secured by Article IV “belong, of right, to the citizens of all free governments.”¹⁸⁰

It is impossible to deny the *Barron*-contrarian overtones of parts of Bingham’s speech. But much of his speech was standard fare and can be interpreted for the proposition that the states may vary and define and regulate such rights, as long as they do not discriminate in their provision. And even if the states could not deny such rights entirely, that is a very different proposition from “incorporation,” by which the rights as defined by the federal government would apply identically in all the states. And that would be somewhat more consistent with his views in 1856 and 1857.

III. READMISSION AND FREEDMEN

This Part turns to the first Reconstruction debates: those over readmission and protection for the freed people. Proponents of in-

176 See GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 44–45 (2013) (quoting CONG. GLOBE, 34th Cong., 1st Sess. 222 (1856)).

177 *Id.* at 55 (quoting CONG. GLOBE, 34th Cong., 3d Sess. app. at 137 (1857)).

178 CONG. GLOBE, 34th Cong., 3d Sess. app. at 137 (1857).

179 *Id.*

180 See *supra* note 39 and accompanying text.

corporation often highlight that several members of Congress in this period “referred to rights secured by the Bill of Rights.”¹⁸¹ But, as explained, that is not very significant evidence because these rights were guaranteed by state constitutions and were expected of all free governments, governments which the slave states would once again have after abolition. And they were secured by Article IV to citizens of other states. To say that a reference to the “rights secured by the Bill of Rights” is an argument for incorporation is to conflate the rights themselves with the various ways in which those rights might be protected and secured.¹⁸²

Section III.A examines statements made in the context of readmission. In these debates, members asked whether states that deny free speech and press rights were worthy of admission. Only one senator (Nye) comes close to suggesting that the Bill of Rights might already bind the states. The question instead was whether the states themselves, after abolition, had made sufficient progress toward restoring fundamental liberties. Section III.B. then explores statements relating to the Freedmen’s Bureau bill, which mentioned a “constitutional right” to bear arms.

A. *Republican Guarantee Clause*

In the debates over readmission, the northerners argued that so long as the southern states continued to suppress free speech, they were not sufficiently republican, and their representatives should not be readmitted to Congress. The Republican Guarantee Clause¹⁸³ thus also “secured,” in its own way, the antecedent natural rights the first eight amendments also secured.

Representative Roswell Hart is a good example. Curtis suggests that Hart “demanded that the rebellious states provide ‘a government whose citizens shall be entitled to all privileges and immunities of other citizens,’” where, Curtis extrapolates, “the guaranties of the First, Second, Fourth, and Fifth Amendments should be respected.”¹⁸⁴ Hart, however, cited the Republican Guarantee Clause and argued that the Constitution itself “describes” what a republican gov-

181 CURTIS, *supra* note 1, at 50.

182 Curtis writes that he “found over thirty examples of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating that they believed that at least some Bill of Rights liberties limited the states,” and from that proposition concludes that they “accepted the application of the Bill of Rights to the states.” *Id.* at 112. Amar relies on this passage from Curtis. AMAR, *supra* note 2, at 186. As far as I have been able to discern, in each example the speaker merely mentions the relevant right, which suggests this conflation is at work.

183 U.S. CONST. art. IV, § 4.

184 CURTIS, *supra* note 1, at 53.

ernment looks like.¹⁸⁵ Such a government must establish justice and meet the other objectives of the Constitution's preamble, must guarantee to citizens "all privileges and immunities of other citizens" (suggesting the need for equality), must not prohibit the free exercise of religion or the keeping and bearing of arms, must provide security against unreasonable searches and seizures, and must not deny due process of law.¹⁸⁶ "Have these rebellious States such a form of government?" he asked.¹⁸⁷ If they have not, then Congress should not admit them.¹⁸⁸

In another speech, Representative Hamilton Ward¹⁸⁹ objected to readmission: "In not a single southern State have they done justice by the freedmen. In not one have they passed just and equitable laws that will protect him in his rights," he argued.¹⁹⁰ "They do not disguise their hate for Union men; who are excluded from all [political] honors and privileges because of their loyalty. Freedom of speech, as of old, is a mockery. In the name of God, is such a people entitled to representation on this floor?"¹⁹¹ The only time Ward discusses the need for an amendment, his focus is equality: "Justice, by constitutional amendment fixed beyond the mutations of southern legislation, would give to every class and race of men in those States equality before the law, and all the power and franchises necessary to secure that equality."¹⁹²

In a similar speech objecting to readmission, Representative Moulton declared, "The constant and barbarous outrages committed by rebels in the South against the Union men and freedmen would fill volumes, and outrage the feelings of savages."¹⁹³ "There is neither freedom of speech, of the press, or protection to life, liberty, or property; and this is the class of people and kind of States that the Democratic party say should be admitted into the Union."¹⁹⁴ Once again, the only objection is to admitting these states before they have restored rights to the freed people and loyalists in the South.

The best evidence for incorporation comes from Senator Nye of Nevada, who, in a long speech on February 28, says that Congress has power under the Necessary and Proper Clause to give "effective op-

185 CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866).

186 *Id.*

187 *Id.*

188 *Id.*

189 CURTIS, *supra* note 1, at 55, 233 n.217.

190 CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866).

191 *Id.*

192 *Id.*

193 CONG. GLOBE, 39th Cong., 1st Sess. 1617 (1866).

194 *Id.*

eration” to the “enumeration of natural and personal rights” in the Constitution, “and to restrain the respective States from infracting them.”¹⁹⁵ Elsewhere in the same speech he declares that an attribute of the Constitution is “[t]he positive constitutional interdict upon the power of Congress and upon the Legislatures of the respective States to subvert or impair the natural or personal rights enumerated or implied in the Constitution.”¹⁹⁶

Yet, upon closer inspection, it is not clear that Senator Nye believes in the general applicability of the Bill of Rights against the States, nor is it clear that his views translate to a pro-incorporation reading of the later-enacted Privileges or Immunities Clause. Senator Nye’s speech is also in the context of readmission and the Republican Guarantee Clause.¹⁹⁷ He explains that the clause “seeks to establish and enforce the maintenance of suffrage government, and no other. In addition to the form of the Government,” he continues, “the enumeration of personal rights in the Constitution to be protected, *prescribes the kind and quality of the governments* that are to be established and maintained in the States.”¹⁹⁸ In other words, before readmission, the seceded states must prove themselves to be republican; and the protection for the natural and personal rights of the kind guaranteed in the first eight amendments are the benchmark.

More still, Nye appears to argue that only an extreme or emergency situation triggers Congress’s power under the clause. After quoting the clause, Nye declares, “It seems to be admitted that there is outside of these States a controlling power [Congress], and that the emergency has arisen that calls such power into requisition.”¹⁹⁹ When a state “as a State, in case the contumacy [of treason] is general enough to impose the necessity,” it can be “politically punished.”²⁰⁰ That is, in that situation “[i]ts State government can be taken away, and the State governed by such laws and regulations as Congress may prescribe.”²⁰¹ To be sure, at times Nye appears to suggest that Congress’s superintending power over the form of government in all the states is general and ongoing.²⁰² But then he returns to the idea that he has “prove[d] that the *exigency* has arisen that calls upon the Government for the exercise of its *extreme* powers,

195 CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866). See generally CURTIS, *supra* note 1, at 53–54.

196 CONG. GLOBE, 39th Cong., 1st Sess. 1075 (1866).

197 *Id.* at 1069, 1072.

198 *Id.* at 1072 (emphasis added).

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 1072–73, 1077.

or those powers lodged in Congress to meet *extraordinary emergencies*.”²⁰³

It is after this passage that Nye describes an attribute of the Constitution to be the general prohibitory nature of the first eight amendments against the state governments. In the immediately succeeding paragraph, he adds that another attribute is “[t]he power of Congress to compel the enforcement and maintenance of republican government in every State, making the enumeration of personal and natural rights and the protective features of the Constitution the definition and test of what is republican government,” as well as, for the same purpose, “to prescribe, in case of necessity, the rule of suffrage or qualification of voters.”²⁰⁴

Senator Nye’s speech is the best evidence so far that some members of Congress might have been perfectly content with a Fourteenth Amendment that incorporated the Bill of Rights against the States. But the evidence is hardly foolproof. It is at least not obvious that Nye believed Congress’s power under the Republican Guarantee Clause extended to nonemergencies, or to states that had not been in open rebellion.

B. *The Freedmen’s Bureau*

One of the most compelling pieces of evidence supporting Amar’s and Curtis’s interpretation is the second Freedmen’s Bureau Act, enacted in the summer of 1866 after the final votes on the Fourteenth Amendment,²⁰⁵ and which one scholar has suggested is “smoking gun” evidence in favor of incorporation.²⁰⁶ It provided in its fourteenth section, in language similar to the Civil Rights Act,²⁰⁷ that where “the ordinary course of judicial proceedings has been interrupted by the rebellion,” and until the rebellious states “have been restored” to their representation in Congress,

the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or dis-

203 *Id.* at 1075 (emphasis added).

204 *Id.*

205 Act of July 16, 1866, ch. 200, 14 Stat. 173; see AMAR, *supra* note 2, at 196 n.*; CURTIS, *supra* note 1, at 72.

206 Wildenthal, *supra* note 3, at 1588.

207 See *infra* Section IV.B.

strict without respect to race or color, or previous condition of slavery.²⁰⁸

This might suggest that the “constitutional right of bearing arms” was applicable to the states.²⁰⁹ There are reasons militating against this interpretation, however. First is the fact that this language was never discussed in Congress. It was only an earlier draft that was routinely discussed, and that draft guaranteed to black persons the same constitutional right to bear arms “belonging to white persons.”²¹⁰ Like the Civil Rights Act, it was an equality guarantee, whose language supports the proposition that when Reconstruction-era Americans spoke of the “constitutional right” to bear arms or to freedom of speech, they understood such “constitutional rights” to be natural rights guaranteed under state law as well as federal law.²¹¹

The second reason militating against an interpretation nationalizing the Second Amendment is that in the context of the bill, Congress was assuming the power of the ordinary states. It therefore made sense to eliminate the equality requirement. The government had to guarantee these rights in the first place, as the state governments ordinarily did. And when the federal government does act in lieu of the states, presumably it *is* bound by the Second Amendment. In short, nothing about the Freedmen’s Bureau bill compels an interpretation suggesting that the “constitutional” right to bear arms meant anything other than the right under state constitutions as applied to the states, or under the federal constitution as applied to the federal government.²¹² Once again merely identifying this antecede-

208 § 14, 14 Stat. at 176–77 (emphasis added).

209 CURTIS, *supra* note 1, at 72 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 743 (1866)); AMAR, *supra* note 2, at 196 n.*; Wildenthal, *supra* note 3, at 1588–89.

210 CONG. GLOBE, 39th Cong., 1st Sess. 209, 318, 416, 628, 1292 (1866); *see also id.* app. at 83.

211 The amended language was introduced in the new bill after Congress failed to override the President’s veto. *Id.* at 943.

212 The context of the Freedmen’s Bureau helps explain other statements upon which Curtis relies to draw inferences in favor of incorporation. For example, Curtis argues that Senator Pomeroy believed that the Thirteenth Amendment empowered Congress to “secure[] the freedom of all men,” including by guaranteeing their right to bear arms. CURTIS, *supra* note 1, at 52 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1183 (1866)). But Pomeroy’s reference to bearing arms was a reference to the Freedmen’s Bureau bill. His speech was an exhortation to secure the freedmen the right to vote in the southern states. He argued that “[t]he ‘right to bear arms’ is not plainer taught or more efficient than the right to carry ballots[, a]nd if appropriate legislation will secure the one so can it also the other.” CONG. GLOBE, 39th Cong., 1st Sess. 1183 (1866). In other words, if Congress can secure the right to bear arms in the states that had not yet rejoined the Union—as it did in the Freedmen’s Bureau Act—then surely it could also guarantee the right to vote in those states.

ent natural right as a “constitutional” right of American citizenship tells us little about the source of that right or how various provisions of the Constitution secure it.

IV. THE ACT AND THE AMENDMENT

This Part considers some of the most central evidence from the legislative history. Sections IV.A–B examine the debates over the first draft of the Fourteenth Amendment and the civil rights bill. What is remarkable about these debates is that John Bingham believed that Congress had no power to enact the civil rights bill because Congress had no power to *enforce the bill of rights*. It is likely that he reached this conclusion because he defined Article IV as being included within the “bill of rights,” and he believed that Article IV required equality in civil rights under state law. Some scholars have argued that the civil rights bill itself can be seen as “incorporating” the first eight amendments, but these arguments are unpersuasive.

Section IV.C. examines the debates over the final text of the proposed Fourteenth Amendment. It is commonly believed that few members spoke about Section 1. It is true that few spoke at any length about it. But before John Bingham spoke, twelve members of the House, with varying degrees of explicitness, believed that Section 1 would guarantee equality in civil rights under state law. This Part then examines the statements of Bingham and Senator Jacob Howard and concludes that they do not compel, although they are consistent with, an incorporation reading.

A. *The Draft Fourteenth Amendment*

We see in the debate over the civil rights bill John Bingham’s initial references to “enforcing the bill of rights,” which prominent scholars have taken to be evidence of incorporation.²¹³ What the context shows is that Bingham appears to have understood the “bill of

Curtis also points to a statement Senator Cowan made—a statement to the effect that the Fifth Amendment already bound the states. CURTIS, *supra* note 1, at 51. This statement, however, was also in opposition to the Freedmen’s Bureau: the freed people had a remedy in the Fifth Amendment if they really needed it against the Black Codes, Cowan argued, and therefore the Freedman’s Bureau was unnecessary. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866). Cowan’s statement should be taken with a hefty grain of salt because his incentive was to dissimulate and make it appear that the Bureau was unnecessary. More still, his whole point in opposition was that the Freedmen’s Bureau bill would “alter the whole frame and structure of our laws,” and “overturn the whole Constitution.” *Id.* Surely he did not think the federal courts or Congress could or should enforce the first eight amendments in the states.

213 See AMAR, *supra* note 2, at 181–83; CURTIS, *supra* note 1, at 70–71.

rights” to include all eight amendments, as well as other guarantees of personal liberty in the Constitution, including most importantly Article IV itself. But a careful reading suggests that Bingham may have sought to “enforce” only two provisions of this “bill of rights”: Article IV, and the due process requirement of the Fifth Amendment. One would require equal rights; the other would require protection for those rights. It is not surprising that Bingham and the Republicans focused on due process. They noted time and again that there were two ways in which rights could be abridged by state governments, which they presumed otherwise were free governments: by denying them to a class of persons in the first place, or by failing to provide legal protection for existing rights.²¹⁴

The aim of these next sections is to establish that one can read Bingham’s statements as well as the other evidence consistently with the proposition that states would continue to define and regulate civil rights, including the kinds of rights protected at the federal level against federal government intrusion in the first eight amendments. A state would only violate the Constitution—whether under the unorthodox reading of Article IV, or under the Privileges or Immunities Clause—if it discriminated in the provision of such civil rights. To repeat a cautionary note, none of this is to claim the text of the Privileges or Immunities Clause cannot do the work of creating a floor of fundamental rights, or that its adopters would have rejected an amendment creating such a floor. The claim is only about what they affirmatively *intended* to accomplish: namely, securing equality in civil rights within a state.

1. January 9, 1866

Seven years after his speech on Oregon’s admission, as the Union emerged victorious from the Civil War, Bingham articulated why a new constitutional amendment was necessary. He began discussion of the issue by stating that Congress might “act upon the suggestion of the President, that hereafter the true intent of the Constitution, which is to secure equal and exact justice to all men, may be carried into effect.”²¹⁵ Bingham then noted how everyone recalled the recent times in which “it was entirely unsafe for a citizen of Massachusetts or Ohio” who advocated against slavery “to be found anywhere in the streets of Charleston or in the streets of Richmond,”²¹⁶ because “in defiance of the Constitution its very guarantees

214 For an exceptionally clear statement of this point, see *infra* notes 288–98 and accompanying text (discussing statement of Rep. Lawrence).

215 CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866).

216 *Id.*

were disregarded.”²¹⁷ This is a reference to Article IV: northerners were denied the right to sue in court and to the protection of the laws in these states, not to mention the right to speak freely.

Bingham then explains how Article IV had been violated and why another amendment, which would become the Fourteenth Amendment, was necessary. “[I]n view of the fact that many of the States—I might say, in some sense, all the States of the Union—have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens,” Bingham began, some “security for the future” against such occurrences must be taken.²¹⁸ Bingham then reiterated his “ellipsis” reading of Article IV:

When you come to weigh these words, “equal and exact justice to all men,” go read, if you please, the words of the Constitution itself: “The citizens of each state (*being ipso facto citizens of the United States*) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis “of the United States”) in the several States.” This guarantee is of the privileges and immunities of citizens of the United States *in, not of, the several 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. It was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts [Samuel Hoar], who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens.²¹⁹

Bingham here does appear to adopt the same unorthodox reading of Article IV he advanced in 1859. Under this reading, the clause guarantees *all* citizens of the United States their privileges and immunities as such citizens *within* every state. But it is important not to overread this theory. It is consistent with the proposition that states define and regulate the content of civil rights. Bingham’s theory of Article IV could easily be consistent with the proposition that the equality work of Article IV should apply to *intrastate* discrimination. The need for “equal and exact justice” does not mean that rights will be exactly the same in every state; only that a state should treat its own citizens equally, and out-of-state citizens equally with its own.

Bingham continues:

217 *Id.* at 158.

218 *Id.*

219 *Id.* (paragraph break and emphasis added). This passage is discussed in BARNETT & BERNICK, *supra* note 125, at 129.

I propose . . . that hereafter there shall not be any disregard of *that* essential guarantee [Article IV] of your Constitution in any State of the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution of their common country, I desire to see the Federal judiciary clothed with the power to take cognizance of the question [to] compel a decent respect for this guarantee to all citizens of every State. . . .

. . . .

. . . I ask that South Carolina, and that Ohio as well, shall be bound to respect the rights of the humblest citizen of the remotest State of the Republic when he may hereafter come within her jurisdiction.²²⁰

It is, to be sure, possible to read Bingham as saying that the rights of American citizens—free speech rights, as well as all civil rights—should be “equal,” or uniform, in all the states. Such a proposition, however, not only would have suggested a radical revision of the division between federal and state power but it also would have been unnecessary. The objectives of the North would be satisfied if Congress were empowered to force the states to treat citizens equally—that is, treat their own citizens equally with one another, and citizens of other states equally with their own.²²¹

220 CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (emphasis added).

221 Bingham’s speech of January 25 is consistent, and does not stand for an unorthodox, substantive reading. *But see* CURTIS, *supra* note 1, at 48 n.157 (citing Bingham’s January 25 speech for an unorthodox reading of Article IV). Bingham first notes the need to enforce due process of law (and the corollary protection of the laws). CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866). He then discusses the various antebellum treaties that held citizens of a state to be ipso facto citizens of the United States. *Id.* at 430. Thus when a slave is emancipated, he “becomes equal before the law with every other citizen of the United States.” *Id.* Bingham argues that “if the late rebel States would make no denial of right to the emancipated citizens no amendment would be needed.” *Id.* Bingham is specifically talking about disfranchisement, but the point is discrimination: whether a minority of whites in any state may “disfranchise the majority of its free male citizens of full age[.]” *Id.* He then appears to connect the franchise to Article IV, notwithstanding his earlier agreement that political rights are excluded. *Id.* This discussion is all about what would become Section Two of the Fourteenth Amendment. *Id.* at 431. It is actually quite unclear whether any of this has to do with Article IV.

2. February 28, 1866

The Joint Committee on Reconstruction's first draft of the Fourteenth Amendment provided that

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.²²²

Bingham stated that this proposed amendment would “arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.”²²³ Akhil Amar has taken this as central evidence that Bingham “described the privileges-or-immunities clause as encompassing ‘the bill of rights’—a phrase he used more than a dozen times” in this key speech.²²⁴ In this speech, Amar writes, Bingham also cited *Barron* by name as a reason for why an amendment was necessary.²²⁵

It is possible, however, that Bingham hoped to enforce the specific provisions of the Bill of Rights at issue: due process and Article IV (which Bingham described as being part of the Bill of Rights). Those are the two clauses of the original Constitution Bingham specifically cites in his speech.²²⁶ Immediately after these citations, he says,

Gentlemen admit the force of *the* provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law,

and then asks, “Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?”²²⁷ Here Bingham may well be using the term “bill of rights” as a reference to the first eight amendments as well as to Article IV,²²⁸ but it seems that he means to enforce these specific provisions of it. Most of Bingham's references to “bill of

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

223 *Id.*

224 AMAR, *supra* note 2, at 182.

225 *Id.*

226 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

227 *Id.* (emphasis added).

228 I previously argued that he may have been using the term “bill of rights” exclusively as a reference to comity and due process, WURMAN, *supra* note 7, at 111, but I believe now that that was an overreading of this speech.

rights” are best read as referring to due process or Article IV specifically.²²⁹

Twice in his speech Bingham can be interpreted as referring to the bill of rights generally.²³⁰ But he then goes on to say that “it appears to me that *this* very provision [Article IV] of the bill of rights brought in question this day . . . makes that unity of government which constitutes us one people.”²³¹ And then: “What more could have been added to that instrument to secure the enforcement of *these* provisions of the bill of rights in every State, other than the additional grant of power which we ask this day?”²³² Bingham, simply put, is making the case to grant Congress the power to enforce the Due Process Clause of the Fifth Amendment and his understanding of Article IV.²³³

It is in the context of equal protection and due process that Bingham cites the need to overturn *Barron*.²³⁴ Bingham did not say in this speech that *Barron* must be overturned so that all eight amendments can apply against the states. He merely stated that an amendment was necessary to secure due process and equal protection because *Barron* had declared that that provision of the Fifth Amendment did not apply against the states.²³⁵ James Garfield similarly declared that the Republicans sought an amendment to make the Fifth Amendment and Article IV enforceable against the states.²³⁶

229 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (“[W]e are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property.”); *id.* at 1090 (in the context of “enforcement of . . . this sacred bill of rights,” noting that it is “surprising that the framers of the Constitution omitted to insert an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens”).

230 *Id.* at 1090 (“Why, I ask, should not the ‘injunctions and prohibitions,’ addressed by the people in the Constitution to the States and the Legislatures of States, be enforced by the people through the proposed amendment?”); *id.* (“Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights.”).

231 *Id.* (emphasis added).

232 *Id.* (emphasis added).

233 This is similar to the conclusion Charles Fairman reached. Fairman, *supra* note 19, at 25; see also Aynes, *supra* note 3, at 67 (criticizing Fairman on this point). Unlike Fairman’s assessment that Bingham defined the Bill of Rights as comprising these two provisions—a view that I myself once accepted, see WURMAN, *supra* note 7, at 111—the better reading is that Bingham understood the Bill of Rights to include all rights guaranteed by the Federal Constitution. Still, a careful reading of his speech suggests that Bingham’s likely aim was to enforce only two specific provisions of it.

234 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

235 The same is true of his March 9 speech, discussed in the next section; he referred to *Barron* explicitly in the context of applying due process to the states. *Id.* at 1292.

236 *Id.* app. at 67.

One final point on this day's discussion. Professor Crosskey accused Fairman of having "omitted any mention of a speech by Hiram Price" in which Price had adverted to the well-known fact that "for the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State," and that the proposed amendment would mean "each citizen of every State sh[ould] have the same rights and privileges as the citizens of every other State."²³⁷ Crosskey asserted that Price's "reference to freedom of speech makes clear that he must have understood the proposed amendment as empowering Congress to enforce the Bill of Rights against the states," and criticized Fairman for not saying so.²³⁸

It was Crosskey, alas, who fell into the conceptual error against which this Article has warned. Price stated expressly in his remarks,

I understand [the proposed amendment] to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years.²³⁹

It is at that point that Price references the denial of speech rights in the South to abolitionists. He then repeats that the "intention of the resolution before the House is to give the same rights, privileges, and protection to the citizen of one State going into another that a citizen of that State would have who had lived there for years."²⁴⁰ After additional discussion, all of which reveals that Price had a traditional, comity-only understanding of Article IV,²⁴¹ and after some interjections and digressions, Price finally makes the statement that Fairman quoted about the freedom of expression and that each citizen of every state should have the "same rights and privileges as the citizens of every other State."²⁴² Price then concludes that the proposal will grant "equal rights and equal privileges from one end of this continent to the other."²⁴³ In context, Price is not suggesting anything like incorporation, but rather that the freedom of speech and protection of law are rights secured by Article IV to citizens of one state when travelling in others.

237 Crosskey, *supra* note 3, at 33 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1066–67 (1866)).

238 *Id.* at 33–34.

239 CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1866).

240 *Id.*

241 *Id.*

242 *Id.* at 1067.

243 *Id.*

3. Federalism Objections

The proposed amendment was tabled.²⁴⁴ There were at least three reasons the proposal was insufficient. First, it was only a grant of congressional power, suggesting that a future majority could repeal any civil rights legislation.²⁴⁵ Second, if the objective was to secure the antislavery, ellipsis reading of Article IV, merely repeating the language of that clause, which had been interpreted more narrowly, would not do the trick.²⁴⁶ But, as Michael Kent Curtis correctly explains, the biggest additional concern over the proposal was that its second provision—empowering Congress to secure “to all persons in the several States equal protection in the rights of life, liberty, and property”—would have allowed Congress “to legislate directly on matters traditionally covered by state law.”²⁴⁷ More specifically, Representatives Hale and Hotchkiss, and Senator Stewart, forcefully argued that the amendment would authorize Congress to enact *uniform* legislation over civil rights traditionally regulated by the states.²⁴⁸

Senator Stewart, for example, argued that the proposal would empower Congress “to legislate fully upon all subjects affecting life, liberty, and property,” and that Congress might “modify” all the current “dissimilar” laws in the states, and therefore “there would not be much left for the State Legislatures.”²⁴⁹ Stewart recognized that the aim of the proposal was the protection of the freed people, but argued it went further.²⁵⁰ Representative Hale similarly thought the intent was to protect the newly freed people, but that it in fact “takes away from the[] States the right to determine for themselves what their institutions shall be.”²⁵¹

Representative Hotchkiss’s remarks are most instructive. On the last day of debate on the initial draft, he specifically observed that he had understood Bingham was seeking to propose an amendment “to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another.”²⁵² The draft, however, “proposed by its terms to authorize Congress to

244 CURTIS, *supra* note 1, at 71.

245 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss) (making this point).

246 Cf. *id.* (“The first part of this amendment . . . is precisely like the present Constitution; it confers no additional powers.”); *id.* at 1082 (statement of Sen. Stewart) (noting that it does nothing the current Constitution does not already accomplish).

247 CURTIS, *supra* note 1, at 68.

248 *Id.* at 69–71.

249 CONG. GLOBE, 39th Cong., 1st Sess. 1082 (1866).

250 *Id.*

251 *Id.* at 1065.

252 *Id.* at 1095.

establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property”; Hotchkiss was “unwilling that Congress shall have any such power.”²⁵³ Making a classic federalism point, Hotchkiss observed that should the “rebels” ever control Congress, “I do not want rebel laws to govern and be uniform throughout this Union.”²⁵⁴ Bingham responded that because the draft language was identical to Article IV, “[i]t is not to transfer the laws of one State to another State at all”²⁵⁵—suggesting once more that Bingham recognized that state laws varied on the subjects of life, liberty, and property.

Hotchkiss then made his final plea on the point, focusing on the need to protect equal rights against future change by shifting majorities. Article IV of the Constitution, he said, *already* guaranteed equal rights to citizens: “[Bingham’s] amendment is not as strong as the Constitution now is. The Constitution now gives equal rights to a certain extent to all citizens. This amendment provides that Congress may pass laws to enforce these rights.”²⁵⁶ This statement is particularly significant for two reasons. First, it reveals that one (like Hotchkiss) could insist on federalism principles and the diversity of state laws, while also asserting the importance or fact of “equal rights.” Second and relatedly, Hotchkiss appears to adopt quite explicitly the intrastate equality reading of Article IV. It was now imperative to make this constitutional guarantee of equality *clear* and to protect it against shifting future majorities: “Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land[?]”²⁵⁷

Neither Thaddeus Stevens nor John Bingham disagreed with these concerns. In response to Hale, Stevens made clear that the intent was only equality; he thought that under the provision, Congress could only interfere where a state law was not “equal” and “impartial to all.”²⁵⁸ Hale conceded that the “gentleman who reported the resolution [Stevens]” and other proponents of it have maintained that it is “simply a provision for the equality of individual citizens before the laws of the several States,” though, again, he thought it went further.²⁵⁹

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.* at 1063.

259 *Id.*

Bingham also responded to Hale that “[t]he gentleman did not utter a word against the equal right of all citizens of the United States *in every State to all privileges and immunities of citizens.*”²⁶⁰ Bingham then made relatively clear that although he believed the right to acquire and possess property to be a natural right, it was still up to *local law* to regulate and define that right.²⁶¹ Bingham explained that “every one knows that” the “acquisition and transmission” of real property “under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States.”²⁶² *Equality* was the concern: “But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection? That is the question, and the whole question”²⁶³

Fairman described Bingham’s remarks as “confused.”²⁶⁴ How could the right to enjoy the property one has acquired be a “universal” right and the “gift of God,” Fairman asked, but at the same time “[t]he right to acquire” the property “depends exclusively upon local law”?²⁶⁵ The answer, of course, is that the right to acquire property is one that all persons in free governments enjoy, *subject to* any impartial local laws and regulations of that right in the public interest. This was standard antebellum fare in which natural rights and federalism cohered. Fairman, not Bingham, was confused.

B. *The Civil Rights Act*

The debate over the civil rights bill is equally instructive. Recall that the bill required equality in civil rights under state law. It declared all persons born in the United States (with exceptions not relevant here) to be citizens of the United States, and declared that “such citizens, of every race and color . . . shall have the same right” to make and enforce contracts, to sue and be parties, to acquire and possess property, and to the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by

260 *Id.* at 1089 (emphasis added).

261 *Id.* (“Although this word property has been in your bill of rights from the year 1789 until this hour [Bingham asked] who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither?”).

262 *Id.*

263 *Id.*

264 Fairman, *supra* note 19, at 31.

265 *Id.*

white citizens.”²⁶⁶ The debate over the civil rights bill is crucially important because it makes clear that John Bingham, the principal author of Section 1, believed that this bill would “enforce the bill of rights.”²⁶⁷

I. Trumbull et al.

Senator Lyman Trumbull introduced the civil rights bill in the Thirty-Ninth Congress.²⁶⁸ The first sentence of the draft bill read, “There shall be no discrimination in civil rights or immunities among citizens of the United States in any State”²⁶⁹ Senator Andrew Davis objected, arguing that Article IV prohibited only discrimination against out-of-state residents and therefore Congress did not have the power to enact the civil rights bill, which would require equality *among* a state’s own citizens.²⁷⁰ Trumbull accepted the conventional comity-only view of Article IV, but argued that the Thirteenth Amendment authorized the bill.²⁷¹ The rights Justice Washington had described as fundamental in *Corfield* would *now* “appertain to all persons who were clothed with American citizenship.”²⁷² Thus, Trumbull argued, the Thirteenth Amendment secured “civil liberty” to all citizens, and therefore if “any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.”²⁷³

266 Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (declaring persons born in the United States to be citizens of the United States, and providing that “such citizens, of every race and color . . . 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 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”).

In all relevant parts the initial draft being debated was identical. It started differently, however, without a declaration of citizenship and providing instead that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color . . . shall have the same right.” CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

267 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

268 CURTIS, *supra* note 1, at 73.

269 CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

270 *Id.* at 595. Of course, this is also more evidence of the traditional, comity-only view of Article IV.

271 BARNETT & BERNICK, *supra* note 125, at 120.

272 CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866).

273 *Id.* at 474.

Trumbull once again makes clear that antebellum and Reconstruction-era Americans could speak of every American's right to "civil liberty," while recognizing that states defined and regulated such liberty and that *unequal* laws are what "deprive" citizens of liberty.

In a related and particularly telling passage,²⁷⁴ Trumbull states, "Each State, so that it does not *abridge* the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial."²⁷⁵ The natural meaning of the sentence is that fundamental rights are "abridged" when a state treats citizens *unequally*. This is yet another recognition that fundamental rights are uniform in that they exist in all free governments, but state laws respecting those rights can vary. Thus, in describing the bill, Trumbull said it provides that there "shall be no distinction in civil rights between any other race or color and the white race."²⁷⁶ And yet he described those very civil rights as the privileges and immunities of citizens of the United States.²⁷⁷ All citizens have the same privileges and immunities, with local variations in municipal regulations; all that is required is equal treatment within the state.

Other representatives who argued that the Thirteenth Amendment authorized Congress to enact the civil rights bill made similar arguments. In support of the bill, James Wilson cited *Corfield v. Coryell* and the inherent civil rights guaranteed under Article IV and declared that the Thirteenth Amendment gave Congress authority to "insure to each and every citizen these things which belong to him as a constituent member of the great national family."²⁷⁸ It is telling that Wilson used "national" language—the freed people are now part of this great *national* family—in support of legislation that would have merely required equality in civil rights under state law. And again: "civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic."²⁷⁹

274 Curtis erroneously takes this passage to be evidence of a national floor of rights in all the states. See CURTIS, *supra* note 1, at 73.

275 CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (emphasis added).

276 *Id.* at 1757.

277 The right of personal security, liberty, and the right to acquire and enjoy property, he said, are "inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be." *Id.* "[W]hat rights do citizens of the United States have?" he asked. "To be a citizen of the United States carries with it . . . 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." *Id.*

278 *Id.* at 1118, 1117–18.

279 *Id.* at 1117.

The bill “would be almost, if not entirely, unnecessary,” Wilson added, if the states would simply “legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color,” thereby ensuring that all citizens, “from the highest to the lowest, from the whitest to the blackest,” are protected “in the enjoyment of the great fundamental rights which belong to all men.”²⁸⁰ The “entire structure of this bill,” he adds, “rests on the discrimination relative to civil rights and immunities” on account of race.²⁸¹

Representative Shellabarger even more emphatically explained that the Civil Rights Act “neither confers nor defines nor regulates any right whatever,” but rather “require[s] that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.”²⁸² Shellabarger also specifically referenced the “right of petition.”²⁸³ This once again suggests that the rights we ordinarily associate with the First Amendment were guaranteed and protected under state law. And Representative Broomall said in defense of the bill that “[t]he object of the bill” was to declare who are citizens, and “to secure them the protection which every Government owes to its citizens.”²⁸⁴

Michael Kent Curtis cites Broomall’s speech in support of the proposition that “Republicans believed that the rights of citizens established by the Constitution limited both state and federal governments” and that “these rights, privileges, and immunities included the rights in the Bill of Rights.”²⁸⁵ Specifically, Curtis argues that Broomall believed “illegal arrests and denials of due process, together with denials of the rights of speech, petition, habeas corpus,

280 *Id.* at 1118.

281 *Id.* It is true that a few days later Wilson argued that the Due Process Clause gave Congress the power to enact the bill. *Id.* at 1294. Of course, he could have been speaking of the portions of the bill that did guarantee due process rights, namely the “full and equal benefit of all laws and proceedings for the security of person and property.” *Id.* at 1291. That does not detract from the point that Wilson largely defended the civil rights bill as being supported by an equality reading of Article IV. *See id.* at 1117–18. And even if he was a contrarian, it is telling that the two clauses (in addition to the Thirteenth Amendment) that he cited in support of the bill were Article IV, Section 2, and the Fifth Amendment—which were precisely the two clauses from which the proposed Fourteenth Amendment drew. *See id.*

282 *Id.* at 1293.

283 *Id.* Shellabarger also noted that the right of petition and “protection in” property were “indispensable,” but that hardly proves a fundamental rights reading. *Id.* They were indispensable, which is why it was important to ensure the states no longer denied these rights to their black citizens.

284 *Id.* at 1262.

285 CURTIS, *supra* note 1, at 49.

and transit, to be denials of the privileges and immunities of citizens secured by article IV, section 2.”²⁸⁶ That these rights were privileges and immunities of citizens “secured by Article IV” tells us nothing, however, about *how* Article IV secured them.

For Broomall, the answer was clear: Article IV ensured that states guarantee these rights to citizens of other states. “For thirty years prior to 1860,” Broomall explained, “the rights and immunities of citizens were habitually and systematically denied in certain States *to the citizens of other States*: the right of *speech*, the right of transit, the right of domicil, the right to sue, the writ of *habeas corpus*, and the *right of petition*.”²⁸⁷ Quite the opposite of demonstrating a belief that the Bill of Rights already bound the states or ought to, these remarks suggest that merely identifying the antecedent rights as the privileges and immunities of citizens does not inform us how various constitutional provisions secured them.

2. Rep. William Lawrence

Representative Lawrence of Ohio, in a long speech in support of the civil rights bill, made the “unorthodox” equality reading of Article IV explicit. Curtis cites Lawrence for the proposition that Article IV required not merely equality but was also a “substantive” guarantee.²⁸⁸ Stripped of its general fundamental-rights language—the idea that all free governments had to secure rights—what emerges from Lawrence’s speech is an explicit articulation of an interstate and intrastate equality reading.

Lawrence began his speech by observing that some rights are “inherent and inalienable,” and “cannot be abolished or abridged by State constitutions or laws.”²⁸⁹ “Every citizen . . . has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property,” he explained.²⁹⁰ So far, standard fare; everyone agreed that all free governments secured certain “inherent and inalienable” rights.

286 CURTIS, *supra* note 1, at 52; *see also id.* at 48 & n.157 (arguing that Broomall adopted an unorthodox, national rights understanding of Article IV).

287 CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (first, second, and fourth emphases added); *see also id.* (arguing that the national government has heretofore “been considered powerless to guard the citizen of Pennsylvania against the illegal arrest, under color of State law, of the most subordinate officer of the most obscure municipality in Virginia,” and it has “had no power to protect the personal liberty of the agent of the State of Massachusetts in the city of Charleston, or enable him to sue in the State courts”).

288 CURTIS, *supra* note 1, at 48, 77.

289 CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

290 *Id.* at 1833.

Lawrence then “assume[d]” that “there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him.”²⁹¹ Lawrence goes on to say, however, that there are two ways in which a state “may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.”²⁹² A “prohibitory” law, he explained, was a *discriminatory* law:

If the people of a State should become hostile to a large class of naturalized citizens and should enact laws to prohibit them *and no other* citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be prohibitory legislation.²⁹³

In other words, Lawrence argued that a state might deprive a citizen of these absolute, inalienable rights by discriminatorily denying civil rights that other citizens enjoy, or by failing to protect a citizen in the enjoyment of civil rights. None of that is to say that a state could prohibit any right altogether without violating natural rights; Lawrence, like many other Americans of his time, assumed that states could not do so. The question, though, is what the federal role was to be in securing these rights. On this score, Lawrence’s concern was equality and protection, the two things the Civil Rights Act was designed to secure.

Lawrence’s explanation of Article IV later in his speech makes it clear that he believed the clause required equality among a state’s own citizens:

The question before us now is this:

When the States deny to millions of citizens the means without which life, liberty, and property cannot be enjoyed, is the nation powerless to punish the great crime of denying civil rights constitutionally recognized and affirmed by national authority? That is, if a State, by her laws, says to whole classes of native or naturalized citizens, “You shall not buy a house or a homestead to shelter your children within our borders;” “you shall be deprived of the means whereby life is preserved, whereby liberty is a boon, and whereby property is held sacred;” “you shall have no right to sue in our courts or make contracts”—in such cases, is the nation powerless to intervene in behalf of her own citizens, in behalf of humanity itself, to avert the annihilation of citizenship?

291 *Id.*

292 *Id.*

293 *Id.* (emphasis added).

Now, when this condition of affairs has been reached, 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.²⁹⁴

Here, then, is the most explicit summary of the Republican, anti-slavery understanding of Article IV: (1) American citizenship implies the enjoyment of all absolute personal and natural rights; (2) civil societies can define, modify, and regulate such rights, and thus the exact contours of these rights will vary from state to state; and (3) Article IV requires equal civil rights among citizens of the same state. Article IV is thus “the palladium of equal fundamental civil rights for all citizens.”²⁹⁵ “Any law,” Lawrence concludes, “that invades its fundamental equality is void, and so it has always been understood.”²⁹⁶

It is important to recall that to Lawrence, Article IV is what authorizes the civil rights bill and that the whole speech is in defense of congressional authority to enact the bill. Thus, he concludes, the civil rights bill “creates no new right, confers no new privilege” because it is instead “declaratory of what is already the constitutional rights of every citizen in every State, *that equality of civil rights is the fundamental rule that pervades the Constitution and controls all State authority*.”²⁹⁷ Lawrence ends his speech as follows: “Mr. Speaker, this nation must settle the question whether *among her own citizens* there may be a *discrimination in the enjoyment of civil rights*.”²⁹⁸ To Lawrence, Article IV, Section 2, Clause 1, and the civil rights bill, both required equality in civil rights among a state’s own citizens.

3. Rep. John Bingham

Bingham’s speech on the civil rights bill on March 9, 1866, aligns with Lawrence’s explanation of Article IV. Akhil Amar cites this

294 *Id.* at 1835 (emphasis added) (second paragraph break added).

295 *Id.* at 1836.

296 *Id.*

297 *Id.* (emphasis added).

298 *Id.* at 1837 (emphasis added).

speech for the proposition that Bingham “invok[ed] ‘the bill of rights’ six times in a single speech and again remind[ed] his colleagues” about *Barron’s* holding that “the bill of rights . . . does not limit the powers of States.”²⁹⁹ What is remarkable about Bingham’s speech, however, is that he believed that the civil rights bill—which merely required equality in civil rights under state law, as defined and regulated by the states—would enforce the “bill of rights.”³⁰⁰ Bingham objected to the civil rights bill because Congress, absent a constitutional amendment, lacked power to enact it. But, he said, “I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution.”³⁰¹ He then notes his “earnest desire to have the bill of rights in [the] Constitution enforced everywhere.”³⁰²

How could Bingham have believed that the Civil Rights Act would “enforce the bill of rights,” and that the proposed constitutional amendment would enforce the Bill of Rights by authorizing such civil rights legislation, if the civil rights bill merely required equality in civil rights under state law? It is of course possible that Bingham was referring only to the due process components of the civil rights bill—those involving testifying in court and “laws and proceedings for the security of person and property.”³⁰³ That would be consistent either with the proposition that all eight amendments should be enforced against the states, or with the proposition that the Fifth Amendment’s Due Process Clause should be made applicable to the states—which the Fourteenth Amendment’s Due Process Clause accomplishes directly.

But it is more likely that Bingham’s intent was for the amendment to authorize Congress to enforce Article IV, which he previously included within his definition of the “bill of rights.”³⁰⁴ And, as we have seen, Bingham (and Lawrence) held an unorthodox view of that clause, according to which all states must treat their own citizens equally. This would cover the remaining rights in the civil rights bill. We cannot discount the possibility that Bingham really did intend to incorporate the Bill of Rights against the states in its entirety,³⁰⁵ and

299 AMAR, *supra* note 2, at 183 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866)).

300 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

301 *Id.*

302 *Id.*

303 Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

304 *See supra* Section IV.A.

305 Bingham states at the end of this speech that he had been advocating “an amendment which would arm Congress with the power to compel obedience to the oath,

one result of that would be that Congress could enforce equality in civil rights (Article IV) and due process (the Fifth Amendment). But his March 9 speech is consistent with the narrower proposition that the proposed amendment would enforce only due process rights and Bingham's intrastate equality reading of Article IV.³⁰⁶

4. Incorporation Through the Civil Rights Act

Neither Amar nor Curtis disagrees that the civil rights bill is central to understanding the meaning of the Fourteenth Amendment. They have, however, proposed alternative theories as to the relationship between the bill and the amendment. Both Amar and Curtis recognize that the Privileges or Immunities Clause is necessary for the Civil Rights Act; but, they argue, "the Civil Rights Act itself could plausibly be understood to incorporate the citizen rights and freedoms of the Bill of Rights."³⁰⁷ If true, then Bingham might still have believed that enforcing the Civil Rights Act would itself apply the Bill of Rights against the states.

The civil rights bill required not only equal contract and property rights, the argument goes, but also the "*full* and equal benefit of all laws and proceedings for the security of person and property,"³⁰⁸ and the "rights and freedoms of the federal Bill [of Rights] had long been

and punish all violations by State officers of the bill of rights." CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). Still, that could refer to the two provisions—Article IV and the Fifth Amendment—he had earlier emphasized.

306 Amar points out that the language of the Civil Rights Act and Section 1 have "almost no textual overlap," and therefore what Bingham might have said about the civil rights bill does not answer the question what the Fourteenth Amendment's final language requires. AMAR, *supra* note 2, at 194. That may be true, but the present point is only that Bingham believed that the Fourteenth Amendment would enforce the "bill of rights" in the states, and he believed that such enforcement of the "bill of rights" would authorize the Civil Rights Act. Whatever the difference in language, the point is only that the "bill of rights" as Bingham understood it must get us to the Civil Rights Act.

There are some sentences of Bingham's speech on the civil rights bill which, taken outside the context of the civil rights legislation itself, could certainly be read to support incorporation more broadly. For example, after stating that he does not "oppose any legislation which is authorized by the Constitution of my country to enforce . . . the bill of rights as embodied in [the] Constitution," Bingham adds, "I know that the enforcement of the bill of rights is the want of the Republic." CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866). Again this is *some* evidence for incorporation of all eight amendments; but, in context of the civil rights bill, this reference to the bill of rights is most naturally read as a reference to Bingham's reading of Article IV.

307 AMAR, *supra* note 2, at 195; *see also* CURTIS, *supra* note 1, at 71–72.

308 AMAR, *supra* note 2, at 178 n.* (emphasis added and omitted) (quoting Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27); CURTIS, *supra* note 1, at 72 (emphasis added) (quoting § 1, 14 Stat. at 27); CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866) (emphasis added) (draft language); *see also* AMAR, *supra* note 2, at 195 n.*.

understood as fitting this description.”³⁰⁹ Amar notes that Blackstone “catalogued various common law antecedents of the Bill of Rights as encompassing ‘the right of personal security, the right of personal liberty, and the right of private property.’”³¹⁰

That is true but irrelevant. Even if the “full and equal benefit of all laws and proceedings for the security of person and property” was a reference to the *kinds* of rights that the first eight amendments protect, that would still tell us nothing about how *the Civil Rights Act* protects them. And the Civil Rights Act required simply equality with respect to those rights, since the phrase “as is enjoyed by white citizens” modifies this clause, too.³¹¹

Amar, however, insists that the word “full” implies an absolute guarantee of all the rights for the security of persons and property. That is, the states *must* secure these rights, and these rights are the same as those in the Bill of Rights. This is implausible, however, in light of the immediately succeeding modifying phrase, “as is enjoyed by white citizens.”³¹² Indeed, in the Civil Rights Act of 1875, Congress legislated that all people in the United States were to have “the *full* and equal enjoyment” of public accommodations, but added: “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.”³¹³ “Full and equal,” in other words, is a hendiadys for fully equal.³¹⁴

There are also two reasons to doubt this clause in the Civil Rights Act really encompassed all the personal rights secured by the first eight amendments. First, Blackstone distinguished the rights of “personal security” from the “right of personal liberty” and the “right of private property.” The relevant clause in the Civil Rights Act seems to be referring only to the first of these rights: to laws and proceed-

309 AMAR, *supra* note 2, at 195 n.*.

310 *Id.* (quoting BLACKSTONE, *supra* note 13, at *125).

311 Again, the Act provided that “such citizens, of every race and color . . . shall have the same right . . . to make and enforce contracts . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .” § 1, 14 Stat. at 27.

312 *Id.*

313 Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 335, 336 (emphasis added). Section 2 of the Act provides punishment for any person who shall deny to any citizen, “except for reasons by law applicable to citizens of every race and color,” the “full enjoyment” of any public accommodations. *Id.* § 2.

314 If it were the intent of the bill’s authors to create an absolute guarantee, it also would have been more natural to omit “all” and provide “full and equal benefit of *laws* and proceedings,” which might imply the need to enact laws for the security of persons and property in the absence of such laws. The phrase “full and equal benefit of all laws and proceedings” more naturally implies the full benefit of all “existing” laws and proceedings for the security of persons and property.

ings for the *security* of one's other rights. This seems a reference to the protection of the laws, which Blackstone defined as access to judicial remedies.³¹⁵ This is further supported by the addition of the word "proceedings" in this part of the statute. The sentence most likely refers to the protection of the laws and due process and not to all natural rights generally.

Second, if the "full and equal benefit of all laws and proceedings for the security of person and property" were a reference to the rights described by Blackstone as involving personal security, liberty, and property, then that passage in the civil rights bill should also extend to property and contract rights, which Blackstone included in his descriptions of personal liberty and private property.³¹⁶ Yet if those rights were included, then the entire preceding sentence about the right to "make and enforce contracts" and to enjoy property rights would be superfluous.

There is a final reason to doubt Amar's reading: the remarks of John Bingham himself, who is otherwise so important to Amar's arguments. When discussing the bill, Bingham asked: "Has the Congress of the United States the power to declare, as this bill does declare, . . . that there shall be no discrimination of civil rights among citizens of the United States in any State[?]"³¹⁷ There is little indication in Bingham's speech on the civil rights bill that he thought it required anything other than equality.

C. *The Final Language*

1. General Evidence

The final draft of the Fourteenth Amendment dropped the Article IV language and provided instead that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."³¹⁸ This raises the important question of

315 BLACKSTONE, *supra* note 13 ("The remedial part of a law is so necessary a consequence of the [declaratory and directory parts of the law], that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.").

316 Blackstone describes personal liberty as consisting "in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct," and then describes this right largely in terms of due process. *Id.* at *130, *130–34. And, of course, property is itself a distinct category. *Id.* at *134–36.

317 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

318 *Id.* at 2468 (quoting language); *see id.* at 2459 (Stevens introducing amendment). The Citizenship Clause was later added by the Senate. *See id.* at 2869, 2890, 2897, 3041.

why the language was changed in this manner. Kurt Lash argues that the new language deployed the phrase “privileges and immunities of citizens of the United States” as a term of art referencing those privileges and immunities enumerated in the Federal Constitution, as opposed to the privileges and immunities of state citizenship guaranteed under Article IV.³¹⁹

There is another explanation, more consistent with the historical evidence. Recall that Bingham and the other antislavery Republicans had a somewhat unorthodox, “ellipsis” reading of Article IV by which the clause required equality in civil rights among a state’s own citizens. That is the reading that Bingham and others sought to enforce. That is the reading that would supply a constitutional basis for the Civil Rights Act. Merely empowering Congress to enforce Article IV would not have solved these problems, however, if the courts were to continue interpreting the clause as a comity-only provision.

Thus the revised language of the proposed amendment had to adopt in express language the ellipsis reading of Article IV by which the clause guaranteed to each “citizen of the United States” in each state the privileges and immunities “of citizens of the United States” in the several states. That is exactly what the final draft does. The ellipsis reading maintains that all United States citizens are entitled to contract and property and other civil rights as defined by each state, and that a state cannot deny these rights to any class of citizens by discriminating against them. An amendment that empowered Congress to enforce “the privileges or immunities of citizens of the United States” is the natural way to enshrine this reading in the fundamental law.

Additionally, the initial language was objected to on the ground that it might authorize Congress to legislate civil rights in all the states.³²⁰ The new language would avoid this result by requiring equality in civil rights under state law, and then guaranteeing due process and legal protection so that the newly freed people could enjoy and exercise those equal civil rights. As Lawrence had explained, there were two ways equal rights could be denied by a state, and which would be of concern to the federal government: by denying equal rights in the law, or by denying legal protection for them.³²¹ The final language of the Fourteenth Amendment solved both prob-

319 LASH, *supra* note 3, at 72–73.

320 See *supra* notes 247–57 and accompanying text.

321 CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (“[T]here are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory [discriminatory] laws, or by a failure to protect any one of them.”).

lems, without empowering Congress to define and regulate civil rights in all the states.

The Joint Committee on Reconstruction's final report is consistent with these observations. There is nothing in that report about incorporating the Bill of Rights or nationalizing civil rights. "It was impossible to abandon" the newly freed men and citizens, the Committee wrote, "without securing them their rights as free men and citizens."³²² Before admitting the insurrectionary states, the Committee observed, "It should appear affirmatively that they are prepared . . . to . . . extend[] to all classes of citizens equal rights and privileges, and conform[] to the republican idea of liberty and equality."³²³ At present, however, "[t]here is no general disposition" in those states "to place the colored race . . . upon terms even of civil equality."³²⁴

Of the fifteen members of the House of Representatives who spoke on the final language, twelve expressly affirmed, either in support or in opposition, the singular purpose of constitutionalizing the Civil Rights Act, or otherwise suggested that the amendment guaranteed equality in civil rights.³²⁵ For example Thaddeus Stevens, leader of the Radical Republicans, explained both when introducing the resolutions in 1865 and when discussing the final amendment that it stood for the proposition that "[a]ll national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."³²⁶ James Garfield argued it was necessary to ensure that future democratic majorities would not repeal the Civil Rights Act.³²⁷ Representative Broomall explained that members had already "voted for this proposition in another shape, in the civil rights bill," and Section I was necessary "to place the power to enact the law unmistakably in the Constitution."³²⁸ Representative Eliot's remarks are particularly instructive. He confirmed his support for

the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the

322 JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT 13 (1866).

323 *Id.* at 16.

324 *Id.* at 17.

325 See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); *id.* at 2461 (statement of Rep. Finck); *id.* at 2462 (statement of Rep. Garfield); *id.* at 2465 (statement of Rep. Thayer); *id.* at 2467 (statement of Rep. Boyer); *id.* at 2468 (statement of Rep. Kelley); *id.* at 2498 (statement of Rep. Broomall); *id.* at 2502 (statement of Rep. Raymond); *id.* at 2511 (statement of Rep. Eliot); *id.* at 2530 (statement of Rep. Randall); *id.* at 2539 (statement of Rep. Farnsworth).

326 *Id.* at 10 (1865); see also *id.* at 2459 (speech on May 8, 1866).

327 See *id.* at 2462.

328 *Id.* at 2498.

power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.³²⁹

Eliot suggests that the amendment prohibits states from “discriminating against classes of citizens,” *in addition to* prohibiting their denials of due process and equal protection. That suggests the Privileges or Immunities Clause does the equality work. Eliot added that he had voted for the civil rights bill, and “I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon” the question of Congress’s power to enact that law.³³⁰

Not a single member mentioned anything remotely approximating the nationalization of civil rights or the incorporation of the Bill of Rights. It was only after these other members spoke that Representative Bingham advocated for the proposed amendment, and Bingham was the last member of the House to speak about Section 1 before the amendment went to the Senate; only Stevens spoke after him to conclude the debate. When Bingham discussed the first section of the proposed amendment, his speech was rather vague; he claimed that no state ever had the right to deny equal protection or to abridge the privileges or immunities of U.S. citizens.³³¹ Bingham then referenced cruel and unusual punishments: “Contrary to the express letter of your Constitution,” Bingham exhorted, “cruel and unusual punishments’ have been inflicted under State laws within this Union upon citizens.”³³² One should recall, however, that Thomas Cooley spoke of the right against cruel and unusual punishments as a “constitutional principle” because it was guaranteed in all the state constitutions.³³³

In any event, Bingham’s passage was cryptic. And that is all there is from the legislative history of the House debate over the final language of the amendment: a dozen representatives all expressing relatively clearly that the amendment would require equal civil rights in the states, and then a vague and cryptic statement from Bingham that never declared expressly that the amendment would incorporate the Bill of Rights against the states.³³⁴

329 *Id.* at 2511.

330 *Id.*

331 *Id.* at 2542.

332 *Id.*

333 See *supra* note 41 and accompanying text.

334 Furthermore, the legislative history of the changing language suggests that Bingham did in fact think the final language was a prohibition on discrimination in civil rights.

2. Sen. Jacob Howard

The best contemporaneous evidence for a fundamental-rights reading of the Privileges or Immunities Clause, and the incorporation of the Bill of Rights in particular, is traditionally thought to be a statement of Senator Jacob Howard, who introduced the amendment in the Senate on May 23.³³⁵ No senator spoke on the merits that day after Howard; the focus was on proposing alterations to the language.³³⁶ Howard's speech was printed and so thoroughly distributed in newspapers across the country that the amendment was often called the "Howard Amendment."³³⁷

The contending sides tend to agree that Howard's speech is evidence for incorporation; even Charles Fairman concluded that Howard's statement "contains the strongest piece of evidence for the view that Section I was designed to incorporate the provisions of the federal Bill of Rights into the Fourteenth Amendment."³³⁸ Both opponents and proponents of incorporation point out that no one responded or objected to the incorporation part of Howard's

On April 21, 1866, the proposal of Robert Dale Owen was introduced before the Joint Committee on Reconstruction. See JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 100–04 (1956). Thaddeus Stevens introduced the proposal on Owen's behalf. BENJ. B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865–1867*, at 83 (1914). This was the initial proposal most closely aligned to the final version of the Fourteenth Amendment, and its first section provided, "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." *Id.* It was on this day, as an amendment to this proposal, that Bingham added the exact words of what would become Section 1 of the Fourteenth Amendment (with the exception of the Citizenship Clause) to the Owen proposal, as section 5. *Id.* at 87. But earlier on that day, instead of adding these words as an entirely new section, Bingham had tried to amend the first section of the Owen proposal by adding "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." *Id.* at 85. This seems to suggest that Bingham did not think a "privileges or immunities clause" was necessary at this time because the Owen proposal already prohibited discrimination.

335 See CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866); BARNETT & BERNICK, *supra* note 125, at 140–43.

336 See CONG. GLOBE, 39th Cong., 1st Sess. 2768–71 (1866).

337 LASH, *supra* note 3, at 188.

338 Fairman, *supra* note 19, at 19. The best Raoul Berger could throw at Howard's speech was that Howard himself was "one of the most . . . reckless of the radicals" and a "Negrophile[.]" RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 166 (2d ed. 1997) (quoting KENDRICK, *supra* note 334, at 192). He did not dispute that Howard's "addition" of the first eight amendments implied incorporation. See *id.* at 168. Wildenthal summarizes generally, "The best that anti-incorporationists have been able to do is to raise doubts about whether [Howard's] view should be given decisive weight." Wildenthal, *supra* note 3, at 1584–85.

speech.³³⁹ George Thomas has further observed that there was almost no commentary in the newspapers that suggested an awareness of the possibility of incorporation.³⁴⁰ He thus concludes that the “lack of a public embrace of Howard’s theory” could be for one of two reasons: either everyone knew and accepted as obvious that the amendment would apply the Bill of Rights against the states, or Howard’s theory was “idiosyncratic.”³⁴¹

Yet there is a third possibility: Howard’s speech was likely little commented upon because everyone already knew what Howard was saying, and what he was saying was not idiosyncratic at all. If Howard’s speech was in fact perfectly conventional, that would go a long way to explain the subsequent silence in Congress and in the press. It is widely believed that Howard described the “first eight amendments” as being among the privileges and immunities of citizens of the United States. But his discussion of those amendments is entirely within his discussion of Article IV. It will not surprise the reader to discover that Howard was using the first eight amendments as *illustrations* of what the privileges and immunities of U.S. citizens were.

His discussion of Section 1 began with the proposition that the Privileges or Immunities Clause “relates to the privileges and immunities of citizens of the several States.”³⁴² Howard explained that, “to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’”³⁴³ Howard then explained that Article IV made the citizens of each state ipso facto “citizens of the United States.”³⁴⁴ As such, “[t]hey are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their

339 See, e.g., George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323, 332 (2009) (“[T]he remarkable fact (in my opinion) about Howard’s crystal clear exposition about privileges and immunities is that it dropped into the pond of the Fourteenth Amendment without leaving a ripple. No one in the House or Senate agreed with his elegant theory of incorporation. No one disagreed. No one mentioned Howard’s interpretation of ‘privileges and immunities.’”); Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 127 (2009) (“[T]he lack of any meaningful response is a testimony to the acceptance and impact of the speech.”).

340 See Thomas, *supra* note 339, at 326, 353–55.

341 *Id.* at 326.

342 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

343 *Id.*

344 *Id.*

enforcement whenever they go within the limits of the several States of the Union.”³⁴⁵

It is at this point that Howard launched into a discussion of “what are the privileges and immunities of citizens of each of the States in the several States.”³⁴⁶ He then listed the various civil rights described by Justice Washington in *Corfield v. Coryell* and states that “[s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”³⁴⁷ “To these privileges and immunities,” he continued,

whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms³⁴⁸

Howard then listed most of the rights secured by the first eight amendments. It is worth repeating that this entire discussion is in the context of what privileges and immunities are guaranteed by Article IV of the Constitution. Howard was simply identifying the privileges and immunities of citizenship—those natural rights that all free governments must secure. He had not at this point said anything about how the new Privileges or Immunities Clause would guarantee those rights above and beyond Article IV.

This point may (now) seem obvious, but it is crucial. Numerous scholars, including opponents of incorporation, have written as though Howard identified the source of these rights *as* the first eight amendments, or as though he described the first eight amendments themselves as among the privileges and immunities of U.S. citizens.³⁴⁹

345 *Id.*

346 *Id.*

347 *Id.*

348 *Id.*

349 See, e.g., *Adamson v. California*, 332 U.S. 46, 73 (1947) (Black, J., dissenting) (Howard “emphatically” indicated “that the Bill of Rights was to be made applicable to the states”); Amar, *supra* note 70, at 1239 (“Howard, for example, plainly said that all the privileges and immunities of Amendments I-VIII were included” (emphasis omitted and added)); *id.* at 1240 (Howard “said plainly and at length that the rights in Amendments I-VIII were encompassed by Section One” (emphasis added)); Aynes, *supra* note 339, at 139 (“Howard said ‘the first eight amendments’” “*are* the privileges or immunities of U.S. citizenship.” (emphasis omitted and added)); *id.* at 86, 140, 150 (similar); Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J.L. & PUB. POL’Y 1, 8 (2020) (noting that Howard “then located a second source of fundamental rights,” and noting the first eight amendments as the source of these rights);

And many scholars assume that because Howard referenced the first eight amendments, that must mean that the *way* the clause secures the rights in those amendments is incorporation.³⁵⁰ These are errors. Howard was referring to the antecedent rights themselves, which the first eight amendments happened to secure. It was common ground that the “privileges and immunities of citizens of the United States” included a whole host of personal and natural rights—contract, property, speech, press, guns—that were secured in different ways by different provisions of the existing Constitution. These “privileges or immunities . . . secured by the Constitution,” as Howard said later in his speech, are “those fundamental rights lying at the basis of all society and without which” a free people could not exist.³⁵¹ That does

Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 15–16 (2009) (“[Both Bingham and Howard] indicat[ed] that the words ‘privileges or immunities’ included rights *in* the Bill of Rights.” *Id.* at 15 (emphasis added).); Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 629 (2019) (“Jacob Howard also included both Article IV and the first eight amendments *as among the enumerated privileges and immunities* of citizens of the United States protected by Section 1.” (emphasis added)); *id.* at 653 (“[Howard’s speech] echoes Bingham’s own view that the privileges and immunities of citizens of the United States *include all enumerated constitutional rights*, whether in the Bill of Rights or elsewhere.” (emphasis added)); Thomas, *supra* note 339, at 326 (“Howard and one New York Times writer are the only two people to have stated with unmistakable clarity that Section 1 included the Bill of Rights.”).

350 See, e.g., MALTZ, *supra* note 3, at 115, 108–21 (“In short, one cannot plausibly argue that Howard and Bingham did not believe the Bill of Rights to be fully incorporated in the privileges and immunities clause.”); Aynes, *supra* note 339, at 86 (“All seem to agree that Senator Jacob Howard’s speech in the Senate indicated that one of the purposes of the Amendment was to enforce the Bill of Rights against the states.”); David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 378 (2003) (“[T]he framers of the Fourteenth Amendment intended to make the first eight Amendments applicable to the States. Bingham and Howard said so expressly . . .” (footnote omitted)); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1133 (2000) (“[B]oth [Howard and Bingham] explained the Privileges or Immunities Clause of the Fourteenth Amendment as requiring states to obey guarantees of the Federal Bill of Rights.”); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers’ Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41, 53 (1996) (“It is thus reasonably clear that Howard . . . intended to make the Bill of Rights applicable to the states . . .”); Newsom, *supra* note 3, at 697 (“Senator Jacob Howard, the amendment’s sponsor in the upper house, was even clearer in announcing his incorporationist intentions for the Privileges or Immunities Clause.”); David Skeels, *Judicial Review and the Fourteenth Amendment: The Forgotten History*, 51 U. TOL. L. REV. 281, 304 (2020) (“No one objected to Howard’s statement or to making the first eight amendments applicable to the states, so there is no reason to believe there was any significant objection to such a result.” (footnote omitted)).

351 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

not answer, however, how the new Privileges or Immunities Clause would protect, guarantee, or secure those privileges and immunities.

All that Howard said about this latter issue came next. Howard said that “the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation.”³⁵² For example, “it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.”³⁵³

Howard then indicated “there is no power given in the Constitution to enforce and to carry out any of these guarantees,” which are not grants of power to Congress, but rather “stand simply as a bill of rights in the Constitution,” and therefore “the States are not restrained from violating the principles embraced in them except by their own local constitutions.”³⁵⁴ The “great object” of Section 1 is therefore “to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”³⁵⁵ It does so by affirmatively delegating “power to Congress to carry out all the principles of all these guarantees.”³⁵⁶

Howard’s statement, especially this final paragraph, can certainly be interpreted to mean that he thought the amendment would apply all eight amendments against the states; the literature is essentially unanimous on this point.³⁵⁷ But that reading is hardly compelled, for two reasons. First, it was common ground among many abolitionists that Congress did not have power to enforce the Fugitive Slave Clause of Article IV, Section 2, Clause 3.³⁵⁸ Thus, they could not maintain

352 *Id.* at 2765.

353 *Id.*

354 *Id.* at 2765–66.

355 *Id.* at 2766.

356 *Id.*

357 See sources cited *supra* notes 349–50.

358 See, e.g., KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 317 (2021) (noting that some Republicans held this view); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 214 (2011) (explaining Salmon Chase’s influential argument that “Congress lacked power to enforce the portion of Article IV, section 2” governing fugitive slaves, and that “[s]uch reasoning applied with equal force” to the other provisions in that section); see also *In re Booth*, 3 Wis. 1, 73 (1854) (Crawford, J., dissenting) (observing that “[i]t has been zealously and ably urged at the bar, by the counsel for the petitioner, that the Constitution of the United States vests no power, either expressly or by implication, in Congress, to legislate upon the subject of the reclamation of fugitives from labor or service”), *rev’d sub nom.* *Ableman v.*

(at least with consistency) that Congress, absent an amendment, had power to enforce the Privileges and Immunities Clause of Article IV, Section 2, Clause 1. That is why Bingham sought an amendment to “enforce” the Bill of Rights, including Article IV, Section 2, Clause 1. And it is to what Howard might be referring in his speech—the Privileges or Immunities Clause *now* gives Congress the power to enforce Article IV, Section 2, Clause 1 against the states.

Second, all Howard said was that the states must at all times “respect” these fundamental guarantees, which, of course, all free governments had to. The Privileges or Immunities Clause could ensure this respect *either* by prohibiting discrimination in these natural and personal rights against a disfavored class of citizens much like Article IV, Section 2, Clause 1 does, *or* by prohibiting any infringement outright as the first eight amendments do. To illustrate this possibility, consider how one 1871 treatise writer treated Article IV. The author explained that the privileges and immunities covered by the clause were the privileges and immunities of *national* citizens, and included the rights to life, liberty, property, and the pursuit of happiness, as well as “[t]hose specified and enumerated in the federal constitution.”³⁵⁹ But the clause itself only required a state to treat out-of-state citizens equally with respect to such rights: “The states without” Article IV, Section 2, Clause 1, “by their local legislation, might, and perhaps would, impose different restrictions on the residents of each other . . . militating against those unalienable rights.”³⁶⁰

Or recall how Trumbull spoke of the Civil Rights Act: “Each state, so that it does not *abridge* the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.”³⁶¹ Here, then, are two illustrations that merely identifying the privileges and immunities of citizenship—identifying the antecedent natural and personal rights—does not tell us how any particular provision secures them. Fundamental rights can be secured by guaranteeing equality in their provision.

3. Corroborating Evidence

Because Howard’s speech is at best ambiguous, it is important to consult any corroborating evidence. And the available evidence cor-

Booth, 62 U.S. (21 How.) 506 (1859); *id.* at 100–01 (opinion of Smith, J.) (holding Fugitive Slave Act of 1850 unconstitutional on this ground).

359 JOHN KING, A COMMENTARY ON THE LAW AND TRUE CONSTRUCTION OF THE FEDERAL CONSTITUTION 274 (Cincinnati, Robert Clarke & Co. 1871).

360 *Id.* at 275.

361 CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (emphasis added).

roborates the alternative reading of Howard's speech. Kurt Lash has pointed out that "Jacob Howard repeatedly voted [in committee] in favor of an amendment that did nothing more than prohibit racial discrimination."³⁶² Although it is possible that Howard was introducing, describing, and advocating language that he had opposed in committee, it is more plausible that he thought the language did exactly what the previous language he had supported did—namely, prevent racial discrimination.³⁶³

In 1869, Howard expressly affirmed the Article IV reading of the Privileges or Immunities Clause. He stated that Section 1 "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."³⁶⁴ Article IV, Howard added, "relat[es] to those personal rights and privileges connected with property which it was intended by the Convention which framed the Constitution to make common and uniform among the citizens of the United States."³⁶⁵ He concluded by observing that the Privileges or Immunities Clause's

immediate object . . . was to prohibit for the future all hostile legislation on the part of the recently rebel States in reference to the colored citizens of the United States It was to secure them against any infringement or violation of their rights by those southern Legislatures. That is the whole history of it.³⁶⁶

And then in January of 1871, John Bingham, as the author of a Judiciary Committee report, explained why *Barron v. Baltimore* had been discussed in 1866: because "[i]t had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States," the drafters of the Fourteenth Amendment had "apprehended that the same might be held of the provision of the second section, fourth article."³⁶⁷ Thus, Congress needed to overrule *Barron* to make *any* of the rights in the Bill of Rights—including Article IV and the Fifth Amendment—applicable against the states.

The senators who followed Howard on subsequent days also corroborate this reading. Senator Poland said on June 5, just a few days

362 Lash, *supra* note 349, at 651 (responding to Barnett and Bernick).

363 *See id.* at 651. That Howard objected to Bingham's language does not mean he opposed it in principle. It is possible that he believed everything in the Bingham draft was already addressed by the discrimination clause of the Robert Dale Owen draft.

364 CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

365 *Id.*

366 *Id.*

367 H.R. REP. NO. 41-22, at 1 (3d Sess. 1871).

before final passage in what at least one newspaper apparently announced would be an important speech,³⁶⁸ that the proposed Privileges or Immunities Clause “secures nothing beyond what was intended by the original provision in the Constitution, that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’”³⁶⁹ The amendment was necessary because “no express power was by the Constitution granted to Congress to enforce it,” and thus “it became really a dead letter.”³⁷⁰ Poland explained that various state laws had been “in direct violation of these principles,” and that “Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill.”³⁷¹ Because some had doubted Congress’s power to enact that law, it was “desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government.”³⁷²

Senator Howe, in a speech spanning June 5 and June 6 that does not appear to be much discussed by the proponents of incorporation,³⁷³ also supports the Civil Rights Act reading—and Curtis even describes Howe as a “[r]adical.”³⁷⁴ Howe asked whether the privileg-

368 CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).

369 *Id.*

370 *Id.*

371 *Id.*

372 *Id.* Bryan Wildenthal has incorrectly characterized Senator Poland’s speech to suggest that he advocated more than mere equality. “Poland declared—in this very same speech, on the very same page as his Article IV comment—that the Amendment would protect rights guaranteed ‘in all the provisions of the Constitution’ and would overcome ‘State laws . . . in direct violation of these principles.’” Wildenthal, *supra* note 3, at 1569–70 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866)). That is not a fair reading of Poland’s speech. That remark was made after Poland was done speaking of the Privileges or Immunities Clause, and had proceeded to address due process and equal protection of the laws. *This* provision, he said (treating due process and equal protection together),

is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles.

CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866). Suffice it to say, the meaning of this passage is not what Wildenthal ascribes to it.

373 *See, e.g.*, AMAR, *supra* note 2 (no reference to this speech in entire book); BARNETT & BERNICK, *supra* note 125 (same); CURTIS, *supra* note 1, at 87–91 (discussing the treatment of the amendment in the Senate and not discussing Howe’s statement); LASH, *supra* note 3 (no reference to this speech in entire book). Charles Fairman briefly discusses parts of Howe’s statement. Fairman, *supra* note 18, at 62–63.

374 CURTIS, *supra* note 1, at 48.

es or immunities provision was necessary, and if there were any states with “an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws?”³⁷⁵ He was “sorry to say” that he did find such an appetite in several of the states. It was widely known that the southern states would deny “to a large portion of their respective populations the plainest and most necessary rights of citizenship.”³⁷⁶ What were these rights of citizenship? He listed the “right to hold land,” the “right to collect their wages,” the “right to appear in the courts as suitors,” the “right to give testimony.”³⁷⁷ These were “not the only particulars in which *unequal laws* can be imposed.”³⁷⁸ He then described a provision for unequal schooling in Florida.³⁷⁹

A speech by Senator Davis in opposition was reported in the appendix to *The Congressional Globe*, and notes that the proposed Privileges or Immunities Clause was “unnecessary, because that matter is provided for in article four, section two, of the Constitution: ‘The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.’”³⁸⁰ Senator Henderson was the last senator to speak about Section 1 shortly before the amendment was approved in the Senate on June 8.³⁸¹ Henderson proposed to discuss the citizenship clause only. “[I]t will be a loss of time to discuss the remaining provisions of the section,” he said, “for they merely secure the rights that attach to citizenship in all free Governments.”³⁸² This statement was standard fare: citizenship in free governments required equal guarantees of natural rights.

In summary, Howard’s statement is traditionally thought to be the best contemporaneous evidence that the public would have understood the Privileges or Immunities Clause to incorporate the first eight amendments. This conventional wisdom is not compelled and is likely wrong. Howard’s statement was standard natural rights talk and was consistent with what every other senator (Poland, Howe, Davis, and Henderson) said more explicitly: that the proposed amendment referred to the same rights to which Article IV referred (all fundamental natural and personal rights), and it would guarantee those rights the same way the civil rights bill did—by requiring equality under law.

375 CONG. GLOBE, 39th Cong., 1st Sess. app. at 219 (1866).

376 *Id.*

377 *Id.*

378 *Id.* (emphasis added).

379 *Id.*

380 CONG. GLOBE, 39th Cong., 1st Sess. app. at 240 (1866).

381 CONG. GLOBE, 39th Cong., 1st Sess. 3031, 3042 (1866).

382 *Id.* at 3031.

V. POST-ENACTMENT

To cover all post-enactment evidence, from 1866 to 1875 when the Civil Rights Act of 1875 was enacted, would require another lengthy article. I have previously discussed some evidence from the 1866 campaign trail.³⁸³ And Michael McConnell famously examined evidence relating to public school desegregation from 1872 to 1875.³⁸⁴ For present purposes, it is sufficient briefly to discuss three important pieces of post-enactment evidence that are routinely discussed in the modern literature: the post-enactment statements of John Bingham, the minimal extant discussion in the state ratification conventions, and contemporaneous treatises.

A. *Rep. John Bingham*

It was not until 1867—after the proposed amendment was adopted by Congress and sent to the states for ratification—that John Bingham began to suggest more explicitly that he intended to make the first eight amendments applicable to the states. On January 28, 1867, the House debated a bill by Representative Kasson that would have prohibited states from authorizing their judges to inflict what Congress viewed to be cruel and unusual punishments, which Kasson believed to be an incident of the slave system.³⁸⁵ Bingham opposed the bill and reminded his colleagues that “it has always been decided that” the “personal rights” in the “articles of amendment” are “limitations upon the powers of Congress, but not such limitations upon the States as can be enforced by Congress.”³⁸⁶ Bingham then added, “I trust the day is not distant when by solemn act of the Legislatures of three fourths of the States of the Union now represented in Congress the pending constitutional amendment”—that is, the Fourteenth Amendment—“will become part of the supreme law of the land, by which no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution.”³⁸⁷

Here, in 1867, is some evidence that Bingham may have intended to incorporate the Bill of Rights against the states. No one responded to Bingham’s point and it was not the central issue in the debate. It is also unclear *how* Bingham thought the proposed

383 WURMAN, *supra* note 7, at 109–10.

384 Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1060–80 (1995).

385 See CONG. GLOBE, 39th Cong., 2d Sess. 810 (1867).

386 *Id.* at 811.

387 *Id.*

amendment would accomplish the “incorporation” of the Eighth Amendment. In his remarks, he seemed to suggest that this might be accomplished through *equal protection*. It is unclear how equal protection would do so, given his earlier use of the term as a reference to access to courts and judicial remedies,³⁸⁸ though it is surely possible to conceive of the subject of punishments as relating to the “protection of the laws.” This post-enactment evidence is therefore some evidence that Bingham may have intended for incorporation, but it is hardly strong evidence.

On March 31, 1871, five years after drafting, Bingham made an unequivocal statement in support of incorporation, which has been cited by Amar and others.³⁸⁹ In his speech, Bingham firmly declared in reference to the Privileges or Immunities Clause that “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution.”³⁹⁰ These eight amendments were “made” into “limitations upon the power of the States” by the “fourteenth amendment.”³⁹¹ Bingham then doubled down, strongly suggesting that the civil rights described in *Corfield* and protected by Article IV were actually *not* protected by the Fourteenth Amendment.³⁹²

388 In responding to a question posed earlier by Representative Hale respecting the property rights of married women, Bingham had stated in 1866 that “every one knows” that the “acquisition and transmission” of property “are dependent exclusively upon the local law of the States.” CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). But if someone “has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection?” *Id.* That is the “whole question, so far as” the equal protection component is concerned. *Id.*; see also *id.* at 1064 (Bingham asking Hale whether the Constitution as it currently stands is sufficient “to secure to a party aggrieved in his person within a State the right to protection by the prosecution of a suit,” where a state denies to citizens “the right to prosecute a suit in their courts, either for the vindication of a right or the redress of a wrong”).

389 See, e.g., AMAR, *supra* note 2, at 183; LASH, *supra* note 3, at 249–50.

390 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871).

391 *Id.*

392 Bingham states,

Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?

Id. On its own this strongly implies that the first eight amendments are the only rights secured by the Privileges or Immunities Clause. That reading is further supported by Bingham’s earlier statement that these privileges were *contradistinguished* from the privileges and immunities of state citizenship.

That is an astonishing about-face. Recall that the Black Codes and the Civil Right Act of 1866 had entirely to do with civil rights under state law,³⁹³ the very privileges and immunities that Bingham now said were not covered. His entire speech on March 9, 1866, maintained that the Fourteenth Amendment would “enforce the bill of rights” by allowing Congress to enforce Article IV, which under his reading required equality in civil rights under state law.³⁹⁴ Indeed, his “ellipsis” reading of Article IV joined United States and state citizenship, guaranteeing to *citizens of the United States in the several States* their privileges as citizens *of the United States*.³⁹⁵ His claim in March 1871 that he had intended to incorporate only the first eight amendments, and distinguishing state and national citizenship, flatly contradicted his speeches from 1859³⁹⁶ and 1866.³⁹⁷

Even more remarkably, Bingham’s statement in March 1871 contradicted his own report as member of the House Judiciary Committee a mere six weeks earlier, on January 30, 1871. In rejecting the memorial of Victoria C. Woodhull requesting the enactment of a law that would guarantee women the right to vote, Bingham’s report expressly stated the Privileges or Immunities Clause “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.*”³⁹⁸ That is, the clause refers *exclusively* to civil rights under state law.

In that same paragraph, Bingham’s report even mentions the first eight amendments. As noted previously,³⁹⁹ it states that the Fourteenth Amendment was necessary to give Congress the power to enforce Article IV because “[i]t 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.*”⁴⁰⁰ Here is a clear statement that *Barron* did not have to be overturned generally and the intent was not to apply all eight amendments against the states, but rather to give Congress power to enforce Article IV. As for Bingham’s later distinction between state and national citizenship, his January 30 report explained that the citizenship

393 See *supra* Section IV.B.

394 See *supra* subsection IV.B.3.

395 See *supra* Section II.C, subsection IV.A.1.

396 See *supra* Section II.C.

397 See *supra* subsection IV.A.1.

398 H.R. REP. NO. 41-22, at 1 (3d Sess. 1871) (emphasis added).

399 See *supra* note 367 and accompanying text.

400 H.R. REP. NO. 41-22, at 1 (emphasis added).

clause “did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution.”⁴⁰¹

A few days after Bingham’s March 31 speech, future President James Garfield, who had been in Congress in 1866, reiterated the same points made by Bingham in his Judiciary Committee report. Garfield said that “[Section 1] was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property.”⁴⁰² He also responded to Bingham’s distinction between state and national citizenship by reminding his colleagues that U.S. citizens had always been state citizens and vice versa.⁴⁰³

Finally, in an 1868 speech that appears to have been quoted only in Fairman’s work,⁴⁰⁴ Bingham seems expressly to affirm the equality-only reading of the Privileges or Immunities Clause. In a debate over readmission of several of the southern states, Bingham wants to impose the following condition: “That civil and political rights and privileges shall be forever equally secured in said States to all citizens of the United States resident therein, in so far as is now provided in said constitutions respectively.”⁴⁰⁵

The objective, Bingham explains, is to ensure “[t]hat all citizens shall be forever equal, subject to like penalties for like crimes and no other,” leaving “to the people the right to amend their State constitutions, subject to the requirements of the Federal Constitution.”⁴⁰⁶ “The civil and political rights and privileges of citizens of the United States of like age, sex, and residence, shall be equally enjoyed,” Bingham continues; “they shall be equally subject to the same disabilities and to no others.”⁴⁰⁷ The “fourteenth article of the amendments of the Constitution secures” to Congress the power to enforce this condition.⁴⁰⁸ Bingham concludes,

I desire equality of right, equality of civil right . . . I propose to declare that the civil and political rights and privileges under these several constitutions shall be forever equally enjoyed by all citizens of the United States *in so far as the same are now secured by said constitutions respectively* . . . thus leaving the people still the privilege of amending their constitutions, enlarging, if they

401 *Id.*

402 CONG. GLOBE, 42d Cong., 1st Sess. app. at 151 (1871).

403 *Id.* at 152.

404 See Fairman, *supra* note 18, at 129. I could find no other article on Westlaw or HeinOnline quoting this speech, nor is it mentioned in the respective books of Amar, Barnett and Bernick, Curtis, and Lash.

405 CONG. GLOBE, 40th Cong., 2d Sess. 2462 (1868).

406 *Id.*

407 *Id.* at 2462–63.

408 *Id.* at 2463.

choose, the liberties of the people, *or removing restrictions*, as the public exigencies may require and the public interest may demand.⁴⁰⁹

This rarely quoted 1868 statement from Bingham is strong evidence that the antislavery, Republican understanding of natural rights and equality was consistent with federalism. To be sure, it is not perfect evidence: the matter in question was state constitutional provisions respecting the elective franchise (a political right), not civil rights.⁴¹⁰ Nevertheless, his statement appears to extend to all civil rights, and is consistent with other statements Bingham made in 1859, 1866, and January 1871. One cannot deny the force of his statement in March 1871. But that statement contradicted almost everything else we know about what Bingham ever said and believed.

B. Ratification

Proponents of incorporation acknowledge that there is little relevant material from the state legislatures,⁴¹¹ likely because the matters had been so thoroughly canvassed in Congress and the popular press that Republicans had little desire to repeat them.⁴¹² To the extent any legislature or member thereof discussed the relevant issues, essentially all of them seemed to presuppose the equality reading of the clause.⁴¹³

409 *Id.* (emphases added).

410 And Bingham may have been understood as referring only to allowing the states to modify their rules respecting the franchise. *See, e.g., id.* at 2465 (“[Bingham] proposes . . . to leave each of these States free after its admission to amend the provisions with reference to the elective franchise, as it may deem proper, with regard to its own citizens.”). Additionally, Bingham was obviously wrong that political rights were included within the privileges and immunities of citizens, so perhaps this speech is unreliable. But he was obviously wrong in 1871, too, when he did a complete about-face. In my view, this speech is good evidence that he had a consistent intrastate equality theory all along. But if it is unreliable, and the 1871 speech is also unreliable, then perhaps Fairman was right all along that Bingham was a confused and unreliable thinker.

411 *See* Wildenthal, *supra* note 3, at 1583–1615; *id.* at 1600 (“Overall, however, the evidence from the ratification struggle seems vague and scattered when it comes to supporting any strong public awareness of nationalizing the entire Bill of Rights. It was not widely framed in those terms as a prominent issue. Republican proponents, apart from Bingham, did not seem to tout it in any systematic or explicit way. At the same time, there does not appear to be any record of Democratic opponents using incorporation of the Bill of Rights as an explicit argument not to ratify the Amendment. What we mostly have is silence.” (emphasis omitted)).

412 *See, e.g.,* Fairman, *supra* note 19, at 105 (quoting Republicans declaring that there should be no unnecessary delay in voting).

413 *See, e.g.,* H.R. JOURNAL, 11th Leg., Reg. Sess. 578 (Tex. 1866) (Texas House committee stating in opposition that Section 1 would “declare negroes to be citizens of the United States, and therefore, citizens of the several States, and as such entitled to all ‘the

One scholar has explained that in three key swing states, the public appeared to believe simply that Section 1 “made constitutional” the civil rights bill, and “[t]here is no record” of any advocate of the amendment “explaining” that the Privileges or Immunities Clause “guaranteed those rights enshrined in the Bill of Rights.”⁴¹⁴

Yet there is one state, Massachusetts, in which a committee report might have contemplated something like incorporation, and this report is important to both Curtis⁴¹⁵ and Crosskey.⁴¹⁶ Even Fairman agreed that this report supported the incorporation reading and thus resorted to his usual attacks.⁴¹⁷ The report can certainly be read as Curtis, Crosskey, and Fairman read it. But it is also possible that the report is consistent with Republican antebellum understandings of Article IV, by which it required a state to treat its own citizens equally in all the privileges and immunities of United States citizens, including those natural rights to free speech and to bear arms.

The authors oppose the amendment because they think it does not go far enough. After quoting Section 1, the report asserts, “It is difficult to see how these provisions differ from those now existing in the Constitution.”⁴¹⁸ It proceeds then to quote the Preamble, cite

privileges and immunities’ of white citizens”); 9 BREVIER LEGIS. REPS., 45th Gen. Assemb., Reg. Sess. 89 (Ind. 1867) (Indiana representative explaining Section 1 “but repeats the principles of the civil rights bill”); S. JOURNAL, 19th Ann. Sess. 33 (Wis. 1867) (Governor’s message stating the amendment “secur[es] to all men equality before the law”); APP’X TO DAILY LEGIS. REC., at xiii (Pa. 1867) (“[The Privileges or Immunities Clause provides that] negroes are citizens, and no State shall say they are not the equal of the white man in every sense. . . . When the power to enforce these privileges and immunities in favor of the negro is vested in Congress, is it possible to conceive of any of the dearest rights of which we are possessed, that Congress may not bestow upon him also?”); *id.* at vii, xxii, xli, xlvi, lxxv (statements relating the amendment to class legislation and the civil rights bill); S. JOURNAL, 17th Sess. 49 (Cal. 1868) (Governor explaining Section 1 guarantees “equality before the law”). There is also some evidence of a minimalist fundamental-rights reading. *See, e.g., Annual Message of the Governor of Ohio, in* 1 EXECUTIVE DOCUMENTS, 57th Gen. Assemb., 2d Sess. 261, 281–82 (1867) (Governor’s message explaining the amendment would grant power “to the National Government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals”). Fairman collects these records. *See* FAIRMAN, *supra* note 19, at 81–132. Curtis also discusses them and comes to different conclusions. *See* CURTIS, *supra* note 1, at 131–53.

414 James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 448–50 (1985).

415 CURTIS, *supra* note 1, at 149.

416 Crosskey, *supra* note 3, at 109–11.

417 Fairman, *supra* note 19, at 120 (suggesting the authors of the report “were completely wrong on a matter that had long been well established [by Barron],” and that their “drafting is not marked by precise statement, or by a critical interest” in the problems their reading raises).

418 H.R. 88-149, at 2 (Mass. 1867).

Attorney General Edward Bates's opinion that free blacks had always been citizens of the United States, and quote Article IV, Section 2, Clause 1, the Republican Guarantee Clause, the First, Second, Sixth, and Seventh Amendments, and part of the Fifth Amendment.⁴¹⁹ "It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language; and, upon any fair rule of interpretation, these provisions cover the whole ground of section first of the proposed amendment."⁴²⁰ As for state citizenship, the report suggests there is no such citizenship "apart from citizenship of the United States."⁴²¹ "The remainder of the first section," possibly excepting equal protection, "is covered in terms by the provisions of the Constitution as it now stands, illustrated, as these express provisions are, by the whole tenor and spirit of the amendments."⁴²²

The report is not written with the utmost clarity. But consider especially the last quoted sentence. A natural reading of the sentence is that the "express provisions" to which it refers are Article IV, Section 2, Clause 1 and the Due Process Clause. These are "express" because they are the two provisions to which Section 1 expressly refers. It is these two express clauses of the "Constitution as it now stands" that are then "illustrated" by "the whole tenor and spirit of the [other quoted] amendments." If this reading is correct, then there may be nothing unconventional about this report. Section 1 *was* intended to give effect to the Republican reading of Article IV, to give Congress the power to enforce its requirement of equal civil rights, and then to supply due process and protection for those rights. The rest of the first eight amendments are then *illustrative* of the kinds of privileges and immunities of citizens of the United States that Article IV already secured. In short, the report likely does not suggest that the Fourteenth Amendment would make the first eight amendments, or some of them (aside from due process), applicable to the states, or that they already so applied. It suggests that Article IV already guarantees these rights.

C. Treatises

Only a handful of treatises interpreted the Privileges or Immunities Clause or Section 1 as a whole prior to or around the time of the *Slaughter-House Cases*.⁴²³ Barnett and Bernick argue in their recent

419 *Id.* at 2–3.

420 *Id.* at 3.

421 *Id.* at 4.

422 *Id.*

423 BARNETT & BERNICK, *supra* note 125, at 173–74; Aynes, *supra* note 3, at 83–94.

book that the 1871 edition of Thomas Cooley's famous treatise "took a narrow view of Section [1]." ⁴²⁴ Richard Aynes argues, however, that this edition "includes two statements which can be interpreted to suggest that the Fourteenth Amendment applied the Bill of Rights to the states." ⁴²⁵ As noted, Cooley's treatise was influential. ⁴²⁶

Cooley argued that the amendment clarifies the citizenship status of African Americans, "but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the *State* constitutions." ⁴²⁷ The amendment merely makes these principles of state constitutional law enforceable by national courts. ⁴²⁸ This strongly implies an equality reading of the clause: the amendment makes *state* constitutional guarantees enforceable in federal court when those guarantees are denied to black citizens. Moreover, earlier in the treatise Cooley restated the holding of *Barron*. ⁴²⁹ There is no emendation to this passage in the 1871 edition that suggests the adoption of the Fourteenth Amendment in any way alters that case. And Cooley added a footnote in 1871 for the proposition that the states may abolish trial by jury. ⁴³⁰ And in an 1874 Michigan case Justice Cooley specifically reiterated that "[i]t is settled beyond controversy, and without dissent, that [the fourth and fifth] amendments are limitations upon federal, and not upon state power." ⁴³¹

Cooley's subsequent reference to the Fourteenth Amendment in the treatise strongly suggests it extends the equality work of Article IV to discrimination internal to a particular state. Cooley adopts the traditional, comity-only reading of Article IV. ⁴³² In the 1871 edition, right after the passages on Article IV, Cooley added a note on the Fourteenth Amendment:

It was not within the power of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded,

424 BARNETT & BERNICK, *supra* note 125, at 173.

425 Aynes, *supra* note 3, at 91.

426 See sources cited *supra* note 41.

427 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *294 (Boston, Little, Brown, & Co. 2d ed. 1871) (emphasis added).

428 *Id.*

429 *Id.* at *19.

430 Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 173 (2009) (quoting COOLEY, *supra* note 427, at *19 n.1).

431 *Weimer v. Bunbury*, 30 Mich. 201, 208 (1874); see also Fairman, *supra* note 19, at 116.

432 COOLEY, *supra* note 41, at 397.

and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.⁴³³

That is all Cooley says about the Fourteenth Amendment. That amendment did not apparently affect Cooley's conclusion that the Bill of Rights only bound the federal government; but it did affect Cooley's Article IV discussion, apparently to the effect that now states could not discriminate against their own citizens.

Neither Aynes nor Barnett and Bernick mention another prominent treatise, the 1873 edition of Chancellor Kent's famous and influential commentaries, which in 1873 was edited by none other than Oliver Wendell Holmes. The treatise prominently confirms that the Bill of Rights, at least prior to the Civil War, had bound only the national government.⁴³⁴ There is no note appended to this passage suggesting that the recent amendment had overturned that basic proposition—despite other annotations updating Chancellor Kent's text to account for the Fourteenth Amendment.⁴³⁵

It is true that two treatise or "hornbook" authors in 1867–68 did seem to believe that the Fourteenth Amendment would overturn *Barron*. Timothy Farrar's 1867 tract argued that the Bill of Rights *al-ready* applied against the states,⁴³⁶ and the third edition seemed to suggest that the Fourteenth Amendment wiped away contrary precedent.⁴³⁷ George Paschal's 1868 digest said of the first "thirteen amendments" that "the general principles, which had been construed to apply only to the national government, are thus imposed on the States," even though "[m]ost of the States, in general terms, had adopted the same bill of rights in their own constitutions."⁴³⁸

433 COOLEY, *supra* note 427, at *397.

434 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 456, 479–80 n.1 (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873).

435 *Id.* at 239 n.1. Wildenthal similarly points out that two prominent criminal law treatises did not show any awareness of the possibility of incorporation in their editions in this time period. Wildenthal, *supra* note 430, at 177–91 (discussing the treatises of Joel Bishop and Francis Wharton).

436 TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 145, 395 (Boston, Little, Brown, & Co. 1867); Aynes, *supra* note 3, at 84.

437 TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 546 (Boston, Little, Brown, & Co. 3d ed. 1872).

438 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 290 (Washington, W.H. & O.H. Morrison 1868); BARNETT & BERNICK, *supra* note 125, at 173–74; Aynes, *supra* note 3, at 86.

These two works are evidence in favor of incorporation, but they must be balanced against Cooley and Kent, who were far more widely read and influential. There are also reasons to discount Farrar and Paschal: Farrar's treatise was more a nationalist political tract than an exposition of the law; he was dead wrong as a matter of doctrine on numerous issues, which reflected a consolidationist interpretation of the Constitution.⁴³⁹ Reviews were punishing.⁴⁴⁰ Bryan Wildenthal concludes that "Farrar's contemporaries had a polarized reaction to his treatise."⁴⁴¹ As for Paschal's contribution, it is a mere three sentences long and his only authority is Farrar.⁴⁴²

Lastly, it is possible to interpret John Pomeroy's 1868 treatise as suggesting that the Fourteenth Amendment would overturn *Barron* and make the first eight amendments applicable to the states.⁴⁴³ Many scholars have relied on this treatise.⁴⁴⁴ Pomeroy's analysis is certainly more serious, but it is not unambiguous. Pomeroy says that the rule of *Barron* is "unfortunate"⁴⁴⁵ because "[t]he citizen should be guarded in the enjoyment of his civil rights of life, liberty, limb, and property, against the *unequal and oppressive* legislation of the states."⁴⁴⁶ As an example, Pomeroy notes that previously if a *state* constitution

439 Farrar argued that the Constitution's Preamble constituted grants of power to the national government, including the power to make regulations for the general welfare and to secure the blessings of liberty, FARRAR, *supra* note 436, at 143, 147–48; that the Habeas Corpus Suspension Clause, having "no special reference to Congress, or to any other department of the general or subordinate governments," therefore "applies equally, and at all times, to every one subject to the laws of the land," *id.* at 416; and that the state constitutions being "compacts" or "contracts," the national authorities had jurisdiction, pursuant to the Contract Clause, over cases in which it is alleged that a state had violated its own constitutional guarantees, *id.* at 508–11.

440 A review in *The American Law Review* in 1868 described Farrar as "an earnest advocate of the most extreme doctrines of what may be called the Anti-State-rights school" and said that "his views, pushed to the length to which he carries them, were unknown, at any rate were not publicly expressed, in this country, until within a few years." Book Notices, 2 AM. L. REV. 158, 158 (1868). *The North American Review* that same year described "Judge Farrar's strange constructions of this much-twisted instrument." Critical Notices, 106 N. AM. REV. 277, 335 (1868).

441 Wildenthal, *supra* note 430, at 231.

442 PASCHAL, *supra* note 438, at 290; *see also* Aynes, *supra* note 3, at 86. It appears that there was only one other edition of Paschal's work, in 1876. A competing digest in the period referenced *Barron v. Baltimore* without so much as a hint that the recent amendment abrogated that decision. NATHANIEL C. TOWLE, A HISTORY AND ANALYSIS OF THE CONSTITUTION OF THE UNITED STATES 236 (Boston, Little, Brown, & Co. 3d ed. 1871).

443 *See* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 145–52 (New York, Hurd & Houghton 1868); BARNETT & BERNICK, *supra* note 125, at 173; Aynes, *supra* note 3, at 90.

444 BRANDWEIN, *supra* note 22, at 115.

445 POMEROY, *supra* note 443, at 149.

446 *Id.* (emphasis added).

guaranteed the right to bear arms and due process of law, but the state denied these state-guaranteed rights to “certain classes of the inhabitants—say negroes,” there previously was no remedy in the national courts “under the [existing] amendments to the United States Constitution.”⁴⁴⁷ This result is “dismaying, and a remedy is needed,” he said; and the question of the remedy’s “adoption is now pending before the people.”⁴⁴⁸

Pomeroy certainly can be interpreted as saying the remedy is direct enforcement of the Second Amendment. But he never quite says that the proposed amendment would make all the first eight amendments applicable to the states. His focus appears to be due process: After quoting Section 1, he notes that, in light of the prohibitions on states already present in Article I, Section 10, it was “strange” that a due process clause applicable to the states “was not also inserted at the outset.”⁴⁴⁹

Moreover, in his third edition in 1875 Pomeroy had the opportunity to comment on the *Slaughter-House Cases*.⁴⁵⁰ He concluded that “[t]he ‘immunities and privileges of citizens of the United States’ embrace those civil capacities and rights which belong to all persons as citizens, and these rights are the same as those which belong to citizens of the several states.”⁴⁵¹ Through the Privileges or Immunities Clause, Congress and the national courts “can afford to its citizens at home complete protection against the *discriminating* legislation of the States which may attempt to invade their privileges and immunities.”⁴⁵² It is certainly plausible to think Pomeroy’s first edition supports incorporation,⁴⁵³ but it is also plausible to read it as suggesting that the new amendment would empower the federal government to require equality and protection in the rights guaranteed under state constitutions and laws. That reading is confirmed in the third edition.

CONCLUSION

The Fourteenth Amendment must constitutionalize the Civil Rights Act of 1866. That much is common ground. It has been my aim in prior scholarship to demonstrate that the Privileges or Im-

447 *Id.* at 150–51.

448 *Id.* at 151.

449 *Id.*

450 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

451 JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 531 (New York, Hurd & Houghton 3d ed. 1875).

452 *Id.* (emphasis added).

453 For a more extended analysis of this language taking the opposite view from mine, see Aynes, *supra* note 339, at 119–21.

munities Clause is what does the necessary work.⁴⁵⁴ As previously noted, equal protection does not do the trick.⁴⁵⁵ The first eight amendments have nothing to do with it, either.⁴⁵⁶ Thus, the privileges or immunities of citizens must include, at a minimum, those fundamental rights traditionally secured and regulated under state law, and the clause must require equality with respect to those rights.

The question then becomes whether the clause can also do some fundamental-rights work, such as incorporation. A “two-tiered”⁴⁵⁷ theory of the clause by which it guarantees the first eight amendments absolutely but contract and property rights only equally does not work as a textual matter: whatever work “abridge” does, it must do with respect to all the privileges and immunities of citizens. Thus, if the clause is a fundamental-rights guarantee with respect to the first eight amendments, it is a fundamental-rights guarantee with respect to property and contract rights, too.

There are therefore two coherent possible meanings of the Privileges or Immunities Clause. The first is that the clause does no fundamental-rights work, requiring only equality and nothing more. The second is that it is a fundamental-rights guarantee with respect to all rights—those in the first eight amendments, but contract and property too—and also requires equality with respect to those rights. Both alternatives are textually possible, and both account for the Civil Rights Act of 1866.

Which of these alternatives is correct depends on the historical evidence. This Article has shown that almost no statement in the historical record compels the second approach. The historical evidence can instead be read most consistently with an equality reading of the Privileges or Immunities Clause. That reading solves the very problem of intrastate discrimination that the drafters of the amendment were targeting and is consistent with conventional understandings of the division of federal and state power, with the fundamental axiom that all free governments had to secure natural rights, and with the longstanding proposition that it was for the states to regulate those natural rights for the common good.

Even if some of the evidence points to a fundamental-rights component to the clause, however, as should now be clear, at most that component would guarantee in each state those fundamental rights that “all free governments” had to secure. That is nothing like incorporation as we know it today; if it is close to any Justice’s views, it

454 See WURMAN, *supra* note 7.

455 See *supra* notes 12–13 and accompanying text.

456 And we have already rejected Amar’s suggestion that the Civil Rights Act can be understood to incorporate the Bill of Rights. See *supra* subsection IV.B.4.

457 AMAR, *supra* note 2, at 178–79 n.*.

is closest to Justices Cardozo's and Frankfurter's accounts that the Fourteenth Amendment secures against state interference only those rights central to or implicit in the "concept of ordered liberty."⁴⁵⁸ Perhaps no state can ban political speech, but surely not all free governments must have the same answer to questions of flag burning,⁴⁵⁹ cross burning,⁴⁶⁰ intentionally distressing speech made at a funeral,⁴⁶¹ advertising violent video games to minors,⁴⁶² student speech,⁴⁶³ stealing valor,⁴⁶⁴ or animal crush videos.⁴⁶⁵ Originalists may have to rethink their faith in incorporation.

458 See *supra* note 26 and accompanying text. To repeat a point made in the introduction, if the first eight amendments were interpreted in a more originalist way—allowing for more regulation for the common good—then the daylight between the “all free governments” approach, the equality approach, and incorporation diminishes greatly, though, as noted, it does not disappear entirely.

459 See *Texas v. Johnson*, 491 U.S. 397 (1989).

460 See *Virginia v. Black*, 538 U.S. 343 (2003).

461 See *Snyder v. Phelps*, 562 U.S. 443 (2011).

462 See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).

463 See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

464 See *United States v. Alvarez*, 567 U.S. 709 (2012).

465 See *United States v. Stevens*, 559 U.S. 460 (2010).