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The Privileges or Immunities Clause Abridged:
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Randy E. Barnett* & Evan D. Bernick**

Abstract

The Privileges or Immunities Clause of the Fourteenth Amendment was virtually eliminated by the Supreme Court in three cases: The Slaughter-House Cases, Bradwell v. Illinois, and United States v. Cruikshank. Today, most constitutional scholars agree that this was a terrible mistake, the effects of which continue to reverberate through our constitutional law. But, as evidenced by the Court’s decision in McDonald v. City of Chicago, both the “left” and “right” sides of the Court are reluctant to open the “Pandora’s Box” of uncertainty created by the phrase “privileges or immunities of citizens of the United States.” Scholars have not yet arrived at a consensus about its original meaning—much less about how to implement that meaning in constitutional practice.

In this article, we clear the field of a competing interpretation offered by Professor Kurt Lash. In an impressive series of articles and monograph, Lash avoids the Pandora’s Box by contending that the “privileges or immunities of citizens of the United States” are limited to the rights enumerated in the text of the Constitution, and do not include any unenumerated rights. While we agree with Lash that the enumerated rights are indeed among the “privileges or immunities” of U.S. citizens, we demonstrate his failure to establish that these are the only rights of U.S. citizens that state legislatures may not abridge.

In future work, we will present evidence of a more capacious original meaning of “privileges or immunities” of U.S. citizens, as well as a practical means for judges to identify these rights and apply them to cases and controversies. It suffices for now to say that we side with Michigan Senator Jacob Howard’s explanation of “privileges or immunities” over Lash’s.

The Privileges or Immunities Clause of the Fourteenth Amendment reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹ Upon confronting this language, the first question most ask is what exactly are the “privileges or immunities of citizens of the United States”? It was this very question that Justice Ruth Bader Ginsburg put to attorney Alan Gura during oral argument in the case of McDonald v. Chicago,² as he was

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¹ U.S. CONST. amend. 14, § 1.
² 561 US 742 (2010).
urging the Court to revive the Privileges or Immunities Clause to protect the right to keep and bear arms. “But I really would like you to answer the question that you didn’t have an opportunity to finish answering, and that is: What other . . . rights? What does the privileges and immunities of United States citizenship embrace?”

On May 23, 1868, Jacob Howard, Senator from Michigan, former Attorney General of Michigan, and the designated sponsor of the Fourteenth Amendment in the Senate, delivered a comprehensive and widely-reported address in which he addressed this question. According to Howard, the “privileges or immunities” of U.S. citizens consisted of two categories of “fundamental guarantees.” In the first category were “the privileges and immunities spoken of in the second section of the fourth article of the Constitution,” which were identified by Justice Bushrod Washington in the 1823 case of *Corfield v. Coryell.* Howard read a very lengthy passage from Justice Washington’s opinion, which included this language: “protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . .”

Howard then located a second category of fundamental rights: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution.” After providing a nonexhaustive list of those enumerated personal rights, Howard summarized his understanding of the two categories of “privileges

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3 See Tr. of Oral Arg. 8 (March 2, 2010).
5 Id. at 2765. The Privileges and Immunities Clause appears at U.S. Const., Art. IV, § 2, cl. 1.
6 6 F. Cas. 546 (C.C.Pa. 1823).
7 Id. at 547. Washington was here reiterating the canonical formulation of natural rights that was originally drafted in 1776 by George Mason for the Virginia Declaration of Rights: 

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

See Committee Approved Draft of Virginia Declaration of Rights (May 27, 1776), http://www.gunstonhall.org/georgemason/human_rights/vdr_committee_draft.html. Mason’s formulation was adopted by several states for the declarations of rights in their own constitutions. See Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People 33-40, 67 (2016). In Washington’s words, these rights were “deemed to be fundamental.” Corfield, 6 F. Cas., at 551.
9 Id. (emphases added). Among other rights, Howard omitted the rights of criminal defendants to confront witnesses, to have compulsory processes for obtaining witnesses in their favor, and to have the assistance of counsel for their defense. Id. See U.S. Const. amend 5. Howard’s list also did not refer to what we call the Establishment Clause as any kind of right. Lash has claimed that, though originally a federalism provision, by 1868, the Establishment Clause was thought to protect an individual right, but Howard’s omission undermines this claim. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1154 (1995) (concluding that “[b]y 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution.”).
or immunities”: “Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution.”

Howard then explained that an amendment was necessary to protect these rights because, at present, “[t]hey d[id] not operate in the slightest degree as a restraint or prohibition on state legislation.” So, “[t]he great object of the first section of this amendment is . . .  to restrain the power of the States and compel them at all times to respect these fundamental guaranties.”

It would seem clear that Howard understood the “privileges or immunities of citizens of the United States” to include both (a) the set of unenumerated rights that Corfield v. Coryell associated with the “privileges and immunities” of Article IV, Section 2, and (b) the rights enumerated in the first eight amendments to the Constitution, and that none of the “fundamental guaranties” in this “mass” may be abridged by states. This is, in fact, the conventional way in which scholars have read Howard’s language.

It would, therefore, take a very bold advocate to claim that the original meaning of the “privileges or immunities” of U.S. citizens did not “restrain the power of the States” to abridge the unenumerated rights of citizens or “compel [states] at all times to respect these guaranties.” Were this claim accurate, it would follow either that Jacob Howard misunderstood the text he was proposing, or that scholars have long misunderstood what Jacob Howard said about that text.

Professor Kurt Lash is so bold. In a series of painstakingly-researched articles that have culminated in a book, Lash has proposed that the original public meaning of the Privileges or Immunities Clause protects rights that are enumerated in the text of the federal Constitution—and only such rights. According to Lash, the Privileges and Immunities Clause of Article IV, Section 2 was, in antebellum jurisprudence, understood to be a mere “Comity Clause” that confers only a singular enumerated right to be free from discrimination with respect

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10 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (emphasis added).
11 Id. at 2766.
15 Id. at xi (averring that “the original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution”).
to one’s fundamental civil rights when traveling in another state. And it was this singular right—the right to be free from state discrimination with respect to one’s fundamental civil rights when sojourning in another state—to which Howard was referring.

According to Lash, therefore, Howard’s two categories of “privileges or immunities” receive two different levels of protection against state abridgment. The enumerated rights listed in the first eight amendments (and elsewhere) are protected absolutely. States are free, however, to abridge the privileges and immunities identified by Justice Washington in Corfield and discussed by Howard in his floor speech, provided they do not discriminate against out-of-staters. Crucially, on Lash’s account, because the original meaning of the Privileges and Immunities Clause in Article IV allowed states to enact laws that discriminate with respect to the unenumerated rights of their own citizens, so too does the Privileges or Immunities Clause of the Fourteenth Amendment.

This has not always been Lash’s view. Around the turn of the millennium, he expressed sympathy for the view that the Clause protected both enumerated and unenumerated rights. In 2009, he announced that he was “no longer convinced” that Ohio Representative John Bingham—the Clause’s principal framer—“read the Privileges or Immunities Clause to have nationalized more rights than those listed in the first eight amendments.” Today, he holds that the Clause nationalized all enumerated rights—not merely those in the first eight amendments—but only enumerated rights. We think he was closest to the mark the first time.

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

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16 Id. at 158-9 (arguing that Howard’s view fit “with the antebellum understanding of ‘privileges or immunities of immunities of citizens of the United States,’” according to which “citizens of the United States had a right of equal access to a limited set of state-conferring rights when traveling to a state other than their home states.”). Enumerated rights also include the right to vote for federal representatives and the right to the writ of habeas corpus. Id. at 148, 300.

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


19 Kurt T. Lash, Beyond Incorporation, 18 J. CONTEMP LEGAL ISSUES 447, 460 (2009).
property. . . .”

It is generally accepted that the Fourteenth Amendment was designed to constitutionalize these rights so they could not be repealed by a future Congress, and to empower Congress to enact such protective legislation. Indeed, in 1870, Congress reenacted the Civil Rights Act after adoption of the Fourteenth Amendment just to be sure.

Lash’s constricted reading of “the privileges or immunities of citizens of the United States” makes it hard for him to explain how the Fourteenth Amendment protects these unenumerated civil rights or how it authorized Congress to enact the Civil Rights Act. The Act, after all, protected against far more than discrimination against citizens sojourning in another state—it guaranteed to all “citizens” the same bundle of listed rights “as [are] enjoyed by white citizens,” full stop. The Enforcement Act of 1870 reenacted the 1866 Act and guaranteed the equal enjoyment of a slightly smaller bundle of rights to “all persons.”

Given his enumerated-rights-only view, Lash has struggled with how to accommodate the Republicans’ well-established efforts to constitutionalize the rights that were enumerated in the Civil Rights Act of 1866, but not in the Constitution. At different times he has located the authority to enact the Civil Rights Act in each of the four operative clauses of Section One of the Fourteenth Amendment: the Privileges or Immunities Clause (2011), the Citizenship Clause (2011), the Enforcement Act (2017), and the Fourteenth Amendment (2023).

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21 Id.
23 The Enforcement Act omits the rights “to inherit, purchase, lease, sell, hold, and convey real and personal property” See id., ch. 114, § 16. We will discuss the significance of this omission, which, as Lash observes, seems to have been a consequence of the shift from “citizens” to “persons.” Kurt T. Lash, Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act, 106 Geo. L.J. 1389, 1464-6 (2017) (acknowledging common law distinction between the ways in which citizens and non-citizens could “hold” real property but denying that it entails the conclusion that the 1866 Civil Rights Act’s protection for property-holding does not “protect[ing] a natural right of all persons.”).
24 14 Stat. 27, 27 ch. 31, § 1 (1866); 16 Stat. 140, 144, ch. 114, § 16, 18 (1870).
25 Lash, The Origins of the Privileges or Immunities Clause, Part II, supra note 13, at 407 (affirming that “ensuring that Congress had such power to enforce the equality principles of Article IV (and thus authorize the Civil Rights Act) was one of the concerns driving the adoption of the Fourteenth Amendment”; that John Bingham “also wanted to protect the substantive rights listed in the first eight amendments; and that “[b]oth goals could be accomplished through an amendment which protected both the equality provisions of Article IV and the substantive liberties enumerated in the Bill of Rights.” Lash’s discussion of Howard’s reference to the “the entire mass of rights, privileges, and immunities found in Article IV and the Bill of Rights” two paragraphs prior, which reference Lash rightly treats as a part of an exposition of the Privileges or Immunities Clause, makes plain Lash’s belief that the means through which these goals were accomplished was the Privileges or Immunities Clause. Id).
In earlier writings, both of us have expressed sympathy for the view that the Privileges or Immunities Clause empowers federal courts to enforce unenumerated rights, such as those contained in the Civil Rights Act of 1866, and authorizes Congress to enact protective legislation. Neither of us, however, has engaged with or responded to Lash’s most recent and unique two-class interpretation of the original meaning of the Privileges or Immunities Clause in the depth that it deserves. In this Article, we will do so.

26 See Lash, supra note 14, at 170 (identifying Citizenship Clause as “the text that constitutionalized the Civil Rights Act of 1866.”).

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

28 See Lash, Enforcing the Rights of Due Process, supra note 23, at 1459 (adducing evidence that the “Due Process Clause of the Fourteenth Amendment carried a meaning that both critics and supporters would have recognized as authorizing legislation like the Civil Rights Act.”).


30 For example, in an 1872 speech, Ohio Senator John Sherman supported the constitutionality of what would eventually become the Civil Rights Act of 1875 by linking the Privileges or Immunities Clause to the “other rights retained by the people” that are affirmed in the Ninth Amendment. [T]he ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them and cannot do it,) of citizens of the United States . . . our fathers did not attempt to enumerate. They expressly said in the ninth amendment that they would not attempt to enumerate these rights; they were innumerable, depending upon the laws and the courts as from time to time administered.

CONG. GLOBE, 42d Cong., 2d Sess. app. 26 (1872).

Those “innumerable” rights to which the Ninth Amendment refers include the individual natural rights that “make it possible for each person to pursue happiness while living in close proximity to others and for civil societies to achieve peace and prosperity.” See, e.g., Barnett, supra note 29, at 266-55; Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 TEX. L. REV. 1 (2006); Randy E. Barnett, Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 937 (2008) Lash agrees, although he argues as well that, in addition to individual natural rights, the “rights . . . retained by the people” also include a collective right of the people to self-governance. See Kurt L. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 895, 910, 912 (2008).

That the courts and Congress must protect these rights does not tell us how they are to do so. In other work, we have maintained that this is done, not by defining and enforcing the rights themselves, but in defining and limiting the scope of governmental power. See Barnett & Bernick, No Arbitrary Power, supra note 17. But this issue is beyond the scope of this article, in which we are solely concerned with the original meaning of the text of the Privileges or Immunities Clause. Getting that meaning right is simply the first step; giving that meaning legal effect is the second.
We will contend that Lash has provided readers with an abridged version of the Clause—one that reduces its originally-understood scope. In a subsequent article, we will advance a competing account of the original public meaning of the Privileges or Immunities Clause, and develop a framework that can be used by judges and legislators to identify the rights protected by the Clause, to thwart state abridgments of those rights, and to evaluate congressional legislation that is said to be designed to protect those rights.

Part I provides an exposition of Lash’s thesis. Because his arguments are complex, and rely on diverse evidence, our summary is lengthy.

Part II systematically critiques Lash’s evidence and arguments. We find that the Enumerated-Rights-Only—or “ERO”—understanding has little support in antebellum jurisprudence; that the evidence Lash offers to show that John Bingham held the ERO understanding is equivocal at best; and that the ERO understanding was not widely shared by the Fourteenth Amendment’s framers. We then explain why evidence from the public debate over ratification does not support a widely-held ERO understanding among members of the public.

Next, we canvas post-ratification jurisprudence and congressional debates over various pieces of civil rights legislation prior to the Supreme Court’s fateful decisions in *The Slaughterhouse Cases* and *U.S. v. Cruikshank*—decisions which are generally regarded as having rendered the Privileges or Immunities a “practical nullity.” We find that the interpretations of the Clause that are contained in these materials are, for the most part, inconsistent with the ERO understanding.

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

Part III concludes.

I. LASH’S THESIS

A. Public Meaning Originalism and Terms of Art

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

The goal of this book is to illuminate the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. I define “original meaning” as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who were aware of the context in which the text was communicated for ratification. Determining original meaning

31 We follow the plan of Lash’s book for ease of exposition, with one exception. What Lash labels as Bingham’s “second” draft of Section One, we call his “third.”
32 83 US 36 (1873).
33 92 US 542 (1876).
requires investigating historical events and texts antecedent to the proposed amendment in order to understand the full historical context in which a proposed text is debated and ratified. This is not an effort to discover the “true” or even “best” meaning of antecedent events and texts. Instead the goal is to recover how these legal antecedents were broadly understood, correctly or not, at the time of the adoption of the Fourteenth Amendment.\footnote{LASH, supra note 14, at xiv.}

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

Consider the Ex Post Facto Clause of Article I, Section 10.\footnote{U.S. CONST. Art. I, § 10, cl. 1.} Scholars generally agree that the term “ex post facto laws” is a term of art—a phrase that was not part of ordinary discourse but which carried a particular meaning in legal settings in 1788.\footnote{See Robert G. Natelson, Statutory Retroactivity: The Founders’ View, 39 IDAHO L. REV. 489, 501-4 (2003) (tracing the term through Roman jurisprudence through the common law to the debate over ratification). We do not here affirm this interpretation, but merely report it.} During the ratification debates, however, the Constitution’s supporters provided public explanations of the meaning of the term and repeatedly emphasized that, because ex post facto laws were criminal in nature, the Ex Post Facto Clause would not prevent state legislatures from adopting retroactive civil legislation.\footnote{See id. at 517-22 (adducing evidence that “the majority of federalists addressing the issue treated ex post facto laws as criminal only” during the ratification debate and that this turned out to be “wise politically”).} Through such public explanations, terms that might otherwise be unintelligible to members of the public who lack antecedent legal knowledge can become publicly understood to denote particular concepts.

More subtly, the concepts associated with legal terms of art may inform public meaning solely by means of deference on the part of laypeople to those with specialized legal knowledge.\footnote{As Lawrence Solum has put it, an ordinary citizen might read a phrase like “ex post facto laws” and think, “Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer.” Lawrence B. Solum, Originalism and the Natural Born Citizen Clause, 29 IMMIGR. & NAT’LITY L. REV. 593, 596 (2008).} That ordinary citizen might be prepared to support the ratification of that phrase into law, knowing that its meaning had previously been established in legal settings and that that meaning would bind the public upon ratification. If one has a high level of trust in the framers of a document, agrees with the terms that one does understand, and regards the status quo as intolerable, it may be reasonable to defer one’s understanding to others in this way.

Showing that a division of linguistic labor has operated in either of these ways, however, is no easy task. To make credible his case that technical “legal antecedents” informed the original public meaning of the Privileges or Immunities Clause, Lash must establish both (a) that these legal understandings were widely accepted \textit{and} (b) either that these understandings were communicated to the public, or that the public deferred to the understanding of those who were legally trained.
With these methodological preliminaries out of the way, we begin by summarizing Lash’s attempt to make out this claim.

B. “Privileges and Immunities of Citizens of the Several States” as a Term of Art: Bingham’s First Two Drafts

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

This claim puts him sharply at odds with Eric Claeys, who has stressed the influence in America of Sir William Blackstone’s conception of privileges and immunities as the positive law protections that civil society affords to the natural rights of its own citizens. According to Blackstone, “‘civil privileges’ refer to entitlements that replicate in positive law the general substance of natural rights. ‘Private immunities’ refer to the domains of noninterference English subjects enjoy as residual rights to do that which is not prohibited by particular civil laws.” In sum, Claeys claims that “privileges” and “immunities” were “understood in context as terms of art for the civil rights citizens were entitled to enjoy in a republican political community.” To our knowledge, Lash has not responded to Claeys.

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

The inquiry is, what are the privileges and immunities of citizens in the several states. We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may,

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40 U.S. CONST., Art. IV, § 2, cl. 1.
41 LASH, supra note 14, at 20.
43 Id. at 821.
44 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. app. 293 (Rep. Shellabarger); id. at 475 (Sen. Trumbull); id. at 1118 (Rep. Wilson); id. at 1836 (Rep. Lawrence); id. at 1835 (Rep. Kelley); id. at 2765 (Sen. Howard) (citing Washington’s opinion in Corfield with approval).
however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned are, strictly speaking, privileges and immunities.\(^{45}\)

Lash argues that Justice Washington’s Corfield opinion expressed a comity-only view of the Privileges and Immunities Clause and was understood to do so by legally-educated readers. From his survey of antebellum cases and commentaries on the Privileges and Immunities Clause, he discerns “five possible approaches to Article IV, with one quickly emerging as the dominant interpretation.”\(^{46}\) The dominant interpretation, he argues, was that the Privileges and Immunities Clause was a “Comity Clause”\(^{47}\) requiring states “to grant sojourning citizens of other states some of the same privileges and immunities that the state conferred on its own citizens.”\(^{48}\) With this assessment of antebellum authorities, we have no quarrel.

What then has this antebellum Privileges and Immunities jurisprudence to do with the Privileges or Immunities Clause? The answer given by most scholars is that the wording of the latter Clause was modeled on the language of the former. The set of rights protected absolutely by the latter, therefore, bears a substantial relationship with the set of rights of sojourners in other states protected from discrimination by the former. For this reason, understanding the substantive rights

\(^{45}\) Corfield, 6 F. Cas. at 551.

\(^{46}\) LASH, supra note 14, at 22.

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

Above all, Article IV is relevant to what the substance of “privileges and immunities” was thought to be in 1868, regardless of how, or against whom, they were constitutionally protected by Article IV.

\(^{48}\) Id. at 22-3.

Lash, however, rejects this consensus. Instead, he advances the novel claim that the language of the Privileges or Immunities Clause is “\textit{not} based on the language of Article IV” because of conflicts that emerged in the Thirty-Ninth Congress over one of Representative John Bingham’s initial drafts of the Clause—a draft that \textit{was} based on the language of Article IV.\footnote{\textit{Lash, supra} note 14, at x-xi.}

On December 6, 1865, Bingham proposed the following amendment to the Constitution: “Congress shall have power to pass all necessary and proper laws to secure to all persons in every state of the Union equal protection in their rights, life, liberty, and property.”\footnote{\textit{Cong. Globe}, 39th Cong., 1st Sess. 14 (1865). This proposed amendment was introduced to the Joint Committee on Reconstruction on January 16. \textit{Benjamin K. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction} 51 (1914).} After detailing systematic state violations of “the absolute guarantees of the Constitution,” Bingham referred his fellow representatives to the Privileges and Immunities Clause and provided the following interpretation of its meaning:

\textit{[G]o read, if you please, the words of the Constitution itself: ‘The citizens of each state (being ipso facto citizens of the United States) shall be entitled to all the privileges and immunities of citizens (applying the ellipsis ‘of the United States’) in the several States.’ This guarantee is of the privileges and immunities of citizens of the United States \textit{in}, not \textit{of}, the several states. This guarantee of your Constitution applies to every citizen of every State of the Union; there is not a guarantee more sacred, and more vital in that great instrument . . .}

Rights of American citizens “\textit{in}” the several states connoted the fundamental preexisting rights of U.S. citizens that traveled with them; rights “\textit{of}” the several states connoted state conferred rights.\footnote{\textit{Cong. Globe}, 39th Cong., 1st Sess. 158 (emphasis added).} In Bingham’s words, the Privileges and Immunities Clause of Article IV guaranteed to U.S. citizens the enjoyment of “natural or inherent rights, which belong to all men irrespective of all conventional regulations.”\footnote{We will confront the textual distinction between “\textit{in}” and “\textit{of}” again when considering an alternative to the Fourteenth Amendment proposed by President Andrew Johnson. \textit{See infra} at notes 325-8.} That these included rights set forth in the 1789 amendments can be seen in Bingham’s express reference to the Fifth Amendment in 1859 as being

\footnote{\textit{Cong. Globe}, 35th Cong., 2d Sess. 983 (1859).}
among the “privileges and immunities of citizens of the United States” and in the subsequent evolution of the text of his proposed amendment.

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

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

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

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

[T]he amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the First Congress in 1789 and made part of the Constitution of the country . . . 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 . . . The House knows, sir, the country knows, the civilized world knows, that the legislative, executive, and judicial officers of eleven States within this Union within the last five years, in utter disregard of these injunctions . . . have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.

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

55 Id.
56 KENDRICK, supra note 51, at 61.
57 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (emphasis added).
58 LASH, supra note 14, at 96.
Democrats, encouraged by the recent Republican failure to override President Andrew Johnson’s veto of the Freedmen’s Bureau Bill, attacked Bingham’s amendment as too great an intrusion upon states’ reserved powers. Lash reads some Republicans as responding by echoing Bingham’s claim that the proposed Amendment did nothing more than to enforce the Privileges and Immunities Clause but averring that the Privileges and Immunities Clause was solely concerned with comity.

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

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

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

A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights . . . had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment . . . I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters 217, in the case of Barron v. The Mayor and City of Council of Baltimore . . .

Note that Bingham’s “bill of rights” included both the Fifth Amendment’s Due Process of Law Clause and the Privileges and Immunities Clause, which—as we have seen—he understood to absolutely protect certain national and inherent civil

59 Id.
60 Id. at 97-99.
61 CONG. GLOBE, 39th Cong., 1st Sess. at 1063-4 (1866).
62 Id. at 1064.
64 CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866).
rights. This was not an idiosyncratic confusion on Bingham’s part. It arose from the fact that the first ten (or eight) amendments were not commonly called “the Bill of Rights” until the Twentieth Century.\footnote{See Gerard N. Magliocca, The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights 6 (2017).}

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

Hotchkiss made plain his “desire to secure every privilege and every right to every citizen in the United States that [Bingham] desires to secure.”\footnote{Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).} He argued, however, that Bingham’s amendment failed to “provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another.”\footnote{Id.}

Lash understands Hotchkiss to have argued that Bingham’s language would likely be understood to protect comity rights alone and to have urged that it should be more “plain” in order to avert that misunderstanding.\footnote{Id.} After what Lash deems an unsuccessful effort on Bingham’s part to defend his proposed language, Hotchkiss held forth about the importance of clearly establishing “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.”\footnote{Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).}

On Lash’s account, Bingham at this point recognized that no proposed amendment that tracked the language of the Privileges and Immunities Clause was likely either to be ratified or to be generally understood to protect more than comity rights and so chose to “go back to the drawing board.”\footnote{Lash, supra note 14, at 109.} When he did, he looked for other language that would attract less opposition and better suit his bill-of-rights-protective purposes. He found that language, ironically enough, in President Johnson’s message in connection with his veto of the Civil Rights Act of 1866.

The Civil Rights Act of 1866 began by declaring “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . are citizens of the United States.”\footnote{14 Stat. 27, ch. 31, § 1 (1866).} President Johnson recognized that the Act directly conferred rights of federal citizenship upon those who had previously been denied those rights rather than altering state citizenship or rights that attached to state citizenship. He posed the following rhetorical question: “Can it be reasonably supposed that [groups previously excluded from national citizenship] possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?”\footnote{Cong. Globe, 39th Cong., 1st Sess 1679 (1866).}
Lash believes that Johnson made a distinctive—and certainly unintended—contribution to the amendment project in which Bingham was mired by distinguishing between rights protected by the Privileges and Immunities Clause and “privileges and immunities of citizens of the United States.”\(^\text{73}\) In Lash’s telling, Bingham used this location to achieve the end for which the language of the Privileges and Immunities Clause proved unsuited—the communication of a concept of protected national rights that was neither too narrow to achieve his goal of Bill-of-Rights enforcement nor too broad to avoid an intra-congressional veto.

C. “Privileges or Immunities of the Citizens of the United States” as a Term of Art: Bingham’s Third and Final Draft\(^\text{74}\)

Lash’s most novel contribution to the body of scholarship on the Privileges or Immunities Clause is his excavation of evidence concerning the “privileges and immunities of citizens of the United States” from what seems at first to be an unlikely source: Antebellum treaty jurisprudence. Lash begins with Article III of the Louisiana Cession Act of 1803 (“Cession Act”).\(^\text{75}\)

Article III promised the inhabitants of territory purchased from France that they would enjoy “all the rights, advantages and immunities of citizens of the United States” upon being fully admitted into the Union.\(^\text{76}\) This language, Lash argues, was “the common language of contemporary international treaties, and . . . clearly influenced later American treaties involving territorial cession” through Reconstruction.\(^\text{77}\)

To explain its meaning, Lash focuses on “one of the most extensive antebellum discussions involving the privileges and immunities of U.S. citizens”—the debate produced by what were ultimately unsuccessful congressional efforts to secure a ban on slavery as a condition of admitting Missouri into the Union.\(^\text{78}\) Opponents urged that such a ban would deny citizens of Missouri “the rights, advantages, and immunities of other citizens of the Union” recognized in the Cession Act.\(^\text{79}\) Free-state advocates argued that the ban did not deny these rights, because the Cession

\(^{73}\) See LASH, supra note 14, at 140 (crediting Johnson with “introduc[ing] the language of the rights of national citizenship into the legislative and public debate”).

\(^{74}\) Lash discusses the two versions of Bingham’s proposed amendment that we examined in the previous section: the version proposed to the Joint Committee on January 16 and the version that he moved to substitute on February 3. But for reasons he does not provide, he labels the third and final version that Bingham proposed to the Committee on Reconstruction on April 21, 1866, as his “second draft.” The latter was identical to the final amendment, save for the absence of the Citizenship Clause, which would be proposed by Jacob Howard on May 30 and adopted on the same day. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Because we think this necessarily imports confusion into a discussion of three of Bingham’s distinct formulations, we do not adopt Lash’s terminology. We instead refer to the April 21st version as his “third draft” or as the “final version”


\(^{76}\) Id. at 202.

\(^{77}\) LASH, supra note 14, at 49.

\(^{78}\) Id. at 52.

\(^{79}\) Id.
Act did not encompass state-conferred rights like slavery, only those which “depend[ed] on the federal Constitution.”

Lash devotes particular attention to the arguments of New Hampshire Senators Daniel Webster and David Morril. He writes that, although Webster and Morril provided “slightly different” lists of national rights, “[n]either list included any natural or common law liberties beyond those listed in the Federal Constitution, much less rights or immunities derived from state law.”

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

Lash points out that certain of these arguments were republished multiple times, including three years before the Civil War. One way or the other, Lash contends, they came to the attention of John Bingham and “inform[ed] [his] final draft of the Privileges or Immunities Clause.” Precisely how Bingham happened to conclude that the language of privileges and immunities “of citizens of the United States” would serve his desired ends is not clear on Lash’s account.

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

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

The language of the Privileges and Immunities Clause was now gone, replaced with that of “citizens of the United States.” After this language was approved 10 to 3 by the Joint Committee following a frankly dizzying series of votes, Bingham

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80 DANIEL WEBSTER ET AL, A MEMORIAL TO THE CONGRESS OF THE UNITED STATES, ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION 15 (Boston, Phelps 1819).
81 LASH, supra note 14, at 58.
82 WEBSTER ET AL., supra note 80, at 16.
83 Id. at 17.
84 Id., supra note 14, at 60.
85 Id.
86 KENDRICK, supra note 51, at 87.
87 The votes are tabulated and summarized in MALTZ, supra note 14, at 87-92.
introduced the proposed amendment to the House on May 10. He stated that it would “protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.” He then added that in doing so it “took from no State any right that ever pertained to it.”

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

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

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

Lash then confronts what he aptly describes as “probably the most studied speech of the Thirty-Ninth Congress regarding the Fourteenth Amendment”—Jacob Howard’s introduction of the proposed amendment to the full Senate on May 23. As we saw in the Introduction, Howard cited with approval Justice Washington’s exposition in Corfield of “the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.” Howard then added, “[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their extent and precise nature—to these should be added the personal rights guarantied and

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88 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
89 Id.
90 Id.
91 Id. (emphasis added).
92 LASH, supra note 14, at 151.
93 Id.
94 Id. at 154.
95 CONG. GLOBE, 39th Cong., 1st Sess. 2675 (1866).
secured by the first amendments of the Constitution.”

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

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

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

In short, Lash claims that, by referencing Article IV and Corfield, Howard simply added the sojourning citizens’ enumerated right to equal protection from parochial discrimination to the personal guarantees enumerated in the first eight amendments. Lash thus reads Howard as communicating an understanding of the “privileges or immunities of citizens of the United States” that is consistent with the enumerated-rights-only position that Lash attributes to Bingham.

Lash then turns to the public debate over the constitutional text that was sent to the states for ratification on January 13. But for the definition of U.S. citizenship set forth in the first sentence—the product of a May 30 proposal by Howard—the language of Section One of the proposed Fourteenth Amendment is identical to that of Bingham’s third draft:

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

96 Id.
97 Id.
98 See sources cited infra note 12.
99 LASH, supra note 14, at 158.
100 Id.
101 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).
due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lash begins his discussion of the public debate over the Fourteenth Amendment by focusing on newspaper coverage. He points out that both the *New York Times* and the *New York Herald* reported Bingham’s February 26 speech introducing his second draft and lamented that “the immortal bill of rights” had been neglected by the states, and that other papers recognized that Congress “was moving toward nationalizing constitutionally enumerated rights.”

Lash acknowledges that “it is difficult to gauge the degree of public awareness of the content of the proposal, much less public understanding of Bingham’s particular theory of the Constitution,” given that (says Lash) Bingham’s congressional colleagues struggled to understand him. Still, Lash maintains that “anyone following the debate . . . would have known that Bingham was attempting to nationalize the Bill of Rights.”

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

That idea was further clarified, on Lash’s account, as a consequence of the Johnson Administration’s politically disastrous counteroffensive against the proposed amendment. In October of 1866, Johnson arranged to have Secretary of the Interior O.H. Browning pen a letter attacking the Amendment. Browning argued that the amendment was both unnecessary and destructive of federalism—that state constitutions already protected citizens’ constitutional rights, such as the right to due process of law, and that the true “object and purpose” of the amendment was to “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.”

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102 *Lash, supra* note 14, at 184. Lash notes that the *Herald* was the most widely-distributed paper in the country. *Id.*

103 *Id.* at 185.

104 *Id.* at 186.

105 *Id.* at 187


107 *Lash, supra* note 14, at 189.

108 *Id.* at 180.

But just two months earlier, on July 30, a white mob organized by the New Orleans mayor massacred mostly Black marchers outside of a reconvened Louisiana Constitutional Convention.\textsuperscript{110} Coming in the wake of this state-sanctioned slaughter, Browning’s arguments appeared both callous and wholly unpersuasive. Lash finds that even papers “traditionally disposed to support the President”\textsuperscript{111} published editorials describing Browning’s letter as not only a “huge political blunder”\textsuperscript{112} but as wrong on the merits—as reflecting a failure to appreciate the need for the federal government to protect citizens from state-sanctioned mob violence.\textsuperscript{113}

The landslide Republican victory in the November 1866 elections constituted a rejection of the Johnson Administration’s Reconstruction policies, including its opposition to the Fourteenth Amendment.\textsuperscript{114} Rather than merely exult in their success, Republicans took the opportunity to emphasize the importance of completing the hard work of ratifying the Fourteenth Amendment. To that end, they continued to expound the amendment’s meaning, and continued to stress the importance of securing the enumerated rights to freedom of speech, freedom of the press, and due process of law. Bingham, in the context of discussing a proposed anti-whipping bill, described the “pending constitutional amendment” as providing for “all the limitations for personal protection of every article and section of the Constitution.”\textsuperscript{115}

While Lash concedes that governors and state legislative assemblies “left little in terms of a historical record,”\textsuperscript{116} he argues that specific references to freedom of

\textsuperscript{110} Id. At least 48 were killed and over 200 were injured in the massacre. For a recent history, see generally James G. Jr. Hollandsworth, An Absolute Massacre: The New Orleans Race Riot of July 30, 1866 (2004). We refer to it as a “massacre” rather than a “riot” not only because the former term more accurately captures the indiscriminate and brutal slaughter that took place, but in recognition of the fact that the term “riot” was used within the South during Reconstruction to “ascribe a tendency to riot to the freedmen.” See LeeAnna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction (2008).

\textsuperscript{111} Secretary Browning’s Letter, Evening Post 2 (Oct. 24, 1866).

\textsuperscript{112} See Mr. Browning’s Letter, Mass. Spy. 1 (Nov. 2, 1866) (“Th[e] liberty of the mob to trample upon the weak and helpless, and of the courts to complacently hold their hands while persons entitled to their protection are lawlessly doomed to death or to a living despair, is what Mr. Browning classes as among the reserved rights of the states”); Semi-Wkly. Wis. (October 31, 1866) (urging that “Mr. Browning must remember the case of Mr. [Samuel] Hoar of Massachusetts, who was sent to South Carolina for the purpose of persuading the haughty Legislature of that State to relax some of its barbarous laws for the imprisonment of colored seamen” and reminding readers that “Mr. Hoar was absolutely driven out of that State, and not permitted the right of domicile or the right of free speech, though he was a citizen of the United States). Hoar, a Massachusetts lawyer, was expelled from South Carolina in 1844. For accounts of his expulsion and its impact, see William Wiecek, The Sources of Antislavery Constitutionalism in America, 1760-1868 140 (1977); Seth F. Kreimer, “But Whoever Treasures Freedom ...”: The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 938 (1993); David R. Upham, The Meanings of the Privileges and Immunities of Citizens on the Eve of the Civil War, 91 Notre Dame L. Rev. 1117, 1135-6 (2016).

\textsuperscript{113} Cong. Globe., 39th Cong., 2d Sess. 811 (1867).

\textsuperscript{114} Lash, supra note 14, at 215.

\textsuperscript{115} Lash, supra note 14, at 220.
speech, peaceable assembly and petition, and use of the press as privileges or immunities, 117 as well as general references to Section One’s protection of “all . . . constitutional rights,” 118 and “all the rights which the Constitution provides for men,” 119 provide “clear evidence that at least some of the assemblies were well aware of the substantive nature of the rights protected under Section One, as well as the textualist nature of the ‘privileges or immunities of citizens of the United States.’” 120

By contrast, he finds that “[n]one of [Section One’s] supporters described the Amendment as nationalizing the subject of civil rights in the states.” 121 Lash includes among the sources of evidence which support the ERO understanding a series of articles published in the New York Times under the pseudonym “Madison” 122 and an essay published by Frederick Douglass in the 1867 issue of the Atlantic Monthly. 123 We will address these two sources below in our critique.

Lash also focuses attention on President Johnson’s proposed “counter-amendment,” offered after six states had voted for and an equal number had voted against ratification of the Fourteenth Amendment. Lash considers it important that President Johnson felt comfortable replacing the Privileges or Immunities Clause with what Lash characterizes as “a passive restatement of Article IV’s Comity Clause.” 124 Here is the final version of Johnson’s counter-amendment:

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. 125

Johnson’s counter-amendment did not shift momentum away from ratification. On July 21, 1868, both houses of Congress issued a concurrent resolution declaring that “three fourths and more of the several States of the Union” had ratified the Fourteenth Amendment—thus satisfying the strictures of Article V—and Johnson acquiesced via his own proclamation of ratification the following week. 126

Lash closes out his discussion of the ratification debate by taking note of a speech delivered, and a letter published, by Judge George W. Paschal. Judge Paschal was a former member of the Southern Loyalists’ Convention who helped

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117 Id. at 220.
118 PA. LEG. REC. APPENDIX LVI (1867).
119 Id. at XCIX.
120 LASH, supra note 14, at 220.
121 Id.
123 Frederick Douglass, An Appeal to Congress for Impartial Suffrage, ATLANTIC MONTHLY 112, 117 (Jan. 1867).
124 LASH, supra note 14, at 222. Lash argues that “it is wholly implausible to think that Johnson would have introduced [Article IV] language into his counter-amendment” if the 1867 public understood it to “authorize[e] federal protection of unenumerated natural rights.”). Id.
125 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION, 1:238 (1907).
126 15 Stat. 710 (1868).
found Georgetown University’s law department and was among Georgetown’s first professors of jurisprudence. In a speech before the Texas House of Representatives, Judge Paschal applauded Congress for “defin[ing] citizenship according to an universal standard” and for safeguarding citizens against the abridgment of national privileges or immunities.127

In a letter published in the New York Herald-Tribune, Judge Paschal again stated that “[t]he lines defining American citizenship will no longer be matter of doubt” and devoted additional attention to the Privileges or Immunities Clause.128 Of the latter’s importance, he wrote that although “[l]aw readers are so accustomed to see similar provisions in the State Constitutions . . . they should know that the bill of rights has, by a common error, been construed not to apply to or control the states.”129

In Judge Paschal’s words, Lash finds a succinct summary of a “moderate proposal” that “did not federalize common law civil rights”—any such “radical proposal” to do the latter having “no chance of passage” —but did “secur[e] those rights already announced in the federal Constitution.”130 The success of that proposal was, Lash argues, made possible through Bingham’s deployment of a term of art with “a history stretching back into statutes and treaties of the early nineteenth century,” the “antebellum understanding” of which that was “brought . . . into public consciousness through [Republicans’] explanations of the Privileges or Immunities Clause.”131

C. Post-Adoption Commentary

Lash is wary of relying upon post-ratification commentary as evidence of the original communicative content of the Fourteenth Amendment, owing to concerns about its reliability.132 Instead, Lash uses original meaning to contextualize post-ratification commentary. He begins with judicial opinions, including Judge Luther Day’s opinion for the Ohio Supreme Court in Garnes v. McCann133 and Justice Joseph Bradley’s circuit court opinion in The Live-Stock Dealers’ Case134 holding unlawful a Louisiana slaughterhouse monopoly, the constitutionality of which would later be upheld in The Slaughter-House Cases.

127 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 4 (July 30, 1868).
129 Id.
130 LASH, supra note 14, at 227.
131 Id.
132 Id. See also Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 552–53 (1994) (describing post-ratification commentary as “the least reliable source for recovering the original meaning of the law”).
133 21 Ohio St. 198 (Ohio Sup. Ct. 1871).
Lash finds that the former is consistent with “the moderate reading of the [Privileges or Immunities Clause] presented by John Bingham and Jacob Howard” because it held that the Privileges or Immunities Clause “includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States.” Lash acknowledges that Justice Bradley took “a more expansive approach” in *The Live-Stock Dealers* but reads Bradley as distinguishing between Article IV “privileges and immunities” and Fourteenth Amendment “privileges or immunities,” just “as would the majority in *Slaughter-House*.”

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

In a report (“Woodhull Report”) submitted by John Bingham, who chaired the committee, the House Judiciary Committee responded that the Privileges or Immunities Clause did not recognize any right to vote. Lash excerpts a key section of the Report:

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

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

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135 LASH, supra note 14, at 231.
136 Id.
137 Id. at 231-2.
138 See 41st Cong., 3d Sess., Senate, Mis. Doc. No. 16.
139 2 HISTORY OF WOMEN’S SUFFRAGE 448, 1861-1876 448 (Elizabeth Cady Stanton et. al eds., 1882).
140 41st Cong., 3d Sess., Senate, Mis. Doc. No. 16 (emphasis added).
It is to Lash’s credit as a scholar that he presents the reader with the Woodhull Report because it seems flatly inconsistent with his interpretation of the Privileges or Immunities Clause. In particular, the Report expressly affirms that the set of “privileges or immunities of citizens of the United States” is identical to—or none “other than” —the set of “privileges and immunities of citizens in the several states.” Crucially, however, if “article 4, section 2,” was generally understood merely to be a “Comity Clause,” as Lash would have it, quite obviously, the enforcement of this clause by the Fourteenth Amendment would not provide citizens with an absolute security in their enjoyment of even their enumerated rights, much less the rights included in the Civil Rights Act.

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

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

Some representatives objected that Congress’s Section Five powers to enforce Section One did not encompass the prohibition of private violations of constitutional rights, being that the text of Section One forbade only “state[s]” from abridging the privileges or immunities of U.S. citizens, depriving people of due process of law, or denying people the equal protection of the laws. Shellabarger responded to these objections in part by invoking Corfield and averring that Justice Washington’s opinion listed “fundamental rights of citizenship” that Congress had power to protect.

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

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

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141 LASH, supra note 14, at 234.
143 CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871).
144 LASH, supra note 14, at 242.
145 CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871).
146 Id. at app. 84.
In reexamining that case of *Barron* . . . after my struggle in the House in February, 1866 . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight amendments to the Constitution of the United States, the Chief Justice said: ‘Had the framers of these amendments intended them to be limitations on the power of State governments they would have imitated the framers of the original Constitution, and have expressed that intention.’

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

‘No state shall . . .’

Bingham then articulated his own understanding of the Clause. First, Bingham denied that *Corfield* meant anything more than that “in civil rights the State could not refuse to extend to citizens of other states the same general rights secured in its own.”

In short, *Corfield* equals comity. Second, he asked rhetorically: “Is it not clear that *other and different privileges and immunities* . . . are secured by the provision of the fourteenth article, that no State shall abridge the privileges or immunities of citizens of the United States, which are defined in the eight articles of amendment?”

Bingham then counseled the House to “follow the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guaranteed by the amended Constitution and expressly enumerated in the Constitution.”

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

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147 Id.
148 Id.
149 Id.
150 Id. (emphasis added). Despite this limited reading of the Privileges or Immunities Clause, Bingham nevertheless thought the Ku Klux Klan Act was constitutional because groups of private actors were presently “trampling under foot the life and liberty, [and] destroying the property of citizens,” id at 85. Bingham urged that Congress could “enforce the Constitution” by dispersing those groups by force, without thereby undermining the “dual system of government” he regarded as “essential to our national existence.” Id.
151 Id. at 250.
152 Id. at 250-51.
153 Id. at 251.
154 Id.
Lash concludes by discussing the legal reception of the Privileges or Immunities Clause. Lash begins with the Supreme Court’s 1873 decision in *The Slaughter-House Cases*. In a majority opinion authored by Justice Samuel Miller, the Court denied that a Louisiana slaughtering monopoly that effectively put hundreds of local butchers out of business deprived those butchers of their “privilege or immunity” to pursue a trade.\(^{155}\)

Lash applauds Justice Miller for distinguishing between the privileges and immunities protected by Article IV and those protected by Section One. Although Justice Miller embraced Justice Washington’s definition in *Corfield* of “fundamental” rights for Article IV purposes, Justice Miller denied that the Privileges and Immunities Clause did more than protect the right to comity.\(^{156}\)

Turning to the Fourteenth Amendment, Justice Miller contended that interpreting the Privileges or Immunities Clause to transform the rights listed in *Corfield* into absolutely-protected national rights would “radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both of these governments to the people.”\(^{157}\) Justice Miller reasoned that such an interpretation ought to be avoided “in the absence of language which expresses such a purpose too clearly to admit of doubt”—and he found no such language in Section One.\(^{158}\) Lash states that the results of his own inquiry “strongly suggest[] that . . . Miller was absolutely right.”\(^{159}\)

Lash denies that Justice Miller “clos[ed] the door on viewing the Privileges or Immunities Clause as protecting enumerated rights.”\(^{160}\) He points out that Justice Miller identified the enumerated right to peaceably assemble to petition the government, the privilege of the writ of *habeas corpus*, and the right to become a citizen of a state through *bona fide* residence in that state, as protected by the Privileges or Immunities Clause.\(^{161}\) He laments, however, that Justice Miller’s opinion “is not clear about which textual rights are protected or how they are protected.”\(^{162}\)

In Lash’s narrative, the Privileges or Immunities Clause was rendered a virtual nullity, not by the *Slaughter-House Cases*, but, rather, by the Court’s 1876 decision in *Cruikshank v. United State*.\(^{163}\) The latter case involved the prosecution of the


\(^{156}\) *Slaughter-House Cases*, 83 U.S., at 77.

\(^{157}\) Id. at 78.

\(^{158}\) Id.

\(^{159}\) Id. at 258.

\(^{160}\) LASH, supra note, at 253.

\(^{161}\) Id. at 253. *See* *Slaughter-House Cases*, 83 U.S., at 79.

\(^{162}\) LASH, supra note 14, at 264

\(^{163}\) 92 U.S. 542 (1876).
perpetrators of the Colfax Massacre—what historian Eric Foner has described as “the bloodiest single instance of racial carnage in the Reconstruction era” under the Enforcement Act of 1870. In *Cruikshank*, the Court held that the right to assemble and petition was limited to the protection of assemblies, the purpose of which was to petition the federal government for redress of grievances.

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

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

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164 As Justice Samuel Alito would recount in his opinion for the Court in *McDonald*, William Cruikshank “allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed.” *McDonald*, 130 S. Ct. at 3030. See *Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 106 (2008) (detailing how Cruikshank “ma[de] a sport out of lining” up two Black men “so close to each other that he could kill them with a single bullet”).

165 *Eric Foner, Reconstruction: America’s Unfinished Revolution* 483 (1988). For two compelling recent histories, published nearly simultaneously, see generally *Keith, supra* note 110; *Lane, supra* note 164. After noting disputes about the precise number, Lane estimates that between 62 and 81 Black Republican candidates who peacefully occupied the Grant Parish courthouse after a county election were slaughtered by a white mob, many after surrendering. *Lane, supra*, at 265-6. Keith points out that the state of Louisiana placed an historical marker on the site of the massacre in 1951, which celebrated the death of “150 negroes” and “the end of carpetbagger misrule in the South.” *Keith, supra* note 110, at xi. The number of whites killed—3—is not in dispute. *Lane, supra*, at 265.

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

167 *Id.* at 553.

168 *Id.*

169 *Lash, supra* note 14, at 267.

170 *Id.* at 273.

171 1 THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST ON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 313 (1871).

172 *Lash, supra* note 14, at 273.
II. Critique

Lash’s research on the Privileges or Immunities Clause is almost overwhelming. We have strived hard to convey to readers the true sense of the depth and complexity of his analysis, though much has been omitted of necessity. One cannot but admire Lash’s energy, his attention to detail, his willingness to pursue the evidence, though it may take him into areas of law not previously considered relevant to his core interpretive goal, and the precision and clarity of his prose.

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

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

First, we are persuaded that the Privileges and Immunities Clause of Article IV was generally understood in antebellum jurisprudence to guarantee sojourning citizens equality in the enjoyment of state-secured natural and common law rights. Lash’s exegesis of leading antebellum cases is convincing. So, too, are his arguments that the discussion of privileges and immunities in Chief Justice Roger Taney’s justly reviled opinion for the Court in Dred Scott v. Sandford suggest a comity view.174

Second, we continue to share with Lash the view that the Privileges or Immunities Clause does not merely provide for the enforcement of the right to comity. Lash’s case against the comity-only-view advanced by Philip Hamburger175 is devastating. As Lash puts it, “[t]here is just too much historical

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173 60 U.S. 393 (1857).
174 Lash, supra note 14, at 40-2. The key passage from Taney’s opinion reads:

[I]f [Blacks] . . . were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Dred Scott, 60 U.S., at 416-7. In context, this was a reductio ad absurdum. Taney evidently expected that readers would find the notion that Blacks were constitutionally entitled to these rights to be absurd and to conclude that Blacks “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution.” Id. at 404.
175 See generally Hamburger, supra note 49.
Further, Hamburger’s claim that freedmen “had little need for assurances of any particular substantive federal rights” appears unsustainable on the basis of the evidence presented by Lash. What good would the right to comity have done Blacks who were massacred by local mobs in their own states?

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

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

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

1. The ERO Understanding Lacks Support in Antebellum Jurisprudence

Lash’s case for the privileges or immunities “of citizens of the United States” as an antebellum term of art that denotes enumerated constitutional rights is based primarily on evidence drawn from debates over the admission of Missouri. There are two problems with Lash’s term-of-art case. First, Lash overstates the degree of consensus within the Missouri debates. Second, Lash neglects other antebellum evidence that renders the development of a widely-held ERO understanding by 1868 highly implausible.

Careful scrutiny of the evidence Lash adduces from the Missouri debates reveals that slavery and free-state advocates held highly diverse understandings of the same treaty language and advanced a variety of arguments in support of their respective understandings. Slavery advocates generally denied that Congress had

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176 See Lash, supra note 14, at 281-3. Lash deals what appears to us to be a decisive blow to Hamburger’s specific claim that the language of a comity-protective privileges-and-immunities bill introduced by Shellabarger inspired Bingham by pointing out, not only that Shellabarger’s bill was never debated or discussed, but that Representative James Wilson added an amendment to the bill which clarified that “the enumeration of the privileges and immunities of citizenship in this act contained shall not be deemed a denial or abridgment of any other rights, privileges, or immunities which appertain to citizenship under the Constitution.” Id. at 282. Wilson’s amendment strongly suggests that “members of the Thirty-Ninth Congress did not believe the rights of the Comity Clause were the only privileges or immunities of national citizenship.” Id. at 283.

177 Hamburger, supra note 49, at 71.

178 Id. at 78.

179 Id. at 69.
the power to require Missouri to ban slavery because the “rights, advantages and immunities of citizens of the United States” included “the right to republican self government or the right of an entering state to equal status with the original states of the Union.”180 True, as Lash emphasizes, sometimes slavery advocates invoked constitutional text, such as the Guarantee Clause and the Tenth Amendment.181 But Lash does not acknowledge that slavery advocates, at other times, relied instead upon general political-philosophical principles and invoked unenumerated rights.182

Slavery advocates did not all acknowledge a distinction between the rights of state citizenship protected by Article IV and rights of national citizenship protected by the Cession Act. Indeed, as the debate raged, the General Assembly of Virginia issued resolutions expressly denying that distinction and rejecting the proposition that the “rights secured by the treaty are those only which are conferred by the federal Constitution.”183

Free-state advocates, for their part, did not all argue that the “right” to hold slaves was unprotected because it was not recognized in the Constitution’s text. Instead, some argued that only rights that were uniformly held across the nation by similarly-situated citizens were “rights, advantages and immunities of citizens of

180 Id. at 58.
181 See, e.g., 33 Annals of Cong. 1195 (1819) (Sen. Scott) (arguing that “the most valuable and prominent” of the “rights, privileges, and immunities” guaranteed by the Cession Act to the people of Missouri was that of “forming and modifying their own State constitution” and that the choice to decide whether to recognize property in people was guaranteed by the Guarantee Clause, the Ninth Amendment, the Tenth Amendment, and the Privileges and Immunities Clause).
182 See, e.g., 33 Annals of Cong. 1227 (Rep. Tyler) (1819) (arguing that the slavery ban would “take[e] away from the people of [the Missouri] territory the natural and Constitutional right of legislating for themselves” and counting the latter right among “their privileges as freemen”); 35 Annals of Cong. 1233 (Sen. Barbour) (1819) (arguing that “[a] State, to be sovereign and independent, must govern itself by its own authority and laws” and questioning whether Missouri can “govern herself by her own authority and laws, in relation to the subject of slavery” if it is required to ban slavery as a condition of its admission); 36 Annals of Cong. 1341 (Rep. Rankin) (1819) (invoking “right [of inhabitants of Missouri] to form their own constitution, and shape their own municipal regulations,” drawing no connection to constitutional text); 37 Annals of Cong. 563 (1820) (Sen. Smyth) (describing “right of self-government” as “a natural inherent right of mankind” and claiming that Missouri became entitled to exercise it by recognizing slavery as soon as it “ceased to be governed as a Territory”); 33 Annals of Cong. 1231-2 (1819) (Sen. McLane) (appealing to “undoubted right of every people, when admitted to be a State, to become free, sovereign and independent—free to make their own constitution and laws” and claiming that this right encompasses the right to hold slaves “if they please to do so”); 35 Annals of Cong. 197 (Sen. Edwards) (1819) (rights guaranteed by Article III include right of people of territories to “form a Constitution for themselves, upon republican principles”). But see id. at 245 (Sen. Otis) (denying that “the right of self-government in the people, or the faculty of making a State constitution” belonged to any but the “people of the several old United States, vested in them by the laws of nature and nations”).
183 PREAMBLE AND RESOLUTIONS, ON THE SUBJECT OF THE MISSOURI QUESTION, PENDING IN THE CONGRESS OF THE UNITED STATES 122 (1819) (“Is there a class of people in this country, who are citizens of the United States, and not citizens of any, state, or territory, or district in the union? If so, how have they become such, and what rights do they possess? There are no such people.”).
the United States;”\textsuperscript{184} that slaveholding was not “essential to constitute [United States] citizenship;”\textsuperscript{185} that Article III’s promise was limited to those rights in Louisiana in 1803, or to areas inhabited in 1803;\textsuperscript{186} that the Cession Act served as a general guarantee of equal footing to newly-admitted states but that the proposed restrictions were consistent with that guarantee;\textsuperscript{187} that congressional power over the admission of territories was absolute and trumped contrary treaty language;\textsuperscript{188} and that slavery could not be a privilege of citizenship because “what is gained by the masters must be lost by the slaves.”\textsuperscript{189}

To the extent free-state advocates did hold a theory according to which the privileges of U.S. citizens needed to be enumerated, the content of that theory is vague. Although both Webster and Morril listed federal rights that appear in the constitutional text, neither listed any of the personal rights set forth in the first eight amendments.\textsuperscript{190} Morril, observes Lash, listed rights relating to federal representation and to the jurisdiction of the federal courts.\textsuperscript{191} Webster listed rights

\begin{footnotes}
\item[184] See Rufus King, Substance of Two Speeches, Delivered in the Senate of the United States, on the Subject of the Missouri Bill 15 (1819) (“federal rights” are “uniform throughout the Union, and are common to all its citizens.”); 36 Annals of Cong. 1379 (1820) (Rep. Darlington) (inferring that the right to hold slaves is not a federal right from the facts that “the people of Missouri may, themselves, exclude slavery” and that “Congress may prohibit slavery in a territory”).\textsuperscript{185} 35 Annals of Cong. 146 (1820) (Sen. Morril); See also id. at 206 (Sen. Leake) (denying that “the toleration of slavery is necessary for the self-preservation of the people of Missouri”).\textsuperscript{186} See 35 Annals of Cong. 213 (1820) (Sen. Burrill) (Article III “cannot refer to persons already citizens of the United States who buy land and remove thither; such require no aid from the treaty.”); 1 John Sergeant, Speech of Mr. Sergeant, on the Missouri Question 1, 33 (1820) (only those who were “inhabitants of the ceded territory, and subjects of the ceding power, at the time of the cession” can “call the treaty to their aid”).\textsuperscript{187} 33 Annals of Cong. 1209 (1819) (Rep. Tallmedge) (“If the proposed amendment prevails, the inhabitants of Louisiana or the citizens of the United States can neither of them take slaves into the State of Missouri. All, therefore, may enjoy equal privileges.”); 35 Annals of Cong. 213-4 (1820) (Sen. Burrill) (“Will [Missouri] not have her Senators, her Representatives, her Electors, by the same rules as other states? Must not all the regulations of her commerce, all her relations to the Union and to the other states, be the same as those of Ohio or Vermont? Will she not, according to her population, have the same power and weight as other states?”).\textsuperscript{188} 33 Annals of Cong. 1209 (1819) (Rep. Tallmedge) (“The Senate, or the treaty-making power of our Government, have neither the right nor the power to stipulate, by a treaty, the terms upon which a people shall be admitted into the Union. This House have a right to be heard on the subject”); 35 Annals of Cong. 215 (1820) (Sen. Lowrie) (“If, by the Constitution, ‘Congress have power to dispose of, and make all needful rules and regulations respecting, the territory and other property belonging to the United States,’ and might . . . prevent migration and importation into the territories and new States . . . if the treaty diminishes this power, then the treaty is contrary to the Constitution, and in that article void.”); id. at 149 (1820) (Sen. Burrill) (“The power of Congress over this territory is sovereign and complete.”).\textsuperscript{189} 33 Annals of Cong. 1182 (1819) (Rep. Fuller).\textsuperscript{190} We are not the first to make this observation. See Bret Boyce, The Magic Mirror of ‘Original Meaning’: Recent Approaches to the Fourteenth Amendment, 66 Me. L. Rev. 29, 47 (2013) (“[A]s Lash himself points out, Webster’s and Morril’s discussions of federal constitutional rights involved “structural guarantees of federalism and access to federal courts,” not the guarantees of the first eight amendments.”).
\item[191] David Morrill, Remarks of Mr. Morrill in the Senate of the United States on the Missouri Question (Jan. 17, 1820), in Hillsboro Telegraph (Amherst, N.H.), Mar. 4, 1820, at 1.
\end{footnotes}
to federal representation and the right to a republican form of government.\textsuperscript{192} It is possible that both men understood “rights, advantages and immunities” to encompass only what Lash describes as “constitutionally express structural guarantees” related to participation in and access to institutions of the national government on equal footing with citizens of other states upon admission to the Union.\textsuperscript{193} That is not the ERO understanding to which Lash is attached.

We can, however, identify instances when the language of privileges or immunities “of citizens of the United States” was used in connection with enumerated personal rights as well, both during the Missouri debate and during the antebellum era more generally. During the Missouri debate, Delaware Senator Louis McLane claimed that the right of states to choose whether to admit or exclude slavery was as much a right under Article III as “the right to be represented in Congress, or the right to a freedom of religious opinion, or the right to have the slaves accounted a part of their population.”\textsuperscript{194} Lash also points to an 1835 letter from Attorney General Benjamin Butler, who wrote that citizens of the United States residing in Arkansas Territory who sought to frame a constitution without a prior enabling act by Congress “possessed the ordinary privileges and immunities of the United States,” including the right “peaceably to assemble and to petition the government for the redress of grievances.”\textsuperscript{195}

But Lash does not merely claim that the privileges or immunities of U.S. citizens included enumerated rights. Rather, he advances the much more difficult-to-prove claim that they were understood during the antebellum period to be limited to enumerated rights. We cannot infer that an enumerated-rights-only understanding was widely held on the basis of this scant evidence.

McLane cited no constitutional text for the proposition that states enjoy the right to choose whether to admit or exclude slavery, resting instead on general principles of popular sovereignty.\textsuperscript{196} To say, as Butler did, that the right to peaceable assembly and petition is “among” the privileges and immunities of U.S. citizens is not to imply that the enumeration of a right is either necessary or sufficient to make it

\textsuperscript{192} WEBSTER ET. AL., supra note 80, at 15.
\textsuperscript{193} Other lists put forward by free-state advocates are similar in this regard. \textit{See}, e.g., 35 Annals of Cong. 183 (1820) (Sen. Mellen) (“The new state shall be entitled to two Senators in Congress; to Representatives in Congress according to the established ration; to Electors of President and Vice President; to the benefit of Federal Courts; the Constitutional guarantee of protection against invasion; and all other advantages and immunities which are of a federal nature”); \textit{id.} at 245 (Sen. Otis) (inhabitants of Louisiana shall “be eligible to be Presidents, Vice Presidents, members of Congress, and capable of sustaining all offices under the Constitution, civil and military, and entitled to their fair and proportionate share of all the great contracts and little contracts, and to all sorts of privileges and advantages enjoyed by any other citizen of the Union in that capacity.”). For an earlier articulation of an equal-footing understanding, see 13 Annals of Cong. 54 (1803) (Senator Taylor) (“The obvious meaning of [Article III] is that the inhabitants of Louisiana are incorporated, by it, into the Union, upon the same footing that the Territorial Governments are, and, like them, the Territory, when the population is sufficiently numerous, must be admitted as a State, with every right of any other state”).
\textsuperscript{194} Louis McLane, Speech of Mr. McLane, of Delaware, on the Missouri Question (Feb. 7, 1820), in \textit{AM. WATCHMAN} (Wilmington, Del.), Mar. 29, 1820, at 2.
\textsuperscript{195} 21 \textit{TERRITORIAL PAPERS OF THE UNITED STATES} 1085 (1829-1836).
\textsuperscript{196} 35 Annals of Cong. 1149-50 (1819).
such a privilege or immunity. The right to peaceable assembly and petition might well be “among” those enumerated and unenumerated rights that belong in the family of “rights, privileges and immunities” because they are essential to the enjoyment of natural rights or because they are uniformly deemed fundamental by states. Lash neglects these possibilities.

The case law concerning the Cession Act, both prior and subsequent to the debate over the Missouri question, does not suggest a widely-held ERO understanding. Less than a decade after the acquisition of Louisiana, the Louisiana Supreme Court in 1812 held that a Domingue refugee named Jean Baptiste Desbois who failed to report his arrival to federal officials in 1806, and thus never began the naturalization process, had nevertheless acquired citizenship through the admission of Louisiana into the Union. As a consequence, Desbois was held to be entitled to “all the rights and privileges of a citizen of the United States”—including the federally unenumerated privilege of practicing law in Louisiana.

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

In the very year that Butler penned his letter identifying an enumerated personal right as one of the privileges of national citizenship, the Supreme Court of the United States strongly implied that certain unenumerated rights were also among those privileges. City of New Orleans v. Armas concerned a dispute over a lot in New Orleans that the city claimed was part of a quay and was dedicated to the city’s use in the original plan of the town. Those who currently possessed the lot sought to be confirmed in their rights and to enjoin the city from disturbing them. After a district court ruled in the possessors’ favor and the Louisiana Supreme Court

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197 For criticism along the similar lines, see Green, supra note 12, at 111-3 (adducing “evidence . . . which Lash does not confront, that the 1803 promise of the rights of citizens of the United States was understood as a promise of the rights of other similarly situated citizens of the United States.”).  
198 Desbois’ Case, 2 Mart. 185 (La. 1812).  
199 Id. This is the very right that the Supreme Court would later deny was a privilege or immunity of U.S. citizens on the day after its decision in the Slaughter-House Cases was announced. See Bradwell v. State, 83 US 130 (1873).  
200 United States v. Laverty, 26 F. Cas. 875 (D. La. 1812).  
201 Id.  
202 Id. at 876.  
203 34 U.S. 224 (1835)  
204 Id. at 225.
upheld the decision, the Supreme Court heard the city’s appeal under Section 25 of the Judiciary Act of 1789.\textsuperscript{205}

In determining that the Court lacked jurisdiction over the controversy, Chief Justice John Marshall discussed the “objects” of Article III of the Cession Act: “One, that Louisiana shall be admitted into the union as soon as possible, upon an equal footing with the other states; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property and religion.”\textsuperscript{206} Marshall then considered whether “[t]he right to bring questions of title decided in a state court, before this tribunal” was among the “rights, advantages and immunities of citizens of the United States” and concluded that the answer was no.\textsuperscript{207}

Importantly, Marshall did not rest his conclusion on the ground that the right to bring questions of title decided in state court before the federal Supreme Court was not constitutionally enumerated. In fact, he argued that “[t]he inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.”\textsuperscript{208} The implication is that the constitutionally unenumerated right to have titles decided by the tribunals of one’s own state was among the “rights, advantages and immunities of citizens of the United States.” It just was not a right that could be protected by a federal court (as the Republicans would later rue).

Earlier in the same year, Marshall wrote for the Court in \textit{Delassus v. United States}\textsuperscript{209} that “rights, advantages and immunities” included “the perfect inviolability and security of property” without mentioning constitutional text.\textsuperscript{210} Lash does not examine either \textit{Armas} or \textit{Delassus}.

Lash also does not explain why, if the language of privileges and immunities “of citizens of the United States” was widely used to denote enumerated rights, and only enumerated rights, Justices John McLean and Benjamin Curtis declined to use it for that purpose in their dissents in \textit{Dred Scott} when responding to Justice John Catron’s concurrence. Justice Catron, drawing upon the Cession Act, maintained that because “Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property,” it followed that the Congress could not “repeal the third article of the treaty of 1803, in so far as it secured the right to hold slave property” through the Missouri Compromise.\textsuperscript{211}

Justice McLean responded by denying that any slavery-related guarantee extended “further than the protection of property in slaves at that time in the ceded

\textsuperscript{205} 1 Stat. 73, § 35 (1789).
\textsuperscript{206} 9 Pet. 117 (1835).
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} 34 U.S., at 235.
\textsuperscript{210} Id. at 133.
\textsuperscript{211} See Dred Scott, 60 U.S. at 524–25 (Catron, J., concurring).
territory,"212 and by pointing out that that guarantee had been complied with.213 Justice Curtis responded by arguing that Article III was “not intended to restrain the Congress from excluding slavery from that part of the ceded territory then uninhabited,”214 and that it did not “secure to [inhabitants] the right to go upon the public domain ceded by the treaty, either with or without their slaves.”215 Relying upon Marshall’s analysis in Armas, Justice Curtis described Article III as a “temporary stipulation . . . in behalf of French subjects who then inhabited a small portion of Louisiana” rather than “a permanent restriction upon the power of Congress to regulate territory then uninhabited.”216

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

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

Bingham may have deployed a distinction between the privileges and immunities of U.S. citizens and those of citizens in the several states in 1866 that was sometimes used during the antebellum era. At which point, debate in the Thirty-Ninth Congress might have led to the development of a consensus within Congress that the set of privileges and immunities of U.S. citizens that would be protected by Section One consisted only in enumerated rights. After which, that consensus understanding might have been communicated to the public. We will consider this possibility in the next Section.

2. The ERO Understanding Was Not Widely-Held by the Fourteenth Amendment’s Framers

As we have explained, Lash presents Bingham’s use of the language of “privileges or immunities of citizens of the United States” as a solution to a twofold political problem. According to Lash, Bingham always wanted to empower Congress and the federal courts to secure enumerated rights. He had, however, perceived a concern on the part of fellow Republicans that the language of “privileges and immunities of citizens in the several states” was too broad and

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212 Id. at 557 (McLean, J., dissenting).
213 Id.
214 Id. at 631 (Curtis, J., dissenting).
215 Id.
216 Id. at 632.
would destroy federalism. According to Lash, Bingham also become concerned that, because his reading of the Privileges and Immunities Clause was not widely-shared, the language of his first proposed amendment would be understood to protect only the right to comity. So Bingham searched for a Goldilocks solution, which he found in the term-of-art meaning of “privileges or immunities” that we critiqued in the previous section.

Lash produces not one scintilla of direct evidence that, when Bingham opted for “privileges or immunities of citizens of the United States” rather than “privileges and immunities of citizens of the several states” when advancing his second proposal, he did so with the purpose of addressing the above concerns about unduly broad and unduly narrow readings. Instead, as we saw, Lash contends that Bingham’s goals can be inferred from (a) Republicans’ defenses of his second draft as merely protecting comity rights; (b) Hale’s critique of his second draft as unduly broad; (c) Hotchkiss’s critique of his second draft as both unduly broad and unduly narrow; (d) Bingham’s express references to the “bill of rights” and to textually enumerated rights in his explanation of his third draft; (e) his claim that it “hath that extent—no more”; and (f) the fact that Bingham’s explanation of his third draft “satisfied the conservative side of the House.”

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

That Woolbridge in particular did not understand Bingham’s second draft to protect only comity rights can be appreciated by reading the commentary excerpted by Lash. In this passage, Woodridge avers that the proposed draft is “intended to enable Congress to give all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to other citizens of the State.” Thus, Woolbridge is adding comity rights to the protection of inalienable (natural) rights.

Nor do we perceive in either Hale or Hotchkiss’s critiques of Bingham’s second draft concerns related to Bingham’s use of the language of the Privileges and Immunities Clause. Recall that this draft read: “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty, and property.”

Hale appears to have been concerned that the language would grant to Congress a primary power to “legislate upon all matters pertaining to life, liberty, and property” as Congress deemed “necessary and proper,” not merely to take action in

\[217\] LASH, supra note 14, at 153.
\[218\] Id.
\[219\] Id.
\[220\] Id. at 98.
\[221\] CONG. GLOBE, 39th Cong., 1st Sess. 1068 (1866).
\[222\] Id. at 1088.
response to state violations of the “bill of rights.” Hotchkiss seems to have shared this concern.

Indeed, Hotchkiss made plain that he understood Bingham’s second draft to be a “grant for original legislation in Congress” rather than a means of “prov[iding] by laws of Congress for the enforcement of . . . rights” and indicated that, while he was “unwilling that Congress shall have [the former] power” he would “go with [Bingham]” if he were to provide for the latter. In short, Hale and Hotchkiss’s problem with this language might have more to do with McCulloch v. Maryland, than with Corfield v. Coryell.

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

As I understand it, [Bingham’s] object in offering this resolution and proposing this amendment is to provide that no state shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it today, but as I do not regard it as permanently securing those rights, I shall vote to postpone its consideration until there can be a further conference between the friends of the motion, and we can devise some means whereby we shall secure those rights beyond a question.

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

We agree with Michael Zuckert that Hotchkiss was troubled by the proposed amendment’s omission of an express prohibition on states violating privileges and immunities—to, as Hotchkiss put it, “provide . . . that no State shall discriminate against any class of its citizens.” Hotchkiss appears to have believed that Bingham’s second draft “le[ft] it to the caprice of Congress” to prevent states from

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223 Id. at 1065.
224 Id. at 1095.
225 LASH, supra note 14, at 109.
226 CONG. GLOBE, 39th Cong., 1st Session, 1095 (1866) (emphasis added).
227 See Michael P. Zuckert, Congressional Power under the Fourteenth Amendment—The Original Understanding of Section Five, 3 CONST. COMMENT. 123,138 (1986) (observing that “Bingham’s draft . . . did not directly supply authority for the kind of action [he] wanted to take, nor did it, as Hotchkiss pointed out, directly forbid the states from doing that which Congress thought the states ought not to do” and crediting Hotchkiss with “showing exactly where Bingham’s draft failed to secure its ends beyond the control of changeable congressional majorities”).
228 CONG. GLOBE, 39th Cong., 1st Sess., 1095 (1866).
discriminating as a consequence of this omission.\textsuperscript{229} Although Bingham maintained that the language of Article IV was sufficient to prohibit state discrimination, in Hotchkiss’s view, the amendment ought to have made “plain” that citizens enjoyed a “constitutional right that cannot be wrested [from them]” and it did not do so.\textsuperscript{230}

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

What of Bingham’s May 10 explanation of his third version of the amendment, which Lash claims represented a substantive departure from the first two drafts? In his speech, Bingham stated that Section One would “protect by national law [a] the privileges and immunities of all the citizens of the Republic and [b] the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”\textsuperscript{231} Lash says, “[i]n this passage, Bingham continues his longstanding practice of distinguishing the natural rights of all persons from the rights of citizens of the United States. The rights of equal protection are ‘the inborn rights of every person,’ whereas ‘citizens of the Republic’ enjoy an additional set of national privileges or immunities.”\textsuperscript{232}

Lash apparently bases this characterization on the next paragraph, in which Bingham observes that “[n]o State ever had the right, under the forms of law or otherwise, [a] to deny to any freeman the equal protection of the laws, or [b] to abridge the privileges or immunities of any citizen of the Republic.”\textsuperscript{233} Presumably because the phrase “the privileges and immunities of . . . citizens of the Republic” is repeated in both paragraphs almost (but not quite) verbatim, Lash thinks “the equal protection of the laws” in the second paragraph must connect with the “inherent rights” mentioned in the previous sentence.

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

\textsuperscript{229} Id.

\textsuperscript{230} Id.

\textsuperscript{231} Id. at 2542.

\textsuperscript{232} LASH, \textit{supra} note 14, at 150.

\textsuperscript{233} CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
What about Bingham’s references to the “bill of rights”? We have seen that the phrase “bill of rights” was not deployed by Bingham solely to refer to what Lash regards as enumerated rights. Thus, in the course of defending his initial proposal, Bingham had characterized the Privileges and Immunities Clause of Article IV—which he described in 1859 as affording protection to the (unenumerated) rights to “know” and to “work and enjoy the product of . . . toil”\(^{234}\)—as part of the “bill of rights.”\(^{235}\) We will see him later associate these rights with the Declaration of Independence.

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

The same goes for Bingham’s assurance that the “extent” of his amendment encompassed only “protection by national law from unconstitutional state enactments. . . . That is the extent it hath, no more.” This statement should not be construed to imply that enumerated rights—and only enumerated rights—are protected “by national law” absent additional evidence that Bingham considered only violations of enumerated personal rights to be unconstitutional. Put another way, an ERO interpretation of this sentence assumes what it purports to prove. Moreover, the last time that Bingham deployed what appears to be a quote from *Othello*\(^{236}\)—on February 28—he held an understanding of the “bill of rights” that included the unenumerated rights protected by the Privileges and Immunities Clause. If Bingham’s view of the extent of the “bill of rights” changed so as to encompass only enumerated rights, he did not say so.

Yet another dog that did not bark was Bingham’s failure, at any point, to dispel the persistent controversy over whether the right to suffrage was among the “privileges or immunities” of citizens by invoking an ERO understanding. It would have been easy enough for him to do so if that was the consensus public meaning of a term-of-art “privileges or immunities.” Bingham might simply have stated that the right to suffrage, *being unenumerated in the text of the Constitution*, was obviously not among the “privileges or immunities of citizens of the United States.” Instead, Bingham advanced the considerably more complex argument that the “second section” of the proposed amendment—which contemplated that states could deny suffrage to Blacks, so long as they were willing to incur the penalty of


\(^{235}\) Id.

\(^{236}\) William Shakespeare, *Othello, The Moor of Venice*, Act 1, Scene 3, lines 80-82 (“True, I have married her. The very head and front of my offending. Hath this extent, no more.”). See also Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* 48-9 (2013) (explaining that “[a] typical Bingham speech was filled with citations and scholarly allusions that few members of Congress could match” and that “[h]e was especially fond of history, Shakespeare, and poetry”).
reduced congressional representation—“exclude[d] the conclusion that by the first section suffrage is subjected to congressional law.”\footnote{CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).}

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

In observing that Bingham’s changes satisfied his fellow Republicans, Lash draws upon the research of Professor Earl Maltz, who identifies five Republicans who “voiced federalism-based concerns regarding Bingham’s initial proposal”—Roscoe Conkling, Thomas Davis, Hale, Hotchkiss, and William Stewart.\footnote{MALTZ, supra note 12, at 59.} We have already discussed the objections of Hale and Hotchkiss. Conkling said little, other than that he objected to the amendment for reasons “entirely opposite to those . . . given” by Hotchkiss and that he thought “no objection is to be made to this proposed amendment because it does not go far enough or because it is not sufficiently radical.”\footnote{CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).} Davis echoed Hale and Hotchkiss’s concerns that Bingham’s second draft would grant Congress the power to enact “original legislation.”\footnote{Id. (Rep. Davis).} Stewart considered the language of privileges and immunities not to be “material” and instead focused his critical attention on how the first proposal empowered Congress to “make all the laws in all the States affecting the protection of either life, liberty, or property, precisely similar.”\footnote{Id. at 1082 (Rep. Stewart).}

Like Hale, Hotchkiss, and Davis, Stewart understood this to be an effective grant of primary power that would enable Congress to “legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several states.”\footnote{Id.} Thus, all of the concerned federalists in this group who elaborated upon their objections understood Bingham’s second draft to grant primary legislative power to Congress and objected on the basis of this understanding. None took issue with the language of privileges and immunities.

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

As to Conkling, his change in position may have had nothing to do with the changed language. He appears to have opposed even Bingham’s third and final draft until the very end of the Joint Committee’s deliberations, when it became clear both
that Bingham’s final draft would be part of the proposed amendment and that the amendment would pass the House. To attribute Bingham’s success in satisfying concerned fellow federalists to the language of “privileges or immunities of citizens of the United States” is to blink the reality that none of those federalists raised concerns about the original language of “privileges and immunities of citizens in the several states” in the first place, and other changes in the language were responsive to the concerns that Davis, Hale, Hotchkiss, and Stewart actually did raise.

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

Lash reads Howard as drawing upon Justice Washington’s discussion of Article IV privileges and immunities in Corfield only for the purpose of explaining that “citizens of the United States had a right of equal access to a limited set of state-conferring rights when traveling to a state other than their home state.” Lash emphasizes that Howard concludes his quotation from Corfield by explaining that “such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution” and only then states that “[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments.” This framing, Lash contends, served to distinguish the right to comity protected by the Privileges and Immunities Clause from the enumerated rights protected by the first eight amendments, and to communicate that only the latter rights would be absolutely protected.

This reading is unpersuasive. To what did Howard intend that the “personal rights guarantied and secured by the first eight amendments” be “added,” if not to the family of “privileges and immunities” described by Justice Washington? Howard proceeded to describe a “mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution . . . some by the first eight amendments” and to state as fact “that all of these

Zuckert, supra note 227, at 146 (“The evidence from the journal of the Joint Committee . . . shows that Conkling had opposed Bingham’s drafts all along, even after they were recast into the ‘no state shall’ form; and that he finally gave Bingham his support only towards the very end of the Committee’s deliberations, when it was well assured that Bingham’s draft would be part of the proposed amendment, and then, in the House, when it was clear that the amendment would pass easily.”).

LASH, supra note 14, at 159.

CONG. GLOBE, 39th Cong., 1st Sess. 2675 (1866).

Id.
immunities, privileges, rights . . . do not operate in the slightest degree as a restraint of prohibition upon state legislation.”

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

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

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

Lash attempts to draw support for his conclusion that Howard intended to communicate an ERO understanding from Howard’s subsequent opposition to the placement of conditions on the admission of Nebraska to the Union. Howard opposed conditioning Nebraska’s statehood on its granting Blacks the right to vote. But he explained that his opposition was based on his disagreement with the “principle” that “under that clause of the Constitution which declares that the Congress may admit new States into this Union, it is competent for Congress to annex as fundamental conditions any requirements that Congress may see fit . . . to remain as law forever.”

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248 Id. (emphasis added).
249 Corfield is referenced on page “2” of his handwritten notes. The rights in the first eight amendments are then inserted on pages “2a” and “2b” before the speech resumes on page “3.” See Notes of Jacob Howard on the Fourteenth Amendment’s Privileges or Immunities Clause (1866), http://www.tifis.org/sources/Howard.pdf [http://perma.cc/V6HA-X2YK]. This observation was first made by Green. See Green, Incorporation, Total Incorporation, and Nothing But Incorporation, supra note 12, at 109 n. 96.
250 Notes of Jacob Howard, supra note 249, at 3.
251 LASH, supra note 14, at 149.
252 CONG. GLOBE, 39th Cong., 2nd Sess. 219 (1867) (emphasis added).
Howard understood congressional power over admission more narrowly as a power to “invest [admitted] states . . . with every power, every faculty, every constitutional provision which pertains to any of the States in the Union under the Constitution.”\footnote{Id.} The admission power did not include the power to prevent states from legislating in ways that Congress deemed inexpedient, indeed, to enact “entire code[s] of laws” in order to “mak[e] provision for every exigency that arises in society.”\footnote{Id.}

In sum, Howard was opposing a principle that would grant Congress primary legislative power over newly-admitted states. There is no tension between opposing that principle and supporting an amendment that would empower Congress to ensure that a limited set of enumerated and unenumerated rights sharing a certain family resemblance\footnote{See Ludwig Wittgenstein, Philosophical Investigations §§ 65-71 (P.M.S. Hacker & Joachim Schulte, 4th ed. 2009) (characterizing the similarities between “games” as “family resemblances” on the ground that “the various resemblances between members of a family—build, features, colour of eyes, gait, temperament . . . overlap and criss-cross in the same way.”) Wittgenstein’s general point is that “the instances to which a word or concept applies [are] connected not by a common property but by ‘relevant resemblances’” and that we should “look for meaning not in an inchoate intelligible essence, but in the use to which words are put in a discourse.” Dennis M. Patterson, Interpretation in Law—Toward a Reconstruction of the Current Debate, 29 Vill. L. Rev. 671, 682-5 (1983).} are not violated by states—whether they be newly admitted or have been in the Union since the Founding.

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

Howard, for instance, contended that the right to suffrage had been “always . . . regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the base of society and without which a people cannot exist except as slaves, subject to a despotism.”\footnote{Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).} On Lash’s account, we can only conclude that Republicans wasted a tremendous amount of time and courted unnecessary risk by failing to avail themselves of a comparatively cheap means of making plain that enumerated rights were categorically “in” and unenumerated rights categorically “out.”

3. Coming to Grips with the Civil Rights Act of 1866
Proponents of Section One frequently referred to the Civil Rights Act and claimed that it would be constitutionalized by Section One. On Lash’s account, it is hard to see how the Privileges or Immunities Clause would have done so. Recall that the Act guaranteed the rights “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property.” None of these rights are enumerated as such in the first eight amendments or elsewhere in the text.

Moreover, the Act did not merely protect those unenumerated rights listed in the Act’s text against parochial discrimination. It also guaranteed that all citizens would have “the same right . . . [to contract, property, security] as is enjoyed by white citizens,” regardless of state citizenship. This is at least an equality guarantee that extends beyond comity and plausibly more than that, insofar as the possibility that states might cease to generally guarantee the listed rights to whites in the future was not considered a live one. On Lash’s account, then, the Privileges or Immunities Clause was not understood in a way that would give this legislation constitutional safe harbor.

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

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

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257 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (Sen. Trumbull); id. at 1117 (1866) (Rep. Wilson); id. at 2459 (1866) (Sen. Stevens); id. at 2883 (Rep. Latham). For additional references, see JACOBUS TENBROEK, EQUAL UNDER LAW 224 n. 11 (1851). See also John Harrison, Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers, 91 KY. L.J. 67, 97 (2002) (arguing that “[t]he white citizen had always been the standard for the highest level of protection of these rights” and that “stating the guaranty as one of equality to whites was sufficient to secure those fundamental rights for everyone.”); MALTZ, supra note 12, at 67 (describing the possibility that the listed rights would be denied to whites as “so farfetched that no speaker even considered it.”).

258 14 Stat. 27, ch. 31, § 1 (1866).

259 Id.

260 See James W. Fox, Jr., Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers, 91 KY. L.J. 67, 97 (2002) (arguing that “[t]he white citizen had always been the standard for the highest level of protection of these rights” and that “stating the guaranty as one of equality to whites was sufficient to secure those fundamental rights for everyone.”); MALTZ, supra note 12, at 67 (describing the possibility that the listed rights would be denied to whites as “so farfetched that no speaker even considered it.”).

261 Notes of Jacob Howard, supra note 250, at 3.

262 See LASH, supra note 14, at 113 (questioning the conventional wisdom that “the Fourteenth Amendment represented a consensus attempt to constitutionalize the Civil Rights Act” and highlighting Bingham’s opposition to it).
Theory #1: The Privileges or Immunities Clause Authorized the Civil Rights Act. In Lash’s second article articulating the ERO understanding, he wrote that “many members of the Thirty-Ninth Congress (though apparently not John Bingham) looked to the Fourteenth Amendment as establishing a source of federal authority to pass the Civil Rights Act” and affirmed that “[e]nsuring that Congress had such power to enforce the equality principles of Article IV (and thus authorize the Civil Rights Act) was one of the concerns driving the adoption of the Fourteenth Amendment.”

But again, a mere Comity Clause could not have authorized an Act that, by its terms, was not solely concerned with comity. And Lash did not demonstrate that, by 1868, the Privileges and Immunities Clause had become associated with “equality principles” that forbade states from discrimination against their own citizens.

Theory #2: The Citizenship Clause authorized the Civil Rights Act. In his book, Lash hedged on whether Bingham’s third and final draft would have constitutionalized the 1866 Act. He points out that whereas the third draft “addressed substantive national ‘privileges or immunities,’ including the Comity Clause rights of visiting out-of-state citizens ... [t]he Civil Rights Act ... addressed equality rights that residents could assert against their own state.”

Lash also raised doubts about whether the Equal Protection Clause might cover the Act, citing Christopher Green’s research for the proposition that the latter Clause “spoke of equal protection of laws, not equal laws.” Instead, Lash claimed that it was Section One’s Citizenship Clause—proposed by Howard on May 30, 1866, just shy of three weeks after Bingham’s presentation of his third draft to the House—that “constitutionalized the Civil Rights Act of 1866.”

Lash did not, however, explain how the Clause’s “definition of national and state citizenship” incorporated equality principles that were broad enough to authorize Congress to forbid intrastate discrimination.

Theory #3: The Equal Protection Clause Authorized the Civil Rights Act. In a 2015 essay, Lash responded to journalist Damon Root’s claim that the Privileges or Immunities Clause “protects unenumerated economic rights.”

263 Lash, The Origins of the Privileges or Immunities Clause, Part II, supra note, at 395 (emphases added).
264 LASH, supra note 14, at 170.
266 U.S. CONST. amend. 14, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).
267 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).
268 LASH, supra note 14, at 171.
269 Id. at 174. We hasten to add that other scholars have elaborated such arguments. See, e.g., Rebecca E. Zietlow, Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism, 62 U. Pitt. L. REV. 281 (2000); Ryan C. Williams, Originalism and the Other Desegregation Decision, 49 VA. L. REV. 493 (2013). Lash does not engage with this scholarship.
270 Root’s view was presented in OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT 27-30 (2014). The exchange was prompted by Lash’s critical two-part review of the book.
agreed that the “Fourteenth Amendment protects unenumerated economic rights,” he claimed that Root “ignore[d] the difference between substantive rights and equal protection.” Lash agreed with Root that economic rights—including those listed in the 1866 Act—were protected by the Fourteenth Amendment. But he now insisted that they were protected by means of an “equal protection clause that protected all persons,” rather than by a Privileges or Immunities Clause that “absolutely” guaranteed the enjoyment of those rights.

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

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

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

**Theory #4: The Due Process of Law Clause Authorized the Civil Rights Act.** Having previously asserted the other three operative provisions of Section One as
a constitutional authority for the 1866 Act, Lash now shifted to a theory based on the fourth—a theory he had briefly dismissed in 2015. In 2017, he published an article setting forth a more developed theory that, after all, the Act was constitutionalized by the Fourteenth Amendment’s Due Process of Law Clause.277

Lash adduced evidence that Republican supporters of the Act like Representative James Wilson and Senator Lyman Trumbull understood the Fifth Amendment’s Due Process of Law Clause to embody the Declaration of Independence’s references to “Life, liberty and the pursuit of happiness” and to provide authority to protect “fundamental rights belonging to every man as a free man.”278 Lash emphasized that the Civil Rights Act originally provided for the protection of “all persons,” not merely citizens, and argued that, although the Act’s scope was altered because of moderate misgivings about Congress’s constitutional authority to protect all persons, the Act was always understood to be a means of ensuring the due process of law.

Lash also detailed how, after the enactment of the Fourteenth Amendment removed any doubt about the constitutionality of protecting what Lash awkwardly describes as the “natural rights of due process,”279 John Bingham—who had initially opposed the Act—voted for the Act’s re-enactment through the Enforcement Act of 1870.280 The authority for this reenactment, Lash argues, was supplied by the latter’s Due Process of Law Clause. As we will discuss below, Section 18 of the Enforcement Act provided that the 1866 Act was “hereby re-enacted.”281 Section 16 of the Enforcement Act, in language that closely resembled that of the 1866 Act, extended to “all persons” many—though not all—of the rights protected by the 1866 Act.282

We agree with Lash that the Fourteenth Amendment’s Due Process of Law Clause places limits on the content or substance of state legislation. We have elsewhere argued that state legislators are bound by the Clause to pursue constitutionally proper ends related to the protection of life, liberty, and property, and that federal judges are required by the Clause to evaluate whether legislation is designed to achieve such ends or is instead arbitrary.283

So, it seems obvious to us that the Civil Rights Act of 1866 protected rights to life, liberty and property that the Due Process of Law Clause safeguards against arbitrary deprivation. It is unclear to us, however, why Lash finds it plausible that a Due Process of Law Clause that was understood to authorize the federal protection of the “fundamental rights belonging to every man as a free man”284—including constitutionally unenumerated rights—somehow made it through the Article V process but implausible that a Privileges or Immunities Clause that was understood

277 Lash, Enforcing the Rights of Due Process, supra note 23.
278 Id. at 1423-28.
279 Id. at 1448. This label appears to be his own innovation.
280 Id. at 1456.
281 16 Stat. 140, 144, ch. 114, § 18 (1871).
282 Id. at, § 16.
283 Barnett & Bernick, No Arbitrary Power, supra note 17.
to protect constitutionally-unenumerated rights belonging only to citizens would have met with success.

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

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

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

They provide that if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail, and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for exercising the functions of a minister of the Gospel, free negroes and mulattoes, on conviction, may be punished by any number of lashes not exceeding thirty-nine, on the bare back, and shall pay the costs. Other provisions of the statute of Mississippi prohibit a free negro or mulatto from keeping a house of

286 Id.
288 Egerton, supra note 287, at 178-82.
289 Id. at 179.
entertainment, and subject him to trial before two justices of the peace and five slaveholders for violating the provisions of this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes of the late slaveholding States.\(^{290}\)

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

Lash highlights the expansive, natural-rights-saturated language that Wilson, Trumbull and others used in describing the rights that the Act would protect. But he does not seek to resolve the apparent tension between this language and the specific laws that the Act’s supporters sought to target, on the one hand, and a fair-legal-procedure-only reading of the Due Process of Law Clause, on the other. Indeed, the language used by the Act’s supporters in connection with the due process of law seems to us to be consistent with an understanding that the due process of law prohibited all legislation that deprived people of life, liberty, or property arbitrarily—that is, all legislation that was not designed to promote the public good by securing and enlarging people’s enjoyment of their natural rights.\(^{291}\)

Consider Representative William Lawrence’s speech—excerpted by Lash—calling upon Congress to overrule President Johnson’s veto of the Civil Rights Act:

All the law-writers agree that every citizen has certain “absolute rights,” which include “The right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and inalienable.” . . .

The bill of rights to the national Constitution declares that: “No person” . . . “shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.” . . .

Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.\(^{292}\)

Lawrence’s emphasis on the “absolute” character of what he called “natural, inherent, and inalienable rights” and the “necessary” character of certain civil rights that facilitate the latter’s enjoyment makes it difficult to believe that he understood due process of law to guarantee only equal treatment. Rather, it appears that, for Lawrence, the “due process of law” requires government—at all levels—to ensure that all people \textit{actually enjoy} their life, liberty, and property rights. If indeed such an understanding was widely held and incorporated into the Fourteenth Amendment’s Due Process of Law Clause, the Clause would not only have constitutionalized the Civil Rights Act but empowered the federal government to

\(^{290}\) CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).
\(^{291}\) See Barnett & Bernick, \textit{No Arbitrary Power}, supra note 17.
\(^{292}\) CONG. GLOBE, 39th Cong., 1st Sess. 1832-3 (1866).
ensure that states did not henceforth arbitrarily deprive people of unenumerated natural and civil rights. This would be difficult to square with Lash’s account of what was politically possible in 1868.

Lash’s claim that the Due Process of Law Clause alone provided constitutional authority for the Civil Rights Act of 1866 and its subsequent repassage in the Enforcement Act also faces some difficulties. As noted above, Section 18 specifically states that the 1866 Act is “hereby re-enacted.”293 Section 16, however, confers a bundle of rights that are similar but not identical to those conferred by the 1866 Act. Compare the language of the 1866 Act to that of Section 16 of the Enforcement Act:

1866: [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal 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.294

1870: [A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.295

The italicized language was redacted. Why?

There is a compelling reason to believe that the redaction was a product of the change from “citizens” in 1866 to “all persons” in 1870.296 Lash acknowledges that “aliens” did not enjoy the same property rights as did “subjects” at common law,297 thanks to a doctrine which tied certain rights to allegiance to the King.298 Among other things, the former could acquire and possess land but not hold “full” fee simple title.299 Although the doctrine of allegiance was amended to fit the American context—“subjects,” for instance, became “citizens,” and allegiance to the King became allegiance to the state300—the linkage between allegiance and landholding

293 16 Stat. 140, 144, ch. 114, § 18 (1871).
294 14 Stat. 27, ch. 31, § 1 (1866).
295 16 Stat. 140, 144, ch. 114, § 16 (1871).
296 Lash, Enforcing the Rights of Due Process, supra note 23, at 1455 n. 244.
297 Id. at 1464.
299 Id. at 156-7.
300 Id. at 156.
rights was maintained in the decades following the Revolution, endured throughout the antebellum period, and persisted during the most open period of immigration in the nation’s history. As Polly Price has detailed, “exclusionary [landholding] practices . . . underlie[d] even . . . a period in which the opportunity to become an American citizen was available to all comers of the white race.”

If the redaction was indeed predicated upon the recognition that Congress could not guarantee to non-citizens equality in respect of all the rights listed in the 1866 Act, Lash’s claim that the Due Process of Law Clause supplied authority for the 1866 Act would be substantially undermined. So, too, would his claim that the Privileges or Immunities Clause did not constitutionalize the 1866 Act. The Privileges or Immunities Clause, which protects only citizens, seems a fit instrument for the constitutionalization of an Act that guarantees equality in respect of rights that only citizens were understood to be entitled to enjoy.

That is not, of course, to say that all of the rights protected either by the Clause or the 1866 Act fit that description. We agree with Lash that many of them were understood to be rights which all people were understood to be entitled to enjoy. But, if some of them do fit that description, then the Privileges or Immunities Clause re-emerges as the more likely source of authority for the 1866 Act.

This is a big problem for Lash, who cannot explain how an enumerated-rights—including-comity-rights Privileges or Immunities Clause could supply the authority to prevent states from discriminating against their own citizens. He may have to bite the bullet and concede that, if he is right about the Privileges or Immunities Clause, leading Republicans were wrong to claim that the Fourteenth Amendment would constitutionalize the Civil Rights Act of 1866—legislation that was widely supported by moderates and radicals, and which was believed to be central to the achievement of shared Republican goals.

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301 Id. at 153.
302 Id. at 184.
303 Id. at 204–5.
304 Id. at 208. Nothing in this discussion should be construed as an endorsement of the political theory which undergirded the doctrine of allegiance, nor of its exclusionary consequences.
305 Suppose Lash went one step further to claim that parts of both the 1866 Act and the Enforcement Act were unconstitutional, insofar as they protected unenumerated rights that were unconnected with legal process. Such a claim would be deeply implausible. We have mentioned repeated Republican representations that the Fourteenth Amendment would constitutionalize the 1866 Act and the shared Republican commitment to the abolition of the Black Codes, which did not—as we have seen—solely target legal process rights. Although the expected applications of constitutional text are not dispositive of original meaning, one should hesitate before attributing meaning to text that contradicts its framers’ and supporters’ public explanations of the text’s implications for highly salient legislation and which would thwart the accomplishment of their public-articulated goals. Further, Lash presents Bingham as an almost unerringly reliable source of interpretive information after his embrace of a comity-only view of the Privileges and Immunities Clause. On his account, if anyone would have been in a position to identify constitutional problems with, and willing to object to, legislation that—however normatively desirable—exceeded Congress’s Section Five powers to enforce Section One, it would be Bingham. But, as Lash makes plain, Bingham enthusiastically supported the Enforcement Act, despite its protection of unenumerated contractual rights. Lash also adduces no evidence that Bingham objected to the 1866 Act because it protected unenumerated rights unconnected to legal process, and we have been unable to find any such evidence in the course
We are not demanding that Lash provide a comprehensive theory of the original meaning of the Fourteenth Amendment and refuse to budge from it. In the future, however, it would be helpful if he explained in greater detail how and why he has updated his prior beliefs about the Fourteenth Amendment; and if he both acknowledge and explain any changes in his views concerning how the 1866 Act constitutionalized. If he concludes that the Due Process of Law Clause is limited to providing equal access to fair legal proceedings, he should reconcile that conclusion with his 2017 beliefs about the Due Process of Law Clause constitutionalizing the Civil Rights Act of 1866. If he concludes that its coverage is broader, he should reconcile that conclusion with his 2014 pessimism about the prospects of an unenumerated-rights-protective Privileges or Immunities Clause being ratified into law.

4. The ERO Understanding Was Not Widely-Held by the Fourteenth Amendment’s Ratifiers

To sum up to this point: We think that Lash has adduced enough evidence to make it appear more likely than not that Bingham and Howard understood Bingham’s third proposal to protect citizens in the enjoyment of enumerated rights, and that this understanding was communicated to their fellow representatives. What is somewhat inaccurately called “incorporation” today is on solid originalist ground.

We lack the same confidence in the accuracy of his account of Bingham’s decision to replace “the privileges and immunities of citizens in the several states” with “the privileges or immunities of citizens of the United States,” and regard Lash’s interpretation of Howard’s introduction of the third draft to the Senate to be dubious. Indeed, it seems to us that if Lash is right about the Privileges or Immunities Clause, then Howard must have been either wrong or careless with his speech when he included unenumerated rights in his “mass” of “privileges, immunities, and rights” without making plain that he had only comity rights in mind.

Given the weakness of Lash’s arguments that Bingham’s absolute-protection understanding of the Privileges and Immunities Clause was idiosyncratic and that his third draft was in fact a repudiation of it, we doubt that Howard was wrong. And, given that, as Christopher Green has observed, Howard “certainly explains himself more adequately than Bingham generally does,” we doubt that Howard was careless with his speech.306

But Lash’s case is not yet doomed. Recall that it ultimately depends upon the public’s understanding of Congress’s handiwork. “[C]ompetent speakers of the English language who were aware of the context in which the text was communicated for ratification” might have gleaned from that context an ERO understanding coverage of congressional debates in the newspapers, arguments

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306 Green, Incorporation, Total Incorporation, and Nothing But Incorporation, supra note 12, at 109.
presented by the amendment’s supporters and opponents in the course of the ratification fight, and statements in response to politically salient events. This Section explores these materials.

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

Early newspaper coverage of the congressional debates is not helpful to Lash. Lash makes much of two facts: First, that Bingham’s various affirmations that the emerging amendment was designed to enforce the “bill of rights” were widely-reported. Second, that the “coverage of Jacob Howard’s presentation to the Senate of the final draft of the Fourteenth Amendment was wide and deep” and praised even by papers with a conservative bias as “clear and cogent.” We question whether it can be inferred from this coverage that readers understood the emerging amendment to protect only enumerated rights.

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

Indeed, it was not until 1952 that “the Bill of Rights” was ensconced in the National Archives alongside the Declaration of Independence and the Constitution. Before 1938, the original published version of the amendments—which were not labeled “the Bill of Rights”—that now resides there was hidden away in the basement of the State Department. Attributing the post-New Deal meaning

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307 LASH, supra note 14, at 182.
308 Id. at 189.
309 See MAGLIOCCA, supra note 65; Michael J. Douma, How the First Ten Amendments Became the Bill of Rights, 15 GEO. J.L. & PUB. POL’Y 593, 609-611 (2017) (finding that “Bill of Rights” became defined as the first ten amendments by the late 1920s and early 1930s); Pauline Meier, The Strange History of the Bill of Rights, 15 GEO. J.L. & PUB. POL’Y 497, 506-511 (2017) (finding that the “Bill of Rights” did not emerge as an icon until the 1930s).
310 See MAGLIOCCA, supra note 65, at 6-7.
311 Id. at 147.
312 Id. at 100. From 1938 to 1952, the federal copy of the first twelve amendments was housed at the National Archives, while the Declaration and Constitution were at the Library of Congress. Id.
of “the Bill of Rights” to the pre-Fourteenth Amendment public is anachronistic. (Although, we have to admit, it was an understandable mistake to have made before this recent revisionist scholarship.)

Bingham’s own usage is evidence that “the Bill of Rights” lacked a standard meaning. We have seen that, at least early in the debates, Bingham used the “bill of rights” to encompass the Privileges and Immunities Clause of Article IV, Section 2, which he understood to protect unenumerated rights. Lash does not demonstrate that Bingham’s use of the “bill of rights” was understood by the 1868 public to include only enumerated rights. Given recent scholarship on the use of the term “the Bill of Rights,” we believe such a demonstration to be impossible.

Among other things, the term “bill of rights” was most commonly associated with a prefatory statement of natural and fundamental rights such as found in the Virginia Declaration of Rights, authored by George Mason, which was incorporated into Justice Washington’s summary of the privileges and immunities of Citizens in the several states in Corfield. As Magliocca explains, the first ten amendments were not thought to be a bill of rights because they did not resemble such perambulatory affirmations of rights. 313

With this in mind, it is unsurprising that, when Howard referred in his speech to “the personal rights guarantied and secured by the first amendments of the Constitution,”314 he does not label these amendments “the Bill of Rights.” As we have already discussed, we do not agree that Howard’s speech is best read as expressing an ERO understanding. And Lash acknowledges that at least one newspaper understood Howard to be referring only to rights protected by the Privileges and Immunities Clause.315 It is wholly insufficient to say, as Lash does, that “the general idea of the amendment seemed to be getting through,” implying an ERO understanding as the general idea, given the importance of the details.316

Early Republican advocacy during the summer of 1866 affirmatively undermines Lash’s case for a public ERO understanding. Lash notes that “a number of Republicans expressly tied Section One of the Fourteenth Amendment to the Civil Rights Act of 1866.”317 By drawing a connection between Section One and

313 Id. at 67 (observing that the 1791 amendments “lacked the formal traits of a bill of rights as understood since the Founding”).
314 CONG. GLOBE, 39th Cong., 1st Sess. 2675 (1866).
315 LASH, supra note 14, at 189.
316 Id. Lash is also mistaken to characterize Samuel Nicholas’s essay as post-ratification commentary on the Fourteenth Amendment. See S.S. Nicholas, A Brief Comment on the Civil Rights Act, LOUISVILLE WEEKLY COURIER, June 6, 1866, at 4, available at http://nyx.uky.edu/dips/xt7ffbdwj40w/data/0050.pdf. The date of the article makes plain that Nicholas did not, as Lash claims, “wr[ite] not long after Congress passed the amendment”—the amendment was not sent to the states until June 13. Indeed, the title of the article suggests that Nicholas was not even discussing the amendment. Although Bryan Wildenthal has argued that Nicholas may have been discussing both the Civil Rights Act of 1866 and the amendment in the passage highlighted by Lash, Lash cannot fairly assume without argument that Nicholas was doing so, or that Nicholas meant by “the bill of rights” only enumerated rights. Bryan H. Wildenthal, The Fourteenth Amendment and The Bill Of Rights: Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873, 18 J. CONTEMP. L. ISSUES 1510, 1593-4 (2009).
317 LASH, supra note 14, at 196.
the Civil Rights Act of 1866, Republicans made it more likely that members of the public would understand Section One to protect equality in the enjoyment of unenumerated rights to contract, property, and security—protection that, it bears repeating, Lash cannot account for in terms of the enforcement of an enumerated right to comity.

As they did in the course of congressional debates, Republicans denied that Section One would enfranchise Blacks, but they neglected to rely upon the unenumerated status of the right to suffrage when doing so. Indeed, they could hardly do so while simultaneously maintaining that Section One removed doubts about the constitutionality of civil rights legislation that protected unenumerated rights. Lash further acknowledges that Republicans frequently emphasized “equal rights” without “exploring the precise content of those ‘equal rights,’” even though it would have, on Lash’s account, been easy for them to supply that content by communicating an ERO understanding, as well as politically useful in alleviating concerns about suffrage.

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

This evidence offers compelling support for the proposition that the Privileges or Immunities Clause was understood to protect enumerated rights. But it is entirely consistent with the proposition that fundamental unenumerated rights that could not “be fully defined in their extent and precise nature” would also be protected by the Clause. That participants in the Convention emphasized that particular enumerated rights would be secured by the Fourteenth Amendment is understandable in the context of recent assaults upon those rights. We cannot infer from this that they understood the Amendment to secure only those rights.

These speeches and resolutions make it more likely that reasonably-informed members of the public generally would have understood those rights to be protected by the Amendment. But it does not make the existence of a shared ERO understanding more likely.

Lash makes too much of President Johnson’s counter-amendment. Lash describes it as “a passive restatement of Article IV’s Comity Clause,” uphold it

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318 Green, supra note 12, at 194 (“The enumerated-rights-only view of the Privileges or Immunities Clause was never offered during 1866 as an explanation of why the Privileges or Immunities Clause did not apply to voting.”).
319 LASH, supra note 14, at 196.
320 Id. at 204.
321 Id. at 222.
as evidence that Johnson found the language of Article IV unthreatening;\textsuperscript{322} and claims that Johnson would certainly not have endorsed language that he believed would be understood to protect substantive national rights.\textsuperscript{323} But Lash’s characterization of the counter-amendment is inaccurate.

The counter-amendment does not merely “restate” the language of the Privileges and Immunities Clause—it alters it in a way that implicitly repudiates the “ellipsis” theory propounded by Bingham by specifying that the protected privileges and immunities belong to “citizens of the several states” rather than to “[citizens of the United States] in the several states.”\textsuperscript{324} The effect is to tie the enjoyment of any privileges or immunities to state rather than to national citizenship.

Further, Lash acknowledges but fails to appreciate the significance of the fact that the amended language was “passive”—namely, that it did not confer upon Congress the power to enforce it, any more than did Article IV.\textsuperscript{325} Taken together, these differences are sufficient to explain Johnson’s comfort with the counter-amendment, irrespective of what he believed the content of “privileges and immunities” to be.

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

What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus; to take, hold and dispose of property, either real or personal, & c., & c. These are the long-defined rights of a citizen of the United States, with which the States cannot constitutionally interfere.\textsuperscript{326}

This is an unambiguous affirmation that the Privileges or Immunities Clause will provide absolute protection to Corfield rights. It uses language from Corfield. It groups enumerated and unenumerated rights together. It describes all of those rights as “rights of a citizen of the United States.” It does not recognize the alleged distinction between unenumerated natural and common rights that were protected

\textsuperscript{322} Id. at 223.
\textsuperscript{323} Id.
\textsuperscript{324} FLEMING, supra note 125.
\textsuperscript{325} See LASH, supra note 14, at 223 (acknowledging that the provision would “do nothing at all” because it “omitted both the ‘no state shall’ language and a final section granting Congress power to enforce the Amendment.”).
\textsuperscript{326} Madison, The Proposed Constitutional Amendment — What it Provides, N.Y. TIMES 2 (Nov. 15, 1866).
against parochial discrimination by Article IV and enumerated national rights that
were to be protected, period, by the Privileges or Immunities Clause, which Lash
claims is the original public meaning of the term.

In the second letter, Madison reiterates that the Privileges or Immunities Clause
“is intended for the enforcement of the Second Section of the Fourth Article of the
Constitution” and proceeded to recite the language of the latter.327 Madison then
referred readers to the first letter, stating that “[w]e have seen . . . what privileges
and immunities were intended.”328 After a discussion of the import of the Due
Process of Law and Equal Protection Clauses and some disparagement of the
“feeble” opposition, Madison concluded by declaring that the Amendment will be
“coextensive with the whole Bill of Rights in its reason and spirit.”329

Although Lash presents Madison’s claims that the Amendment is necessary to
enforce “the Bill of Rights”—claims made in numerous letters—as evidence of an
ERO understanding,330 it is obvious in context that the author understands “the Bill
of Rights” to include a variety of unenumerated rights associated with Article IV.
We have here another example of the nonstandard use of that phrase before it
became exclusively associated with the first eight or ten amendments.

Lash’s treatment of Frederick Douglass’s January 1867 Atlantic essay is
similarly selective. Lash is certainly correct that Douglass “reminded readers of
how the South had suppressed free speech, free press, and the free enterprise of
religion.”331 But James Fox has pointed out that Douglass did much more, both in
that essay and in a prior essay published in the Atlantic in December of 1866 in the
immediate aftermath of the Republican victory.332 Douglass gave voice to an
understanding of citizenship that was not exhausted by enumerated rights.

In portions of the January essay that Lash does not discuss, Douglass
condemned the “denial of political rights” as an instantiation of master-slave
ideology and describes suffrage as essential to citizenship.333 In the November
essay, Douglass denied that the Constitution knew “any difference between a
citizen of a State and a citizen of the United States”; affirmed that “[c]itizenship . . ...
includes all the rights of citizens, whether state or national”; and argued that the
Privileges and Immunities Clause guaranteed that “a legal voter in any State shall
be a legal voter in all the States.”334

328 Id.
329 Id.
330 LASH, supra note 14, at 217.
331 Id. at 216.
332 See James W. Fox, Jr., Publics, Meanings, and the Privileges or Citizenship, 30 CONST.
COMMENT. 567, 597-99 (2015) (showing that Douglass articulated “a very different view of the
[1866] election and the structure and relationship of rights than presented in [Lash’s book]”). Fox
also criticizes Lash for narrowing the scope of Victoria Woodhull’s constitutional claims and
privileging the “legalistic arguments of her counsel.” Id. at 600-4.
333 Frederick Douglass, An Appeal to Congress for Impartial Suffrage, THE ATLANTIC MONTHLY
(Jan. 1, 1867), available at http://www.theatlantic.com/magazine/archive/1 X67/01/an-appeal-to-
congress-for-impartial-suffrage/306547
334 Frederick Douglass, Reconstruction, THE ATLANTIC MONTHLY (Dec. 1866), available at
https://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561/.
To focus only on Douglass’s references to enumerated rights is to narrow the breadth of his constitutional arguments and to fail to come to grips with the contestation concerning the nature of citizenship that was taking place. This contestation makes the determinate public meaning for which Lash contends still less likely.

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

General statements that all “constitutional rights” or “rights which the Constitution provides” underdetermine the question of enumeration. We have just seen that Madison understood the Privileges or Immunities Clause to protect those unenumerated rights “provide[d]” by the Privileges and Immunities Clause of Article IV, to which he or she referred as “the whole Bill of Rights.” To claim that these statements reflected an understanding of the “‘textualist nature’ of the ‘privileges or immunities of citizens of the United States’” is to raise the further question of whether those who made them understood the existing constitutional text as Lash does. Lash does not answer that question.

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

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

335 LASH, supra note 14, at 218-9.
336 Id. at 220.
337 Id. at 221.
338 Id.
5. Post-Ratification Evidence Does Not Support the ERO Understanding

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

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

Lash is correct about this: Bingham praised *Barron* as correctly decided and needing to be reversed by a properly worded amendment; stated that the “privileges and immunities of citizens of the United States” are “chiefly defined in the first eight amendments,” which he went on to quote in their entirety; and most significantly described the rights protected by the Privileges or Immunities Clause as “other and different” than the “civil rights” which *Corfield* held that states “could not refuse to extend to citizens of other states.” Standing alone, Bingham seems here to deny that the “privileges or immunities of citizens of the United States” effectively nationalized *Corfield* rights. It is indeed difficult to read this account as anything other than a denial that the set of rights protected by Article IV is identical to the set of rights protected by the Privileges or Immunities Clause.

On the other hand, it is equally difficult to read this particular speech and find any support for Lash’s current view that the Privileges or Immunities of U.S. citizens extends to enumerated rights beyond those in the first eight amendments. Bingham here speaks only of the first eight amendments. There is, therefore, nothing in *this* speech that supports Lash’s current claim that Bingham (or anyone else) viewed the comity-only reading of Article IV as an additional enumerated right.

Perhaps, however, we should not overread this speech. To say, as Bingham does, that privileges or immunities are “chiefly defined” in the first eight amendments is to imply that they are not entirely defined in the first eight amendments. Indeed, a few moments later, as Christopher Green points out, Bingham himself offered the following caveat about his preceding remarks: “in this discussion I have . . . referred only incidentally to the provisions of the Constitution guarantying rights, privileges, and immunities to the citizens of the United States.”

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340 See Lash, *Beyond Incorporation*, supra note 19, at 460 (stating that he was “no longer convinced” that Bingham understood the Clause to “nationalize[] more rights than those listed in the first eight amendments”).
341 Green, *Incorporation, Total Incorporation, and Nothing But Incorporation*, supra note 12, at 134.
Bingham then asked “the House, when they come to deliberate upon this question, not to forget the imperishable words of our great Declaration [of Independence], ‘All men are created equal and endowed by their Creator with the rights of life and liberty.’” 343 He also asked “gentlemen not to forget those other words of the Declaration, that ‘to protect [sic] these rights’ (not to confer them) ‘governments are instituted among men.’” 344 Then, just after this clear affirmation of natural rights, Bingham sings the praises of the unenumerated “liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow men, and to be secure in the enjoyment of the fruits of your toil.” 345 And, lest we jump to the conclusion that he was here referring to some comity-only-protected natural liberties—or liberties protected only by the due process of law, Bingham equated these unenumerated liberties with “the right ‘to know, to argue, and to utter freely according to conscience’” 346—natural rights that are protected by the First Amendment.

At best, if Bingham’s 1871 speech is not contradictory, then it is ambiguous. But that’s not all. Bingham’s Woodhull Report on women’s suffrage—issued just two months previous—plainly affirms that the set of rights protected by Article IV is identical to the set of rights protected by the Privileges or Immunities Clause. Lash’s dismissal of the Woodhull Report is unsatisfactory. 347

Suppose we grant that Bingham’s subsequent speech is a more credible expression of his own personal understanding of the Clause than his Woodhull Report. It remains striking that neither the majority of Committee members who signed onto the Woodhull Report, nor the minority who opposed it, endorsed the ERO understanding, even though they disagreed about which rights the Privileges or Immunities Clause protected. Six of these ten Committee members were members of the Thirty-Ninth Congress; 348 three were elected to office in November of 1866. 349 In short, the Woodhull Report makes Lash’s interpretation of the Privileges or Immunities Clause less likely.

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

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole

343 Id.
344 Id. (emphasis added). The Declaration uses “secure,” not “protect.”
345 Id.
346 Id.
347 In a trial, Bingham’s Woodhull Report would be considered a prior inconsistent statement that could be used to impeach the credibility of his later claim.
348 Specifically, John Bingham, Burton Cook, Charles Eldridge, Giles Hotchkiss, Michael Kerr, and Ulysses Mercur.
349 Specifically, Benjamin Butler and William Loughridge.
Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under the second section of the fourth article of the old Constitution. That section declares that—“The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.”

There it was plainly written down. Now, sir, it seems to me, that unless the Senator from Vermont and the Senator from Massachusetts can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States, they must give up the argument; and I assert here with confidence that no such construction was ever given to the second section of the fourth article of the Constitution.350

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

So, even if we grant that Lash has read Bingham’s 1871 speech correctly, there appears to be a post-ratification conflict between Bingham and Howard that Lash simply does not address.351

Turning now to post-ratification case law, Lash begins his study with two decisions: Garnes v. McCann and The Live-Stock Dealers. In Garnes, the Ohio Supreme Court rejected a claim that the Fourteenth Amendment forbade segregated schools.352 Lash reads Judge Luther Day’s opinion for the court in Garnes as “reject[ing] an effort to interpret the [Privileges or Immunities] Clause as protecting unenumerated rights.”353 Lash excerpts the following language:

350 CONG. GLOBE, 40th Cong., 3d Sess., 1003 (1869) (emphases added).
351 In a blog post, Lash interpreted Howard to be arguing that “[i]f the Comity Clause did not provide that right to anyone (visitor or resident), then neither did the Fourteenth Amendment.” Kurt Lash, More Than Equality, Less Than Federalizing the Common Law: A Response to Christopher Green, THE ORIGINALISM BLOG (Nov. 24, 2014), http://www .originalismblog.typepad.com/the-originalism-blog/2014/11/more-than-equality-less-than-federalizing-the-common-law-a-response-to-christopher-green-kurt-lash.html [http://perma .cc/T22C-5VB3]. It is not clear why Howard would have deployed such an argument against Sumner and Edmunds, who were not arguing that the Privileges or Immunities Clause protected the right to vote against merely parochial discrimination but, rather, against all invidious state discrimination. See CONG. GLOBE, 40th Cong., 3d Sess., 1003 (1869) (Senator Sumner) (arguing that a constitutional amendment “conceded to the States the power to discriminate against colored persons” when regulating the qualifications of voters “would not have passed the Senate had anyone attributed to it that meaning”); id. at 1002 (Senator Edmunds) (arguing that “it is one of the essential privileges of citizenship . . . to vote, to exercise political power” and implying that any state constitutional clause that “limits the right to vote to persons of a particular race” is “swept away” by the Fourteenth Amendment).
352 Garnes, 21 Ohio at 211.
353 LASH, supra note 14, at 232.
We are not aware that this has been as yet judicially settled. The language of the clause, however, taken in connection with other provisions of the amendment, and the constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States. A broader interpretation opens a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.\textsuperscript{354}

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

In contrast, Justice Bradley’s opinion in\textit{The Live-Stock Dealers} clearly contradicts Lash’s account. Lash emphasizes Bradley’s claim that the Privileges or Immunities Clause “embraces much more” than the Privileges and Immunities Clause of Article IV, and the latter only prohibited states from “discriminating in favor of [their] own citizens, and against the citizens of other states.”\textsuperscript{355} But in the very next paragraph after the language excerpted by Lash, Justice Bradley equates the rights protected by the two clauses and implies that they may not all be enumerated:

\begin{quote}
What, then, are the essential privileges which belong to a citizen of the United States, as such, and which a state cannot by its laws invade? It may be difficult to enumerate or define them. The supreme court, on one occasion, thought it unwise to do so. 18 How. 591.\textsuperscript{356}
\end{quote}

The citation is to\textit{Conner v. Elliot},\textsuperscript{357} in which the Court discussed, but provided no definitive interpretation of, the Privileges and Immunities Clause of Article IV.\textsuperscript{358}

Worse still for Lash, Bradley goes on to identify the unenumerated “privilege . . . of every American citizen to adopt and follow . . . lawful industrial pursuit[s]” alongside the enumerated rights to due process of law and equal protection of the laws as privileges without indicating that enumeration has any significance.\textsuperscript{359} It is the fact that these privileges “cannot be invaded without sapping the very

\begin{footnotes}
\item[354] Garnes, 21 Ohio at 209-10.
\item[355] The Live Stock Dealers, 15 F. Cas., at 652.
\item[356] \textit{Id.} (emphasis added).
\item[357] 18 How. 591 (1856).
\item[358] \textit{Id.} at 593.
\item[359] The Live-Stock Dealers, 15 F. Cas., at 652.
\end{footnotes}
foundations of republican government” that, for Justice Bradley, identifies them as “essential” and therefore protected by the Privileges or Immunities Clause.\footnote{Id.}

We have examined every decision prior to the \textit{Slaughter-House Cases} in which the Privileges or Immunities Clause was discussed.\footnote{These cases include White v. Clements, 39 Ga. 232 (1869); Ex parte Smith, 38 Cal. 702 (1869); The Live-Stock Dealers, 15 F. Cas.; Lonas v. State, 50 Tenn. 287 (1871); United States v. Hall, 26 F. Cas. 79 (S.D. Ala. 1871); State v. Gibson, 36 Ind. 389 (1871); State v. Stanton’s Liquors, 38 Conn. 233 (1871); In Re Hobbs, 12 F. Cas. 262 (1871); Van Valkenburg v. Brown, 43 Cal. 43 (1872); Burns v. State, 48 Ala. 195 (1872); Minor v. Happersett, 53 Mo. 58 (1873); Donnell v. State, 48 Miss. 661 (1873).}

We have found no case in which a court expressly distinguished the set of rights protected by the Privileges or Immunities Clause from those protected by the Privileges and Immunities Clause. We have found no case in which a court expressly endorsed the ERO understanding. We have found no case in which a court expressly rejects the proposition that the Privileges or Immunities Clause protects unenumerated rights.

To the contrary, we have found numerous cases in which courts endorsed the latter proposition, including not only \textit{The Live Stock Dealers} but also:

- \textit{Burns v. State}: the “rights conferred by citizenship” include the right of “suing any other citizen” and “the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.”\footnote{Burns, 48 Ala., at 198.}
- \textit{United States v. Hall}: in which future Supreme Court Justice William Woods identified privileges or immunities as “those which may be denominated fundamental,” citing \textit{Corfield};\footnote{Hall, 26 F. Cas., at 81. Woods included “among” these rights “those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments,” such as “the right of freedom of speech, and the right peaceably to assemble.” \textit{Id.}}
- \textit{In Re Hobbs}: stating that “[a]ny attempt . . . to enumerate or describe the fundamental rights” secured by the Privileges or Immunities Clause would “give but an unsatisfactory result.”\footnote{See \textit{In Re Hobbs}, 12 F. Cas., at 264.}
- \textit{Van Valkenburg v. Brown}: privileges and immunities include “the enjoyment of life and liberty, and the right to acquire and possess property, and to demand and receive the protection of the Government in aid of these,” as well as “the right to sue and defend in the Courts, to have the benefit of the writ of habeas corpus, and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances.”\footnote{Van Valkenburg, 43 Cal. at 48-50.}

Given the massiveness of his research, Lash’s failure to discuss the myriad authorities that rejected his position in the pre-\textit{Slaughter-House} case law is hard to understand.

This brings us to Justice Miller’s opinion for the Court in \textit{The Slaughter-House Cases}, which Lash presents as a badly-misunderstood affirmation of an ERO
understanding. Lash is not alone in this revisionist view of Miller’s opinion. Now-Judge Kevin Newsom defended a similar view, as has Bryan Wildenthal.

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

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

Turning, finally, to Lash’s post-ratification commentary on the Clause, we again find that Lash overstates his case for consistency. It is true, as Lash claims, that John Norton Pomeroy, Timothy Farrar, and George Paschal all interpreted Section One as overturning Barron. But these commentators also said things that are either in tension with, or outright contradict, the ERO understanding.

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

368 See Fox, Re-Readings and Misreadings, supra note 259, at 78-9.
369 Id. at 78; Slaughter-House Cases, 16 Wall., at 80.
370 Slaughter-House Cases, 16 Wall., at 80.
371 Id. at 118-9 (Bradley, J., dissenting) (listing rights “specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities” of U.S. citizenship).
372 Fox, Re-Readings and Misreadings, supra note 259, at 80.
373 Cruikshank, 92 U.S., at 552.
374 LASH, supra note 14, at 273.
citizen of the United States,” citing “Am. 14, § 1.”375 Pomeroy opined that the “broad, general principles of interpretation” adopted by the Slaughter-House dissenters was “correct” and predicted (incorrectly) that it would “in time, be universally accepted.”376

Paschal’s view appears closest to the ERO understanding. He took a comity-only view of the Privileges and Immunities Clause; stated that Section One “impose[s] upon the States” those “general principles which had been construed to apply only to the national government”; and stated that those principles are embodied in the “guarant[ees]” of both the Privileges and Immunities Clause and “the thirteen amendments.”377 Yet, this is awfully nonspecific language, and Paschal’s subsequent praise for Justice Stephen Field’s “very able” dissent in The Slaughter-House Cases raises questions about how broad Paschal understood those “general principles” to be.378

We do not offer here a theory of the discount rate that should be used in assessing the credibility of post-ratification evidence. It is clear, however, that post-ratification evidence generated during the timeframe canvassed by Lash does not make his interpretation of the Clause more likely to be true. There is little evidence that the ratified language was understood by most Republicans or by courts and commentators during this timeframe to protect only enumerated rights, and much evidence that suggests otherwise.

The only unambiguous advocacy of the ERO understanding during this timeframe appears to have come from Democratic opponents of the Civil Rights Act of 1875, upon whom Lash is understandably loath to rely for credible interpretations of an amendment that they opposed, or for credible claims concerning the authority it provided for legislation they also opposed.379 This is not good company for Lash to keep, and he wisely declines to do so.

6. Lash’s Pessimism About the Enactment of an Unenumerated-Rights-Protective Amendment is Unwarranted

Lash is relentlessly bearish about the prospects of any amendment that was understood to protect unenumerated rights being proposed and ratified during the

375 See TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 198 (3d ed. 1872). See also id. at 200 (stating that “on the 9th of April, 1866, a statute was enacted for executing [the Privileges and Immunities Clause]”).
376 JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 179 (1886).
378 Id. at 488.
379 See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. app. 25-26 (1872) (Sen. Thurman); id. at 342–43 (1873) (Sen. Beck); id. at app. 233–44 (1874) (Rep. Norwood). For further examples of Democratic reliance upon the ERO understanding in the course of opposition to the Civil Rights Act of 1875, see Green, Incorporation, Total Incorporation, and Nothing But Incorporation, supra note 12, at 132 n. 339-45.
Thirty-Ninth Congress. Again he denies that moderates and conservatives would have signed off on a Privileges or Immunities Clause that would “nationalize natural and common law civil rights in the states.” Lash repeatedly insists that radicals who might have hoped for the latter simply did not have the votes.

We agree that the Thirty-Ninth Congress would not likely have proposed an amendment that was widely understood to leave the specification of “privileges or immunities” entirely to Congress, owing to widespread Republican attachment to some version of federalism, fear of a future Democratic Congress, and deep, widespread racism within both northern and southern society. But Lash offers no compelling reason to believe that a proposed amendment which was understood to protect some unenumerated rights would have met the same fate.

This was not, after all, a Congress that was unprepared to enact legislation that expressly protected unenumerated rights. The Civil Rights Act of 1866 expressly protected unenumerated rights, and Lash acknowledges that numerous Republicans affirmed during the ratification process that Section One would secure the Civil Rights Act’s constitutionality. Nor were Republicans afraid to outpace popular opinion during Reconstruction in their efforts to enforce rights that they knew to be politically controversial. That Black suffrage remained deeply unpopular with white voters did not stop Republicans from proposing and securing the ratification of the Fifteenth Amendment in 1870.

More generally, Lash’s argument appears to rest upon unwarranted confidence in his capacity to specify the range of possible outcomes of a highly complex collective decisionmaking process. According to Lash, if an amendment that gave Congress and the federal courts a blank check to define and protect unenumerated rights would have been rejected, then any amendment that succeeded must have been understood to exclude unenumerated rights.

Lash’s conclusion does not follow from his premise. Suppose, counterfactually, that Bingham emerged from his deliberations with a version of Section One containing the language in italics:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge any rights of citizens of the

380 LASH, supra note 14, at 104 (Bingham’s initial draft had “nothing to do with radical efforts to nationalize the countless common law and natural rights traditionally regulated by the states).

381 Id. at 285 ("[M]oderates opposed on federalist grounds any effort to nationalize the substance of civil rights in the states.").

382 Id. at 78.

383 See Paul Finkelman, Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North, 17 RUTGERS L.J. 415, 419 (1986) (acknowledging “extreme racism” in the North but emphasizing that while “economic and social conditions for northern blacks were generally deplorable,” there was “a clear trend in the direction of granting greater legal rights and protections to free blacks.”).

384 See Michael W. McConnell, Segregation and the Original Understanding: A Reply to Earl Maltz, 13 CONST. COMMENT. 233, 236 (1996) (“It is apparent that Republicans during Reconstruction were willing to buck public opinion in the service of constitutional reform.”).
United States that are expressly enumerated in the text of the Constitution of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.  

We think it plausible that this hypothetical Section One—a more-specific articulation of what Lash understands the enacted Section One to mean—would have met with considerable resistance. Democrats, of course, would have opposed it, as they would have opposed any proposed amendment. We suspect that not only radicals, but even moderate Republicans would have opposed it because it would not clearly secure the constitutionality of the Civil Rights Act of 1866. Obviously, an enumerated-rights-only Privileges or Immunities Clause would not have secured the Act’s constitutionality, and Lash has not developed a persuasive theory of how the original meaning of the Due Process of Law, Equal Protection, or Citizenship Clauses would have done so. Of course, given that this is a counterfactual, it is difficult to say.

If the above hypothetical amendment would have been defeated, then does it follow that the enacted amendment must have protected unenumerated rights, or safeguarded citizens against other-than-parochial discrimination? It does not. The enacted amendment may have been underdeterminate as to some or all of those questions, in the sense that there may be no one answer to them in which the ratifiers would have placed a higher credence than any other. Underdeterminacy, in turn, may have resulted from a failure on the part of the framers to reach agreement concerning them, and the failure of subsequent public debate to produce such agreement.

In a subsequent article, we will argue that the Privileges or Immunities Clause did clearly authorize Congress and the federal courts to protect unenumerated civil rights that shared a family resemblance. At the same time, it did not confer upon Congress plenary power to regulate the full panoply of these rights. For his argument-from-implausibility to work, Lash needs to show that an amendment that threaded this needle would likely have not made it through the relevant veto-gates. This he does not do, instead relying—as did Justice Miller in the Slaughter-House Cases—upon tendentious characterizations of unenumerated-rights-protective theories of the Privileges or Immunities Clause as effectively turning Congress into a “perpetual censor” upon all state legislation and expressing doubt that such a Clause could have been ratified. We share his doubts on that score. But we have similar doubts about a differently-worded amendment that specified his ERO understanding.

Given those cross-cutting doubts, Lash’s argument-from-implausibility fails.

CONCLUSION

\(^{385}\) U.S. CONST. amend. 14, § 1.

\(^{386}\) Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing determinacy, indeterminacy, and underdeterminacy). In brief, the constitutional text is underdeterminate with respect to a given question “only if the set of results . . . that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.” Id.
We have concluded that the original meaning of the Privileges or Immunities Clause is considerably more complicated than Professor Kurt Lash makes it out to be. We would not blame readers for being disappointed. The pull of parsimony is strong. And Lash’s account of the Clause’s meaning—enumerated rights and nothing but—seems to promise originalists who are concerned about the abuse of judicial discretion that they can have their original meaning and eat their judicial restraint, too. Alas, this promise is false. Lash subtracts far too much from the Clause’s communicative content for it to be adopted in full, either by scholars and citizens who seek a comprehensive understanding of the Clause’s original meaning, or by public officials who are oath-bound to interpret and implement the Clause.

We are aware that it takes a theory to beat a theory, and that we have only begun to sketch one of our own. We urge those who are skeptical of unenumerated rights to bear with us. As Justice Clarence Thomas put it when calling for the Privileges or Immunities Clause’s revival in his landmark concurrence in *McDonald v. City of Chicago*:

The mere fact that the [Privileges or Immunities] Clause does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress’ power or is otherwise prohibited . . . To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer.

The Privileges or Immunities Clause raised hard questions that led even those present at its enactment to speak of its “euphony and indefiniteness of meaning” and to express uncertainty about its “effect.” Kurt Lash’s diligent research and

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387 See Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, supra note 12 (reviewing Lash’s book). Lash objects to the “incorporationist” label, and so we do not apply it. See Lash, *More Than Equality, Less Than Federalizing the Common Law: Response to Christopher Green*, supra note 351 (objecting that the term suggests that Lash holds Justice Hugo Black’s view that the Privileges or Immunities Clause “protects nothing more than the rights of the first eight amendments”). Black presented his view in *Adamson v. California*, 332 US 46, 72-92 (1947) (Black, J., dissenting). We, too, reject “incorporation” as an unhelpful way of conceiving of the panoply of fundamental rights protected from abridgment by the Privileges or Immunities Clause.

388 THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77 (1970) (observing that “once it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternative candidate is available to take its place.”). Kuhn’s central point is that “anomalies abound in all theories, but we are prepared to live with them if we find the theory to be more useful than the best alternative.” Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?*, 21 J. APPLIED CORP. FINANCE, 1,13 (2009).


390 McDonald, 561 U.S., at 854-5 (Thomas, J., concurring).

391 GEORGE S. BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41–42 (1902) (writing that the Clause’s “euphony and indefiniteness of meaning was a charm to [Bingham].”).

392 See CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (Sen. Johnson) (objecting to and moving to redact the Privileges or Immunities Clause because of his uncertainty about its “effect.” The lone Democrat on the Joint Committee on Reconstruction, Senator Reverdy Johnson was “[a] noted
serious engagement with these questions has borne tremendous fruit that we have been able to gather at a considerably lower cost than we might have otherwise incurred, thanks to his assiduous efforts, for which we sincerely commend him. We have learned much even from what we have concluded are his mistakes. We will bring to bear more of what we have learned when, in our next article, we present an interpretation that better fits the available evidence.

But, in the end, we must side with Jacob Howard.

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constitutional authority” who “remained a respected figure in the Senate.” Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction, 45 Ohio St. L.J. 933, 957 (1984)).