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The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866

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The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866

KURT T. LASH*

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INTRODUCTION

For the ratification of the federal Constitution, the key votes occurred on different days in separate state ratifying conventions.¹ For the ratification of the Fourteenth Amendment, the key vote took place on a single day: November 6, 1866. On that day, congressional Republicans won a landslide victory in the national congressional elections. Both Republicans and Democrats made the election of 1866 a referendum on the Fourteenth Amendment.² Had the Republicans lost a congressional majority, this would have doomed any hope for passing the Amendment and may well have triggered a new civil war.³ Instead,

1. The debates in and around the state ratifying conventions for the federal Constitution can be found exhaustively presented in the multivolume work *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (Merrill Jensen et al. eds., 1986).

2. According to Eric Foner, "More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'" ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 267 (1988); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 180–82 (1998) (describing how the Fourteenth Amendment became the campaign focus for the 1866 election); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 449 (1960) (noting "the positive function of the election [of 1866] as a referendum on the Fourteenth Amendment"); Richard L. Aynes, *The 39th Congress (1865–1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 *AKRON L. REV.* 1019, 1045 (2009) (similar).

3. According to Michael Les Benedict, "A Johnsonian gain of only twenty or thirty seats would bring on the crisis [of an 'alternate congress']. . . . Republicans urged northern voters to 'secure the all-important point, the election of at least 122 Republicans to the next House of Representatives, the only way . . . by which the country can be saved from an outbreak of violence.'" MICHAEL LES BENEDICT,

the Republicans received a national mandate to move forward in their effort to secure the Amendment's ratification and protect the rights of American citizens in the southern states.⁴

The conjunction of a proposed constitutional amendment and a major national election created a political dynamic quite different than that which existed at the time of the Founding. In 1787, the voters who needed to be persuaded were the members of the individual state ratifying conventions.⁵ Pamphlets and newspaper editorials were generally regional⁶ and the conventions themselves often included days of detailed analysis and debate on the proposed Constitution.⁷ In 1866, by contrast, the relevant voters were the national electorate. Newspapers and pamphlets enjoyed far greater circulation and national penetration⁸ and were put to use by two dominant political parties with the ability to coordinate and widely disseminate their positions on the proposed Fourteenth

A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 207 (1974) (emphasis omitted) (quoting 3 *Nation* 221, 230 (Sept. 20, 1866)); see also ACKERMAN, *supra* note 2, at 178 (discussing the crisis of an alternate congress). According to Congressman Ben Butler at Johnson's Impeachment Trial:

Does any one doubt that if the intentions of the respondent [Johnson] could have been carried out, and his denunciations had weakened the Congress in the affections of the people, so that those who had in the North sympathized with the rebellion could have elected such a minority even of the Representatives to Congress as, together with those sent up from the governments organized by Johnson in the rebellious States, should have formed a majority of both or either House of Congress, that the President would have recognized such body as the legitimate Congress, and attempted to carry out its decrees by the aid of the Army and Navy and the Treasury of the United States . . . and thus lighted the torch of civil war?

PROCEEDINGS IN THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE UNITED STATES SENATE, ON ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES, WITH AN APPENDIX 77 (1868) [hereinafter JOHNSON IMPEACHMENT TRIAL].

4. See, e.g., McKITTRICK, *supra* note 2, at 450 ("The people had spoken and the primary decision on reconstruction had thus been placed beyond dispute for the first time since the end of the war. The Union was to be restored, but there would have to be terms."); see also *The Election, Final Repudiation of the Democratic Party*, N.Y. TIMES, Nov. 7, 1866, at 1 (reporting election results).

5. For accounts of the ratification debates in the several states, see THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 1.

6. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 83–85 (2010).

7. For the best and most accessible introduction to the ratification debates, see *id.*

8. There were 24 daily newspapers at the time of the Founding. By the time of the Civil War, there were more than 250. Taking advantage of technological developments like the telegraph and railroads, newspapers vastly increased their circulation and penetration. James Gordon Bennett's *New York Herald*, for example, had a circulation of "77,000 on the eve of the Civil War, the largest daily circulation in the world." Thomas C. Leonard, *Magazines and Newspapers*, in THE READER'S COMPANION TO AMERICAN HISTORY (Eric Foner & John A. Garraty eds., 1991). Horace Greeley's *New York Tribune* had a weekly circulation of 200,000. *Id.* According to Eric McKittrick, "The fact is that by the summer of 1866 the American people actually had at their disposal an extraordinary amount of information upon which to make up their minds about any political issue, probably as much as would ever be the case in comparable circumstances." McKITTRICK, *supra* note 2, at 439.

Amendment.⁹ Relatively little debate on the amendment took place in the state assemblies.¹⁰ A great deal of debate took place on the national campaign trail.¹¹ This different dynamic has important implications for those seeking to determine the original meaning of the Fourteenth Amendment.

Originalist scholars of the Fourteenth Amendment have long lamented the “sounds of silence” in the state ratifying conventions.¹² When combined with the coercive measures Congress used to secure ratification by the southern states,¹³ this silence seems to make determining the original meaning of the Fourteenth Amendment doubly problematic: there is little we can glean from ratification assemblies in the states, and those assemblies themselves seem to lack the same kind of popular legitimacy as those that met at the time of the Founding.¹⁴ The result has been a far thinner originalist account of the meaning of the Fourteenth Amendment than that which exists for the original Constitution.

Once we understand that the key debates took place as part of a national election and not in individual state ratifying conventions, however, much of the presumed methodological difficulty regarding originalist study of the Fourteenth Amendment disappears. There was a deep and robust public discussion of the Amendment in 1866, one that culminated in a landslide national election in favor of adding the text to the Constitution. As had been the case at the time of the Founding, supporters and opponents of the proposed constitutional text developed sophisticated and specific arguments regarding the meaning of the

9. For a discussion of the political parties’ use of American newspapers during the Civil War, see McKittrick, *supra* note 2, at 439–42.

10. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 145 (1986) (“Most of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it shed little light on their understanding of its meaning.”).

11. Both parties tied their fortunes to the electorate’s conclusion regarding the need to pass the Fourteenth Amendment. See Foner, *supra* note 2, at 267. This guaranteed that the Amendment would play a role in every major campaign speech right up to the November elections.

12. Charles Fairman first articulated the “argument from silence” against an incorporationist reading of the Fourteenth Amendment. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 81–132 (1949). For responses to Fairman that concede the problem of relative “silence,” see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 197–206 (1998); Curtis, *supra* note 10, at 131–53; see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 110 (1998) (“The debates examined so far in Congress, in the state legislatures, in the columns of newspapers, and in the correspondence of congressmen contained little analysis of the issues that would come to plague the Supreme Court once section one of the Fourteenth Amendment became part of the Constitution.”).

13. See Military Reconstruction Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (requiring states to ratify the Fourteenth Amendment as a condition for readmission to the Union). For a discussion of the revolutionary nature of the First Reconstruction Act, see Ackerman, *supra* note 2, at 198–200.

14. For a modern discussion of the Fourteenth Amendment and political legitimacy, compare Amar, *supra* note 12, with Ackerman, *supra* note 2. See also Akhil Reed Amar, *America’s Constitution: A Biography* 364–80 (2005) (discussing how the Fourteenth Amendment was legitimately adopted “within the general Article V framework”); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 *HARV. L. REV.* 1737, 1747 n.25 (2007) (discussing belief that the Fourteenth Amendment was adopted against an unconstitutional background).

text. The Democratic Party and men like President Andrew Johnson, O.H. Browning, and S.S. Nicholas played the roles once played by Anti-Federalists like Patrick Henry, Melancton Smith, and "Brutus." The Republican Party and men like John Bingham, Jacob Howard, and George W. Paschal stepped into roles once played by Federalists like James Wilson, Alexander Hamilton, and James Madison. Republicans even had their own "Publius," the pseudonymous "Madison" who published essays in the *New York Times* that explained and defended the need for the proposed Fourteenth Amendment.¹⁵

Because originalist accounts of the Fourteenth Amendment have tended to focus on the framing debates in the Thirty-ninth Congress, they have both undervalued and underexplored the public political debates of 1866. Most critically, they have completely missed President Johnson's important role as leader of the Anti-Amendment Party in the drama of the Fourteenth Amendment. As the de facto national head of the Democratic Party, Johnson took the lead in crafting arguments against the Amendment. Through what Bruce Ackerman has coined the "paradox of resistance,"¹⁶ Johnson's sustained attempt to defeat the Amendment both deepened and helped shape public understanding of the proposed text and its impact on the autonomy of the states. It was President Johnson, for example, who first declared that congressional efforts to protect the "privileges and immunities of citizens of the United States" required a constitutional amendment.¹⁷ When Congress submitted a proposed amendment that adopted the President's own locution, Johnson responded by challenging the very legitimacy of the Republican Congress and making opposition to the Amendment the focus of the Democratic platform in the fall elections.¹⁸ The subsequent national debate between Johnsonian Democrats and congressional Republicans clarified the choice facing the country: either accept President Johnson's assurance that the southern states could be trusted to protect the national rights of American citizens, such as freedom of speech and assembly, or adopt the Fourteenth Amendment and empower the national government to protect the privileges and immunities of citizens of the United States.

Viewing ratification of the Fourteenth Amendment through the lens of a national election also allows us to see how politically salient events during the summer of 1866 transformed a dry, theoretical discussion of the Amendment's merits into an argument over what was literally a matter of life and death in the southern states. The July 30, 1866 massacre of freedmen meeting in convention

15. See, e.g., Madison, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2.

16. ACKERMAN, *supra* note 2, at 164. According to Ackerman, Andrew Johnson's fight against the Fourteenth Amendment had the ironic result of "increas[ing] the legitimacy of the decision by the People to embrace revolutionary reform." *Id.* Ackerman describes how Johnson's long fight "gave the turbulent debate a pragmatic anchor in reality," rather than involving a "heady" discussion of "constitutional abstractions." *Id.*

17. See *infra* notes 75–78 and accompanying text.

18. See *infra* notes 131–38 and accompanying text.

in New Orleans became a national scandal, particularly when it became clear that state officials had led the attack.¹⁹ Republicans used the New Orleans riot as a stark example of the need to adopt the Fourteenth Amendment in order to protect the rights of speech and assembly against state abridgement. President Johnson's feckless response to the massacre only heightened public concern that the Administration had no intention of securing the rights of national citizenship in the southern states.²⁰ This political blunder became a disaster when Johnson had his Secretary of the Interior, O.H. Browning, publish a letter representing the Administration's position that the Fourteenth Amendment was unnecessary in light of existing protections in state constitutions.²¹ Republicans around the country excoriated the letter and pointed to the blood-stained hands of Louisiana officials as evidence that southern states could not be trusted to protect the national rights of speech and assembly.²² Only weeks after the publication of Browning's letter, Republicans enjoyed a landslide victory at the polls and a popular mandate to secure the ratification of the Fourteenth Amendment.²³

Despite the defeat of "My Policy,"²⁴ President Andrew Johnson had one final act to play in the drama of the Fourteenth Amendment. With ratification at an impasse due to the southern-state policy of "masterly inactivity,"²⁵ President Johnson met with conservative advisors and drafted an alternative amendment that he hoped would attract the support of northern and southern conservatives.²⁶ Unlike the proposed Fourteenth Amendment which declared that "no state shall" henceforth violate the rights of citizens of the United States, Johnson's alternate version erased the proposed Privileges or Immunities Clause and replaced it with a passive reaffirmation of the Comity Clause.²⁷ Instead of requiring states to enforce substantive rights like speech and assembly, John-

19. See *infra* section II.D.2.

20. See *infra* note 176 and accompanying text.

21. See *infra* section III.D.1.

22. See *infra* section III.D.2.

23. See *infra* section III.E.

24. In speeches delivered during his famous 1866 "Swing Around the Circle," President Johnson so often referred to his reconstruction policy as "My Policy" that the very phrase became a subject of Republican mockery. See MCKITTRICK, *supra* note 2, at 428.

25. The idea was that the passing of time would wear down northern support for Reconstruction. As Benjamin Wood published in a contemporary essay for the *New York Daily News*:

We answer, let them do nothing, so far as political action is concerned. Let them simply watch and wait. A masterly inactivity is the best policy they can adopt. Time, that will gradually teach the masses of the North the necessity of redeeming the republicanism of the country, will work out the problem in the interests of the South. The Radicals demand negro suffrage and the ratification of the Constitutional Amendment. They can get neither except by the consent of the Southern States and the suffrages of the Southern people.

CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-1888, Part One A, at 256 (2010) (internal footnotes omitted) (quoting Editorial, *Masterly Inactivity the Policy of the South*, N.Y. DAILY NEWS, Dec. 1, 1866).

26. See *infra* note 242 and accompanying text.

27. See *infra* note 247 and accompanying text.

son's alternative would merely require that states provide equal access to a limited set of state conferred rights.²⁸ The proposal went nowhere, and Congress proceeded to pass a series of legislative acts that ultimately secured the ratification of the Amendment.²⁹

The 1866 national political struggle between Johnson and congressional Republicans opens a historical window on the original meaning and public understanding of Section I of the Fourteenth Amendment. By making the proposed amendment the focus of the dispute between contending political parties, Johnson triggered a sustained national public debate regarding the nature and importance of the privileges and immunities of citizens of the United States. The events of the summer of 1866 further deepened the national debate by focusing on the particular enumerated rights of speech and assembly—rights that were widely accepted *examples* of the privileges or immunities of citizens of the United States.³⁰ Johnson's final effort to replace the language of the Privileges or Immunities Clause with the language of the Comity Clause illustrates his understanding that the Amendment as proposed was both different from and more expansive than the Comity Clause. This cuts equally against two recent lines of scholarship, one viewing the Privileges or Immunities Clause as providing nothing more than a degree of equal protection for state-conferred rights,³¹ the other reading the Clause as opening the door to judicial identification and enforcement of unenumerated rights.³²

The third in a series of works on the origins of the Privileges or Immunities Clause, this Article focuses on public consideration of the Fourteenth Amendment as proposed. Two previous articles considered the antebellum understanding of phrases like "privileges and immunities of citizens of the United States"³³ and the drafting debates in the Thirty-ninth Congress.³⁴ All three aspects—pre-amendment legal understanding, framers' understanding, and contemporaneous public understanding—are critical components of a comprehensive view

28. *See id.*

29. *See* ACKERMAN, *supra* note 2, at 189–205 (discussing the importance of the first and second Reconstruction Acts in the effort to secure the ratification of the Fourteenth Amendment).

30. Michael Curtis has done extremely valuable work highlighting concerns about speech and press both before and after the adoption of the Fourteenth Amendment. *See, e.g.,* MICHAEL KENT CURTIS, *FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000); CURTIS, *supra* note 10. Although Curtis has not developed a theory of the original meaning of the Privileges or Immunities Clause beyond the inclusion of the rights of free speech, this Article is deeply indebted to his path-breaking work exploring the historical evidence in support of an incorporationist reading of the Privileges or Immunities Clause.

31. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 62 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992).

32. *See* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 157 (2012); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 62–65 (2004).

33. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1244 (2010).

34. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 337 (2011).

of the original meaning of the Privileges or Immunities Clause.³⁵ Together, they mutually reinforce a conclusion that the phrase “privileges and immunities of citizens of the United States” referred to the personal rights enumerated in the federal Constitution. These rights included the substantive personal rights listed in the first eight Amendments, as well as the equal rights of sojourning citizens protected under the Comity Clause of Article IV.

This Article divides the events of 1866 into four phases. First, I discuss the early framing debates and the political rupture between congressional Republicans and President Andrew Johnson that occurred in the spring of 1866. Johnson’s March 27 veto of the Civil Rights Act and the congressional override were major public events and signaled what would become the central issue in the fall elections: whether the southern states should be readmitted without condition, or whether they must first be forced to protect the rights of citizens of the United States. The second Part discusses the final framing and initial public discussion of the Fourteenth Amendment during the summer of 1866. The broadly publicized speech of Jacob Howard that introduced the Amendment to the Senate and to the country confirmed what observers of the Thirty-ninth Congress had long suspected: Congress proposed to require the states to protect the constitutionally enumerated rights of American citizens (through the Privileges or Immunities Clause) and the natural rights of all persons (through the Due Process and Equal Protection Clauses). In particular, states must respect the enumerated rights of American citizenship, from the substantive rights listed in the first eight Amendments to the equal protection principles declared by the Comity Clause. In response to what he viewed as a radical intrusion on the reserved powers of the states, President Johnson challenged the right of the rump Congress³⁶ to propose constitutional reform and called on the country to make its opinion on the matter known in the fall election.

The third Part examines the dramatic and tragic events of the summer of 1866 that sharply focused political debate in the fall and clarified to the electorate what was at stake in the upcoming election. The state-sanctioned attack on black delegates meeting in convention in New Orleans on July 30, 1866, shocked northern voters and became a Republican clarion call for ratification of the Fourteenth Amendment. When President Johnson had his administration declare the proposed amendment unnecessary due to the existing protections in

35. For a helpful guide to the history of, and current approaches to, originalist interpretation of the Constitution, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923, 933–39 (2009). For discussions of the form of originalism used in this Article, “public meaning originalism,” see JACK M. BALKIN, *LIVING ORIGINALISM* (2011); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. Rev. 383 (2007).

36. “Rump Congress” is a term occasionally used in reference to the members of Congress who remained after the exit of representatives from the seceding states. See, e.g., ACKERMAN, *supra* note 2, at 171.

state constitutions, Republicans pointed to the massacre in New Orleans as a stark example of why states must be required to protect the constitutionally enumerated rights of speech and assembly.

The fourth and final Part of the Article discusses the aftermath of the Republican landslide and Johnson's final attempt to defeat the Fourteenth Amendment. Working with a group of conservative advisors, Johnson drafted an alternate "fourteenth amendment" that deleted the Privileges or Immunities Clause and replaced it with a passive restatement of the Comity Clause. After months of political debate, it was clear the Privileges or Immunities Clause would force the states to protect rights that under the original Constitution had been left to state control. By erasing that Clause and replacing it with a restatement of the Comity Clause, Johnson's version would do nothing more than require states to provide sojourning citizens equal access to a limited set of state-conferred rights. Johnson's effort failed, but the attempt reflects the commonly accepted distinction between the Comity Clause of Article IV and the proposed Privileges or Immunities Clause—a critical point that cuts against scholarly attempts to equate the rights covered by both clauses. The Article closes with a discussion of remaining questions about the meaning of the Privileges or Immunities Clause and the need for a comprehensive theory of Section I of the Fourteenth Amendment.

I. THE EARLY MONTHS OF 1866

As the Thirty-ninth Congress began its discussion of what would become the Fourteenth Amendment, conservative critics outside the halls of Congress could only watch in frustration. Instead of following President Johnson's lead and moving to normalize relations with the southern states,³⁷ Congress seemed intent on imposing conditions on the readmission of the rebel governments.³⁸ The delay did not sit well with the conservatives. In an essay published on January 10, 1866, Unionist Kentucky Judge Samuel Smith (S.S.) Nicholas essentially echoed the views of the Johnson Administration. "The only proper pending issue," Nicholas wrote, "is how speedily to restore national con-

37. Johnson had already signaled his intent to normalize relations with the southern states by issuing a broad pardon in May of 1865 and by having his Secretary of State William Seward count the votes of southern states for the purposes of ratifying the Thirteenth Amendment that December. *See* ACKERMAN, *supra* note 2, at 153 (discussing Seward's "provocative" proclamation regarding the ratification votes of the southern states); MCKITTRICK, *supra* note 2, at 49 (discussing the Amnesty Proclamation of May 29, 1866).

38. Radical Republicans like Thaddeus Stevens held to a "Dead States" theory whereby the rebel states had committed "political suicide" and could be excluded from participating in the national government until such time as the "living" states were satisfied they had restored a proper form of republican government. *See* GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 101–02 (2006). Not all members of the Thirty-ninth Congress subscribed to the Dead States theory, but the majority agreed that the southern states ought not to be readmitted until Congress could be assured of the proper protection of individual liberty.

cord The speedy restoration of the desired amity indispensably requires, that the South should be promptly invited to a participation in the legislation of Congress."³⁹ Recognizing that Congress intended to bestow the rights of citizenship on newly freed blacks, Nicholas questioned whether such an effort was possible absent a constitutional amendment reversing *Dred Scott*:

If the object of the exclusion experiment is to obtain for freed negroes a change from their mere denizenship to full citizenship, then the effort is to coerce the eleven States into doing what it is very doubtful whether they have power to do. According to the express decision of the Supreme Court, and the concurring legislative and judicial action of nearly every State, a negro never was and never can become a full citizen by reason of any mere State action. Indeed, it is doubtful whether he ever can be made such, except by an amendment of the Constitution.⁴⁰

In fact, the Thirty-ninth Congress was engaged in multiple efforts intended to secure the rights of freedmen. In addition to preparing a reauthorization of the Freedmen's Bureau Act,⁴¹ Congress was drafting a Civil Rights Act that would both define and confer the status of citizenship on newly freed blacks while also guaranteeing a certain degree of equal civil rights in the states.⁴² On a separate but parallel track, John Bingham was spearheading an effort to pass an amendment to the federal Constitution that would require states to protect the constitutionally enumerated rights of citizens and the natural rights of all persons to due process and equal protection.⁴³ None of this was being done in secret: the press reported major speeches in the House and Senate and the country received a steady stream of newspaper editorials commenting on the policies of the Thirty-ninth Congress.⁴⁴ By early February, for example, observers deep in the heartland knew that Congress was moving towards nationalizing constitutionally enumerated rights. According to the *Fort Wayne Daily Democrat*, the Senate had instructed the Joint Committee on Reconstruction to "enquire into [the] expediency of amending the Constitution of the United States so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation *all the guarantees contained in that instrument*."⁴⁵

A. DEBATING THE FIRST DRAFT OF THE FOURTEENTH AMENDMENT

On February 3, 1866, the Joint Committee on Reconstruction adopted Ohio Congressman John Bingham's initial draft of the Fourteenth Amendment:

39. 3 S.S. NICHOLAS, *Power and Policy of Exclusion*, in CONSERVATIVE ESSAYS, LEGAL AND POLITICAL 5, 7 (1867).

40. *Id.* at 13–14.

41. See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 48 (1990).

42. *Id.* at 61.

43. Lash, *supra* note 34, at 349.

44. For a discussion of the significant depth of reporting on political issues during 1866, see MCKITTRICK, *supra* note 2, at 439.

45. *The Nigger Congress!*, *FORT WAYNE DAILY DEMOCRAT*, Feb. 1, 1866, at 4 (emphasis added).

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amendment).⁴⁶

In a February 26 speech before the House, Bingham explained the meaning and purpose of his draft. Of particular importance is Bingham's insistence that the amendment would force the states to protect the "immortal bill of rights," which he insisted included rights enumerated in Article IV and in the Fifth Amendment:

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

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

The fifth article of the amendment provides that—

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

Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. . . .

I ask the attention of the House to the further consideration that the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution. . . .

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

46. BENJ. B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865-1867*, at 61 (1914).

country knows, the civilized world knows, that the legislative, executive, and judicial officers of eleven States within this Union within the last five years, in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.⁴⁷

Bingham fleshed out these ideas in more detail in a speech on February 28. Bingham delivered this second speech in the shadow of Congress's failure, only days earlier, to override President Johnson's federalism-based veto of the Freedmen's Bureau Bill.⁴⁸ Successful passage of the Fourteenth Amendment would have to satisfy the concerns of moderate Republicans or the proposal would meet the same fate. Fully aware of the need to maintain moderate (and moderate-conservative) support, Bingham began by insisting the amendment did not "take away from any State any right that belongs to it."⁴⁹ The purpose of the amendment was simply "to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent—no more.'"⁵⁰ Therefore, "[g]entlemen who oppose this amendment oppose the grant of power to enforce the bill of rights."⁵¹ After quoting the language of Article IV and the Fifth Amendment, Bingham then admonished opponents of the amendment:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?⁵²

47. CONG. GLOBE, 39th CONG., 1st SESS. 1034 (1866); see also *Another Amendment to the Constitution*, N.Y. HERALD, Feb. 27, 1866, at 1, col. 5 (presenting a slightly different version of Bingham's speech than that contained in the *Globe*: "But it was equally clear that by every construction of the constitution—its contemporaneous and continuous construction—that great provision contained in the second section of the fourth article, and in a portion of the fifth amendment adopted by the First Congress in 1789, that immortal bill of rights had hitherto depended on the action of the several States.").

48. President Johnson vetoed the Bill on February 19. See MALTZ, *supra* note 41, at 49. The next day, February 20, the Senate failed to override the veto by two votes, 30–18. See CONG. GLOBE, 39th CONG., 1st SESS. 943 (1866).

49. CONG. GLOBE, 39th CONG., 1st SESS. 1088 (1866).

50. *Id.*

51. *Id.* at 1090.

52. *Id.* at 1089.

Bingham mocked his colleagues for claiming they were “not opposed to the bill of rights” but only opposed to their federal enforcement.⁵³ If states had no authority to violate the Bill of Rights, “how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?”⁵⁴ Such enforcement was essential, argued Bingham, in light of Chief Justice John Marshall’s Supreme Court ruling in *Barron v. Baltimore*⁵⁵ that held that federal courts could not enforce the Bill of Rights against the states.⁵⁶

Although cases like *Barron* barred the courts from enforcing the Bill against the states, Bingham remained convinced that states were nevertheless constitutionally bound to respect the Bill of Rights. Here, Bingham quoted Daniel Webster regarding the oath taken by all state officials to support the Constitution of the United States.⁵⁷ This oath obligated state officials to enforce Article IV and protect what Bingham insisted were its attendant national privileges and immunities.⁵⁸ The Supremacy Clause further obligated the states to protect such rights notwithstanding any state law to the contrary.⁵⁹ The question thus boiled down to “whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question.”⁶⁰ Without such enforcement, the Bill of Rights would stand as “a mere dead letter.”⁶¹

I have explored the roots of Bingham’s theory of the Bill of Rights and national liberty elsewhere.⁶² For the purpose of this Article, it is only important to note that Bingham initially believed that he could accomplish his announced purpose of enforcing the Bill of Rights against the states through federal enforcement of the Comity Clause and that the purpose of the draft was well discussed in the press. President Johnson, the Democrats, and those members of the electorate following events in the national newspapers would be under no illusion regarding Bingham’s target.

53. *Id.* (“Ah! [S]ay gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.”) (emphasis added).

54. *Id.*

55. 32 U.S. 243 (1833).

56. CONG. GLOBE, 39th CONG., 1st SESS. 1088, 1089–90 (1866).

57. *Id.* at 1090.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. See Lash, *supra* note 34.

B. NEWSPAPER REPORTING

Multiple newspapers reported on the debates in the Thirty-ninth Congress regarding John Bingham's proposed Fourteenth Amendment. On February 14, the *Daily Milwaukee News* reported both Bingham's first draft and his explanation that "the object of the amendment was to *extend universally* the guarantee of constitutional protection."⁶³ The Illinois *Alton Weekly Telegraph* also reported Bingham's proposed amendment and his explanation that "[t]he proposed amendment placed no obligation on any State or citizen not now enjoined by the letter of the Constitution."⁶⁴ The *New York Times* and the *New York Herald* (the most widely distributed newspaper in the country at the time)⁶⁵ both reported Bingham's speech of January 26, in which he declared that states ought to be bound to protect the "immortal Bill of Rights."⁶⁶

Newspaper reportage covered the arguments of both supporters and critics of Bingham's initial draft of the Fourteenth Amendment. The *New York Times*, for example, reported Congressman Robert Hale's objection that Bingham's effort would "utterly obliterate State rights and State authority over their own internal affairs."⁶⁷ On March 1, the *New York Times* published John Bingham's speech of February 28, in which Bingham declared that his proposal did not "take from any State rights that belonged to it under the Constitution" and that "[t]his was simply a proposition to arm the Congress of the United States, by the consent of the people, with power to enforce the Bill of Rights as it stood in the Constitution. It had that extent—no more."⁶⁸ The *Times* then reported Robert Hale's "clear and forcible speech"⁶⁹ opposing Bingham's amendment in part because Hale believed that the states already were constrained by the federal Bill of Rights.⁷⁰ That same day, the *Times* also printed an editorial on "Amending the Constitution," which noted Hale's "able and interesting speech" and warned that Bingham's "amendment seem[ed] to be only another of the steps proposed by the Radicals in Congress, for the consolidation of the central power, and the complete overthrow of State authority."⁷¹ Almost in confirmation of the *Times's*

63. DAILY MILWAUKEE NEWS, Feb. 14, 1866, at 1 (emphasis added).

64. ALTON WEEKLY TELEGRAPH, Mar. 2, 1866, at 2.

65. AMAR, *supra* note 12, at 187; MCKITRICK, *supra* note 2, at 441.

66. N.Y. TIMES, Feb. 27, 1866, at 8 (reprinting Bingham's speech and its reference to "this immortal Bill of rights"); see also *Another Amendment to the Constitution*, *supra* note 47.

67. *Amending the Constitution: Federal Power and State Rights*, N.Y. TIMES, Mar. 2, 1866, at 2 (reporting on Hale's speech).

68. *Thirty-ninth Congress, First Session*, N.Y. TIMES, Mar. 1, 1866, at 4.

69. *Debate in the House on the Constitutional Amendment, Clear and Forcible Speech by Mr. Hale Against Its Adoption*, N.Y. TIMES, Feb. 28, 1866, at 1.

70. The *Times* reported that Hale described the first ten Amendments as "a bill of rights for the protection of the citizen, and defining and limiting of power of Federal and State legislation" and also reported Hale's colloquy with Bingham in which Hale noted that he had always "gone along with the impression" that the Bill of Rights bound the states "in some way, whether with or without the sanction of a judicial decision that we are so protected." *Amending the Constitution*, *supra* note 2 (emphasis added).

71. Editorial, *Amending the Constitution*, N.Y. TIMES, Mar. 2, 1866, at 4.

warning, the *Congressional Globe* published Bingham's speech of February 28 as a pamphlet titled, "*One Country, One Constitution, and One People*": *In Support of the Proposed Amendment To Enforce the Bill of Rights*.⁷² Finally, on March 10, the *Times* reported Bingham's declaration that "the enforcement of the Bill of Rights in the Constitution was the want of the republic."⁷³

By pointing out the degree of newspaper coverage for Bingham's initial draft of the Fourteenth Amendment, I do not mean to suggest the public was broadly aware of the content of the proposal or Bingham's particular theory of the Constitution. It is true that anyone following the debate in the *New York Times* and the widely circulated *Herald* would have known that Bingham was attempting to nationalize the Bill of Rights. At this point, however, there was little reason for the general public to focus its attention on the debates of the Thirty-ninth Congress. That would change, of course, as the fall elections approached and both parties made the amendment the focus of their campaigns. However, by clarifying the purposes of his amendment, Bingham alerted the political opposition, both in Washington, D.C., and around the country, that a proposal was now on the table that would dramatically alter the autonomy of the states. One member of that opposition paying especially close attention to the actions of the Thirty-ninth Congress was President Andrew Johnson.

C. ANDREW JOHNSON'S VETO OF THE CIVIL RIGHTS ACT

President Johnson's February veto of an extension of the Freedmen's Bureau Bill came as a surprise to congressional Republicans.⁷⁴ There had been little reason at the time to suspect that Johnson would refuse to work with Congress on a bipartisan approach to Reconstruction. His veto of the Civil Rights Act, however, amounted to a declaration of political war.⁷⁵

The Civil Rights Act of 1866 declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States"; these citizens would henceforth enjoy 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

72. See John A. Bingham, *One Country, One Constitution, and One People: In Support of the Proposed Amendment To Enforce the Bill of Rights*, CONG. GLOBE, Feb. 28, 1866 (pamphlet).

73. *Thirty-ninth Congress: First Session. Senate*, N.Y. TIMES, Mar. 10, 1866, at 1.

74. See FONER, *supra* note 2, at 247; MCKITRICK, *supra* note 2, at 286–88. Under the original Act, the Freedmen's Bureau was vested with control over every aspect of refugees and freedmen in the southern states until one year following the end of hostilities. The vetoed bill would have both extended the life of the Act and expanded its jurisdiction throughout the country. For a general discussion of the proposed extension of the Freedmen's Bureau Act, see BENEDICT, *supra* note 3, at 147–50.

75. According to Eric Foner, "[f]or Republican moderates, the Civil Rights veto ended all hope of cooperation with the President." FONER, *supra* note 2, at 250; see also *id.* (quoting a letter by a member of the Ohio Senate, saying "[i]f the President vetoes the Civil Rights bill, I believe we shall be obliged to draw our swords for a fight and throw away the scabbard").

property, as is enjoyed by white citizens.”⁷⁶ To President Johnson, both the bestowal of national citizenship and the regulation of equal rights in the states were beyond the legitimate powers of Congress.

In his veto message, Johnson distinguished the rights of national citizenship from the rights of state citizenship and objected to Congress’s effort to confer the former upon the freedmen:

By the first section of the bill, all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is by the bill made a citizen of the United States. It does not purport to declare or confer any other right of citizenship than Federal citizenship. It does not purport to give these classes of persons any status as citizens of States, except that which may result from their status as citizens of the United States. The power to confer the right of State citizenship is just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress.

The right of Federal citizenship thus to be conferred on the several excepted races before mentioned is now, for the first time, proposed to be given by law.⁷⁷

To Johnson, conferring the rights of national citizenship on these “previously excluded groups” was unwise. “Can it be reasonably supposed,” Johnson wrote, “that they possess the requisite qualifications to entitle them to *all the privileges and immunities of citizens of the United States*?”⁷⁸

This is the first appearance in the debates of 1866 of the phrase that would enter our fundamental law in Section I of the Fourteenth Amendment. John Bingham’s original draft of the Fourteenth Amendment had used the language of the Comity Clause: “privileges and immunities of *citizens in the several*

76. Here is the full language of Section One of the Civil Rights Act:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, 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.

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

77. CONG. GLOBE, 39th CONG., 1st SESS. 1679 (1866).

78. *Id.* (emphasis added).

states.”⁷⁹ Although his effort was to secure the constitutional rights of American citizens listed in the Bill of Rights, his colleagues pointed out that his language would be read as doing nothing more than requiring the states to provide a degree of equal protection to sojourning citizens.⁸⁰ This response to Bingham’s first draft reflected a commonly accepted antebellum distinction between the rights “of citizens in the several states,” which provided equal access to state-conferred rights and was covered by the Comity Clause, and the “rights, advantages and immunities of citizens of the United States” bestowed by treaties like the Louisiana Cession Act⁸¹ and that referred to constitutionally conferred rights such as those declared in the First Amendment.⁸²

In his veto message to Congress,⁸³ President Johnson made the same kind of distinction: the privileges and immunities of citizens of the United States are not those of *state* citizenship conferred in various degrees by the several states but instead involve the rights of *federal* citizenship that are conferred equally upon all American citizens. To Johnson, the “the privileges and immunities of United States citizens” were of such high importance that immigrants had to first go through a period of probation and education before qualifying to become a citizen of the United States:

[T]he policy of the Government, from its origin to the present time, seems to have been that persons who are strangers to and unfamiliar with our institutions and our laws should pass through a certain probation, at the end of which, before attaining the coveted prize, they must give evidence of their

79. KENDRICK, *supra* note 46, at 61 (emphasis added).

80. Lash, *supra* note 34, at 378 & n.232.

81. According to the Louisiana Cession Act:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

Louisiana Purchase Treaty, U.S.-Fr., art. III., Apr. 30, 1803, 8 Stat. 200, 202. The language of the act became the basis for numerous antebellum treaties that bestowed the rights of American citizenship on inhabitants of acquired territory. See Lash, *supra* note 33, at 1285.

82. See AMAR, *supra* note 32, at 157. When the American citizens of the Arkansas territory gathered in convention to propose a Bill of Rights, the Jackson Administration denied that the assembly had authority to draft a constitution but nevertheless conceded that:

They undoubtedly possess the ordinary privileges and immunities of citizens of the United States. Among these is the right to assemble and to petition the Government for the redress of grievances; In the exercise of this right, the inhabitants of Arkansas may peaceably meet together in primary assemblies, or in conventions chosen by such assemblies, for the purpose of petitioning Congress to abrogate the Territorial government, and to admit them into the Union as an independent State.

CONG. GLOBE, 35th CONG., 1st SESS. 14, 16 (1857) (quoting speech by Stephen A. Douglas regarding the President’s message); see also AMAR, *supra* note 12, at 168; Lash, *supra* note 33, at 1299.

83. CONG. GLOBE, 39th CONG., 1st SESS. 1679 (1866).

fitness to receive and to exercise *the rights of citizens as contemplated by the Constitution of the United States*.⁸⁴

Johnson then turned to the rights specifically protected in the Act: "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 for the security of person and property as is enjoyed by white citizens."⁸⁵ According to Johnson, "[h]itherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States."⁸⁶ Unlike the "privileges and immunities of citizens of the United States," these "are matters which in each State concern the domestic condition of its people, varying in each according to its own peculiar circumstances, and the safety and well-being of its own citizens."⁸⁷ Although the federal Constitution contains some restrictions on state authority in Article I, Section 9, Johnson asked, "Where can we find a Federal prohibition against the power of any State to discriminate, as do most of them, between aliens and citizens, between artificial persons called corporations and natural persons, in the right to hold real estate?"⁸⁸ He added:

If Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and, finally, to vote "in every State and Territory of the United States." As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the Federal power; but as to the States no similar provisions exist, vesting in Congress the power "to make rules and regulations" for them.⁸⁹

The general thrust of Johnson's argument was that beyond those constraints that the Constitution expressly placed upon the states, local governments retained the constitutionally established right to control the substance of local civil rights. Echoing the same rule announced by the Supreme Court in *Barron v. Baltimore*,⁹⁰ Johnson declared:

[T]he Constitution guaranties nothing with certainty, if it does not insure to the several States the right of making and executing laws in regard to all

84. *Id.* (emphasis added).

85. *Id.*

86. *Id.* at 1680.

87. *Id.*

88. *Id.*

89. *Id.*

90. 32 U.S. 243, 251 (1833) (ruling that the Takings Clause of the Fifth Amendment does not bind the states).

matters arising within their jurisdiction, subject only to the restriction that in cases of conflict with the Constitution and constitutional laws of the United States the latter should be held to be the supreme law of the land.⁹¹

Johnson concluded his objections to the Bill with an appeal to constitutional federalism:

[The provisions of the Civil Rights Act] interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative power in the national Government.⁹²

On March 27, President Johnson's veto of the Civil Rights Bill exploded across newspaper headlines throughout the United States, with many papers printing his accompanying message in full.⁹³ Although an important part of the story of Reconstruction, the importance of President Johnson's veto in terms of the ultimate draft of the Fourteenth Amendment has been completely missed.

Johnson's suggestion that Congress lacked constitutional authority to confer the status of national citizenship would ultimately lead to the addition of the citizenship clause of the Fourteenth Amendment.⁹⁴ But even more importantly, Johnson introduced the language of the rights of national citizenship into the legislative and public debate. In one of the most (if not the most) widely publicized speeches of 1866, Johnson announced that Congress had sought to confer the "*privileges and immunities of citizens of the United States*," a category of rights altogether different from the state-conferred rights protected under the Comity Clause.⁹⁵ This particular locution regarding the rights of national citizenship would soon become a part of the Fourteenth Amendment.

91. CONG. GLOBE, 39th CONG., 1st SESS. 1679, 1680 (1866).

92. *Id.* at 1681.

93. ALBANY EVENING J., Mar. 28, 1866, at 2 (Albany, N.Y.); BOS. DAILY ADVERTISER, Mar. 28, 1866, at 1; *The Civil Rights Bill and the President's Veto*, N.Y. TIMES, Mar. 28, 1866, at 1; DAILY NAT'L INTELLIGENCER, Mar. 28, 1866, at 1 (Wash., D.C.); DAILY AGE, Mar. 28, 1866, at 1 (Phila., Pa.); DAILY NAT'L REPUBLICAN, Mar. 31, 1866, at 1 (publishing excerpt from NEW HAVEN PALLADIUM); NEW HAMPSHIRE SENTINEL, Apr. 5, 1866, at 1 (Keene, N.H.); N.Y. DAILY TRIB., Mar. 28, 1866, at 7; PITTSFIELD SUN, Apr. 5, 1866, at 1 (Pittsfield, Mass.); *President's Message Vetoing the Civil Rights Bill*, CEDAR FALLS GAZETTE, Apr. 6, 1866, at 1 (Cedar Falls, Iowa); SALT LAKE DAILY TELEGRAPH, Mar. 29, 1866, at 2; SEMI-WKLY. TELEGRAPH, Apr. 2, 1866, at 1 (Salt Lake City, Utah); VT. J., Apr. 7, 1866, at 1 (Windsor, Vt.); *Veto of the Civil Rights Bill*, TITUSVILLE MORNING HERALD, Mar. 31, 1866, at 1 (Titusville, Pa.); WKLY. PATRIOT & UNION, Apr. 5, 1866, at 2 (Harrisburg, Pa.); WOOSTER REPUBLICAN, Apr. 5, 1866, at 1 (Wooster, Ohio).

94. See *infra* note 131 and accompanying text.

95. See *supra* notes 77–78 and accompanying text.

D. CONGRESSIONAL OVERRIDE: THE SPEECH OF LYMAN TRUMBULL

Following President Johnson's veto of the amended version of the Civil Rights Act, the Senate sponsor of the Bill, Illinois Senator Lyman Trumbull, delivered an extended speech defending the Act against Johnson's objections that the Act expanded federal power beyond the proper subjects of national regulation.⁹⁶ The veto and Trumbull's speech signaled the final breach between the President and the Republicans of the Thirty-ninth Congress. According to Eric McKittrick, when Trumbull spoke on April 4, he "made his case, and that of the Republican Party."⁹⁷

Trumbull began by reassuring any wavering Republicans that although the federal government had power to protect the fundamental civil rights of American citizens, this power would not extend to conferring political rights such as suffrage. "The right to vote and hold office in the States," explained Trumbull, "depends upon the legislation of the various States."⁹⁸ Trumbull then carefully cabined the particular rights covered by the Act. Invoking the language of the Fifth Amendment, Trumbull explained that the rights of American citizenship included the equal protection of one's life, liberty, and property.⁹⁹ Trumbull also invoked rights covered by the Comity Clause of Article IV, but described these rights as involving the principle of nondiscrimination:

The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. 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.¹⁰⁰

E. CONFERRING THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

In his veto message to Congress, President Johnson insisted that the Act's attempt to bestow newly freed blacks in the several states with all the privileges and immunities of citizens of the United States was an unprecedented use of

96. CONG. GLOBE, 39TH CONG., 1ST SESS. 1757 (1866).

97. MCKITTRICK, *supra* note 2, at 316.

98. CONG. GLOBE, 39TH CONG., 1ST SESS. 1757 (1866).

99. *Id.* Trumbull's use of the Fifth Amendment as a textual hook for the Act mirrors a similar move by the Act's sponsor in the House, James Wilson, who initially defended the Act by making expansive claims about federal power to protect fundamental rights but eventually moved to an argument based on the enforcement of enumerated rights such as those found in the Fifth Amendment. Compare CONG. GLOBE, 39TH CONG., 1ST SESS. 1117-19 (1866), with CONG. GLOBE, 39TH CONG., 1ST SESS. 1295-96 (1866); see also NELSON, *supra* note 12, at 86 (noting the "libertarian scope" became "somewhat narrower" as the Thirty-ninth Congress crafted specific legislation); Lash, *supra* note 34, at 379-81 (highlighting the shift in Wilson's position as he defended the bill on March 1).

100. CONG. GLOBE, 39TH CONG., 1ST SESS. 1760 (1866). Representative Lawrence's speech in the House on April 7 followed this same basic approach: the rights of life, liberty, and property protected under the Fifth Amendment represent inherent rights that no state may abridge. See *id.* at 1833 (Remarks of Mr. Lawrence) (Apr. 7, 1866).

congressional power. In response, Trumbull declared, "This is not a misapprehension of the law, but a mistake in fact, as will appear by references to which I shall call the attention of the Senate, and which will show that the President's facts are as bad as his law."¹⁰¹ Trumbull then repeated his earlier citation of the treaty with the Stockbridge Indians but also added a specific reference to the rights, advantages, and immunities of citizens of the United States guaranteed by the Louisiana Cession Act. Quoting from *Lawrence's Wheaton on International Law*, Trumbull recited:

"[b]y the third article of the first convention of April 30, 1800, with France, for the cession of Louisiana, it is provided that the inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted, as soon as possible, according to the principles of the Federal Constitution to the enjoyment of all rights, advantages, and immunities of citizens of the United States."¹⁰²

Trumbull did not disagree with President Johnson that the rights of American citizenship were altogether different from the rights of state citizenship, including the state-level rights specifically named and granted equal protection by the Civil Rights Act. Trumbull simply maintained that Congress had bestowed the rights of national citizenship in the past, citing precedents like the Louisiana Cession Act of 1803 as examples of congressional conferral of the "rights, advantages, and immunities of citizens of the United States."¹⁰³

Trumbull's speech was widely reported in the press,¹⁰⁴ as was Congress's

101. *Id.* at 1756.

102. *Id.* (quoting LAWRENCE'S WHEATON ON INTERNATIONAL LAW 897). In his speech to the House supporting an override of Johnson's veto, Representative William Lawrence of Ohio also cited the Louisiana Cession Act as establishing the authority to "declare that classes of people collectively, shall be citizens." *See id.* at 1832.

103. *Id.* at 1756.

104. As they had with Johnson's veto message, newspapers widely reported Trumbull's speech defending the congressional override, with a number of papers reprinting the entire text of his speech. *See By Telegraph to the Boston Daily Advertiser the Civil Rights Bill Debate in the Senate*, BOS. DAILY ADVERTISER, Apr. 5, 1866, at 1 (providing significant excerpts of the speech, including Trumbull's reference to the Louisiana Cession Act); DAILY AGE, Apr. 5, 1866, at 1 (Phila., Pa.) (full speech); N.Y. TRIB., Apr. 5, 1866, at 1 (full speech); *Senator Trumbull On The President's Veto*, HARTFORD DAILY COURANT, Apr. 7, 1866, at 1 (full speech); *see also* BOS. DAILY J., Apr. 6, 1866, at 4 (edited version, with text in full until "bad as his law," then paraphrases, "Here Mr. Trumbull read extracts from Wheaton's International Law, showing that by various treaties, resolutions and acts of Congress, Frenchmen and Spaniards, Mexicans and Indians have at various times been made citizens of the United States.").

Trumbull's speech generated responses, both supporting and opposing, regarding whether Congress had the power to grant the rights of national citizenship upon persons in the states, and whether groups like newly freed blacks were ready to enjoy the rights of American citizenship. *Compare American Citizenship*, 54 COLUMBIAN WKLY. REG., May 19, 1866 (New Haven, Conn.) (arguing that, although the federal government may make citizens in the territories through treaty, or may establish a uniform rule of naturalization for foreign-born immigrants, the Tenth Amendment reserves to the states the power to make citizens of persons born on state soil), with *The Civil Rights Law at the South*, BOS. J., Apr. 24, 1866, at 4 (published as BOS. DAILY J.) ("While some of the Northern Democrat organs have been

successful override of Johnson's veto¹⁰⁵—the first successful override involving a major piece of legislation in American history.¹⁰⁶ Although Congress mustered the votes to override Johnson's veto, serious concerns remained regarding whether Congress had power to pass the Act, even if the Act was narrowly construed. John Bingham, for example, argued that the Act exceeded Congress's constitutional powers.¹⁰⁷ Bingham not only voted against the Act, he declined to support the congressional override.¹⁰⁸ As Congress took up consideration of a new draft of the Fourteenth Amendment, it did so facing the possibility that the Civil Rights Act might be struck down by the Supreme Court as exceeding federal power. For now, President Johnson had alerted the country to the unconventional effort by Congress to confer upon newly freed blacks the rights of *citizens of the United States*. The people who followed this well-published drama would soon see this phrase again, this time in the text of the proposed Fourteenth Amendment.

F. REPORTING THE SECOND DRAFT OF THE FOURTEENTH AMENDMENT

When John Bingham voted with his colleagues to postpone discussion of his initial draft of the Fourteenth Amendment, the conservative press was pleased but cautious. Under the headline, "*Practical failure of the Constitutional Amendment*," the *New York Times* reported Hotchkiss's objection that Bingham's initial draft "was not radical enough" and that Congress had "moved its postponement until the second Tuesday of April."¹⁰⁹

As news emerged that the Committee of Fifteen had completed work on a second draft, so too did warnings in the conservative press. On April 27, the *Richmond Whig* reported:

After a lull of excitement, it begins to be rumored that the Committee of fifteen is ready to make another report on the subject of reconstruction, which is said to be the suggestion of Robert Dale Owen, and to be more radical than anything that has yet been proposed. The Washington correspondent of the

instigating the President not to execute the Civil Rights act . . . we are glad to observe prominent Southern organs taking a much more sensible and becoming course. The *Mobile Register*, for instance, edited by John Forsyth, says that Alabama already has a class citizens very similar to what the negroes will be under the Civil Rights act, namely, the colored Creoles who, being citizens under the Spanish government, were secured the rights of American citizenship by the treaty of 1819. They have proved an exemplary class . . .").

105. The Senate voted on April 6, 1866, to override Johnson's veto, 33–15. CONG. GLOBE, 39th CONG., 1st SESS. 1809 (1866). The House followed suit on April 9, the override passing on a vote of 122–41 (Bingham abstaining). *Id.* at 1861.

106. McKITRICK, *supra* note 2, at 323.

107. According to Bingham, "[t]he Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States." CONG. GLOBE, 39th CONG., 1st SESS. 1291 (1866). For a discussion of members' concerns about the constitutionality of the Act, see Lash, *supra* note 34, at 378–95.

108. See CONG. GLOBE, 39th CONG., 1st SESS. 1861 (1866).

109. *Gratifying Triumph of Moderate Counsels*, N.Y. TIMES, Mar. 1, 1866, at 4.

New York World thus describes its provisions: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.¹¹⁰

When the members of the Joint Committee on Reconstruction renewed their consideration of what would become the Fourteenth Amendment, they did so fully aware of their colleagues' objections to national control of common law civil rights. Concerns about federal power doomed both the override of the Freedmen's Bureau veto and Bingham's initial draft of the Fourteenth Amendment,¹¹¹ and similar concerns forced a change in the language of the Civil Rights Act.¹¹² Any new draft of the Fourteenth Amendment would have to avoid raising similar concerns.

There is no record of the discussions by members of the Joint Committee regarding their views on the various forms of the new draft, but we do have a record of the drafts it considered, as well as the votes of individual members. The initial draft originated as a proposal by Indiana Congressman Robert Dale Owen¹¹³: "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."¹¹⁴ John Bingham immediately moved to amend the proposal by broadening the equal protection principle beyond race and adding a substantive liberty from the Bill of Rights: "[N]or 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."¹¹⁵ After Bingham's motion to amend failed, he joined a majority vote in favor of the original proposal.¹¹⁶ Bingham did not give up, however, and he eventually persuaded fellow committee members to replace Owen's proposal with an entirely different provision:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.¹¹⁷

Bingham's new draft amendment survived a back-and-forth series of votes that first adopted, then rejected, then readopted his proposal.¹¹⁸ This became the

110. *Congress and Its Pet Committee*, RICHMOND WHIG, Apr. 27, 1866, at 1.

111. See Lash, *supra* note 34, at 363, 378.

112. See *id.* at 391–93 (discussing the deletion of the term "civil rights" from the Civil Rights Act).

113. For a discussion of Robert Owen and his presentment of a draft Fourteenth Amendment to Thaddeus Stevens, see Epps, *supra* note 38, at 198–200.

114. KENDRICK, *supra* note 46, at 296.

115. *Id.* at 85.

116. *Id.*

117. *Id.* at 87.

118. *Id.* For an account of the various votes, see MALTZ, *supra* note 41, at 82.

final version of Section I of the Fourteenth Amendment.¹¹⁹

Bingham's first draft had used the language of Article IV's Comity Clause and its protection of the rights "of citizens in the several states." Bingham's second draft dropped the language of the Comity Clause and instead protected the rights "of citizens of the United States." This new version met Johnson's challenge that protecting such rights required a constitutional amendment, and it did so by using Johnson's own language regarding the "privileges and immunities of citizens of the United States"—language rooted in antebellum treaties such as the Louisiana Cession Act, which Trumbull had named as legal precedent. I have elsewhere explored in detail the drafting of the Privileges or Immunities Clause and the associated congressional debates.¹²⁰ Here, I want to focus on how the draft and the major debates were communicated to the public.

Newspapers around the country quickly reported Bingham's new draft and its adoption by the House.¹²¹ Although newspaper coverage of the final House debates was relatively slight,¹²² the coverage of Jacob Howard's presentation of the amendment to the Senate was wide and deep. At least four major papers reprinted Howard's discussion of Section I: the *New York Times*, the *Philadelphia Inquirer*, the Washington, D.C. *National Intelligencer*, and the *New York Herald*.¹²³

The public dissemination of Howard's speech is important for a number of reasons. Not only did Howard present the official understanding of the Commit-

119. The full text of Section I reads:

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

U.S. CONST. amend. XIV, § 1.

120. See generally Lash, *supra* note 34.

121. *Amendment of the Constitution—Proposition of the Reconstruction Committee*, EVENING BULL., May 1, 1866, at 2 (S.F.) (reporting the new draft); *Passage in the House of the Constitutional Amendment of the Committee of Fifteen*, N.Y. HERALD, May 11, 1866, at 6; BURLINGTON DAILY HAWKEYE, May 12, 1866, at 2 (Iowa).

122. See, e.g., *From Washington*, JANESVILLE GAZETTE, May 2, 1866, at 1 (noting that "Mr. Bingham of Ohio" would present an amendment "next Tuesday morning"); see also *Closing A Debate: Speech of Hon. Thaddeus Stevens on Closing Debate on the Reconstruction Amendments*, N.Y. TIMES, May 14, 1866, at 8 (recording Stevens's final comments on the amendment).

123. See *Senator Howard's Speech*, PHILA. INQUIRER, May 24, 1866, at 8; N.Y. TIMES, May 24, 1866, at 1; NAT'L INTELLIGENCER, May 24, 1866, at 3; N.Y. HERALD, May 24, 1866, at 1. According to Eric Foner, at that time the Herald was the nation's most widely circulated paper. See FONER, *supra* note 2, at 260–61. Regional papers also printed the relevant portions of Howard's speech. See *Speech of Hon. J. M. Howard in the Senate*, May 25, HILLSDALE STANDARD, June 5, 1866 (Mich.). Thomas Hardy has identified a few transcription errors and slight differences in the newspaper reporting of Howard's speech, but none affecting the substantive content or any critical passage. See Thomas T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695, 715–16 (2009). Hardy's helpful article primarily focuses on the published speeches of Bingham and Howard and does not discuss the general political debates regarding the Fourteenth Amendment in 1866. See *id.*

tee of Fifteen, he also presented the public with a detailed account of the meaning of “privileges or immunities of citizens of the United States.”

Here is the critical section of Howard’s speech:

[T]he personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . ¹²⁴

According to Howard, the amendment would protect enumerated constitutional rights such as those protected under the Comity Clause and those listed in the first eight amendments to the Constitution. The general idea was that every personal right listed in the federal Constitution constituted a right of American citizenship. In this way, the final draft fulfilled the intentions of Congress first reported by the press back in February. As the *Fort Wayne Daily Democrat* had pointed out, Congress had instructed the Joint Committee on Reconstruction to “enquire into expediency of amending the Constitution of the United States so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation *all the guarantees contained in that instrument*.”¹²⁵

Even those papers with a conservative bias appreciated Howard’s clarity and good faith explanation of the amendment. The *New York Times*¹²⁶ devoted a noteworthy editorial to Howard’s “frank and satisfactory” speech and praised his detailed description of the Privileges or Immunities Clause as “clear and cogent.”¹²⁷ In fact, from this point forward, public discussion of the Fourteenth Amendment commonly referred to the proposal as the “Howard Amend-

124. CONG. GLOBE, 39th CONG., 1st SESS. 2765 (1866).

125. *The Nigger Congress*, FORT WAYNE DAILY DEMOCRAT, Feb. 1, 1866 (emphasis added); see also George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323, 353 (2009).

126. According to Michael Les Benedict, the *New York Times* was “the conservative organ of the Seward–Weed faction of the New York Republican party.” BENEDICT, *supra* note 3, at 111.

127. Editorial, *The Reconstruction Committee’s Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4.

ment.”¹²⁸ Not every paper printed Howard’s entire speech, and at least one report emphasized the link to the Comity Clause.¹²⁹ Still, whether by way of Bingham’s long-reported effort to nationalize the Bill of Rights, President Johnson’s warnings, or the substantial reporting of Howard’s description of national “privileges or immunities,” the general idea of the Fourteenth Amendment seemed to be getting through. As conservative commentator S.S. Nicholas ruefully wrote not long after Congress adopted the proposed Fourteenth Amendment:

The bill of rights, or what are termed the guaranties of liberty, contained in the Federal Constitution, have none of them any sort of application to or bearing upon the State governments, but are solely prohibitions or restrictions upon the Federal Government. The recent attempt in Congress to treat them as guaranties against the State governments, with an accompanying incidental power to enforce the guaranties, is a surprising evidence of stolid ignorance of Constitutional law, or of a shameless effort to impose upon the ignorant.¹³⁰

II. PRESIDENTIAL OPPOSITION: THE SUMMER OF 1866

A. JOHNSON’S CHALLENGE TO THE LEGITIMACY OF THE THIRTY-NINTH CONGRESS

The House adopted Bingham’s version of Section I and sent the amendment to the Senate which then added a sentence to Section I declaring that “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.”

128. See N.Y. DAILY TRIB., June 29, 1866, at 4 (“The Raleigh N.C. Standard says of Reconstruction and the Constitutional Amendment: ‘We prefer the President’s plan. We are for that plan against all others. But if we cannot get it, we will take the Howard amendment, because we know that if we reject it the terms thereafter imposed will be much harder than any we have yet feared. Is this view not reasonable? Who says nay to it?’”); FLAKE’S BULL., July 8, 1866, at 4 (Galveston, Tex.) (same); CINCINNATI DAILY ENQUIRER, Sept. 21, 1866, at 3 (“[Gubernatorial candidate Hon. W. Fred] Dockery stands boldly on the Howard amendment and the whole basis, which Governor Holden says will give him a large majority in the western part of the State, and with the vote of the rest of the State, may elect him.”); N.Y. DAILY TRIB., Sept. 21, 1866, at 5 (also reporting Dockery’s support of the “Howard Amendment”); BOS. DAILY ADVERTISER, Sept. 22, 1866, at 1 (same as above); BOS. J., published as BOS. DAILY J., Nov. 21, 1866, at 4 (noting Governor Worth’s publicly declared opposition to the “Howard Amendment”); N.Y. HERALD, Nov. 30, 1866, at 3 (citing “Unconditional Union man” Mr. Logan of Rutherford County’s following resolve: “that it is the sense of this House that the article proposed by the Congress of the United States as an amendment to the constitution of the same, known as the Howard Amendment and Article 14, should be ratified by the General Assembly of North Carolina, now in session”), *The Howard Amendment*, TIMES-PICAYUNE, published as DAILY PICAYUNE, Mar. 9, 1867, at 9 (New Orleans, La.) (presenting a tally of states that had ratified or rejected “The Howard Amendment”); see also JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 100 (1984) (noting that the “Howard Amendment” was “a name often given to the Fourteenth Amendment”).

129. See *Reconstruction the Debate in the Senate*, BOS. DAILY ADVERTISER, May 24, 1866, at 1 (paraphrasing Howard’s speech as referring only to the rights of the Comity Clause).

130. 3 S.S. NICHOLAS, *The Civil Rights Act*, in *CONSERVATIVE ESSAYS, LEGAL AND POLITICAL*, *supra* note 39, at 47, 48–49.

The Clause echoed the opening provision of the Civil Rights Act, a sentence opposed by President Johnson and one that might well be repealed if the Democrats should one day take control of Congress. In order to prevent this, Jacob Howard convinced his colleagues to add the Citizenship Clause in order to "put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power."¹³¹ The House concurred with the Senate's alterations on June 13, and Congress then sent the amendment to the Secretary of State for forwarding to the States for ratification.¹³²

Nine days later, President Johnson sent a message to Congress in which he refused to support the amendment and, instead, challenged the very legitimacy of the sitting Congress.¹³³ "[O]f the thirty-six States which constitute the Union, eleven are excluded from the representation in either House of Congress," Johnson wrote, "[despite that] they have been entirely restored to all their functions as States, in conformity with the organic law of the land, and have appeared at the national capital by Senators and Representatives, who have applied for and have been refused admission to the vacant seats."¹³⁴ Nodding towards the fall elections, Johnson added:

Nor have the sovereign people of the nation been afforded an opportunity of expressing their views upon the important questions which the amendment involves. Grave doubts, therefore, may naturally and justly arise as to whether the action of Congress is in harmony with the sentiments of the people, and whether State Legislatures, elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment.¹³⁵

Both the "letter and spirit of the Constitution . . . suggest[ed] a doubt whether any amendment to the Constitution ought to be proposed by Congress and pressed upon the Legislatures of the several States for final decision until after the admission of . . . loyal Senators and Representatives of the now unrepresented States."¹³⁶ Johnson's meaning was clear: the current Congress lacked the legal and political legitimacy to propose an amendment. Reconstruction should not go forward until *first* readmitting the excluded states.

Johnson's frontal assault on the legitimacy of the sitting Congress profoundly raised the stakes for the coming election. If the Republicans ended up with less than 122 seats in the House (a loss of twenty to thirty seats), Johnson could cobble together a coalition of conservative northern and currently excluded

131. CONG. GLOBE, 39th CONG. 1st SESS. 2896 (1866); see also *id.* at 2768 (recording comments of Mr. Wade calling for a provision clarifying the nature of national citizenship, even though he "regard[ed] it as settled by the Civil Rights Bill").

132. See *id.* at 3135.

133. See ACKERMAN, *supra* note 2, at 177.

134. *Id.*

135. *Id.*

136. *Id.* at 177-78.

southern representatives and set up a "true" Congress in opposition to the Republicans.¹³⁷ What would happen at that point was anyone's guess, but a new civil war was not beyond imagining.¹³⁸ The potential stakes made both defending and challenging the amendment a delicate proposition. Democrats initially avoided challenging the amendment on the merits, focusing instead on the timing and necessity of the proposal. Most of all, Democrats portrayed the amendment as an attempt to give blacks the rights of suffrage.

As detailed below, Republicans responded that the amendment did nothing more than constitutionalize the same rights of national citizenship first announced in the Civil Rights Act. President Johnson himself had suggested that federal enforcement of these rights required a constitutional amendment. Nor would the amendment confer the rights of suffrage; citizenship involved personal rights, not political rights. In fact, throughout the early summer of 1866, Republicans tended to downplay the potential scope of the amendment in order to avoid alienating the votes of wavering Republicans in the upcoming elections. A bloody riot in New Orleans that summer, however, would change that calculation. By fall, Republicans would engage in a full-throated defense of an amendment that would bind the states to protect the constitutionally enumerated rights of speech, petition, and assembly.

B. INITIAL CONSERVATIVE CRITICISM

Even before Johnson delivered his message, critics of the proposed amendment and of Congressional Reconstruction picked up on the idea that the exclusion of the south violated the "letter and spirit" of the Constitution. To supporters of the South, the current Republican policy of exclusion violated the constitutional privileges of citizens of the United States. In his June 14 essay discussing the Joint Committee on Reconstruction, S.S. Nicholas insisted that "as citizens of the United States [loyal southerners] are secured many rights and privileges with which the public law has nothing to do, and which can not be taken from them except by a usurpation and violation of the Constitution as

137. For a study of the constitutional issues raised in the standoff between President Johnson and the Republicans, see ACKERMAN, *supra* note 2. For the particular point about the Republican need to maintain 122 seats (or avoid a loss of twenty to thirty seats), see *id.* at 178.

138. According to Congressman Ben Butler at Johnson's impeachment trial:

Does any one doubt that if the intentions of the respondent [Johnson] could have been carried out, and his denunciations had weakened the Congress in the affections of the people, so that those who had in the North sympathized with the rebellion could have elected such a minority even of the Representatives to Congress as, together with those sent up from the governments organized by Johnson in the rebellious States, should have formed a majority of both or either House of Congress, that the President would have recognized such body as the legitimate Congress, and attempted to carry out its decrees by aid of the Army and Navy and the Treasury of the United States . . . and thus lighted the torch of civil war?

JOHNSON IMPEACHMENT TRIAL, *supra* note 3, at 77; see also ACKERMAN, *supra* note 2, at 179.

morally and treasonably base as rebellion.”¹³⁹ President Johnson’s pardon of the previous summer had:

Embraced at least nineteen-twentieths of all the Southern people. When this was done, all those thus pardoned, some five or six millions, stood where they did as to all rights belonging to citizens before the war. The Constitution tells us what those rights are. Among them is the important right to be represented in Congress. It says that the people of every State shall have two Senators and at least one Representative.¹⁴⁰

As far as the proposed Fourteenth Amendment was concerned, Nicholas had little criticism beyond objecting the nationalization of matters best left to the states:

The first section is uncalled for, and comparatively inoperative except as to the citizenizing of the negro, and except for the after clause [Section 5] giving Congress the power to enforce the article by appropriate legislation, or, in other words, to harass the States by Congressional intrusion within what should be exclusive State jurisdiction, according to the original theory of the Constitution. The other matters are already well provided for in the State constitutions, where they appropriately belong, and need no aid from the Federal Government.¹⁴¹

Nicholas, who understood the amendment as an effort to impose the national Bill of Rights on the States,¹⁴² viewed the enterprise as entirely unnecessary. State Constitutions contained their own declarations of rights covering the essential rights of person and property.¹⁴³ Nationalizing these rights would merely afford Congress an excuse to interfere with matters that, under “the original theory of the Constitution,” had been left to the control of the States. Most of all, the *real* constitutional privileges being violated were those of loyal (or pardoned) southerners who were denied their rightful seats in Congress. As Thomas Ewing wrote to O.H. Browning that summer, “The exclusion of the States, as States, for any reason, supposed or alleged, is a violation of their

139. 3 S.S. NICHOLAS, *Report of Joint Congressional Committee*, in CONSERVATIVE ESSAYS, LEGAL AND POLITICAL, *supra* note 39, at 22, 29–30.

140. *Id.* at 30.

141. *Id.* at 31–32.

142. *Id.* at 48–49.

143. *Id.* See also *Speech of the Hon. George H. Pendleton*, in SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY 4 (CINCINNATI COM. 1866) (“No state shall impair the privileges and immunities of citizens of the United States. What are these privileges and immunities? Where are they defined? Where written? The Constitution has already put each citizen of each State upon the same footing as citizens of the several States.”) [hereinafter SPEECHES OF THE CAMPAIGN OF 1866].

constitutional privileges.”¹⁴⁴ In light of the wrongful exclusion of the southern states, Congress could not legitimately propose an amendment to the federal Constitution.¹⁴⁵

As far as the substance of Section I was concerned, critics generally echoed Nicholas’s federalism-based objections, with some pointing out that rejecting the “Howard Amendment” might actually lead to more onerous demands in the future.¹⁴⁶ It was not so much the content of rights that triggered conservative opposition as it was the idea that Congress intended to extend these rights to black as well as white citizens.¹⁴⁷

C. THE FIRST PHASE OF REPUBLICAN ADVOCACY

Republican advocates of the Fourteenth Amendment that summer generally dealt in vague generalities. John Bingham, for example, maintained his general theory that Section I did nothing more than bind states to follow previously announced constitutional norms, but he pitched at the high level of generality:

That amendment consists of five sections, the first of which provides [reads the section in full.] It is the spirit of Christianity embodied in your legislation. It is a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every state of this Union by the combined power of all the people of every State. It takes from no State any right which hitherto pertained to the several States of the Union, but it imposes a limitation upon the States to correct their abuses of power, which hitherto did not exist within the letter of your Constitution, and which is essential to the nation’s life. Look at that simple proposition. No State shall deny to any person, no matter whence he comes, or how poor, how weak, how simple—no matter how friendless—no State shall deny to any person within its jurisdiction the equal protection of the law.¹⁴⁸

144. *Thomas Ewing’s Letter to Hon. O. H. Browning, Read at the Democratic Convention at Columbus, Aug. 7, in SPEECHES OF THE CAMPAIGN OF 1866, supra note 143, at 10; see also MACON DAILY TELEGRAPH*, June 15, 1866, at 2 (arguing that since “the highest authority in the government has declared that the southern states are still members of the Union, [for the purposes of counting votes for the Thirteenth Amendment], Article V requires the participation of the currently excluded states. And, if the southern states are not part of the Union, it would be unconstitutional under Article V to count their votes for ratification.”)

145. *See NELSON, supra note 12, at 93.*

146. *See Opinion, N.Y. DAILY TRIB.*, June 29, 1866, at 4 (“The Raleigh N.C. Standard says of Reconstruction and the Constitutional Amendment: ‘We prefer the President’s plan. We are for that plan against all others. But if we cannot get it, we will take the Howard amendment, because we know that if we reject it the terms thereafter imposed will be much harder than any we have yet feared. Is not this view reasonable? Who says nay to it?’”).

147. *NELSON, supra note 12, at 96–97.*

148. *John A. Bingham, Speech at Bowerston, Harrison County, O., Aug. 24, in SPEECHES OF THE CAMPAIGN OF 1866, supra note 143, at 19; Aug. 22, 1866, speech in Bowerston, Ohio; The Constitutional Amendment Discussed by its Author, CINCINNATI COM.*, Aug. 10, 1866. This quote is quintessential Bingham. As Garrett Epps writes, “Bingham absorbed an old-style Protestantism that equated republicanism with God’s will, and the United States with His kingdom on earth.” *EPPS, supra note 38, at 97.*

A number of Republicans expressly tied Section I of the Fourteenth Amendment to the Civil Rights Act of 1866,¹⁴⁹ a reference rendered ambiguous in light of President Johnson's objection that, by conferring the status of citizenship on freedmen, Congress had not only granted certain equal rights, they had also necessarily conferred *all* the substantive rights of citizens of the United States.¹⁵⁰ Others, however, focused solely on the equal rights of citizenship.¹⁵¹ The same

149. See, e.g., *Speech of John Sherman, Cincinnati, Sept. 28, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 39 ("[President Johnson's] objection to the Civil Rights Bill is that we had not the power to pass it; but, my friends, we took it out of his way. We proposed to appeal to the people of the United States to give Congress the power to pass it—[great cheers and laughter] and we did. . . . What are the features of that amendment? Every thing that was radical which he objected to—I believe the President does not like that name—was stricken out. The first section was an embodiment of the Civil Rights Bill, namely; that every body—man, woman and child—without regard to color, should have equal rights before the law; that is all there is in it."); see also 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, 1575 n.223 (2007) (arguing that there is nothing inconsistent with this speech and the principle of incorporation, and pointing out that Sherman later gave a speech which clearly does envision the Bill of Rights as the rights of American citizenship).

150. Speakers often focused on the Bill's grant of citizenship, without exploring the implications or addressing Johnson's objection that doing so necessarily conferred all the rights of citizens of the United States. See, e.g., *Speech of Indiana Republican Senator Lane, Aug. 18, 1866, at Indianapolis, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 14 ("The first clause in that Constitutional Amendment is simply a re-affirmment of the first clause of the Civil Rights Bill, declaring the citizenship of all men born in the United States without regard to race or color. Then there is another provision, and a most important one, namely, basing representation on population, excluding such as are excluded by the local law from the suffrage on account of race or color."); *Speech of Lyman Trumbull, Aug. 2, 1866, Chicago Tribune, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 6 ("[The Civil Rights Bill's] great feature was to confer upon every person born upon American soil the right of American citizenship, and every thing belonging to the free citizen of the Republic The first [section of the proposed Fourteenth Amendment], and it is all one, article declares the rights of the American citizen. It is a reiteration of the rights as set forth in the Civil Rights Bill. An unnecessary declaration, perhaps, because all the rights belong to the citizen, but it was thought proper to put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic [applause] and that all who were born here, or who came here from foreign lands and were naturalized, were to be deemed citizens of the United States in every State where they happen to dwell.")

151. See *Speech of Governor Morton, Anderson Indiana, Sept. 22, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 35 ("This amendment consists of four sections, and the first section declares that every man born in the United States, without regard to color, or naturalized according to the laws of the land, shall be a citizen of the United States and of the State in which he lives. What is the object of this? It is to give every man, without regard to color, the equal protection of the laws, and to protect him in his life, liberty and property. . . . We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has. We propose that, without regard to color, all these rights shall be enjoyed, and to this end we have declared that every man born upon the soil of the United States shall be regarded as a citizen of the United States."); see also *Speech of Gen. Benjamin Butler, Toledo Ohio, Oct. 3, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 41 ("The first [condition for readmission] was that every citizen of the United States should have equal rights with every other citizen of the United States, in every State. Why was this necessary? It was because the President, in vetoing the Civil Rights Bill, said that it was unconstitutional to pass a law that every citizen of the United States should have equal rights with every other citizen in every State of the Union. To render that certain, which we all supposed up to that hour was certain, Congress said: 'Well, we will put it in the Constitution so it shall be there forever.'"); *Speech of United States Senator from Michigan Zachariah Chandler, Mount Clemons, Mich., Oct. 22, in SPEECHES OF THE CAMPAIGN OF 1866, supra* note 143, at 56 ("[The first clause] simply gives equal civil rights, before the law, to all

was true of speeches that described the clause as guaranteeing equal rights of citizens in the states, since both nationalizing the Bill of Rights and enforcing the Comity Clause would have had that effect.¹⁵² Although a promise of "equal rights" was a common theme, Republicans in this first phase of advocacy avoided exploring the precise content of those "equal" rights.

Although generally playing it safe in regard to the precise content of the rights covered by Section I of the amendment, Republicans were explicit in denying that the amendment would enfranchise blacks.¹⁵³ General Robert Schenck, for example, read the first section of the proposed amendment and then declared to his audience:

Is there any Democrat here who will dare to stand up and say that this is not right and just? It is putting into the organic law of the land a declaration of those principles of liberty and equality which were understood to be in the Constitution without any such amendment, by those who framed it. It is the removal of doubt upon that question, as we sought also to remove it by the corresponding Civil Rights Bill, passed by two-thirds of each House of Congress over the head of the President. But they are afraid that it may have some concealed purpose of elevating negroes; that if you make them, as you do women and children born here or naturalized, citizens of the United States,

persons, white or black, or naturalized. Every man, under this, has a right to sue and be sued, to make contracts and enforce them, and to enjoy all civil rights; but not the right to vote. That is left with the States. Had I had my way, I should have gone further.").

152. As an example of this kind of ambiguity, see *Speech of General Butler, Gloucester (Boston Advertiser, Aug. 27)*, in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 20 ("The first section [of the proposed amendment] (and I thought it was in the Constitution already,) is that every citizen of every State shall have the right of every citizen of every State—in other words, that any one here shall walk in peace in South Carolina the same as a citizen of South Carolina can now walk in Massachusetts.").

153. For example, in his speech of July 27, Indiana Governor Oliver P. Morton focused on the Privileges or Immunities Clause only in order to refute Democratic claims that it would grant blacks the right of suffrage:

It is from the first part of the second clause of the section, which says "that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," that it is pretended to extract negro suffrage. Now if the right of suffrage is a privilege or immunity belonging to citizens of the United States, as such, then these gentlemen are right: but if, on the other hand, the right of suffrage is conferred, regulated, bestowed or withheld, by the several States, then it is not a privilege or immunity of citizens of the United States, as such . . . but is conferred upon such citizens of a State as the Constitution and laws thereof prescribe. Women and children are citizens of the State, but have not the right of suffrage. If the right of suffrage is a privilege or immunity of citizens of the United States, as such, then it has always been so, for the amendment only defines who shall be citizens of the United States, but does not confer new privileges or immunities, and in that case would always have been under the control of Congress, and not of the States.

Speech of Governor Morton, New Albany Indiana, July 27, in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 3.

you necessarily make them voters But it does not such thing; it simply puts all men throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation.¹⁵⁴

In general, Republican speakers in this first phase of the election season avoided specifics in regard to the Privileges or Immunities Clause, preferring instead to stress the general rights of due process and equality under law. Neither Republicans nor Democrats said anything that contradicted Jacob Howard's description of the rights of national citizenship, but neither did anyone attempt to present a fully developed theory of Section I. In this initial phase of speeches and commentary, the most consistent theme among the Republicans was an assurance that the Amendment would not confer the rights of suffrage. This reflected the most consistent criticism of the Democrats who repeatedly warned that the amendment either expressly or implicitly enfranchised blacks.

D. ATTACKS ON FREEDOM OF SPEECH AND ASSEMBLY IN THE SOUTHERN STATES

No single event in 1866 more clearly illustrated the states' continued failure to protect the constitutionally enumerated rights of American citizens than the New Orleans Riot of July 30, 1866. The riot left scores dead and wounded, many of them blacks who had fought for the Union in the Civil War.¹⁵⁵ To Republicans, the violence in New Orleans exemplified everything that was wrong with President Johnson's approach to Reconstruction and starkly illustrated the need to require states to protect the rights of speech, press, assembly, and due process.

154. *Speech of General Robert C. Schenck, Aug. 18, 1866 (Dayton Ohio)*, in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 13. On August 7, Shuyler Colfax, Speaker of the House, gave a speech in Indianapolis that followed this same approach:

[The first section of the Fourteenth Amendment] is the Declaration of Independence placed immutably and forever in the Constitution. . . . It declares that every person—every man, every woman, every child, born under our flag, or naturalized under our laws, shall have a birthright in this land of ours. . . . We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property, and be subject to like punishments. That is the last law on the subject. The Democrats haven't found that out yet. They have been hunting up a new edition of Webster's dictionary to find the meaning of the word citizen. . . . I grant that the man who votes has a right to be called a citizen, but it don't follow that every citizen has a right to vote.

Speech of Shuyler Colfax, Speaker of the House of Representatives, Aug. 7th, Indianapolis, in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 14. See generally *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143 (recording many similar examples).

155. McKittrick, *supra* note 2, at 421.

1. The Memphis Riot and the Call for a Southern Loyalist Convention

Major rioting in 1866 actually began in Tennessee. In May, three days of police-led rioting in Memphis, Tennessee, left at least forty-eight dead.¹⁵⁶ According to the official House Report, "The whole evidence discloses the killing of men, women, and children—the innocent, unarmed, and defenceless pleading for their lives . . . the burning of dwellings, the attempts to burn up whole families in their houses, and the brutal and revolting ravishings of defenceless and terror-stricken women."¹⁵⁷ The Report concluded:

The fact that the chosen guardians of the public peace, the sworn executors of the law for the protection of the lives, liberty, and property of the people, and the reliance of the weak and defenceless in time of danger, were found the foremost in the work of murder and pillage, gives a character of infamy to the whole proceeding which is almost without a parallel in all the annals of history.¹⁵⁸

The rising tide of violence and the not-coincidental political resurgence of former rebels in the southern states inspired southern loyalists to band together in their pursuit of political reform. On July 4, 1866, a call went out for a Convention of Southern Loyalists to be held in Philadelphia that fall (with any site in the southern states being too dangerous for such an assembly). Widely published in newspapers throughout the South and North,¹⁵⁹ the call emphasized both the failure of the southern states and the current Administration to protect the constitutional rights of citizens of the United States:

The great issue is upon us! The majority in Congress, and its supporters, firmly declare that "the rights of the citizen enumerated in the Constitution, and established by supreme law, must be maintained inviolate."

Rebels and rebel sympathizers assert that "the rights of the citizen must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe."

156. See H.R. REP. NO. 101, at 34 (1866); see also *Scenes in Memphis*, HARPER'S WKLY., May 26, 1866, <http://blackhistory.harperweek.com/7Illustrations/Reconstruction/ScenesInMemphis.htm> (last visited Feb. 7, 2013) (illustrating scenes from the riot, including a burning a schoolhouse and murdering African-Americans).

157. H.R. REP. NO. 101, at 5 (1866).

158. *Id.* at 34.

159. See BOS. DAILY ADVERTISER, July 12, 1866, at 1; BOS. POST, July 12, 1866, at 2; *Call for the Southern Unionists' Convention*, EVENING POST, July 12, 1866, at 1 (N.Y.C.); *Call for a National Convention by Southern Radicals*, MACON DAILY TELEGRAPH, July 17, 1866, at 3; *Call for a National Convention by Southern Radicals*, GEORGIA WKLY. TELEGRAPH, July 23, 1866, at 6; *Convention of Loyal Southerners*, ALBANY EVENING J., July 12, 1866, at 2; *Convention of Loyal Southerners*, ALBANY ARGUS, July 13, 1866, at 2; *Convention of Loyal Southerners*, WASH. REP., July 18, 1866, at 2 (Wash., Pa.); *The Southern Radicals*, ALEXANDRIA GAZETTE, July 12, 1866, at 2 (Alexandria, Va.); *TITUSVILLE HERALD*, July 14, 1866, at 1 (Titusville, Pa.); see also *The Philadelphia National Convention*, N.Y. TIMES, July 12, 1866, at 1 ("The indications are that this Convention will be one of the most imposing and important assemblages ever held in this country.").

We have seen this doctrine of State sovereignty carried out in its practical results, until all authority in Congress was denied, the Union temporarily destroyed, the constitutional rights of the citizens in the South nearly annihilated, and the land desolated by civil war.

The time has come when the restructure of Southern State governments must be laid on constitutional principles, or the despotism grown up under an atrocious leadership be permitted to remain. We know of no other plan than that Congress, under its constitutional powers, shall now exercise its authority to establish the principle whereby protection is made co-extensive with citizenship.

We maintain that no State, either by its organic law or legislation, can make transgression on the rights of the citizen legitimate. We demand and ask you to concur in demanding protection to every citizen of the great Republic on the basis of equality before the law; and further, that no State government should be recognized as legitimate under the Constitution in so far as it does not by its organic law make impartial protection full and complete.

Under the doctrine of "State sovereignty," with rebels in the foreground, controlling Southern legislatures, and embittered by disappointment in their schemes to destroy the Union, there will be no safety for the loyal element of the South. Our reliance for protection is now on Congress, and the great Union party that has stood, and is standing, by the nationality, by the constitutional rights of the citizen, and by the beneficent principles of free government.

For the purposes of bringing the loyal Unionists of the South into conjunctive action with the true friends of republican government in the North, we invite you to send delegates in goodly numbers from all the Southern States, including Missouri, Kentucky, West Virginia, Maryland, and Delaware, to meet at Independence Hall, in the city of Philadelphia, on the first Monday or September next. It is proposed that we should meet at that time to recommend measures for the establishment of such government in the South as accords with and protects the rights of all citizens. We trust this call will be responded to by numerous delegations of such as represent the true loyalty of the South. That kind of government which gives full protection to all the rights of the citizen, such as our fathers intended, we claim as our birthright. Either the lovers of constitutional liberty must rule the nation, or rebels and their sympathizers be permitted to misrule it. Shall loyalty or disloyalty have the keeping of the destinies of the nation?¹⁶⁰

Accompanying the call was a circular signed by the provisional governor of Texas, A.J. Hamilton, along with Alabama Judge M.J. Saffold and Tennessee Congressman William B. Stokes. The circular expanded on the need for a Convention to address the southern states' failure to protect the rights of due process, speech and press against the violence of the mob:

160. *The Southern Loyalists' Convention*, TRIB. TRACTS No. 2, July 10, 1866, at 1.

We had all hoped that when treason was beaten in the field, and her armed traitors captive to the Government which they had wickedly sought to destroy, we of the South who, through four long years of untold suffering and horrors, adhered to her fortunes and her banner amidst all the changes and vicissitudes of war, would at least receive protection to all the constitutional rights of American citizens We relied, too, as we had a right to rely, on the earnest and efficient co-operation of the Executive of the Nation We confidently expected his hearty co-operation with the political department of the Government in providing such governments in the States lately in rebellion as would protect the country from conspirators in official positions against its peace; and secure to loyal citizens life, liberty, and property, together with the inestimable privilege of impressing upon the minds of others his conscientious convictions of truth, by speech and through the medium of the press. We also had reason to hope that the freedman as well as the loyal white man in the South would find ample protection for all his rights as an *American citizen*, by actual military force if necessary, until equal laws and corrected public sentiment would place them on a firm and enduring basis. In these hopes, predicated on the oft-repeated declarations of the President, we have been grievously disappointed—cruelly deceived. . . .

. . . .
. . . Let us act boldly as becomes free men; and if we thereby incur danger, the country will understand and appreciate the shameless hypocrisy of those who prate of their loyalty and right to readmission into the Union in one breath, and, in the next, excite a brutalized mob to violence upon a citizen for exercising the constitutional right of meeting his fellow-citizens to petition the political power of the nation to for a redress of grievances.¹⁶¹

The call and the accompanying circular proved prescient. Only weeks later, one of the signers of the call would lie among the dead in New Orleans.

2. The Riot of New Orleans

The specific events of July 30 unfolded against a background of resurgent rebel power in the state of Louisiana.¹⁶² In an effort to regain control of the state legislature, a coalition of conservative Unionists and radical Republicans attempted to reconvene the state's 1864 constitutional convention.¹⁶³ The idea was to draft a new state constitution that would enfranchise blacks and disenfranchise former rebels and then submit the new constitution for ratification by the people of Louisiana.¹⁶⁴ The newly appointed presiding officer of the convention Judge Rufus K. Howell published a call for the return of delegates. In reading

161. Circular Letter, signed by A.J. Hamilton, M.J. Saffold, & Wm. B. Stokes, TRIB. TRACTS NO. 2, July 10, 1866, at 3–4.

162. For an account of the riot, see JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 (2001). See also CURTIS, *supra* note 10, at 136–37.

163. For discussions of the political situation in New Orleans and the riot itself, see BENEDICT, *supra* note 3, at 206; FONER, *supra* note 2, at 263; MCKITTRICK, *supra* note 2, at 421.

164. BENEDICT, *supra* note 3, at 204.

the call, note the self-conscious reference back to the same convention that led to the adoption of the federal Constitution:

Whereas by the wise, just and patriotic policy developed by the Congress now in session, it is essential that the organic law of the State of Louisiana should be revised and amended so as to form a civil government in this State in harmony with the general government, establish impartial justice, insure domestic tranquility, secure the blessings of liberty to all citizens alike . . . and whereas, further, it is important that the proposed amendment to the Constitution of the United States should be acted upon in this State with the shortest practicable delay.

Now, therefore, I, Rufus K. Howell, President *pro tem*, of the Convention [of 1864] as aforesaid, by virtue of the power and authority thus conferred on me, and in pursuance of the aforesaid resolutions of adjournment, do issue this my proclamation reconvoking the said "convention for the revision and amendment of the constitution of Louisiana"; and I do hereby notify and request all the delegates to said Convention to assemble in the hall of the house of representatives, Mechanics' Institute building, in the city of New Orleans, on the fifth Monday (thirtieth day) of July, 1866 . . .¹⁶⁵

Although the sitting Governor J. Madison Wells endorsed the convention,¹⁶⁶ anticonventionists contacted the local military authority, General Absalom Baird, seeking to have the convention leaders arrested for planning an unlawful assembly.¹⁶⁷ Baird refused on the grounds that it was no crime to convene the assembly and that its legal validity would have to be challenged in the courts.¹⁶⁸ Desperate to stop the convention from taking place, the leader of anticonventionists, Lieutenant Governor Albert Voorhies, contacted President Johnson, informing him of a proposed plan to arrest the conventioners under a warrant issued by a local court. In such a case, Voorhies asked Johnson, would the federal military "interfere to prevent process of [the state] court?"¹⁶⁹ Johnson immediately responded, "[t]he military will be expected to sustain, not obstruct or interfere with, the proceedings of the courts."¹⁷⁰ This was all the encouragement needed by local police. What happened next, according to General Sheridan's subsequent report, was "an absolute massacre."¹⁷¹ The

165. Proclamation, R.K. Howell (July 7, 1866), *reprinted in* ALBANY EVENING J., Aug. 1, 1866, at 2.

166. *See* FONER, *supra* note 2, at 263.

167. *See* MCKITTRICK, *supra* note 2, at 423.

168. *See id.*

169. *Id.*

170. *Id.*

171. *The New Orleans Riot*, N.Y. COM. ADVERTISER, Aug. 31, 1866, at 2. Sheridan had determined that state and local officials were responsible for the massacre. *See* MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 53 (1973). Johnson "suppressed the section of General Philip H. Sheridan's report that called it a massacre by the police." GLENNA R. SCHROEDER-LEIN & RICHARD ZUCZEK, *ANDREW JOHNSON: A BIOGRAPHICAL COMPANION* 96 (2001). In a letter sent to General Grant on August 2, Sheridan wrote, "The more information I obtain of the affair of the 30th, in this city,

police and white Louisianans attacked the convention hall, shooting down delegates as they fled, despite their raising a white flag. Altogether, about forty delegates and supporters were killed, with hundreds more wounded.¹⁷²

3. Reportage and Johnson's Response

Apart from the election itself, the New Orleans riot was one of the most heavily covered events of 1866 (the coverage of the two often intertwined).¹⁷³ Newspapers reported General Sheridan's report of "an absolute massacre" and that "at least nine-tenths of the casualties were perpetrated by the police and citizens by stabbing and smashing in the heads of many who had been already wounded or killed by policemen."¹⁷⁴ Instead of moving to hold the rioters accountable, President Johnson encouraged local officials to continue to suppress "all illegal or unlawful assemblies," including those that "assume to exercise any power or authority without first having obtained the consent of the people of the State."¹⁷⁵ In essence, Johnson took the position that citizens seeking to exercise their right to assemble for the purposes of amending either state or federal law could do so only with the permission of state authorities.

Only a few weeks later, during President Johnson's famous campaign, "Swing Around the Circle,"¹⁷⁶ Johnson laid the blame for the riots, not on state officials in Louisiana who, it was now clear, had perpetrated the assault, but on the Republicans in Congress.¹⁷⁷ In a speech reported by the *Missouri Democrat*, Johnson insisted that the conventioners intended to "supersed[e] and upturn[]

the more revolting it becomes. It was no riot; it was an absolute massacre by the police It was a murder which the Mayor and police of the city perpetrated without the shadow of a necessity." Letter from P. H. Sheridan, Major-General Commanding, to U. S. Grant, General (Aug. 2, 1866), *reprinted in* 6 THE AMERICAN ANNUAL CYCLOPEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1866, at 456 (1867).

172. HOLLANDSWORTH, *supra* note 162, at 3.

173. The references are so numerous they are impossible to list. A search of the precise phrase "New Orleans Riot" in one historical newspaper database, Evans, for example, returns 448 references to the event in 1866 alone. Reporting continued for months after the riots. *See, e.g., The New Orleans Riot*, Report of the Military Commission, Oct. 11, 1866, at 2 (Keene, N.H.).

174. *The New Orleans Riot*, N.Y. COM. ADVERTISER, Aug. 31, 1866, at 2.

175. Here are Johnson's instructions sent to local military officials and published in northern newspapers:

To Andrew J. Herron, Attorney General of Louisiana:

You will call on General Sheridan, or whoever may be in command, for sufficient forces to sustain the civil authority in suppressing all illegal or unlawful assemblies which usurp or assume to exercise any power or authority, without first having obtained the consent of the people of the State. If there is to be a convention, let it be composed of delegates chosen fresh from the people of the whole State. The people must be first consulted in relation to changing the organic law of the State. Usurpation will not be tolerated. The laws and the Constitution must be sustained, and thereby peace and order.

See U.S. GOV'T PRINTING OFFICE, CONGRESSIONAL SERIAL SET 115 (1922).

176. For an account of Johnson's politically disastrous "Swing Around the Circle," *see* MCKITTRICK, *supra* note 2, at 428.

177. *See* FONER, *supra* note 2, at 265.

the civil government which had been recognized by the government of the United States" and that everyone who participated in the convention "was a traitor to the Constitution of the United States."¹⁷⁸ Ultimate responsibility for the traitorous assembly, however, lay with the "Radical Congress" who had "determine[d] that a government established by negro votes was to be the government of Louisiana."¹⁷⁹

Johnson's failure to defend the rights of speech and assembly in New Orleans and his exoneration of the local authorities proved politically disastrous.¹⁸⁰ According to Eric McKittrick, "Johnson's belligerent defense of those authorities had the worst possible effect on Northern public opinion"¹⁸¹ and would help seal the fate of Democrats that November.¹⁸² Most importantly, the riots of Memphis and New Orleans became a living lesson to the public regarding the meaning and necessity of Section I of the Fourteenth Amendment.

III. THE FALL CAMPAIGN

A. THE RISING CALL TO PROTECT THE RIGHTS OF SPEECH AND ASSEMBLY AGAINST STATE ABRIDGMENT

When Jacob Howard described the Privileges or Immunities Clause of Section I of the Fourteenth Amendment as protecting substantive rights enumerated in the first eight Amendments, and the rights of equal protection under the Comity Clause, he presented the issue as one of abstract theory. In the aftermath of state-sponsored murder of Americans participating in a constitutional convention, Howard's theory now had immediate and practical application. Southern Loyalists increasingly called for the adoption of the Fourteenth Amendment in order to protect their rights as American citizens against state-directed (or consciously permitted) violence.

In August, one of the signers of the Call for the Loyalist Convention, Alabama Judge M.J. Saffold, sent a letter to the Montgomery Mail (which he also published as a pamphlet), mocking the newspaper's attempt to frighten him into silence by labeling him a "Radical Orator."¹⁸³ As much as the newspaper's reference to "radicalism" was meant to terrorize "the great non-slaveholding peoples of the South," to "free, unfettered intellects" the term "extends the great guarantees of the our Constitution, of "free speech," "free press," the "immuni-

178. JOHNSON IMPEACHMENT TRIAL, *supra* note 3, at 6.

179. *Id.*

180. His speech laying blame for the riot on Congress became part of the evidence used against him in his impeachment trial. *See id.*; *see also* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 269 (1875).

181. *See* MCKITTRICK, *supra* note 2, at 427.

182. *Id.* at 421.

183. Letter from M. J. Saffold of Ala. to the Editors of Montgomery Mail (Aug. 13, 1866), in SOUTHERN ARISTOCRATIC REPUBLIC! VERSUS SOUTHERN DEMOCRATIC REPUBLIC!: "IRREPRESSIBLE CONFLICT!" 1, 4, 10, 11 (1866), available at <http://www.archive.org/stream/southernaristocr00saff/page/10/mode/2up>.

ties and privileges" of citizens of the different States."¹⁸⁴ That kind of "radicalism," Safford exclaimed, "I accept as the greatest *political virtue*!"¹⁸⁵ Safford applauded the demands of the so-called "radical Congress" that southern rebels "banish your proscriptive public sentiment, manufactured for despotic purposes, and let in democratic principles" as well as their demand "[t]hat the constitutional guarantees of free speech, free press, constitutional comity between the states, must prevail."¹⁸⁶ Finally, Safford goaded his critics on the subject of black suffrage by pointing to the riots of Memphis and New Orleans as examples of southern "representation" of black citizens:

But you say we represent our women and children, why cannot we represent our negroes? Simply because *representation* means *protection*, and the Congress does not believe you are disposed to *protect* them. You have given them no reason to believe so. Representation is not for the benefit of the *representative*, it is for that of the *represented*. The negroes do not wish you to represent them. They prefer to be unrepresented, so long as you massacre them as you did at New Orleans and Memphis.¹⁸⁷

B. THE SOUTHERN LOYALISTS CONVENTION

After a long summer, on September 3, 1866, supporters of the Union from southern and border states gathered in Philadelphia for a five-day convention. Participants included Frederick Douglass, Texas judge and legal scholar George W. Paschal, provisional Texas Governor A.J. Hamilton, and Alabama Judge M.J. Safford. One of the original signers of the call for convention who would not attend, Anthony Paul Dostie, perished in the New Orleans riot.¹⁸⁸

Although the convention split on the subject of black suffrage,¹⁸⁹ members "readily endorsed" the proposed Fourteenth Amendment.¹⁹⁰ Speech after speech condemned the riots of Memphis and New Orleans¹⁹¹ and called for the adoption of the proposed amendment to prevent states from further abridging

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 11.

188. See *The Southern Loyalists' Convention*, *supra* note 160, at 62 (1866).

189. See FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS: FROM 1817-1882*, at 348-49 (John Lobb ed., 1882). Suffrage was not discussed until the second half of the convention, after border-state members had voted in support of the Fourteenth Amendment and returned home. See *The Southern Loyalists' Convention*, *supra* note 1160, at 52.

190. See FONER, *supra* note 2, at 270.

191. One of the first items on the convention agenda was a motion by Mr. E. Heistand of Louisiana:

That we, as the representatives of the loyal States lately in rebellion against the Government, demand of the President of the United States, the publication of the testimony taken before the Military Commission appointed by Brevet Major-Gen. Baird, commanding the Department of Louisiana, to examine into the causes of the massacre of loyal men in the city of New Orleans, on the 30th day of July last, as well as the report made by the said commission, in order that the people of the United States may see the manner in which said massacre was resolved upon and deliberately executed by the reconstructed Rebels of the South.

the rights of American citizens of free speech, free press, and equal protection of the laws.¹⁹² The fact that border-state delegates would not support any radical measure that might hurt their prospects in the fall election¹⁹³ makes it all the more significant that the convention repeatedly declared that the southern states had violated the enumerated constitutional rights of citizens of the United States—rights that would be protected under the proposed Fourteenth Amendment.

1. The “Appeal”

Midway through the convention, the assembly adopted an “Appeal of the Loyal Men of the South to their Fellow-Citizens of the United States.”¹⁹⁴ Drafted by a committee chaired by judge and scholar George W. Paschal, the “Appeal” was both an account of the abridgment of constitutional rights by the governments in the southern states and a call to support the policies of the Thirty-ninth Congress, including the adoption of the Fourteenth Amendment. The Appeal opened by lamenting President Johnson’s betrayal of loyal southerners: “Unexpected perfidy in the highest place in the Government, accidentally filled by one who adds cruelty to ingratitude, and forgives the guilty as he proscribes the innocent,” had encouraged rebels to renew their hopes for revenge against supporters of the Union; “[w]here we expected a benefactor, we find a persecutor.”¹⁹⁵ Johnson’s lenient treatment of former rebels, and his obstruction of Republican Reconstruction policy had made outbreaks of southern violence inevitable. By turning a blind eye, Johnson had “allowed the Rebel soldiery to persecute the teachers of the colored schools, and to burn the churches in which the freedmen have worshipped the living God.”¹⁹⁶

That a system so barbarous should have culminated in the frightful riot at Memphis, and the still more appalling massacre at New Orleans, was as natural as that a bloody war should flow from the teachings of John C. Calhoun and Jefferson Davis. Andrew Johnson is responsible for all these unspeakable cruelties¹⁹⁷

See The Southern Loyalists’ Convention, *supra* note 160, at 12. On the convention’s fifth day, the assembly adopted a report with a detailed and damning report of the New Orleans Riot and the egregious actions of the Johnson Administration. *See id.* at 48–51; *see also id.* at 20 (recording speech of Mr. Moss asking, “How long would it take, with a few more examples besides New Orleans—how easy it would be, to see the whole South in a flame?”).

192. *See, e.g., id.* at 54 (recording Mr. Bott’s resolution); *id. passim*.

193. Douglass reports that, on the train to the convention, some members tried to persuade him not to attend in order to avoid public controversy. *See DOUGLASS, supra* note 189, at 341–42.

194. *See The Southern Loyalists’ Convention, supra* note 160, at 22.

195. *Id.*

196. *Id.* at 23.

197. *Id.*

Turning to the southern states' long-standing failure to protect the rights of American citizens, the Appeal declared, "The hand of the Government was stayed for eighty years. The principles of constitutional liberty languished for want of Government support."¹⁹⁸ Here, the Appeal specifically pointed to the states' abridgment of the privileges and immunities of citizens of the United States, such as the rights of speech and press:

Statute books groaned under despotic laws against unlawful and insurrectionary assemblies, aimed at the constitutional guaranties of the right to peaceably assemble and petition for a redress of grievances. It proscribed democratic literature as incendiary, nullified constitutional guaranties of freedom and free speech and a free press. It deprived citizens of the other States of their privileges and immunities in the States¹⁹⁹

The Appeal concluded by announcing its support of the Republican Congress in the forthcoming elections and for the adoption of the Fourteenth Amendment. Although the Amendment might be more lenient to the southern states regarding their readmission than the Loyalists might prefer, ratification "would be the commencement of a complete and lasting protection to all our people."²⁰⁰

2. Sherwood's Address

At the same time the convention considered approving the Appeal, it also considered a proposed alternative address authored by Texas Judge Lorenzo Sherwood. Sherwood assured the assembly that he "agree[d] with the address" proposed by Judge Paschal, and thought it should be "printed and circulated through the land"; nevertheless, he thought it "a little too short" and asked permission to read what he considered to be an address that "cover[ed] the whole case," and to applause and cries of "[r]ead it from the stand," Sherwood offered his extended version.²⁰¹

Sherwood's address began by noting that the Loyalists had presented a platform which sought to "avoid all things that might excite cavil or affect the sensibilities of any lover of Free Government," and then posed the principles the convention considered unassailable:

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

198. *Id.*

199. *Id.*; see also *Convention of, "Appeal of the Loyal Men of the South to Their Fellow Citizens,"* N.Y. DAILY TRIB., Sept. 7, 1866, at 1; *Address of the Southern Loyalists: Appeal of the Loyal Men of the South to Their Fellow Citizens,* NEWARK DAILY ADVERTISER, Sept. 7, 1866, at 1.

200. *The Southern Loyalists' Convention, supra*, note 160, at 24.

201. *Id.* at 25.

Security to Life, Person and Property; Freedom of the Press; Freedom of Opinion; and Freedom in the exercise of Religion. Fair and impartial Trial by Jury under such regulations as to make the administration of justice complete. Unobstructed commerce between the States, and the right of the citizens of each State to pass into and sojourn in any other State, and to enjoy the immunities and privileges of the citizens of such other State. Exemption from any order of nobility or government through privileged class: The guaranty of Republican Government in every State and to all the People thereof, making the preservation and maintenance of the above enumerated rights, *unless forfeited by crime*, the constitutional test and definition of what is Republican Government.²⁰²

According to Sherwood, “[t]hese natural, cardinal, fundamental rights of the citizen were established in political form by the Constitution of the United States.” Because these rights were “established by the supreme law of the land, there is no power, legislative, executive, or judicial, State or National, that has authority to transgress or invade them; and protection of these rights must be made co-extensive with American citizenship.”²⁰³ Indeed, declared Sherwood, “[t]he constitutional rights of the citizen throughout the Union must be maintained inviolate!”²⁰⁴

The proceedings of the convention were published in pamphlet form, and at least one newspaper published the Appeal and Sherwood’s extended Address.²⁰⁵ Regardless of the degree to which the country read the particular speeches and resolutions, the proceedings themselves illustrate the common conception of the Fourteenth Amendment as guarding against state-sponsored abridgment of constitutionally enumerated rights such as speech and assembly. Proponents of the Fourteenth Amendment had been making this same point since the spring. The violence of that summer, however, gave the issue an importance and immediacy otherwise lacking in a theoretical debate about rights of American citizenship.

C. THE REPUBLICAN CASE

Soon after the Convention of Southern Loyalists, the Republican activist and future Missouri senator Carl Schurz delivered a speech in Philadelphia echoing many of the Convention’s themes. Republicans, Schurz explained, sought to restore “a Union based upon universal liberty, impartial justice and equal rights . . . on every square foot of which free thought may shine out in free utterance,” whereas President Johnson would restore “a Union in a part of which the rules of speech will be prescribed by the terrorism of the mob, and

202. *Id.*

203. *Id.* at 33.

204. *Id.* at 31.

205. See N.Y. DAILY TRIB., Sept. 9, 1866, at 1.

free thought silenced by the policeman's club and the knife of the assassin."²⁰⁶ Less than a week later, the *Wooster Republican* challenged claims by President Johnson and conservative Democrats that the southern states were "in an attitude of loyalty toward the Government, and of sworn allegiance to the Constitution of the United States. In no one of them is there the slightest indication of resistance to this authority":

"*Loyal to the Constitution*," these men who prohibit the circulation of papers that do not suit them, threaten the lives of loyal men who desire to live among them, and mob peaceable assemblages of citizens! The whole conduct of the South today is as boldly defiant of the Constitution and of the lawmaking power of the Government as it ever was in 1861.²⁰⁷

A few weeks later, in Carthage Ohio, General Benjamin Butler spoke about how the Fourteenth Amendment would protect citizens of the United States in their rights of free expression. "Before the war," Butler reminded the crowd,

You know that you did not dare to go to any of the Southern States and there express your opinions freely upon the great questions that were dividing the American people: because, my friends, we knew that, we say now that we will have inserted in the Constitution of the United States, in the form of the proposed amendment, a clause securing to every citizen a right to go where he pleases within the limits of the United States, and then and there to assert his high and noble rights and dignity as an American citizen.²⁰⁸

Similarly, Republican congressman Columbus Delano reminded his listeners of the long-standing problem of mob violence against free expression in the South:

I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power to protect them. I know that white men have for a series of years been driven out of the South, when their *opinions* did not concur with the "chivalry" of the Southern slaveholders. I know that you remember when an able lawyer from Massachusetts was expelled from South Carolina by a Southern mob. And I know that we determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected, and I know you

206. Carl Schurz, Speech Delivered in Phila., Pa. (Sept. 8, 1866), in *SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ* 412-13 (Frederic Bancroft ed., 1913).

207. *Issues of Fact. Spirit of the South*, WOOSTER REPUBLICAN, Sept. 13, 1866, at 1 (Wooster, Ohio).

208. Gen. B.F. Butler, Speech at Carthage Ohio (Oct. 6, 1866) in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 44.

have lost your reason, every man of you, who denies the propriety of their protection.²⁰⁹

It was clear that Republicans had struck a popular chord by using well-known Southern suppression of speech and assembly in their efforts to gain reelection and ratify the Fourteenth Amendment. It was universally accepted in the North that the rights of speech and assembly of citizens of the United States ought to be protected against any abridgment by state or federal authorities.²¹⁰ The repeated and uncontradicted Republican claim that such protection would be achieved by ratifying the Fourteenth Amendment reflected the Republicans' calculation that such claims increased support for both the Party and the proposed amendment.

D. THE DEMOCRAT DEFENSE

Prior to the fall of 1866, Democrats had by and large avoided addressing the specific substance of the Fourteenth Amendment, preferring instead to stress issues of unconditional readmission, state autonomy, and the dangers of black suffrage.²¹¹ The Republican strategy of emphasizing the need to protect the specific rights of speech, assembly, and due process, however, made Democrat avoidance of the Amendment's merits impossible. According to an October 6 editorial in *Harper's Weekly* titled "A Clear Issue":

The Address of the National Union Committee states briefly, precisely, and forcibly the exact issue. It is sharply defined, and there can be no misapprehension. It is the issue set forth at Syracuse, at the Loyal Southern Convention in Philadelphia, and by every Union orator and journal in the country. The foolish cry that nobody but the President and the Democrats know what they want has already died away. Vermont and Maine know distinctly what they wish. Illinois and Pennsylvania and Ohio and New York are not in the least doubt. The present issue is that the Constitutional Amendment, which the President himself formerly warmly favored, shall be adopted by any late insurgent State before it resumes its place in Congress.

This Amendment simply fixes in the organic law the legitimate results of the war. . . . It defines and defends citizenship in the United States and its rights.²¹²

209. Representative Columbus Delano, Republican, Speech at Coshocton, Ohio (Aug. 28, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 23.

210. For an exhaustive treatment of widespread support for freedom of speech in the North prior to and during Reconstruction, see CURTIS, *supra* note 30.

211. For example, not one of the ten principles of the National Union Platform adopted in August 1866 at the Philadelphia National Union Convention (the so-called Arm-in-Arm Convention) addressed the merits of the Fourteenth Amendment. See *Declaration of Principles*, National Union Convention, in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION*, *supra* note 180, at 240, 240–41.

212. *A Clear Issue*, *HARPER'S WKLY.*, Oct. 6, 1866, at 627.

Ultimately, President Johnson decided to meet the Republican arguments head on and challenge the necessity and the merits of Section I of the Fourteenth Amendment.

1. The Letter of Interior Secretary O.H. Browning

In late October, President Johnson arranged to have his Secretary of the Interior, O.H. Browning, publish a letter laying out the Administration's position on the Fourteenth Amendment.²¹³ Newspapers throughout the country published Browning's letter, which was "generally taken as the official statement of the Administration's position."²¹⁴ Instead of echoing the standard Democratic objections to the timing of the Amendment, Browning launched a frontal assault on Section I characterizing it as a Republican effort to destroy the autonomy of the States:

The first section of the proposed article contains, among others, the following provision:

"Nor shall any State deprive any person life, liberty, or property, without due process of law."

Why insert such a provision in the Federal Constitution? It already contains [the Fifth amendment] . . . [M]ost of the State constitutions, I believe all of them, contain a similar provision, as a limitation upon the powers of the States respectively. . . .

The object and purpose are manifest. It is to subordinate the State judiciaries, in all things, to Federal supervision and control—to annihilate totally the independence and sovereignty of State judiciaries in the administration of State laws, and the authority and control of the States over matters of purely domestic and local concern. . . .

The Federal judiciary has jurisdiction over all questions arising under the Constitution and laws of the United States, and by virtue of this new provision, if adopted, every matter of judicial investigation, civil or criminal, however insignificant, may be drawn into the vortex of the Federal judiciary. . . . [I]f a murderer be arrested, tried, convicted, and sentenced to be hung, he may claim the protection of the new constitutional provision, allege that a State is about to deprive him of life without due process of law, and arrest all further proceedings until the Federal Government shall have inquired whether a State has a right to punish its own citizens for an infraction

213. Letter from O.H. Browning to Colonel W.H. Benneson and Major H.V. Sullivan (Oct. 13, 1866) (published in N.Y. papers on Oct. 24, 1866, and in CINCINNATI COM. on Oct. 26, 1866). According to Eric L. McKittrick, "[t]he letter had been read by Browning to Johnson on Oct. 20 and the President was especially anxious that it be published." McKittrick, *supra* note 2, at 469 n.55 (citing 2 DIARY OF ORVILLE HICKMAN BROWNING 101 (James G. Randall ed., 1933); see also JAMES, *supra* note 128, at 74.

214. McKittrick, *supra* note 2, at 469. McKittrick notes that the letter was "a campaign document" for President Johnson and was "discussed with great animation in the Democratic press both North and South," with southern newspapers in particular viewing the letter as representing the President's "sweeping repudiation of the [Fourteenth] Amendment." *Id.* at 469 & n.55.

of its own laws, and have granted permission to the State tribunals to proceed.²¹⁵

By highlighting the fact that most southern state constitutions already contained analogues to the federal Due Process Clause, Browning hoped to generate suspicion that the Republicans were attempting to use a needless clause as a tool for federal domination of state civil and criminal procedure.²¹⁶ The Johnson Administration presumably hoped to attract the support of conservatives who continued to believe in constitutional federalism. But however successful such an argument might have been had it been made in the spring, after the summer riot in New Orleans it was no longer plausible to claim that the southern states had any interest in providing the rights of due process to loyal southern Unionists. Instead of shoring up conservative support, Browning's letter proved to be a political disaster.

2. "A Huge Political Blunder"

The first wave of criticism came from papers traditionally disposed to support the President. According to an editorial published in the *Evening Post*,²¹⁷ if the letter represented the position of the Administration (which the *Post* assured its readers it doubted), then it had to be regarded as "a political blunder."²¹⁸ It simply was not plausible to believe that the southern states could be trusted to protect individual liberty:

If Mr. Browning had contented himself with saying, This is not the proper time to discuss or adopt constitutional amendments; all the states ought to be represented in Congress when so important a measure as a change in the organic law is considered—he would have stood on different ground. But to oppose an amendment which appeals most strongly to the justice and self-respect of the people, to set himself against this reform at any time, is a huge political blunder. . . .

215. *Secretary Browning's Letter*, COLUMBUS DAILY ENQUIRER, Oct. 30, 1866, at 2 (Columbus, Ga.); see also *The Constitutional Amendment. Letter From Hon. O. H. Browning*, DAILY NAT'L INTELLIGENCER, Oct. 24, 1866, at 2 (Wash., D.C.); N.Y. TIMES, Oct. 24, 1866.

216. In his effort to prove the Fourteenth Amendment was not understood as incorporating the Bill of Rights against the states, Charles Fairman points to O.H. Browning's speech at the Illinois constitutional convention of 1869 to 1870. There, Browning urged the state's retention of the grand jury but "never so much as suggested that the Fourteenth Amendment incorporated the federal Bill of Rights and thus had fastened the grand jury upon the several states." Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 99 (1949). Putting aside whether Browning's letter suggests he would have been fully aware of the possible implications of the ratified Fourteenth Amendment, Browning himself would have been the last person to rely on the argument that the Fourteenth Amendment properly bound the states to enforce the Bill of Rights.

217. According to Michael Les Benedict, "Johnson's activity in the Louisiana crisis was probably the most important factor in his abandonment by the states-rights-oriented Democratic wing of the Republican party represented by the editors of the New York *Evening Post*." BENEDICT, *supra* note 3, at 206.

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

Mr. Browning objects to the provision of the first article of the amendment: "Nor shall any state deprive any person of life, liberty or property without due process of law"—that it interferes with the right of a state. What right? To oppress its citizens? Is that a right? But he adds that the states have already individual guarantees to the same effect. Alas, it is too true, both that they have, and that these guarantees have been openly, constantly, flagrantly violated in the late slave states, for many years past. Out of this arises the necessity for an amendment which shall protect the low and weak everywhere. But the purpose is not to "subject the state judiciaries" but to arouse them to the performance of duties which they have neglected; to make lawful liberty, the security of life, person and property, a reality and not a mere sham, all over the land.²¹⁹

The editorial concluded, "If a state refuses to do justice, it obliges the general government to do it."²²⁰

Other papers echoed the *Post's* view that the letter was a mistake. The *New Orleans Times*, for example, predicted that "the document will operate mischievously, and that its publication is a mistake that will add to the difficulties of the President's policy."²²¹ Papers less friendly to the Administration were more blunt. According to the *Sparta Eagle*, "[t]he most foolish and ill-timed document that has emanated from any of the departments at Washington since Andy Johnson's 22 of February speech is Secretary Browning's letter."²²²

Even the leading Democratic journal in the North, the *New York World* is disgusted at its sophistry and the false premises which it assumes . . . This letter is received as an authorization document from the White House evincing Andy's deadly hostility to the ratification of the amendment. . . . No Democratic speaker has yet during this campaign descended to the infamy of attacking this amendment on its merits. The Democratic press, too, have avoided this issue [sic] . . . The people accept the issue made by the renegade Secretary, and will render their verdict in November.²²³

Republicans quickly responded to Browning's letter, using it as both an example of the President's feckless policies and an opportunity to remind the public of the state-driven violence in the southern states. "[The President's] secretary has done him the kindness to revive the almost forgotten roll of pro-slavery arguments in defence of [the President's] obstinacy," wrote the *Massachusetts Spy*.²²⁴

219. *Id.*

220. *Id.*

221. *NEW ORLEANS TIMES*, Oct. 31, 1866, at 4.

222. *SPARTA EAGLE*, Oct. 31, 1866, at 2.

223. *Id.*

224. *Mr. Browning's Letter*, *MASS. SPY*, Nov. 2, 1866, at 1.

The first clause declaring that no state “shall deprive any person of life, liberty, or property without due process of law,” provokes Mr. Browning into the absurdity of saying that it will be used “to annihilate the state judiciary” and “gradually but surely revolutionize the whole structure of our government.” Gen. Tillson, who is not a radical, and was sent to administer the Freedmen’s Bureau in Georgia because he was not a radical, relates in a letter, which we refer to elsewhere, how innocent persons are deprived of life, liberty and property in that state without due process of law, and how the Georgia judiciary, though appealed to again and again to stop the carnival of cruelty, remains cold as a stone, and as cruel in its indifference as the mob in its crimes. This liberty of the mob to trample upon the weak and helpless, and of the courts to complacently fold their hands while persons entitled to their protection are lawlessly doomed to death or to a living despair, is what Mr. Browning classes among the reserved rights of the states, to interfere with which is to annihilate the state judiciary, and change the entire structure and texture of our government!²²⁵

Most of all, Browning’s letter clarified the difference between the Reconstruction policies of the President and those of the Republican Congress. Where the President would leave the protection of free speech and equal protection of the laws to the states, Republicans insisted that recent history—both before the War and that summer—amply demonstrated the necessity of adding an amendment that would permanently nationalize these essential rights of national citizenship. This was a message repeated north and south, from the east coast to the interior. In Vermont, Governor Paul Dillingham declared that “the riots at Memphis and New Orleans have furnished the most complete and startling evidence of the inherent error of the executive scheme, and have written its condemnation in characters of blood.”²²⁶ According to the *Semi-Weekly Wisconsin*:

Secretary Browning, like most of the rebel and Copperhead leaders throughout the land, regards the Amendments *as positively evil*. . . . He insists that [Section 1 of the Amendment] will be a dangerous limitation of State authority and State courts. But if Mr. Browning had the large patriotism of a true national man, he would better appreciate the grand nobility of an ordinance in a Republic, which may eventually cover the Continent, declaring that a citizen of Maine or a citizen of Wisconsin should enjoy the same civil rights in Louisiana or in Texas, as the citizens who are born or reside in these States. Mr. Browning must remember the case of Mr. Hoar, of Massachusetts, who was sent to South Carolina for the purpose of persuading the haughty Legislature of that State to relax some of its barbarous laws for the imprisonment of colored seamen. Mr. Hoar was absolutely driven out of that State, and not permitted the right of domicile or the right of free speech, though he was a citizen of the United States, and had been a member of the National Congress.

225. *Id.*

226. See JOURNAL OF THE SENATE OF THE STATE OF VERMONT 26 (1866).

That outrage, and hundreds like it, was performed under . . . laws of a sovereign State. That outrage was committed under the Constitution, as it was, because there were many lawyers who held that South Carolina had a constitutional right so to act. But under the present amendments, it is manifest that such an outrage could not be committed.²²⁷

E. THE ELECTION

On November 6, the Republicans won a landslide victory against their Democratic opponents. The Republicans had needed to maintain at least 122 seats in the House. They won 144.²²⁸ Republicans also carried every state legislature in the North, and won every contested governorship.²²⁹ "Republicans could barely believe the election returns," writes Michael Les Benedict, "a victory as great as that of 1864, a majority of over three quarters of each branch of Congress."²³⁰

A week after the election, the *New York Times* published the first of what would be a series of articles by the pseudonymous "Madison." In "The National Question," Madison explained the importance of the Republican victory:

The elections are now over. The country has decided between the policy of the President and Congress. . . . The one great issue really settled is, that the people will not lose the fruits of the victory won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; to keep and bear arms in his own defence, to be tried and sustained in every way as an equal, without distinction to race, condition or color. These are the demands; these the securities required. In addition to these rights of the citizen, it is demanded that the life of the nation shall be sustained, and the Union perpetuated.²³¹

Despite the Republican victory, the struggle for ratification would continue for two more years. It was not that the amendment and its implications for the southern states remained unclear. It would have been difficult for anyone following the debates between the Republicans and the Johnson Administration not to have recognized that the issue involved binding the states to protect both substantive and procedural rights of American citizens. The issue was one of southern intransigence and continued doubts in the North regarding whether states *ought* to be so bound.

227. SEMI-WKLY. WIS., Oct. 31, 1866.

228. ACKERMAN, *supra* note 2, at 182.

229. MCKITRICK, *supra* note 2, at 447; *see also* ACKERMAN, *supra* note 2, at 182.

230. BENEDICT, *supra* note 3, at 208.

231. Madison, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2.

That winter, supporters of the Republican Congress continued to stress the need to protect the enumerated constitutional rights of American citizens against abridgment by the states. In the January 1867 issue of the *Atlantic Monthly*, Frederick Douglass reminded readers of how the South had suppressed free speech, free press, and the free exercise of religion:

Freedom of speech and of the press it slowly but successfully banished from the South, dictated its own code of honor and manners to the nation, brandished the bludgeon and the bowie-knife over Congressional debate, sapped the foundations of loyalty, dried up the springs of patriotism, blotted out the testimonies of the fathers against oppression, padlocked the pulpit, expelled liberty from its literature, invented nonsensical theories about master-races and slave-races of men, and in due season produced a Rebellion fierce, foul, and bloody.²³²

In an essay published in the *New York Times*, the pseudonymous "Madison" continued his discussion of Fourteenth Amendment privileges and immunities and stressed the need to require states to protect the rights of free speech and the Fifth Amendment. According to Madison, "[t]his protection must be coextensive with the whole Bill of Rights in its reason and spirit."²³³ In a follow-up essay, "Madison" explained that the delay in ratifying the Fourteenth Amendment was due to southern resistance to the idea of being bound to follow the Bill of Rights—resistance exemplified by the violence of southern mobs:

The positions heretofore illustrated have been that there exists a necessity of defining national citizenship, growing out of the fact that one-eighth part of the whole population of the United States is not generally admitted to have any legal *status* whatever; and that there also exists a necessity of more clearly defining the privileges, immunities and rights of the citizen, and of securing his protection everywhere against mob violence and unjust State and municipal legislation. . . . Both the Senate and House reports of the Legislature of Texas base the strongest opposition to the Constitutional Amendment, upon the ground that it assumes to define national citizenship; and they distinctly claim that no one is a citizen of the United States except in and through his citizenship of a State. Most of the States refuse to declare their secession ordinances void; on the contrary insist that they have only been repealed, and everywhere among them it is objected that to Congress is given the power to enforce the Bill of Rights.²³⁴

232. Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, ATL. MONTHLY, Jan. 1867, at 112, 117.

233. Madison, *The Proposed Constitutional Amendment—What it Provides*, N.Y. TIMES, Nov. 15, 1866, at 2.

234. Madison, *The National Question—The Constitutional Amendment—Suffrage—The Rebel States—The Truth of History*, N.Y. TIMES, Nov. 28, 1866.

Again, the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea. In South Carolina, Governor Benjamin Franklin (B.F.) Perry opposed the amendment on the grounds that it "ma[de] citizens of all negroes in the Southern States, and invest[ed] them with the rights of citizenship, without regard to their fitness or moral character. . . . The last section of the amendment utterly wipe[d] out all the rights of the States and centralize[d] all power in Congress."²³⁵ In his address to the Ohio legislature, Governor Jacob D. Cox *recommended* ratification of the Amendment for similar reasons cited by Governor Perry:

The first section [of the Fourteenth Amendment] . . . was necessary long before the war, when it was notorious that *any attempt to exercise freedom of discussion* in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are the very essence of free government. . . . If these rights are in good faith protected by State laws and State authorities, there will be no need for federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.²³⁶

In January, while discussing a proposed anti-whipping bill, John Bingham reminded his colleagues that Congress remained without power to enforce the Bill of Rights, but that this would change with the adoption of the Fourteenth Amendment:

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

On the contrary, the Supreme Court, when presided over by men who never were suspected of mere partisan judgments, whose ability and integrity were acknowledged by all and challenged by none, ruled invariably as I have

235. Governor B.F. Perry, Letter to the Editor, *Governor Perry on the Constitutional Amendment*, N.Y. HERALD, Nov. 22, 1866, at 5.

236. JAMES, *supra* note 128, at 162 (emphasis added) (quoting CINCINNATI COM., Jan. 3, 1867) (internal quotation marks omitted).

stated. If these limitations upon your power confer power to legislate over the States, why not enforce them all by penal enactment?

... So far as we can constitutionally do anything to prevent the infliction of cruel punishments by State laws I wish to see it done. I trust the day is not distant when by solemn act of the Legislatures of three fourths of the States of the Union now represented in Congress the pending constitutional amendment will become part of the supreme law of the land, by which no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution²³⁷

In January of 1866, when John Bingham spoke of an amendment requiring the states to enforce the Bill of Rights, he spoke alone. One year later, the only issue involved whether such an amendment would be ratified. This was not a question of meaning; it was a question of political strategy.

IV. WINTER 1866–1867: SECURING THE FOURTEENTH AMENDMENT

A. PRESIDENT JOHNSON'S ALTERNATE "FOURTEENTH AMENDMENT"

By the end of 1866, only six states had ratified the Fourteenth Amendment²³⁸ with an equal number voting to reject the proposal—four of those rejections coming in December alone.²³⁹ By the beginning of 1867, writes Joseph James, "[t]he situation had now reached a stage in which even its advocates believed the amendment would not pass."²⁴⁰

Sensing an opportunity to move momentum away from ratification, in December of 1866 President Johnson met with a number of provisional southern governors and like-minded conservative politicians to begin forging a North–South alliance that would craft a new approach to Reconstruction.²⁴¹ As a result of those meetings, Johnson and his associates began drafting a "counter-Fourteenth Amendment."²⁴² In January of 1867, Senator James R. Doolittle of Wisconsin, "a conservative leader and close associate of the President in opposing congressional reconstruction in the form of the Fourteenth Amendment,"²⁴³ met with cabinet members and presidential advisors to discuss a proposed alternative to the Howard Amendment.²⁴⁴ The next day, a second meeting took place with President Johnson's approval (and likely participation) in order to frame a specific counter-amendment.²⁴⁵ The final version of the

237. CONG. GLOBE, 39th CONG., 2d SESS. 811 (1867).

238. Connecticut (June 25, 1866), New Hampshire (July 6, 1866), Tennessee (July 19, 1866), New Jersey (Sept. 11, 1866), Oregon (Sept. 19, 1866), Vermont (Oct. 30, 1866).

239. Texas (Oct. 27, 1866), Georgia (Nov. 9, 1866), Florida (Dec. 6, 1866), North Carolina (Dec. 14, 1866), Arkansas (Dec. 17, 1866), South Carolina (Dec. 20, 1866).

240. JAMES, *supra* note 128, at 131.

241. *Id.* at 134, 138.

242. *Id.* at 134–35.

243. *Id.* at 134.

244. *Id.* at 137.

245. *Id.* at 137–38.

counter-amendment erased the Privileges or Immunities Clause and replaced it with a passive restatement of Article IV's Comity Clause:

Sect. 3. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State in which they may reside, and the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. No state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁴⁶

As a viable alternative to the Fourteenth Amendment, Johnson's counter-amendment had little chance of success. The Republicans were committed to ratifying the Fourteenth Amendment and the southern states were equally committed to doing nothing—the so-called policy of “masterly inactivity.”²⁴⁷ What is important about Johnson's proposal is what it tells us about the common understanding of the Privileges or Immunities Clause.

The only change in Johnson's counterversion of Section I involves the Privileges or Immunities Clause. After months of opposing the Fourteenth Amendment due to its intrusion upon matters Johnson believed ought to be left to state control, it is certain that Johnson would not have replaced the language of the Privileges or Immunities Clause with language understood as imposing *greater* constraints upon the states than the proposed Amendment. This might seem an obvious point, but numerous scholars have argued that the Fourteenth Amendment should be read as a reflection of the Radical Republican reading of the Comity Clause. James Wilson and Lyman Trumbull, for example, occasionally insisted that the Comity Clause should be read in conjunction with a broad reading of *Corfield v. Coryell*²⁴⁸ and as authorizing federal protection of unenumerated natural rights.²⁴⁹ If this was the public understanding of Comity Clause language in 1867, it is wholly implausible to think that Johnson would have introduced such language into his counter-amendment.

More likely, Johnson and his advisors viewed the Comity Clause in the same manner as antebellum courts and treatise writers who claimed the provision did nothing more than guarantee sojourning citizens equal access to a limited set of state-conferred rights. By replacing the Privileges or Immunities Clause with a passive restatement of the Comity Clause, Johnson ensured that the Amendment would not apply the substantive rights listed in the first eight Amendments against the states. Indeed, it would do *nothing at all*, because Johnson's counter-amendment lacked both the “no state shall” language and a section

246. *Id.* at 140 (citing WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION, 1:238).

247. MCKITRICK, *supra* note 2, at 472; see also JAMES, *supra* note 128, at 143–46 (“Most reaction [in the South] was in terms of continued inactivity rather than activity for or against any plan.”).

248. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

249. For a discussion of the many and varied references to *Corfield* during the debates of the Thirty-ninth Congress, see Lash, *supra* note 34, at 358–63.

granting Congress power to enforce the amendment. In other words, just as one would expect, Johnson's counter-amendment was an effort to lessen the proposed restrictions on the state governments.²⁵⁰

Most importantly, the alteration suggests that Johnson and his advisors likely understood the phrase "privileges or immunities of citizens of the United States" in the same manner as John Bingham, Jacob Howard, the members of the Southern Loyalist Convention, "Madison," and many others who had publicly discussed the Privileges or Immunities Clause in recent months. The provision would bind the states to protect enumerated substantive rights such as freedom of religion, speech and press, and the right to assemble for the purposes of petitioning government for redress of grievances—all subjects left to state control under the original Constitution. Republicans supported this idea; Democrats like Andrew Johnson opposed it.

B. THE END GAME

In the final days of their session, the Thirty-ninth Congress enacted the First Reconstruction Act over the veto of President Johnson.²⁵¹ The Act divided the southern states into districts and instructed the military commanders of each district to "suppress insurrection, disorder and violence."²⁵² Acting under that protection, states were to elect delegates regardless of "race, color or previous condition" (excluding former rebels) to a convention for drafting a new state constitution.²⁵³ These constitutions would then be submitted to the people of the states, black and white, for ratification and, if approved by a majority, submitted to Congress "for examination and approval."²⁵⁴ Finally, and most importantly, even if their proposed state constitution was approved, no former member of the Confederacy would be allowed to rejoin the Union until *after* three-fourths of the states, north and south, had voted to ratify the Fourteenth Amendment.²⁵⁵ Only a few days after the Thirty-ninth Congress passed the first Reconstruction

250. The alternate's omission of the "no state shall" language is significant for an additional reason: It suggests that Johnson and his advisors did not believe that merely defining national citizenship would bind the states to protect the rights of national citizenship. Following the rule of *Barron v. Baltimore*, 32 U.S. 243 (1833), this could only be accomplished by an affirmative express declaration. Thus, Johnson felt comfortable leaving in the Citizenship Clause of Section I, so long as the second sentence was removed. In his message accompanying his veto of the Civil Rights Act, President Johnson had argued that the initial sentence of the Civil Rights Act both defined and bestowed the rights of national citizenship. It is not clear, however, whether Johnson believed that the bare conferral of citizenship had the effect of applying all enumerated constitutional rights against the states.

251. See EDWARD MCPHERSON, *Reconstruction Act of Thirty-ninth Congress*, in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION*, *supra* note 180, at 191–92 (1875).

252. See *id.* at 191–92.

253. *Id.*

254. *Id.*

255. See *id.*; see also ACKERMAN, *supra* note 2, at 197–98 ("Even then [if the southern states ratified the Fourteenth Amendment], they would have to wait until the Amendment received the approval of three-fourths of the states . . .").

Act, the *Fortieth* Congress met and immediately passed the Second Reconstruction Act.²⁵⁶ This Act instructed the military district commanders to register eligible black and white voters for the state constitutional convention, oversee the election of convention delegates, and also oversee the vote to ratify the convention's proposed state constitution.²⁵⁷

The passage of the two Reconstruction Acts signaled the beginning of the end game for the Fourteenth Amendment, a final phase that would include a presidential impeachment.²⁵⁸ As important as these later events were to the ultimate successful ratification of the Amendment, they did not involve substantive debate regarding the meaning of the Fourteenth Amendment. After March 2, 1867, the future of the Amendment turned on a strategy of political pressure, not one of debate and persuasion. The process by which Congress secured ratification raises important and difficult questions of political legitimacy.²⁵⁹ It does not, however, involve issues of original textual meaning. The debates of 1866 forced a deep and prolonged discussion of the meaning of the Amendment and the content of the rights of citizens of the United States. These debates not only provided the Union an opportunity to signal its considered approval of the Amendment in the elections of 1866, they also have left behind a substantial corpus of material from which we can draw reasonable conclusions about the public meaning of texts like the Privileges or Immunities Clause. This is particularly true if we can cross-check these conclusions against the framing debates and consensus antebellum understanding of phrases like "privileges and immunities of citizens of the United States."

C. RATIFICATION AND CLOSURE

On July 21, 1868, both houses of Congress issued a concurrent resolution "declaring the ratification of the Fourteenth Amendment."²⁶⁰ One week later, Secretary of State William Seward signaled presidential acquiescence by issuing the Executive branch's own proclamation of ratification.²⁶¹ On the eve of the President's surrender, Judge George W. Pascal delivered a speech in the Texas House of the Representatives. Pascal was a Texas judge, legal scholar, political activist, and one of the first professors of jurisprudence in the law department of Georgetown University—a department he helped found.²⁶² Most importantly,

256. ACKERMAN, *supra* note 2, at 202.

257. See EDWARD MCPHERSON, *Supplemental Reconstruction Act of Fortieth Congress*, in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* *supra* note 180, at 192–93.

258. See MCKITRICK, *supra* note 2, at 486.

259. See *supra* note 14.

260. See BOS. DAILY ADVERTISER, July 22, 1868, at 1.

261. 15 Stat. 708, 710 (1868); see also ACKERMAN, *supra* note 2, at 233–34.

262. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 86 n.174 (1993). Paschal also authored an influential treatise on the Constitution of the United States which Congress ordered at the same time it finalized the framing of the Fourteenth Amendment. See *Thirty-ninth Congress. First Session. Senate House of Representatives*, N.Y. TIMES, May 15, 1866,

Paschal had been a member of the Southern Loyalist Convention where he joined Frederick Douglass in calling for the passage of the Fourteenth Amendment and the protection of "the right to peaceably assemble" and the "constitutional guarantees of freedom and free speech and a free press."²⁶³ On this day, Paschal celebrated the passage of an amendment that conferred the rights of citizenship in the tradition of Congress's bestowal of the rights of American treaties like the Louisiana Cession Act of 1803:

The nation was obliged to define citizenship according to the rules of common sense. And not only to define citizenship according to an universal standard, but to add the guarantee that "No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States. . . . The purchase of Louisiana and Florida, the conquest of California, and the purchase of Arizona and Alaska have all involved nice questions of the transfer of allegiance and the rights of citizenship. It is time that these things were settled upon an enduring basis."²⁶⁴

One week later, Paschal published a letter in the *New York Herald-Tribune* explaining that, with the passage of the Fourteenth Amendment, the guarantees of the Bill of Rights were now protected against abridgment by state-sanctioned mobs who might otherwise be emboldened by the failed policies of Andrew Johnson:

The lines defining American citizenship will no longer be matter of doubt. Nor is the remaining guarantee in this clause less important. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any citizen of life, liberty, or property without the process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Law readers are so accustomed to see similar provisions in the State Constitutions, that they underrate this national guaranty. They should have lived in the South, where there was always a class of "persons" for whom there was a summary and barbarous code; they should know that the national bill of rights has, by a common error, been construed not to apply to or control the States; they should have seen and felt that for 30 years there was even half the area of the Union where no man

at 1 (reporting "Mr. Cooke offered a resolution, which was adopted, instructing the Judiciary Committee to inquire into the expediency of purchasing from GEORGE W. PASCHALL his copyright of the Constitution of the United States, with his notes of judicial and legislative decisions thereon, together with the copious index thereto."); see also GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* (1868).

263. See PASCHAL, *supra* note 263; see also *Appeal of the Loyal Men of the South to Their Fellow-Citizens of the United States*, N.Y. DAILY TRIB., Sept. 7, 1866, at 1; *Address of the Southern Loyalists: Appeal of the Loyal Men of the South to Their Fellow Citizens of the United States*, NEWARK DAILY ADVERTISER, Sept. 7, 1866, at 1.

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

could speak, write, or think against the institution of Slavery; they should know that even now to be called a "Radical" is to endanger life; they should know that all the laws passed under Mr. Johnson's new governments reestablish Slavery in a more onerous form to the blacks than the rule of buying and selling and scourging.²⁶⁵

CONCLUSION

The history presented in this Article allows us to make some critical initial conclusions about the public meaning of the Privileges or Immunities Clause. When Congress first debated the Clause, it did so against a background antebellum distinction between the rights of state citizenship and the rights of national citizenship. The former involved state-conferred rights covered in part by the Comity Clause of Article IV. The latter involved federally conferred rights such as those enumerated in the federal Constitution. This antebellum distinction informed the debates of the Thirty-ninth Congress and led John Bingham to abandon his original Comity-Clause-based draft of the Fourteenth Amendment and adopt a draft based on the language of federal treaties like the Louisiana Cession Act in order to achieve his goal of requiring the states to enforce federal rights enumerated in the first eight Amendments.

We now know that this distinction informed the meaning of national privileges or immunities outside the halls of Congress. President Andrew Johnson distinguished the rights of state citizenship from the "privileges and immunities of citizens of the United States" and declared that protecting the latter would require a constitutional amendment. Bingham responded with a second draft of Section I that abandoned the language of the Comity Clause and adopted Johnson's own language, language rooted in antebellum treaties protecting the constitutionally conferred rights of American citizens. When Jacob Howard announced to his colleagues and the country that the "privileges and immunities of citizens of the United States" included enumerated rights such as those listed in the first eight Amendments and in Article IV, his reading of the words mirrored antebellum legal understanding, the framers' understanding (Bingham) and the understanding of the Chief Executive (Johnson). This by itself is highly suggestive of a common public understanding of national privileges and immunities.

Evidence of consensus public understanding grows even stronger when we consider the public political debates of the summer and fall of 1866. With both parties making the Fourteenth Amendment a central aspect of their national platform, Section I became the subject of impassioned and prolonged public debate. The July riots in New Orleans provided Republicans with a specific and bloody example of why it was necessary to adopt an amendment that would force the states to protect enumerated constitutional privileges and immunities

265. George W. Paschal, Letter to the Editor (July 24, 1868), in *The Fourteenth Article*, N.Y. DAILY TRIB., Aug. 6, 1868, at 2.

such as the First Amendment rights of speech, press, and assembly. Opponents of the Amendment did not disagree with the Republican understanding of the privileges and immunities of citizens of the United States; they simply sought to prevent the passage of an amendment that would force the states to respect such rights.

All of this suggests two important aspects of the original meaning of the Privileges or Immunities Clause. First, the Clause was widely understood to protect substantive, constitutionally enumerated rights *such as* the rights of the First Amendment. The argument was not that First Amendment rights were a category unto themselves, but that as enumerated constitutional rights, they fell within the category of “privileges or immunities of citizens of the United States.” This explains why speakers also described the equal protection rights of the Comity Clause of Article IV as an additional aspect of national privileges or immunities. Jacob Howard had expressly named both the first eight Amendments and the Comity Clause as representing aspects of the privileges or immunities of citizens of the United States and the debates of the fall campaign reflect the same understanding.

The debates also indicate a consensus understanding of the Comity Clause as providing sojourning citizens with equal access to a limited set of state-conferred rights. This equal protection reading can be found in antebellum case law, the framing debates of the Thirty-ninth Congress, and throughout the campaign speeches of 1866. It is most strongly reflected in President Andrew Johnson’s proposed counter-Fourteenth Amendment which would have replaced the Privileges or Immunities Clause with a passive restatement of the Comity Clause. Johnson’s draft would have left protection of enumerated rights under the control of the several states, a preservation of the pre-Civil War status quo that Johnson had long insisted be maintained.

These two conclusions, that the Privileges or Immunities Clause protected enumerated constitutional rights and that these rights included, but were not limited to, the equal protection rights of the Comity Clause, carry important implications for contemporary debates regarding the meaning of Section I in general, and the Privileges or Immunities Clause in particular. To begin with, the evidence provides strong historical support for an incorporationist reading of Section I. Scholars have long pointed to various comments during the framing debates and related public discussions that seemed to link the Privileges or Immunities Clause to rights listed in the first eight Amendments. Until now, however, no scholar has presented a theory of public meaning that explains *why* these rights were viewed as an aspect of national citizenship. It has long been assumed that the so-called “silence” about the Privileges or Immunities Clause precluded any historically grounded claims about the original meaning of the text. Far from silence, we now know that the protection of enumerated rights was part of the public understanding of the text, and we know *why* such rights were aspects of the privileges of national citizenship.

Finally, the debates of 1866 provide the outlines of a theory of the Privileges or Immunities Clause that avoids both constitutional redundancy and uncabined judicial discretion. For example, some scholars argue that the Privileges or Immunities Clause is simply a rewording of the Comity Clause and should be understood as doing nothing more than authorizing federal enforcement of the rights of equal protection in the states.²⁶⁶ The evidence suggests that these scholars are right to identify Comity Clause rights as one aspect of the rights protected under the Privileges or Immunities Clause, but are wrong to *equate* the two clauses. A second and perhaps more pervasive scholarly proposition also equates the Privileges or Immunities Clause with the Comity Clause but argues that the Fourteenth Amendment transforms the “privileges and immunities” of the Comity Clause into substantive national rights.²⁶⁷ These scholars rely on Justice Bushrod Washington’s opinion in *Corfield v. Coryell*²⁶⁸ and his reference to “fundamental” rights protected under the Comity Clause, and argue that the Privileges or Immunities Clause allows the Courts to identify and enforce an undefined set of rights regardless of constitutional enumeration.²⁶⁹ However, nothing in the public debates of 1866 suggest the text was understood as a reference to unenumerated substantive rights. To the degree that speakers cited the Comity Clause, it was in reference to the principle of equal protection. Named substantive rights related to those rights actually enumerated in the Constitution. In other words, rather than an inexhaustible source of unenumerated rights, the evidence suggests that the “privileges and immunities of citizens of the United States” involved those rights conferred upon citizens by the federal Constitution.²⁷⁰ Such a reading would support judicial incorporation of the Bill of Rights and federal enforcement of the equal rights protected under the Comity Clause, but it would not open the door to judicial enforcement of an undefined and unenumerated set of substantive liberties against the policy choices of the people in the states.

Although the above conclusions are consistent with historical evidence, there nevertheless remain many questions regarding the proper construction of the Privileges or Immunities Clause and the manner in which it relates to the other clauses of Section I. Recent historical scholarship on both the Due Process and Equal Protection Clauses suggests the need to rethink a number of older

266. See, e.g., Hamburger, *supra* note 31, at 111–12; NELSON, *supra* note 12, at 118.

267. See, e.g., AMAR, *supra* note 132, at 102; AMAR, *supra* note 12, at 176–78; BALKIN, *supra* note 35, at 208–09; BARNETT, *supra* note 32, at 62–65.

268. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

269. See sources cited *supra* note 268.

270. Just to be clear, I am not arguing that there is evidence of a public *rejection* of an unenumerated substantive rights reading of the Privileges or Immunities Clause. My point is only that the evidence we have reveals a public understanding of the Clause that went beyond mere equal protection principles but no further than those rights actually enumerated in the Constitution. I have discovered no evidence that shows any segment of the public understood the Privileges or Immunities Clause as nationalizing substantive natural rights or even well-accepted substantive common law rights.

assumptions regarding these critical aspects of the Fourteenth Amendment.²⁷¹ There also remains the question of how the Citizenship Clause relates to the Privileges or Immunities Clause. For example, does the Citizenship Clause itself confer rights, or is this accomplished only by the Privileges or Immunities Clause? Also, to what degree, if any, does the Citizenship Clause's conferral of state citizenship constrain state legislation?²⁷² In brief, what we still lack is a comprehensive originalist theory of the Fourteenth Amendment.²⁷³

For now, it is enough to conclude that the evidence presented in this Article substantially vindicates the intuition that led people to rename the Fourteenth Amendment the "Howard Amendment." Jacob Howard's description of the Privileges or Immunities Clause as involving those personal rights enumerated in the Constitution was a remarkably accurate account of the public meaning of the Clause, one that fits both antebellum and the framers' understanding of the rights "of citizens of the United States." It was because President Andrew Johnson shared Howard's understanding that he attempted to remove the Clause from the Fourteenth Amendment. In fact, we owe a debt of thanks to President Johnson for his forceful and extended opposition to the Fourteenth Amendment. The public debate was richer for it, as is our understanding of the original meaning of the Privileges or Immunities Clause.

271. For examples of recent historical scholarship, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (discussing protection against sex discrimination as an aspect of the original understanding of various clauses in Section 1); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (discussing a limited historical understanding of the "substantive due process"); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2008) (presenting evidence suggesting the Equal Protection Clause guaranteed equal enforcement of the laws, and not substantively equal laws); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (discussing the historical distinction between the Fifth Amendment and Fourteenth Amendment Due Process Clauses). See also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that the Privileges or Immunities clause, and not the Equal Protection Clause, was the primary antidiscrimination provision of Section 1).

272. Justice John M. Harlan, for example, famously argued that the citizenship clause by itself constrains states to enact laws of "equal citizenship." See *The Civil Rights Cases*, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting) ("Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same state.").

273. One that I hope to supply in a forthcoming work.

