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**The Origins of the Privileges or  
Immunities Clause, Part II:  
John Bingham's Epiphany**

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## I. INTRODUCTION

The current debates over the incorporation of the Second Amendment have reignited interest in the historical understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. The Supreme Court's history-laden analysis of the Second Amendment in *District of Columbia v. Heller*<sup>1</sup> signaled the Court's openness to an originalist understanding of the Bill of Rights. Not surprisingly, the Court's decision to hear *McDonald v. Chicago*<sup>2</sup> and consider whether to extend the right recognized in *Heller* against the states triggered an avalanche of briefs (both principle and amici) which explore the history behind the Privileges or Immunities Clause and its relationship to the original Bill of Rights.<sup>3</sup> Regardless of the Court's decision in *McDonald*, we seem to have entered a period of renewed judicial and scholarly interest in the original understanding of Section One of the Fourteenth Amendment.<sup>4</sup>

This renewed attention is long overdue. Courts and legal scholars have long chafed under the Supreme Court's implausible use of the Due Process Clause as the textual vehicle for incorporating the Bill of Rights. The awkward use of the Due Process Clause, in turn, seems to have been driven by the Supreme Court's original decision in *The Slaughter-House Cases* which gave a limited reading to the Privileges or Immunities Clause of Section One of the Fourteenth Amendment. For years, scholars have pressed the Court to revisit the issue, overrule *Slaughter-House*, and establish the Privileges or Immunities Clause as the primary source of substantive individual rights against state action.

Just how the Privileges or Immunities Clause protects substantive individual rights is a matter of some dispute. To date, most historical accounts of the Privileges or Immunities Clause assume that the author of the text, John Bingham, based the Clause on Article IV of the original Constitution.<sup>5</sup> According to this view, Bingham and the other Republican members of the

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> *Nat'l Rifle Ass'n v. Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) cert. granted sub nom. *McDonald v. City of Chicago*, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

<sup>3</sup> The following is only a partial list of the briefs in *McDonald* which spend a significant portion of their argument exploring the history behind the adoption of the Fourteenth Amendment: 2009 WL 4378912 (Appellate Brief) (U.S. November 16, 2009), Petitioners' Brief, (No. 08-1521.); 2009 WL 2574073 (Appellate Petition, Motion and Filing) (U.S. August 18, 2009), Reply Brief, (No. 08-1521.); 2009 WL 908685 (Appellate Brief) (C.A.7 February 06, 2009), Brief of Constitutional Law Professors as Amici Curiae in Support of Reversal, (Nos. 08-4241, 08-4243, 08-4244.); 2009 WL 2028912 (Appellate Petition, Motion and Filing) (U.S. July 09, 2009), Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, (No. 08-1521.); 2009 WL 4099518 (Appellate Brief) (U.S. November 23, 2009), Amicus Brief for Academics for the Second Amendment in Support of the Petitioners, (No. 08-1521.); 2010 WL 383619 (Appellate Brief) (U.S. January 29, 2010), Reply Brief, (No. 08-1521.); 2009 WL 4049146 (Appellate Brief) (U.S. November 23, 2009), Amicus Curiae Brief of the American Center for Law and Justice in Support of Petitioners, (No. 08-1521.); 2009 WL 4049148 (Appellate Brief) (U.S. November 23, 2009), Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners, (No. 08-1521.).

<sup>4</sup> Columbia Law Professor Philip Hamburger and Georgetown Law Professor Randy Barnett are just two major constitutional scholars who have recently posted articles exploring the history behind the Privileges or Immunities Clause. See, Philip Hamburger, *Privileges or Immunities* (2010) (paper posted on Social Science Research Network at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1557870](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557870)), Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* (2010) (paper available on Social Science Research Network at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1538862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538862)).

<sup>5</sup> See Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 191 (1998) (describing Bingham's "pious blending of phraseology from no fewer than four sections of the pre-1866 Constitution (Article I, section 10; Article IV; and Amendments I and V)"); John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28-29 (1980) (the "amendment's framers repeatedly adverted to the *Corfield* discussion [of Article IV] as the key to what they were writing"); Daniel Farber, *Constitutional Cadenzas*, 56

Thirty-Ninth Congress embraced Justice Bushrod Washington's opinion in *Corfield v. Coryell*<sup>6</sup> as the authoritative statement on the meaning of Article IV.<sup>7</sup> Since *Corfield* presented Article IV as protecting all "fundamental" privileges and immunities, these scholars assume that Bingham and the Reconstruction Republicans understood the Privileges or Immunities Clause of Section One as somehow federalizing a broad category of fundamental civil rights originally protected under Article IV.<sup>8</sup> Because a majority of the Supreme Court in *The Slaughterhouse Cases* rejected this view and instead sharply distinguished Article IV privileges and immunities from Fourteenth Amendment privileges or immunities, a number of influential legal scholars believe the Supreme Court should overrule *Slaughterhouse* and replace it with a decision that

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Drake L. Rev. 833, 842-43 (2008) ("The debates confirm that, by referring to privileges or immunities, the supporters of the Fourteenth Amendment were drawing a link to the "P & I" Clause of the original Constitution . . . . In the House, Bingham explained that the effect of the Amendment was "to protect by national law . . . the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."); Risa E. Kaufman, Access to the Courts as a Privilege or Immunity of National Citizenship, 40 Conn. L. Rev. 1477, 1493 (2008) ("Scholars arguing that the Privileges or Immunities Clause of the Fourteenth Amendment was modeled on Article IV's Comity Clause note that proponents of the Fourteenth Amendment, including its primary author, Representative Bingham, often referred to Justice Washington's language in *Corfield*, including its discussion of the right to access the courts."); Derek Shaffer, Note: Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship within the Fourteenth Amendment, 52 Stan. L. Rev. 709 (2000) ("Bingham envisioned that the Clause would serve a vital role in securing substantive protection for certain fundamental rights of the sort enumerated in *Corfield* and previously violated by the states."). See also, David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 404 (2008); Richard L. Aynes, Unintended Consequences of the Fourteenth Amendment and What They Tell Us About its Interpretation, 39 Akron L. Rev. 289, 298 (2006); John Harrison, State Sovereign Immunity and Congress's Enforcement Powers, 2006 Sup. Ct. Rev. 353, 368; Michael Kent Curtis, John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause", 36 Akron L. Rev. 617, 655 (2003); Douglas G. Smith, The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment, 34 San Diego L. Rev. 809 (1997).

<sup>6</sup> 6 Fed. Cas. 546 (C.C.E.D.Pa. 1823).

<sup>7</sup> See, e.g. Randy E. Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 61 (2004) ("It is not seriously disputed, however, that sometime after ratification it came to be widely insisted by some judges, scholars, and opponents of slavery that Article IV was indeed a reference to natural rights. Nor is it disputed that, whenever it first developed, the members of the Thirty-Ninth Congress meant to import this meaning into the text of the Constitution by using the language of "privileges" and "immunities" in the Fourteenth Amendment."). See also, Amar, THE BILL OF RIGHTS, *supra* note 5, at 177-78; Farber, *supra* note 5 at 842-43; Jack M. Balkin & Sanford Levinson, Thirteen Ways of Looking at Dred Scott, 82 Chi-Kent L. Rev. 49, 57 (2007) (Republicans believed that "the purpose of the Fourteenth Amendment" was to give Congress power to enforce the rights protected under Article IV); John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 565-67 (2005); James E. Pfander, The Tidewater Problem: Article III and Constitutional Change, 79 Notre Dame L. Rev. 1925, 1958 (2004) ("If still contested, the story of the Privileges or Immunities Clause of the Fourteenth Amendment has a familiar set of chapters. Most everyone agrees that it broadens and extends the guarantees that had previously appeared in the Privileges and Immunities Clause of Article IV, making them applicable to citizens of the United States as well as to citizens of the several states"); John Harrison, Reconstructing the Privileges and Immunities Clause, 101 Yale L.J. 1385, 1398-401 (1992) (same); Chester Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 Wm. & Mary L. Rev. 1 (1967). See also, Saenz v. Roe, 526 U.S. 489, 503 n.15 (1999) (Stevens, J.) (describing the Privileges or Immunities Clause of the Fourteenth Amendment as modeled on Article IV).

<sup>8</sup> A recent example of this scholars linking of *Corfield*, Article IV and the Privileges or Immunities Clause can be found in a recent amicus brief signed by five legal scholars supporting incorporation of the Second Amendment. See McDonald, et al. v. City of Chicago, Brief of Constitutional Law Professors as *Amicus Curiae* in Support of Petition for Writ of Certiorary to the Court of Appeals for the Seventh Circuit (No. 081521) (signed by Profs. Richard L. Aynes, Jack M. Balkin, Randy R. Barnett, Michael Kent Curtis, Michael A. Lawrence, and Adam Winkler).

looks to antebellum cases like *Corfield* as the historical template for understanding the Privileges or Immunities Clause.<sup>9</sup>

This paper refutes such historical claims. A close examination of the original sources calls into question every aspect of this commonly presented historical account of the Privileges or Immunities Clause. John Bingham did not base the final version of the Fourteenth Amendment on Article IV, he never relied on *Corfield* during the framing debates, and he went out of his way to distinguish the rights protected under Section One from the rights protected under Article IV. Far from relying on the language of the Comity Clause of Article IV, Bingham's final draft of the Fourteenth Amendment removed such language and replaced it with a reference to the *privileges and immunities of citizens of the United States*, a term of art broadly understood in antebellum America as having nothing to do with state-conferred common law rights. According to Bingham, federal privileges and immunities were those "defined in the Constitution," such as the liberties enumerated in the first eight amendments to the Constitution. Bingham expressly limited his efforts to enforcing textually enumerated rights such as those listed in the Bill. According to Bingham, his amendment "hath that extent—no more."<sup>10</sup> Justice Miller's opinion in *The Slaughterhouse Cases* left the door open to incorporating federal privileges and immunities such as those listed in the Bill of Rights<sup>11</sup> even as it closed the door on the nationalization of the common law. In doing so, Miller's reading of the Privileges and Immunities Clause not only mirrored the views of the man who drafted Section One, it also followed a well established strain of antebellum anti-slavery Republican thought.

The second of a two-part investigation of the origins of the Privileges or Immunities Clause, this article analyzes the debates of the Thirty-Ninth Congress, with particular focus on the man who drafted Section One, John Bingham. Despite his key role in drafting Section One of the Fourteenth Amendment, Bingham remains a frustratingly elusive figure in the search for the original understanding of the Privileges or Immunities Clause. Bingham authored one of the most important constitutional provisions in our nation's history, and his participation in the

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<sup>9</sup> A number of the briefs supporting the petitioners in the *McDonald* case, for example, insist that that Court overrule *Slaughterhouse* and use *Corfield* as a guide to understanding the Privileges or Immunities Clause. See, e.g., Petitioner's Brief, *McDonald v. City of Chicago* (No. 08-1521), 2009 WL 4378912 at page 6; Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago* (No. 08-1521), 2009 WL 4099504 at pp. 9-11; Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners, *McDonald v. City of Chicago* (No. 08-1521), 2009 WL 4049148 at pp. 9-10. See also, Aynes, Unintended Consequences, *supra* note 5 at 298 (Miller in *Slaughterhouse* erroneously distinguished the nature of rights protected under Article IV and Section One); Jack Balkin, Abortion and Original Meaning, 24 Const. Comm. 291, 313-14 (2007) (linking the Privileges and Immunities Clause to Article IV of the original constitution and criticizing the majority in *Slaughterhouse* for its "crabbed reading [which] was not faithful to the constitutional text and underlying constitutional principles because the Privilege or Immunities Clause was supposed to be the Amendment's major source for constitutional protection of both civil liberty and civil equality.").

<sup>10</sup> Cong. Globe., 39<sup>th</sup> Cong. 1<sup>st</sup> Sess., 1088-91.

<sup>11</sup> A point that scholars increasingly recognize. See, e.g., Gerard N. Magliocca, Why Did Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?, 94 Minn. L. Rev. 101, 104 (2009) ("A careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation."); Bryan H. Wildenthal, The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment, 61 Ohio St.L.J. 1051, 1063 (2000). David P. Currie notes that "[i]t is not entirely clear that Justice Miller rejected the incorporation theory in *Slaughter-House*; indeed, Professor Ely takes Miller's inclusion of the right to assemble and petition and the privileges of the Government among the privileges of national citizenship as indicating that the Court actually embraced incorporation." David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS, 1789-1888 at p. 345 n. 122 (internal citations omitted).

Reconstruction Debates has been the subject of intense historical study. Despite volumes of work, however, scholars remain hopelessly divided on the simple issue of whether Bingham was a constitutional visionary or a lazy and muddleheaded Representative who cared nothing about constitutional language and lacked sufficient intelligence to understand long-standing constitutional doctrine.<sup>12</sup>

There is good reason for this scholarly divide: John Bingham left a trail of conflicting statements regarding the meaning of Article IV, the nature of the Bill of Rights, and the relationship of both to the proposed Fourteenth Amendment. For example, at one point, Bingham insisted that his proposed version of the Fourteenth Amendment was based on the text and principles of the Privileges and Immunities Clause of Article IV.<sup>13</sup> Later, however, Bingham expressly denied that Article IV had anything to do with the Fourteenth Amendment.<sup>14</sup> Likewise, early in the debates, Bingham insisted that Article IV was part of the federal Bill of Rights; later, however, Bingham expressly limited his definition of the Bill of Rights to just the first eight amendments to the Constitution.<sup>15</sup> Further complicating the picture was Bingham's insistence that Article IV must be read as containing additional, though unstated, language—an implied “ellipsis” which Bingham originally believed obligated the states to enforce the federal Bill of Rights despite the Supreme Court's ruling to the contrary in *Barron v. Baltimore*.<sup>16</sup> Later, however, Bingham described *Barron* as “rightfully” decided, and Bingham abandoned his claim that Article IV required the states to enforce the Bill of Rights.<sup>17</sup>

John Bingham's seemingly inconsistent and idiosyncratic views have led some scholars to dismiss Bingham as a trustworthy source of information regarding the original understanding of the Fourteenth Amendment.<sup>18</sup> Anti-incorporationist scholars, for example, stress Bingham's odd views regarding Article IV and the Bill of Rights which he expressed early in the 1866

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<sup>12</sup> See Harrison, Reconstructing the Privileges or Immunities Clause, *supra* note 7 at n.61 (“Representative Bingham presents the most exasperating problem faced by anyone who tries to take seriously the words of the second section of Section 1 because he seems to have written them without being a man who took words seriously himself. . . . My view is that either Bingham's analytical powers were mediocre or he was too lazy to use them.”).

<sup>13</sup> Cong. Globe, 39<sup>th</sup> cong., 1<sup>st</sup> sess. 1033 (Feb 13, 1866) (remarks of John Bingham).

<sup>14</sup> Cong. Globe, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

<sup>15</sup> Id. (1871) (“Jefferson well said of the first eight articles of Amendment to the Constitution of the United States, they constitute the American Bill of Rights.”). See *infra* note 354 and accompanying text.

<sup>16</sup> Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess., 158 (January 9, 1866) (“When you come to weigh the words, “equal and exact justice to all men,” go read, if you please, the words of the Constitution itself: “The citizens of each state (being ipso facto citizens of the United States) shall be entitled to all the privileges and immunities of citizens (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 in, and not of, the several States.”).

<sup>17</sup> Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., app. 84 (1871). See *infra* note 353 and accompanying text.

<sup>18</sup> Harrison, Reconstructing the Privileges or Immunities Clause, *supra* note 7 at 1404 n. 61 (1992) (“Bingham's speeches were highly rhetorical, and his thoughts are hard to follow; he was undoubtedly a gasbag. Whether he was also a gashead is a more difficult and controversial question. My view is that either Bingham's analytical powers were mediocre or he was too lazy to use them.”); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 26 (1949) (Bingham was “befuddled”); John P. Frank & Robert F. Munro, The Original Understanding of “Equal Protection of the Laws,” 50 Colum. L. Rev. 131, 164-65 n. 169 (1950) (Bingham had “a strong egocentricity and a touch of the windbag. As a legal thinker he was not in the same class with the top notch minds of his time.”); Raoul Berger, GOVERNMENT BY JUDICIARY 145 (1978) (describing Bingham's thinking as “muddled”); Charles Fairman, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART I, 1288 (1971) (describing Bingham's “confused discourse” of May 10, 1866 regarding Section One of the proposed Fourteenth Amendment); Charles Fairman, VII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART II, at 133 (1987) (Bingham was “distinguished for elocution but not for hard thinking”).

debates.<sup>19</sup> Pro-Incorporation scholars, on the other hand, either downplay Bingham’s idiosyncratic and conflicting statements or instead emphasize Bingham’s more traditional comments regarding the Bill of Rights which he delivered in 1871.<sup>20</sup> All sides in the incorporation debate, however, assume that Bingham’s views remained consistent throughout the debates; either consistently confusing or consistently reliable.

In the analysis which follows, I argue that Bingham’s statements early in the debate over the Fourteenth Amendment cannot be reconciled with his ultimate understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. This inconsistency does not reflect error or confusion, it reflects a change of mind—an epiphany which led Bingham to make a critical change in his proposed constitutional text. Midway through the debates on the Fourteenth Amendment, John Bingham realized that his initial understanding of the Privileges and Immunities Clause of Article IV was incorrect. Because Bingham had based his original draft of Section One of the Fourteenth Amendment on the language and presumed meaning of Article IV, this meant that Bingham’s original draft was fatally flawed—it would not accomplish his objective of making the Bill of Rights applicable against the states. Worse, by using the language of Article IV, Bingham’s initial draft threatened to federalize the common law and establish congressional power to regulate a vast array of subjects which Bingham and a critical number his colleagues in the Thirty-Ninth Congress wished to leave in the hands of local state governments. Accordingly, Bingham *withdrew* his initial draft, abandoned the language of Article IV, and produced a new draft of Section One. This new, and ultimately final, draft of Section One included the Privileges or Immunities Clause which Bingham now expressly *distinguished* from the Privileges and Immunities Clause of Article IV. Bingham insisted that this final draft protected the first of the first eight amendments as “privileges or immunities of citizens of the United States,” but left common law civil rights in the hands of local government subject only to the requirement that such laws be equally enforced regardless of race.

Understanding Bingham’s evolution in thinking regarding Article IV explains the apparent inconsistency in Bingham’s remarks. It relieves historians of the burden of trying to synthesize all of Bingham’s statements into a single coherent theory of the Fourteenth Amendment. Finally, Bingham’s epiphany regarding the meaning of Article IV suggests that scholars have too quickly dismissed *Slaughterhouse* as containing a reasonable theory of the original understanding of the Privileges or Immunities Clause.

## II. METHODOLOGY

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<sup>19</sup> See Fairman, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 18 at 1288 (1971); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, *supra* note 18 at 26; Raoul Berger, “Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat, 42 Ohio St. L. J. 435, 450 (1981).

<sup>20</sup> See, e.g., Akhil Amar, THE BILL OF RIGHTS, *supra* note 5 at 181-83, 183 n.\*; Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993); Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 121-25 (1986); William W. Crosskey, Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954). All of these writers defend Bingham against the most critical assertions of scholars like Fairman and Berger. None of them identify, much less discuss, any degree of inconsistency in Bingham’s arguments during the Reconstruction Debates. Richard Aynes, for example, defends attacks against Bingham for his initial idiosyncratic view of the Bill of Rights as including Article IV by suggesting there may have been a “transcription error” in the report of Bingham’s speech or that Bingham may have simply “misspoke.” Aynes, On Misreading John Bingham, *supra* this note at 68 n.61.

As a work of constitutional history, the history and arguments in this project are intended to become part of the contemporary debate over the original meaning of the Fourteenth Amendment. There are different ways to explore and apply historical evidence, however, making it important that I explain my own normative commitments and historical methodology.

This article explores the debates in the Thirty-Ninth Congress regarding the drafting and adoption of the Privileges or Immunities Clause of the Fourteenth Amendment. As did Part I, the primary sources which I investigate include newspapers articles, books, legal treatises, religious sermons, political tracts, public political debates, and judicial opinions. When appropriate, I refer to the broader social context of the period, but primacy of place is given to the use and development of legal terms and ideas as a part of public legal debate. This is not an attempt to artificially separate legal argument from social reality. In fact, social advancements at the time of Reconstruction, were often facilitated (or impeded) by the convincing use of legal argument.<sup>21</sup> As Eric Foner notes, “this was an age which cared deeply about constitutional interpretation, and regarded the Constitution as the embodiment of legal wisdom,”<sup>22</sup> or, as John Bingham put it, “everything was reduced to a constitutional question in those days.”<sup>23</sup> It is reasonable, then, to seriously consider the legal arguments which preceded and dominated the Reconstruction debates, even while acknowledging the influence of political events and personal motivations. The overall goal is to illuminate both how the members of Congress understood a particular legal text, the Privileges or Immunities Clause, and how that text was likely understood by the public who considered and ratified the Fourteenth Amendment.

Readers will recognize this approach as an exercise in originalism; the effort to identify the original understanding of constitutional text in the belief that original meaning should play a significant role in contemporary interpretation and application of the Constitution.<sup>24</sup> Nothing in this article requires the embrace of originalism—the history I explore stands on its own two feet, so to speak. Nevertheless, I acknowledge that my choices of which aspects of the historical record to focus upon are influenced by my adoption of “original public meaning originalism” as a normatively attractive approach to constitutional interpretation.

Because *original public meaning originalism* is a bit of a departure from older forms of originalism, a short explanation is in order. Until the last couple of decades, originalist scholars tended to search for the original intent of the drafters of a constitutional text. This kind of *original intent* originalism was subjected to a withering fire of scholarly criticism which stressed the difficulty of determining subjective psychic intent and aggregating the multiple private intentions which informed whichever group drafted or supported a particular

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<sup>21</sup> A number of contemporary Fourteenth Amendment scholars stress the importance of legal theory and argument in securing sufficient political majorities for legislative and constitutional change. See, e.g., Earl M. Maltz, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 12 (1990) (discussing the importance of framing text and crafting legal arguments in a manner acceptable to Republican moderates in the Thirty-Ninth Congress). See also, Daniel W. Hamilton, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007); Eric Foner, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 85 (1970, 1995 paperback edition).

<sup>22</sup> Foner, *FREE SOIL*, *supra* note 21 at 85.

<sup>23</sup> As reported by Walter G. Shotwell, *Driftwood* 81 (1927). See also, Aynes, Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment, 70 *Chi-Kent L. Rev.* 1197, 1254, n.382 (1995).

<sup>24</sup> For outstanding theoretical works on contemporary originalism, see Illinois Professor Lawrence Solum’s, *Sematic Originalism*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244), and Princeton Professor Keith E. Whittington’s, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (Kansas 1999). Although some scholars have attempted to limit the term “originalism” to a theory of contemporary application of the Constitution which relies *solely* on original meaning, this definition does not reflect the approach of any currently practicing originalist.

constitutional text.<sup>25</sup> Today, however, most originalist scholars reject “original intent” originalism and instead seek evidence of original public understanding.<sup>26</sup> This approach seeks to determine the likely public understanding of a proposed constitutional text, with special emphasis placed on those with the authority to ratify the text and make it an official part of the Constitution.<sup>27</sup> This form of originalism avoids many of the difficulties associated with original intent analysis and it has been embraced by a wide range of constitutional historians with a wide range of ideological commitments.<sup>28</sup> Public meaning originalism has the additional advantage of tracking the normative political theory of the Founders: popular sovereignty.<sup>29</sup> By emphasizing the understanding of those who had the authority to ratify the text, original meaning originalism echoes the views of Founders like James Madison who also stressed the importance of interpreting the Constitution according to ratifier understanding.<sup>30</sup> Original public meaning originalism does not dismiss the personal intentions of the framers of a given text (to the extent they can be determined), but considers such views as having weight only to the degree that they reflect or illuminate the likely public understanding of the text.

Although the search for original public meaning in the last decade or so has become the norm among originalist legal theorists, it is important to remember that some of the most influential works on the historical Fourteenth Amendment were written at a time when the search for original *framers’ intent* dominated the field of constitutional historical debate.<sup>31</sup> Such works generally focused on discerning (or debating) the private intentions of key members of the Thirty-Ninth Congress during the debates over the Fourteenth Amendment.<sup>32</sup> Obviously, this

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<sup>25</sup> See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 *Boston University L. Rev.* 204 (1980); Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985).

<sup>26</sup> See, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 *Const. Comm.* 291 (2007); John O. McGinnis and Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *Nw. U. L. Rev.* 383 (2007); Lawrence Solum, *Semantic Originalism*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244); Whittington, *supra*; Randy Barnett, *An Originalism for Non-Originalists*, 45 *Loyola (L.A.) L. Rev.* 611 (1999).

<sup>27</sup> See Lawrence B. Solum, *Semantic Originalism* 15 (paper available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244)).

<sup>28</sup> Akhil Amar, Jack Balkin, Randy Barnett, Steven Calabresi, Michael Kent Curtis, Philip Hamburger, Larry Kramer, Keith Whittington, John Harrison, Lawrence Solum, and Michael McConnell have all published important work that falls within the broad range of original meaning originalism. See Amar, *THE BILL OF RIGHTS*, *supra* note 5; Barnett, *RESTORING THE LOST CONSTITUTION*, *supra* note 7; Curtis, *NO STATE SHALL*, *supra* note 20; Hamburger, *LAW AND JUDICIAL DUTY* (2008); Larry D. Kramer, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Keith E. Whittington, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U. L. Rev.* 923 (2009); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *Tex. L. Rev.* 7 (2008); Jack M. Balkin, *Abortion and Original Meaning* 24 *Const. Comm.* 291 (2007); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947 (1995); Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 7.

<sup>29</sup> See Kramer, *THE PEOPLE THEMSELVES*, *supra*, note 28 at 3-8.

<sup>30</sup> See James Madison, *Speech Opposing the Bank Bill*, in *JAMES MADISON: WRITINGS* 480-483, 489 (Jack Rakove, ed. 1999).

<sup>31</sup> See, e.g., See Charles Fairman, *Does the Fourteenth Amendment Incorporate a Bill of Rights?*, 2 *Stan. L. Rev.* 5 (1949); 2 William Winslow Crosskey, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); Raoul Berger, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2nd ed., Liberty Fund, Inc. 1977); Curtis, *NO STATE SHALL ABRIDGE*, *supra* note 20; Charles Fairman, *RECONSTRUCTION AND REUNION 1864-88* (1971) Jacobus tenBroek, *EQUAL UNDER LAW* (rev. ed., Collier Books 1965) (1951).

<sup>32</sup> See, e.g., Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, *supra* note 18; Crosskey, Charles Fairman, *supra* note 20; Berger, *GOVERNMENT BY JUDICIARY*, *supra* note 18; Curtis, *NO STATE SHALL ABRIDGE*, *supra* note 20.

article accepts such historical investigation of individual intent as potentially important, but only to the degree that it helps us understand the final draft of the Privileges or Immunities Clause and how that text was likely understood by the people who made it part of our fundamental law.

That being said, one important goal of this paper is to consider anew the public statements of the man who drafted some of the most important words in the United States Constitution. Most historical accounts of John Bingham and his role in creating the Privileges or Immunities Clause assume that Bingham left the debates of the Thirty-Ninth Congress with the same arguments and ideas that he had going into those debates. This assumption, I believe, has led a generation of scholars to either downplay the inconsistencies in Bingham's statements, or use those inconsistencies as evidence of a feeble mind. The article presents the possibility that Bingham engaged his fellows in debate with an open mind, and found himself persuaded by his colleagues that achieving his goals required both a change of mind and a change of text.

In light of the above, it should be apparent that this paper has limited goals. I *do not* make claims in this paper about the original public understanding of the Privileges or Immunities Clause. Although this paper is part of that larger project, its focus on the understanding of the man who drafted the Clause is meant more to clear up prior historical error than establish original public meaning. A number of assumptions about the history of the Fourteenth Amendment have become so ingrained in contemporary scholarship that, before one can proceed, many of these earlier assumptions and errors must be addressed and cleared away. Again, the views of the members of the Thirty-Ninth Congress are certainly relevant to determining public understanding—the debates of the Reconstruction Congress provide clues regarding the likely contemporary understanding of the words and legal terms deployed in the Privileges or Immunities Clause. But even if readers find the arguments in this paper persuasive, this still will not fully answer the historical question regarding the original *public* understanding of the Privileges or Immunities Clause. Part III of this project therefore will turn from antebellum understandings and the mind of John Bingham, and focus on the likely public understanding of Bingham's handiwork: the final text of Section One of the Fourteenth Amendment.

### III. MR. BINGHAM'S FIRST DRAFT OF THE FOURTEENTH AMENDMENT

#### A. Republican Constitutional Theory at the Time of Reconstruction

As an Ohio Republican well-versed in the language and ideology of mid-western abolitionist rhetoric, John Bingham shared many of the views which informed moderate Republicans in the Thirty-Ninth Congress.<sup>33</sup> Placing his views in context therefore requires a quick review of Republican theory at the time of Reconstruction.

The Thirteenth, Fourteenth and Fifteenth Amendments represent a dramatic restructuring of the dispersion of powers between the federal and states governments. Under the original Constitution, states were generally free to regulate local municipal matters free from federal

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<sup>33</sup> For background on Bingham's roots and abolitionist Republican beliefs, see Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 *Cath. U. L. Rev.* 881 (1988).

interference.<sup>34</sup> Although Article I, Section 10 imposed some constraints on state activity, most personal rights and civil liberties, however, were left to the control of the states.<sup>35</sup> The Bill of Rights constrained only the federal government (as in *Congress shall make no law . . .*), reserving all non-delegated powers and rights to the people in the states under the terms of the Ninth and Tenth Amendments. The federalist language and structure of the Bill of Rights was officially declared by the Supreme Court in *Barron v. Baltimore*,<sup>36</sup> with John Marshall holding that the Fifth Amendment, like the rest of the Bill, bound only the federal government.

The long-simmering debate over slavery, however, soon called into question the Founding era presumption that individual liberty was best preserved by leaving most matters of individual rights to state control. A creature of state law, abolitionists railed against chattel slavery as violation of natural law, the principles of the Declaration of Independence, and the preamble to the Constitution.<sup>37</sup> The institution of slavery violated not only the natural rights of slaves in southern slave-holding states, efforts to preserve slavery ultimately impacted the rights of individual in northern states as well. Congress denied individuals the right to petition Congress for the abolition of slavery, the federal mails were purged of abolitionist expression, and the abolitionist press in the north came under violent attack when pro-slavery mobs attacked and killed the northern editor of an abolitionist press.<sup>38</sup> By the 1830s, no person within a slaveholding state could expect anything but expulsion or violent retribution at the hands of the law or angry mobs if they engaged in open criticism of slavery. In what became one of the most infamous examples of southern state treatment of northern citizens, Massachusetts Samuel Hoar was chased out from South Carolina when he attempted to investigate the imprisonment of free blacks on ships moored in South Carolina harbors.<sup>39</sup>

Although united in their opposition to slavery, abolitionists themselves differed significantly on such critical subjects as whether slavery was constitutional, the scope of federal power to limit or ban slavery, and the need to preserve the right to local self-government. Moderates like Salmon P. Chase accepted the legitimacy of the federalist structure which left the issue of slavery to state determination under the Tenth Amendment.<sup>40</sup> However, Chase also believed that the Due Process Clause of the Fifth Amendment constrained the federal government to oppose any expansion of slavery beyond the original states, and that Congress should refuse to

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<sup>34</sup> According to James Madison in The Federalist No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, [such] as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.

James Madison, THE FEDERALIST PAPERS No. 45, 292-93 (Rossiter, ed. 1961).

<sup>35</sup> According to Earl Maltz, "In the antebellum era, all but the most radical of abolitionists agreed that each state government possessed the exclusive authority to protect the fundamental, natural rights of its own citizens." Maltz, *supra*, note 21 at 32. See also Nelson, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 27 (1988).

<sup>36</sup> 32 U.S. 243 (1833).

<sup>37</sup> Foner, FREE SOIL, *supra* note 21 at 76.

<sup>38</sup> For a discussion of how slavery affected first amendment rights in the north, see Michael Kent Curtis, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

<sup>39</sup> See Richard Aynes, Why "Privileges or Immunities"? An Explanation of the Framers' Intent, 42 Akron L. Rev. 1111, 113-14 (2009) (discussing the expulsion of Samuel Hoar from South Carolina and its impact on the members of the Thirty-Ninth Congress).

<sup>40</sup> Foner, FREE SOIL, *supra* note 21 at 76.

assist in the return of runaway slaves.<sup>41</sup> Garrisonians, on the other hand, repudiated the Constitution and sought disunion, the secession of the North and the complete disassociation with slave states.<sup>42</sup> Finally, abolitionists like Lysander Spooner, Alvan Stewart, and William Goodell argued that the Constitution prohibited slavery or, at the very least, empowered Congress to restrict its expansion.<sup>43</sup>

Like the varied views of abolitionists, the Republican members of the Thirty-Ninth Congress held a variety of positions on natural law, the constitutionality of slavery and the scope of federal power to eradicate the peculiar institution. There was broad agreement that eradicating slavery and the web of state laws which preserved it required serious rethinking of the original constitutional rules of federalism.<sup>44</sup> States must no longer be free to shackle any individual except upon conviction for a criminal act, and the basic rights of citizens in the states, and citizens moving among the states, must be preserved and protected at a federal level. Beyond this agreed-upon set of basic principles, however, Republican unanimity quickly splintered over the *degree* of constitutional restructuring that would be required. Contemporary historians generally divide the Republicans of the Thirty-Ninth Congress into three basic groups; radical, moderate, and conservative. The labels over-simplify the views of the individuals involved, some of whom might be radical on some issues, but moderate or conservative on others. The distinctions are nevertheless helpful in understanding the basic disagreements among Reconstruction Republicans, and important to understanding the arguments and positions of John Bingham. Finally, because the traditional tripartite characterization continues to be used by most contemporary legal historians, I believe that any attempt at “re-labeling” would likely cause more confusion than clarification.<sup>45</sup>

Radical Republicans, although disagreeing among themselves about the legal details, generally believed that Congress had full power to protect civil rights in the States *even prior* to the adoption of the Thirteenth and Fourteenth Amendments. Relying on once-derided theories of federal power found in cases like *Prigg v. Pennsylvania*,<sup>46</sup> radical Republicans claimed that if Congress had implied power to enforce the fugitive slave provisions of Article IV (the holding of *Prigg*), Congress also had implied power to enforce the Privileges and Immunities Clause of Article IV.<sup>47</sup> Highlighting Justice Washington’s language of “fundamental rights” in the

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 138.

<sup>43</sup> See generally, Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1538862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538862).

<sup>44</sup> Numerous scholarly works explore the details of Republican theory at the time of Reconstruction. See generally, Foner, *FREE SOIL*, *supra* note 21; Nelson, *THE FOURTEENTH AMENDMENT*, *supra* note 35; Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863-1869* (New York 1974). See also William M. Wiecek, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

<sup>45</sup> See, e.g., Garrett Epps, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 101 (describing Thaddeus Stevens and his “radical faction” as well as the “more cautious” members like William Fessenden and John Bingham); Daniel Hamilton, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* 37 (2007); Maltz, *CIVIL RIGHTS*, *supra* note 21 at 42. Readers therefore should not equate my use of the term with an effort to disparage its members—indeed, the term was used by members of the Thirty-Ninth Congress themselves. See Epps, *supra* this note at 92 (noting Thaddeus Stevens description of William Fessenden as having “that vile ingredient, called conservatism”). Much less is my use of the term an effort to vindicate the views of the now properly discredited “Dunning School” of historical scholarship which portrayed Radical Republicans as foolish at best and malevolent at worst. See PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PROBLEM OF HISTORICAL TRUTH* 105-06, 115-16 (1999).

<sup>46</sup> 41 U.S. 539 (1842).

<sup>47</sup> See, e.g. Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 1118 (remarks of Mr. Wilson).

Article IV case *Corfield v. Coryell*, these Republicans insisted that Congress had full power to nationalize natural and common law civil rights in the states,<sup>48</sup> and were particularly committed to eradicating state laws prohibiting black suffrage.<sup>49</sup> In general, the radical position rejected the idea of state sovereignty in any form and viewed the national government as having general oversight powers over any matter affecting civil liberties in the states.<sup>50</sup> In this, the radicals in the Thirty-Ninth Congress followed the anti-slavery constitutional arguments of abolitionists like Joel Tiffany who argued that Congress had full power to protect natural rights in the states, including the right to “life, liberty and the pursuit of happiness.”<sup>51</sup>

As a group, moderate Republicans embraced the abolitionist sentiment of their more radical counterparts, but insisted that the remedial efforts of the Reconstruction Congress maintain the basic federalist structure of the Constitution.<sup>52</sup> In general, this meant that states ought to retain a degree of quasi-sovereign autonomy over municipal affairs, and federal power must remain limited under the traditional doctrine of enumerated power, with all non-delegated power remaining under the control of the states under the Tenth Amendment. Although today it might seem surprising that abolitionists embraced such doctrines even after the Civil War, in fact federalism in antebellum America was not always on the side of the slave power. Antebellum abolitionists, for example, insisted on the autonomy of the states to free slaves who touched the soil of a free state and they decried nationalist Supreme Court opinions like *Ableman v. Booth* and *Prigg v. Pennsylvania* which held otherwise. The infamous decision of *Dred Scott*, of course, was anything but a states’ rights opinion, with Chief Justice Taney’s reasoning widely expected to ultimately result in denying northern states the right to prohibit slave owners from carrying their slaves in transit across free-state soil.<sup>53</sup> As the great abolitionist Wendell Philips declared, “I love State Rights; that doctrine is the cornerstone of individual liberty.”<sup>54</sup>

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<sup>48</sup> See, e.g., Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1072 (Remarks of Mr. Nye) (insisting that Congress had “necessary and proper” power to “restrain the respective states from infracting” both enumerated and unenumerated “natural and personal rights.”).

<sup>49</sup> See Maltz, *supra* note 21 at 51-52 (discussing Charles Sumner, “the champion of the radical position,” and his support for black suffrage).

<sup>50</sup> See, e.g., Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1072 (Remarks of Mr. Nye) (“Congress, under the Constitution, has a controlling power to enforce the principle of protection on all the States. Congress is the tribunal of States; and this tribunal of States is the umpire in judging of what is protective republican government in the several States, and what is not; what the form of the state government should be, and what it should not be, what the distribution of power or degree of enfranchisement in order to guard against the despotism of class; and what the machinery to be adopted or tolerated so as to make the State government effective on the side of protection.”)

<sup>51</sup> See Joel Tiffany, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 55-57 (1849).

<sup>52</sup> This does not mean that federalism was irrelevant to Radicals. As explained above, -free-state federalism was as important to radicals as to moderates. See, William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 Loy. L.A. L. Rev. 1177, 1177-78 (1992) (“Although the protection of rights and the preservation of federalism strike us as inconsistent goals, I argued that the two goals seemed far more consistent to the Radicals, who had had a long history of using state institutions to protect human rights.”).

<sup>53</sup> According to Abraham Lincoln:

[W]hat is necessary to make the institution [of slavery] national? Not war. There is no danger that the people of Kentucky will shoulder their muskets and with a young nigger stuck on every bayonet march into Illinois and force them upon us. There is no danger of our going over there and making war upon them. Then what is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done.

Abraham Lincoln, First Debate, Mr. Lincoln's Reply, in 2 *SPEECHES AND WRITINGS* 508, 524 (Library of America, 1989).

Official Republican policy adhered to this moderate adherence to the basic forms of federalism. According to the 1860 Republican Platform, “[t]he Federal Constitution, the Rights of the States, and the Union of the States must and shall be preserved.”<sup>55</sup> Article 4 of the 1860 Platform specifically addressed Republican fidelity to the original dualist structure of the federal Constitution:

“That the maintenance inviolate of the rights of the States, and especially of the rights of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends.”<sup>56</sup>

As other historians have noted, moderate Republicans continued to embrace constitutional federalism both during<sup>57</sup> and following the Civil War.<sup>58</sup> “I would say once and for all,” declared John Bingham during the debates over the Fourteenth Amendment, “this dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it.”<sup>59</sup> Other moderate Republicans, as we shall see, were similarly committed to a “dualist” Constitution.<sup>60</sup> In sum, although moderate Republicans rejected the fire-breathing southern arguments of nullification and secession, they continued to believe that a basic separation of power between the national and local governments was a critical component of American liberty.<sup>61</sup>

## **B. The Constitutional Theory of John Bingham**

A native Ohioan and long-time anti-slavery advocate, Representative John Bingham’s vision of liberty in the post-civil war Republic went far beyond the mere abolition of slavery under the Thirteenth Amendment. In particular, Bingham was convinced that the original Constitution imposed an obligation on the States to protect the rights listed in the first eight amendments to the Constitution. “Whenever the Constitution guaranties to its citizens a right,” Bingham

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<sup>54</sup> *National Anti-Slavery Standard*, May 15, 1865, p.2 (New York).

<sup>55</sup> See 1860 Republican Platform, available at [http://cpr.org/Museum/Ephemera/Republican\\_Platform\\_1860.html](http://cpr.org/Museum/Ephemera/Republican_Platform_1860.html).

<sup>56</sup> *Id.*

<sup>57</sup> In December of 1860, Lyman Trumbull of Illinois rejected the secessionists idea of absolute sovereignty, but acknowledged that “States are sovereign as to their reserved rights.” See *Cong. Globe*, 36<sup>th</sup> Cong., 2d Sess. 156 (Dec. 20, 1860).

<sup>58</sup> See Nelson, *THE FOURTEENTH AMENDMENT*, *supra* note 35 at 27-39 (discussing the continued commitment to principles of federalism in the Reconstruction Congress). See also, Maltz, *supra* note 21 at 30 (The task of Reconstruction “was further complicated by the Republicans firm attachment to the basic structure of federalism.”).

<sup>59</sup> *Cong. Globe*, 39<sup>th</sup> Cong., 2d Sess. at 450 (Jan. 14, 1867).

<sup>60</sup> See *infra* note 157 and accompanying text.

<sup>61</sup> Nelson, *THE FOURTEENTH AMENDMENT*, *supra* note 35 at 114 (“Most Republican supporters of the [Fourteenth] Amendment, like the Democrat opponents, feared centralized power and did not want to see state and local power substantially curtailed.”). The Republican Party’s national platform in 1860 insisted that “the Federal Constitution, the Rights of the States, and the Union of the States, must and shall be preserved.” [National Republican Platform, Adopted by the Chicago Convention (May 17, 1860), in 2 *THE AMERICAN PARTY BATTLE, ELECTION CAMPAIGN PAMPHLETS, 1828-1876*, at 121 (Joel H. Silbey ed., 1999).] The platform went on to guarantee “the maintenance, inviolate, of the Rights of the States, and especially of the right of each State to order and control its own domestic institutions according to its own judgment exclusively.” *Id.* According to Michael Les Benedict, “most Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power.” Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 *J. Am. Hist.* 65, 67 (1974).

declared, “such guarantee is in itself a limitation upon the States.”<sup>62</sup> During the many months of debate in the Thirty-Ninth Congress regarding the Fourteenth Amendment, Bingham again and again returned to the idea that the Bill of Rights represented privileges and immunities belonging to all United States citizens and which should be guarded against abridgement by either federal or state authorities. In this regard, Bingham’s views tracked those of other Republicans who agreed that provisions in the Bill of Rights did or, at the very least, *should* bind the States.<sup>63</sup>

Although John Bingham’s reading of particular provisions in the Constitution changed over time, his basic theory of citizenship, natural rights and constitutional government did not. Like most of his Republican colleagues, John Bingham accepted the concept of natural rights—the idea that some freedoms were so foundational that they belonged to all persons regardless of their status in society. Unlike “conventional rights,” which were subject to majoritarian political control, natural rights existed independent of the political process. However, unlike the specific substantive rights belonging to citizens under the Bill of Rights, Bingham viewed the natural rights of all persons were protected through the procedural rights of equal protection and due process of law.<sup>64</sup>

Keeping this distinction in mind is critical to understanding the views of John Bingham. Bingham sharply distinguished the category of natural rights of “all persons” from the rights of *United States citizens*—a special and distinct set of privileges and immunities conferred upon individuals when they became citizens of a state or the national government.<sup>65</sup> Contra the theory of slave states (and *Dred Scott*) which maintained that national citizenship was derivative of state citizenship, Bingham insisted that “all free persons born and domiciled with the United States”<sup>66</sup> or those “naturalized by law”<sup>67</sup> were citizens of the United States. Thus, “the citizens of each State in the Union are *ipso facto* citizens of the United States.”<sup>68</sup> Only

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<sup>62</sup> Cong. Globe, 35<sup>th</sup> Cong., 2d Sess. 982 (1859).

<sup>63</sup> See Amar, *THE BILL OF RIGHTS*, *supra* note 5 at 145.

<sup>64</sup> See Cong. Globe, 34<sup>th</sup> Cong., 3d Sess. app. 139-40 (Jan. 13, 1857) (“The Constitution is based upon the EQUALITY of the human race . . . A State formed under the Constitution, and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its principle object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. Mere political or conventional rights are subject to the control of the majority; but the rights of human nature belong to each member of the state, and cannot be forfeited but by crime.”); Cong. Globe, 35<sup>th</sup> Cong., 2d Sess., 983 (Feb. 11, 1859) (“And in further illustration of my position I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive term “person,” as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that “no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.” And this guarantee applies to all citizens within the United States.”).

<sup>65</sup> Cong. Globe, 35<sup>th</sup> Cong. 2d Sess. 983 (Feb. 11, 1859) (John Bingham’s Speech on the Admission of Oregon) (“And in further illustration of my position I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive term “person,” as contradistinguished from the limited term citizen”).

<sup>66</sup> *Id.* at 984.

<sup>67</sup> *Id.* at 983.

<sup>68</sup> *Id.* Here Bingham cites (“Story on the Constitution, vol. 3, p. 565). At that point in his Commentaries, Story explained, “[e]very citizen of a state is *ipso facto* a citizen of the United States. *Section 1688*. And a person, who is a naturalized citizen of the United States, by a like residence in any state in the Union, becomes *ipso facto* a citizen of that state.” Joseph Story, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 565-66 (1833) (Reprint, Rothman 1999).

citizens of the United States could claim to be “the People of the United States” as announced in the Preamble to the federal Constitution.<sup>69</sup>

All persons possessed natural rights. United States citizens, however, possessed all natural rights *plus* those particular rights which were conferred exclusively as a matter of United States citizenship. Like his political hero, Daniel Webster, Bingham believed that the rights of citizens of the United States included the political rights of representation in the national government as delineated in the Constitution.<sup>70</sup> Bingham also shared the increasingly common view of his contemporaries that the rights of the first eight amendments constituted privileges and immunities of citizens of the United States.<sup>71</sup> As we shall see, Bingham’s unwavering goal in the debates of the Thirty-Ninth Congress was to secure to all persons their natural rights of equal protection and due process, and to all citizens of the United States their guaranteed privileges and immunities as declared in the first eight amendments to the federal Constitution. Like most moderates, however, Bingham did not believe admitting blacks to both natural rights and the rights of national citizenship entitled them to the equal political rights of suffrage.<sup>72</sup>

Bingham’s insistence that the States were bound by the Bill of Rights despite the Supreme Court’s holding in *Barron* has led scholars like Akhil Amar to label Bingham a “Barron-Contrarian.”<sup>73</sup> However, although Bingham believed that states were constitutionally bound to enforce the Bill, he never rejected the reasoning of Chief Justice John Marshall in *Barron v. Baltimore*. Bingham simply insisted that, although *Barron* held the Bill unenforceable by federal courts, it nevertheless remained a binding obligation upon the states as part of their oath to uphold the Constitution.<sup>74</sup> In fact, when discussing the final version of the Fourteenth Amendment, Bingham expressly declared that the “great” decision of *Barron v. Baltimore* had

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<sup>69</sup> According to Bingham:

The people here referred to are the same community, or body-politic, called, in the preamble of the federal Constitution, “the people of the United States.” They are the citizens of the United States, and no other people whatever. It has always been well understood among jurists in this country, that the citizens of each State constitute the body-politic of each community, called the people of the State; and that the citizens of each State in the Union are *ipso facto* citizens of the United States.”

Cong. Globe, 35<sup>th</sup> Cong., 2d Sess. 983.

<sup>70</sup> As Bingham explained:

. . . I maintain that these powers [of Congress to establish rules for the election of Senators and Representatives, as well as the right to judge the election and qualification of members] were conferred for the especial protection of the political rights of the citizens of the United States.” (983)

. . . Sir, what are the distinctive political rights of citizens of the United States? The great right to choose (under the laws of the States) severally, as I remarked before, either duly by ballot or individually through their duly constituted agents, all the officers of the Federal Government . . . the right, also, to hold and exercise, upon election thereto, the several offices of honor, of power, and of trust, under the Constitution and Government of the United States. It is worthy of remark that every political right guaranteed by the Constitution of the United States is limited by the words people or citizen, or by an official oath, to those who owe allegiance to the Constitution. . . .

Id.

<sup>71</sup> Amar, THE BILL OF RIGHTS, *supra* note 5 at 181-87.

<sup>72</sup> See Cong. Globe, 37<sup>th</sup> Cong. 2d Sess., 1639 (April 11<sup>th</sup>, 1862) (Remarks of Mr. Bingham) (the rights of citizenship do not include the rights of suffrage).

<sup>73</sup> Amar, THE BILL OF RIGHTS, *supra* note 5 at 185 (Bingham “read the Bill [of Rights] through contrarian lenses”).

<sup>74</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1090 (Feb. 28, 1866) (Remarks of Rep. Bingham).

been “rightfully” decided,<sup>75</sup> and he insisted that a deeper understanding of Marshall’s reasoning in *Barron* had convinced him to redraft Section One of the Fourteenth Amendment.<sup>76</sup> This tracks Bingham general reliance on the reasoning of the famous Chief Justice, particularly when it came to Bingham’s understanding of the scope of federal power to enforce the Reconstruction Amendments.<sup>77</sup> Whatever else he was, Bingham was not a *Marshall-Contrarian*.<sup>78</sup>

### C. John Bingham’s Initial Draft of the Fourteenth Amendment

On December 6, 1865, John Bingham, a member of the Joint Committee on Reconstruction, proposed adding a fourteenth amendment to the Thirty-Ninth Congress.<sup>79</sup> The proposed amendment was to empower Congress to pass “all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights of life, liberty, and property.”<sup>80</sup>

Early the next month, Bingham spoke to the House about the need for the Amendment and, in doing so, provided a sketch of his theory of Article IV and its relationship to the rights of national citizenship. Pointing to the numerous examples in recent years of states violating “the absolute guarantees of the Constitution,” Bingham insisted that “it is time that we take security for the future, so that like occurrences may not again rise to distract our people and finally to dismember the Republic.”<sup>81</sup> Referring to the amendment’s protection of equal rights, Bingham explained:

When you come to weigh the words, “equal and exact justice to all men,” go read, if you please, the words of the Constitution itself: “The citizens of each state (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (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 in, and not of, the several States. This guarantee of your Constitution applies to every citizen of every State in the Union; there is not a guarantee more sacred, and none more vital in that entire instrument. It was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts, who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens.

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<sup>75</sup> Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., app. 83 (March 31, 1871) (Remarks of Rep. Bingham) (“And yet it was decided [in *Barron*], and rightfully, that these 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.”).

<sup>76</sup> See *infra* note 351 and accompanying text.

<sup>77</sup> See, e.g., Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., app. 81 (Bingham citing Marshall’s opinion in *Cohens v. Virginia* as a guide to understanding federal power to legislate to enforce “negative restrictions upon the states”).

<sup>78</sup> Professor Richard Aynes believes that Bingham held a “compact” view of the Bill of Rights, whereby states were obligated by oath to enforce the Bill of Rights even in the absence of federal authority to enforce the Bill in the States. See Aynes, On Misreading John Bingham, *supra* note 20. While this may have been Bingham’s original position, he ultimately came to agree with Marshall that the Bill was not originally binding upon the states. See *infra* note 351 and accompanying text.

<sup>79</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (Dec. 6, 1865).

<sup>80</sup> *Id.*

<sup>81</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 158 (Jan 9, 1866).

I propose, with the help of this Congress and the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State in the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen in every State—their equal personal rights.”<sup>82</sup>

At this point in the debates, Bingham read the Privileges and Immunities Clause of Article IV as containing additional words in an unstated “ellipsis”: “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.” To Bingham, these additional words pointed Article IV away from the protection of state-conferred privileges and immunities (of citizens in the several states) and towards the protection of national privileges and immunities (of United States citizens). As Bingham put it, “This guarantee is of the privileges and immunities of *citizens of the United States in*, and not *of*, the several States.” Bingham was not the first to read Article IV as referring to sojourning citizens of the United States,<sup>83</sup> but the implications which he drew from the additional words were uniquely his own.

According to antebellum case law, the particular protections of the Comity Clause of Article IV were keyed to rights conferred on citizens of the state as a matter of state law.<sup>84</sup> Bingham’s “ellipsis” reading of Article IV, on the other hand, placed the Privileges and Immunities Clause in an altogether different legal context than that assumed by antebellum cases like *Campbell v. Morris*,<sup>85</sup> *Livingston v. Van Ingen*,<sup>86</sup> *Abbott v. Bayley*<sup>87</sup> and *Corfield v. Coryell*.<sup>88</sup> Where those cases had all read Article IV as referring to a set of state-conferred common law rights,<sup>89</sup> Bingham read Article IV as having to do with *nationally*-conferred rights. Thus, unlike many of his Republican colleagues during the debates of the Thirty-Ninth Congress, Bingham never once linked the drafts of the Fourteenth Amendment to *Corfield* or Justice Washington’s list of “fundamental” state-conferred rights.<sup>90</sup> Instead, Bingham expressly distinguished the rights discussed in *Corfield* from the rights he sought to protect in the Fourteenth Amendment.<sup>91</sup> The *Corfield* reading viewed Article IV as requiring states to offer visiting citizens equal access to a limited set of state-conferred rights. Bingham, on the other hand, read Article IV as referring to

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<sup>82</sup> Id. Bingham introduced his proposed amendment to the Joint Committee on January 16. See Maltz, *supra* note 21 at 44 (Table 4.1).

<sup>83</sup> See Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 565-66 (1833) (Reprint, Rothman 1999). Although Joseph Story described the Comity Clause as containing an unstated ellipsis, he read this ellipsis in a manner fully consistent with the consensus view of the Comity Clause as providing sojourning citizens (of the United States) equal access to a limited set of state conferred rights. Bingham’s use of the ellipsis language in the early debates of the Thirty-Ninth Congress, however, was uniquely his own. Later, however, Bingham adopted the more conventional “ellipsis” understanding found in Story’s Commentaries. See *infra* note 310 and accompanying text.

<sup>84</sup> See Lash, *The Origins of the Privileges or Immunities Clause, Part I: Privileges and Immunities as an Antebellum Term of Art* (forthcoming, Georgetown Law Journal, 2010).

<sup>85</sup> 3 H & McH 535 (MD Gen. 1797) (Chase, J.).

<sup>86</sup> 9 Johns. 507 (NY Sup. 1812).

<sup>87</sup> 6 Pick. 89, 92-93 (Mass. 1827).

<sup>88</sup> 6 Fed. Cas. 546 (C.C.E.D.Pa. 1823).

<sup>89</sup> See Lash, *Privileges and Immunities as an Antebellum Term of Art*, *supra* note 84.

<sup>90</sup> A number of scholars have mistakenly claimed that Bingham linked *Corfield* and Justice Washington’s list of fundamental rights to the Fourteenth Amendment. See sources cited in note 7. The mistake likely arises from Bingham’s initial reliance on the language of Article IV and a scholarly assumption that Bingham must have therefore embraced Article IV cases like *Corfield*.

<sup>91</sup> See *infra*, note 362 and accompanying text.

a set of absolute national rights which all states were bound to respect *regardless* of state law. In his January speech, Bingham did not provide much in the way of specifics regarding the nature of rights he sought to protect.<sup>92</sup> Over time, however, Bingham provided clues regarding the content and nature of these national privileges and immunities.

Bingham's proposal was submitted to the Joint Committee on Reconstruction where he and the other members of the committee worked through a number of drafts. On February 3, the committee debated the following draft:

Congress shall have power to make laws which shall be necessary and proper to secure to all persons in every State full protection in the enjoyment of life, liberty and property; and to citizens of the United States in every State the same immunities, and equal political rights and privileges.<sup>93</sup>

Bingham, however, moved successfully to substitute a different version which followed the language of the Constitution:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all the 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 (5<sup>th</sup> Amendment") [parenthesis in original].<sup>94</sup>

Bingham's draft rejected the broad grant of federal legislative power in the committee's original draft. Just over a week later, on February 13, Bingham explained what he believed was the meaning and purpose of this initial draft of the Fourteenth Amendment. His speech presents a relatively concise statement of Bingham's constitutional theory at the time, so it is worth an extended excerpt. Of particular importance is Bingham's insistence that the Amendment tracts the exact words and ideas of the original Constitution:

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

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

The fifth article of the amendment provides that—

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<sup>92</sup> Though Bingham did elliptically refer to President Johnson's recent declaration that “[t]he American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all his faculties.” Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 158 (Jan 9, 1866).

<sup>93</sup> Benjamin B. Kendrick, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 60 (Columbia University Press, 1914).

<sup>94</sup> Kendrick, Journal of the Joint Committee, *supra* note 93 at 61.

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

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

I ask the attention of the House to the further consideration that the proposed amendment does not impose on any state of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution. I need not remind gentlemen here that the Constitution, as originally framed, and as adopted by the whole people of this country provides that—

“This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

Could words be stronger, could words be more forceful, to enjoin on every officer of every State the obligation to obey these great provisions of the Constitution, in their letter and their spirit? I submit to the judgment of the House, that it is impossible for mortal man to frame a formulae of words more obligatory than those already in the instrument, enjoining this great duty upon the several States and the several officers of every State in the Union.

And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the States. 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 these last five years, in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.<sup>95</sup>

The above speech presents several key aspects of Bingham’s original theory of Article IV and how that theory influenced his original draft of the Fourteenth Amendment. First, Bingham stressed that the words of the proposed Amendment tracked the *exact* language and ideas of the original Constitution. Second, Bingham believed that the original Constitution imposed an obligation on the States to protect liberties listed in the original Bill of Rights (here, the Fifth Amendment). Third, this meant that the proposed Amendment imposed *no new obligations* on the States beyond those which they were already legally bound to respect under the original Constitution—and thus no power was granted to the national government beyond the power to

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<sup>95</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> sess. 1033 (Feb 13, 1866). See also, New York Times, Feb. 27 1866 (presenting a slightly different version of Bingham’s speech (“But it was equally clear that by every construction of the Constitution—its contemporaneous and continuous construction—that great provision contained in the second section of the fourth article and in a portion of the fifth amendment adopted by the first congress in 1789, that that immortal bill of rights had hitherto depended on the action of the several States.”)).

enforce rights already in the Constitution. Fourth, the failure of the States to respect these rights justified the addition of an amendment which authorized congressional enforcement of provisions such as the Fifth Amendment. As we shall see, Bingham's focus on textually recognized rights allowed him to avoid the undue expansion of federal power by carefully limiting Congress's enforcement power to those rights already expressly guaranteed in the Constitution.

Bingham fleshed out these ideas in more detail in a speech of February 28—a speech delivered in the shadow of the Senate's failure, only days earlier, to override President Johnson's veto of the Freedman Bureau Bill. Fully aware of his need to maintain moderate (and moderate conservative) support, Bingham began by insisting the Amendment did not “take away from any State any right that belonged to it.” The purpose of the Amendment was simply “to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.’”<sup>96</sup> Therefore, “Gentlemen who oppose this amendment oppose the grant of power to enforce this bill of rights.”<sup>97</sup>

After quoting the language of Article IV and the Fifth Amendment, Bingham admonished opponents of the Amendment:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty or property without due process of law; but they say, ‘We are opposed to its enforcement by act of Congress under the amended Constitution as proposed.’ That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?<sup>98</sup>

Bingham rejected the idea that the Tenth Amendment reserved to the states the right to violate the provisions of the Bill of Rights:

Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose on him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States.<sup>99</sup>

Bingham mocked his colleagues for claiming they were “not opposed to the bill of rights,” but only opposed to federal enforcement of the same.<sup>100</sup> If states had no authority to violate the Bill of Rights “how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?”<sup>101</sup> Such enforcement was essential, argued Bingham, in light of Chief

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<sup>96</sup> Cong. Globe., 39<sup>th</sup> Cong. 1<sup>st</sup> Sess., 1088-91.

<sup>97</sup> Id. at 1090.

<sup>98</sup> Id. at 1089.

<sup>99</sup> Id.

<sup>100</sup> Id. (“Ah! Say gentlemen who oppose this amendment, *we are not opposed to the bill of rights* that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of the United States.”).

<sup>101</sup> Id.

Justice Marshall's Supreme Court's ruling in *Barron v. Baltimore* which held that federal courts could not enforce the Bill of Rights against the States.<sup>102</sup>

Although cases like *Barron* barred the courts from enforcing the Bill against the States, Bingham remained convinced that states were nevertheless constitutionally bound to respect the Bill of Rights. Here, Bingham quoted Daniel Webster regarding the oath taken by all state officials to support the Constitution of the United States.<sup>103</sup> This oath obligated officials to enforce Article IV and protect what Bingham insisted were its attendant national privileges and immunities. The Supremacy Clause further obligated the states to protect such rights notwithstanding any state law to the contrary.<sup>104</sup> The question thus boiled down to "whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question."<sup>105</sup> Without such enforcement, the Bill of Rights would stand as "a mere dead letter."<sup>106</sup>

In sum, Bingham believed that Article IV protected a set of national rights. According to the ellipsis reading, the provision protected the "privileges and immunities of citizens (of the United States) in the States." These national rights included rights listed in the Bill of Rights such as the Fifth Amendment. Although Supreme Court cases like *Barron v. Baltimore* prevented the federal courts from enforcing these rights against state abridgments, state courts nevertheless remained constitutionally bound to do so according to their oath to uphold the Constitution and the supremacy of federal law.

#### **D. Prior Scholarly Treatment of John Bingham's "Bill of Rights"**

One of the major disputes over John Bingham's reliability as an expositor of the Constitution and the meaning of the Fourteenth Amendment involves statements in which Bingham appears to argue that the Comity Clause of Article IV was part of the Bill of Rights.<sup>107</sup> Anti-incorporationist scholars like Charles Fairman and Raoul Berger have pointed to these references as evidence Bingham did not mean what we understand as the "Bill of Rights" whenever he used that phrase during the Reconstruction debates.<sup>108</sup> Pro-incorporationist scholars, on the other hand, insist that Bingham meant the first eight amendments to the Constitution when he referred to the Bill of Rights and, as evidence, point to statements Bingham made at later points in the debates.<sup>109</sup>

A close look at the debates suggests that both sides in this debate are partially correct. Bingham *did* originally have an idiosyncratic view of the Bill of Rights which included Article IV, but he later changed his mind and adopted the more standard understanding of the Bill as including only the first eight amendments to the Constitution.<sup>110</sup> Trying to force Bingham's

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<sup>102</sup> *Id.* at 1089-90.

<sup>103</sup> *Id.* at 1090.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> John Harrison also notes how Bingham included Art. IV as part of the Bill of Rights. Harrison, *Reconstructing the Privileges or Immunities Clause* *supra* note 7 at n.72. So did both Fairman and Tenbroek. See Fairman, *supra* note 18 at 26; Tenbroek, *supra* note 31 at 212-15.

<sup>108</sup> See, e.g., Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, *supra* note 18 at 25-26.

<sup>109</sup> See, e.g., Amar, *THE BILL OF RIGHTS*, *supra* note 5 at 183.

<sup>110</sup> See *infra* note 353 and accompanying text.

statements into a single consistent line of reasoning obscures important developments in his thinking that occurred as the debates moved forward.

To begin with, Bingham clearly viewed the Comity Clause of Article IV as part of the Bill of Rights during the debates over his initial draft of the Fourteenth Amendment. In his speech of February 13, Bingham quoted both Article IV and the Fifth Amendment and then lamented the lack of congressional power “to enforce obedience to these requirements of the Constitution.”<sup>111</sup> Bingham next cited the Supremacy Clause as “enjoin[ing] on every officer of every State the obligation to obey these great provisions of the Constitution.”<sup>112</sup> Bingham’s use of the plural for “these requirements” and “these great provisions,” indicates that he is referring to both of the provisions he just quoted—Article IV and the Fifth Amendment. Bingham then explained to the House that “these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the States.” Here, Bingham plainly equates “these great provisions” with “this immortal Bill of Rights.”

On February 28, Bingham was even more explicit in his description of Article IV as part of the Bill of Rights:

Gentlemen admit the force of the provisions in *the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States*, and that no person shall be deprived of life, liberty or property without due process of law; but they say, ‘We are opposed to its enforcement by act of Congress under the amended Constitution as proposed.’ That is the sum and substance of all the argument that we have heard on this subject. *Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?* Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose on him, no matter from what State he may have come, any burden contrary to *that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States.*

Pro-incorporation scholars have struggled with these passages.<sup>113</sup> Given that no one else, in or outside Congress, appears to have shared Bingham’s view that Article IV was part of the Bill of Rights, Bingham’s idiosyncratic interpretation might seem to disqualify his understanding of the Constitution as representing any kind of a broader consensus view of the Fourteenth Amendment.

Attempts to reconcile this passage with a traditional understanding of the Bill of Rights have been nothing if not creative. William Crosskey suggested that, perhaps, Bingham was holding a copy of the (traditional) Bill of Rights and was gesturing with it when he referred to “this immortal Bill of Rights.”<sup>114</sup> Richard Aynes has raised the possibility of a transcription error,

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<sup>111</sup> Cong. Globe, 39<sup>th</sup> cong., 1<sup>st</sup> Sess. 1033 (Feb 13, 1866).

<sup>112</sup> Id.

<sup>113</sup> See, e.g., Amar, THE BILL OF RIGHTS, at 183 n.\*; Richard L. Aynes, The Bill of Rights, The Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship, 8 W&M Bill of Rights J. 407, 412 (2000).

<sup>114</sup> Crosskey, *supra* note 20 at 28.

and that the Reporter accidentally typed “*this* Bill of Rights” instead of “*the* Bill of Rights.”<sup>115</sup> Most commonly, pro-incorporationist scholars simply ignore these troubling passages and focus instead on the more traditional descriptions of the Bill of Rights that Bingham makes much later in the Reconstruction Debates and claim that Bingham consistently embraced the traditional understanding of the Bill of Rights *throughout* the debates.<sup>116</sup>

None of these efforts, I believe, are persuasive. Worse, they have the effect of obscuring an important aspect of Bingham’s early thinking about Article IV and the Fourteenth Amendment.<sup>117</sup> When Bingham links “these great provisions” to “this Bill of Rights,” it does not matter whether the reporter failed to write “the” instead of “this”—the result is the same: Bingham is arguing that both Article IV and the Fifth Amendment are both part of the Bill of Rights.

In fact, it makes sense that Bingham initially viewed the Comity Clause as part of the federal Bill. We know, for example, that Bingham believed that the Clause played a critical role in the protection of individual rights. State officials took an oath to uphold the federal Constitution, including the privileges and immunities of protected under Article IV. As did a growing number of antebellum legal and political thinkers, Bingham believed these privileges involved *national* rights such as those listed in the Fifth Amendment to the Bill of Rights. Because Bingham believed that without Article IV the Bill of Rights was no more than a “dead letter,” he insisted that Article IV was an essential part of the Bill of Rights. Much later in the debates, Bingham would drop his claim that the Bill of Rights included Article IV, and he would describe the Bill as consisting (only) of the first eight amendments to the Constitution. By that time, however, Bingham had adopted an altogether different view of Article IV than the one he pressed early in the debates.<sup>118</sup>

John Bingham’s early idiosyncratic view of Article IV explains why he parted ways with more radical Republicans and never cited *Corfield v. Coryell* or Justice Washington’s invocation of fundamental common law privileges and immunities in any of his speeches during the Thirty-Ninth Congress. Bingham had a completely different view of Article IV than that presented by the courts in state-law centered cases like *Corfield*, *Livingston* and *Campbell*. Nor was he interested in giving the federal government power to define and enforce the common law rights described in these cases.<sup>119</sup> Instead, one of Bingham’s consistent goals throughout the debates was to find a way to require the States to respect rights listed in the first eight amendments to the Constitution. Even if *Corfield* could be read as embracing such rights along with various other common law rights (something which neither Justice Washington nor any other judge

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<sup>115</sup> Aynes, On Misreading John Bingham, *supra* note 20 at 68 n. 61. More seriously, Aynes argues that Bingham may have understood the Fifth Amendment as one of many privileges and immunities of United States citizens, but also as one belonging to all persons, citizen or not. *Id.* at 68-69. This reading of the speech has its own problems, including the fact that Bingham goes on to describe both provisions as “absolutely essential to American nationality,” indicating that he was not, at that moment at least, discussing anything other than the concerns of American citizenship. But even if correct, this leaves the problem of Bingham’s idiosyncratic view that Article IV was part of the Bill of Rights, not to mention Bingham’s later *denial* that Section One privileges or immunities included the privileges and immunities of Article IV.

<sup>116</sup> See, e.g., Akhil Reed Amar, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 387 (2006).

<sup>117</sup> They also have the effect of obscuring the strongly negative reaction to Bingham’s initial arguments on the part of Democrats and moderates—votes that would be critical to any successful effort to pass the Amendment.

<sup>118</sup> See *infra* note 309 and accompanying text.

<sup>119</sup> As we shall see in the section discussing the Civil Rights Act of 1866, Bingham also rejected the idea that the federal government should have power to define and enforce common law civil rights in the states. See *infra* note 209 and accompanying text.

following the opinion suggested), granting federal power to identify and enforce the fundamental rights only partially enumerated by Washington in *Corfield* would extend federal power well beyond anything Bingham was willing to support.<sup>120</sup> Instead, Bingham's unique view of Article IV looked not to Justice Washington and *Corfield*, but towards the limited set of national liberties expressly enumerated in the Constitution, particularly in the Fifth Amendment's Due Process Clause.

The problem was, by using the *exact language* of Article IV, Bingham ensured that the proposed amendment would be viewed against the background of judicial opinions and legal treatises which took a distinctly non-Bingham approach to Article IV. This opened the door to a *Corfieldian* reading of Bingham's proposal which he did not want and would not be acceptable to those moderate Republicans whose votes were critical to the successful passage of the Amendment. In the end, Bingham's unique reading of Article IV fell before a barrage of criticism in which even Bingham's ideological friends rejected his "ellipsis" reading of the Privileges and Immunities Clause, ultimately forcing him to withdraw his first draft of the Fourteenth Amendment.

#### **E. The Contemporaneous Debates on the Civil Rights Act of 1866**

At the same time that Congress debated John Bingham's initial draft of the Fourteenth Amendment, it also debated an early draft of the Civil Rights Act of 1866.<sup>121</sup> Because supporters argued that the Act enforced rights listed in the Privileges and Immunities Clause of Article IV, this resulted in simultaneous debates in the House and Senate which involved the meaning of Article IV. Both sets of debates witnessed repeated references to Article IV case law, including the decisions in *Campbell*, *Abbott* and *Corfield*. From Bingham's perspective, of course, those cases had little if anything to do with what he was trying to accomplish. He refused to support the Civil Rights Act and his understanding of Article IV was quite different from that presented in antebellum case law. It is no surprise then that Bingham never once mentioned, much less discussed, cases like *Campbell* and *Corfield*. However, since apparently *everyone else* thought these cases relevant to both the initial draft of the Civil Rights Act and the initial draft of the Fourteenth Amendment, Bingham's idiosyncratic reading of Article IV had to compete with the more traditional readings presented by members in both sets of debates. This disadvantage proved decisive in the outcome of the debates on Bingham's initial draft.

The cross-fire of debate involving Article IV for both the Civil Rights Act and the initial draft of the Fourteenth Amendment creates something of an illusion. If one simply counted the numerous references to *Corfield* and Article IV in these debates, one might think the sheer number alone reflected widespread agreement about the meaning and importance of both to the original understanding of the Fourteenth Amendment. This clearly was not the case. The meaning of Article IV and whether it should be viewed as an appropriate source of federal power or a guide to national rights were subjects of heated debate and disagreement.<sup>122</sup> Bingham himself, of course, stands as an example of how one must be careful in picking out

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<sup>120</sup> *Id.* (discussing Bingham's objections to the Civil Rights Act of 1866).

<sup>121</sup> The Civil Rights Bill was reported to the Senate on January 12, 1866, and passed on March, 15 that same year. See Maltz, *supra* note 21 at 45-46.

<sup>122</sup> Compare the remarks of Senator Trumbull, Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 474-75 (arguing that Article IV privileges and immunities included fundamental civil rights which Congress was empowered to protect under the 13<sup>th</sup> Amendment), with the remarks of Senator Davis, Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 595 (insisting that Article IV did not justify federal enforcement of civil rights in the states, but did nothing more than protecting the rights of sojourning citizens).

any single statement as representative of even a single person’s final views, much less Congress as a whole.

Finally, one has to appreciate the role of moderate Republicans in determining the shape—and thus the ultimate success—of any proposed Amendment. Moderates had successfully opposed broad confiscation schemes during the Civil War and prevented Congress from overriding President Johnson’s veto of the Freedman’s Bureau Act.<sup>123</sup> During the debates over the Civil Rights Act, moderate opposition to the initial draft resulted in Congress deleting language which would have prohibited discrimination in “civil rights or immunities.”<sup>124</sup> As Earl Maltz puts it, “[t]he disposition of the Freedman’s Bureau Bill and apportionment amendment demonstrated that only those civil rights measures that received virtually unanimous support from mainstream Republicans could be adopted.”<sup>125</sup> Successful passage of the Fourteenth Amendment thus had to satisfy moderate concerns regarding the need to maintain a federalist structure of government.

### *1. The Radical Republican Reading of Corfield and Article IV*

Both the Civil Rights Bill and Bingham’s initial draft of the Fourteenth Amendment raised objections based on the need to preserve the reserved powers of the States. Many of these objections were based on the broad interpretation of Article IV presented by Radical Republicans in support of the Civil Rights Act—interpretations which, if accepted, would substantially expand the reach of Bingham’s Article IV-based draft of the Fourteenth Amendment.

The Civil Rights Bill, as initially drafted, provided:

[A]ll persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>126</sup>

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<sup>123</sup> See Cong. Globe, 39th Cong., 1st Sess. 943 (1866). See also Maltz, *supra* note 21 at 60. Congress later passed a different version of the Freedman’s Bureau Bill which was passed over Johnson’s veto. See Cong. Globe, 39th Cong., 1st Sess. 3842.

<sup>124</sup> See Maltz, *supra* note 21 at 69.

<sup>125</sup> *Id.* During the debates over the Civil Rights Act of 1866, New York Republican Thomas T. Davis declared:

“This government is one of delegated powers, and . . . every law enacted is circumscribed by the limitation of the Constitution. The states have reserved all sovereignty and power which has not been expressly or impliedly granted to the Federal Government.”

Cong. Globe, 39<sup>th</sup>, 1<sup>st</sup> Sess., 1265-66 (1869). Note, however, Republicans generally distinguished the concept of “state sovereignty” (which was associated with secession) and “state rights” which was associated with the more acceptable form of federalism. See Maltz, *supra* note 21 at 33.

<sup>126</sup> Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

Prior to the adoption of the Fourteenth Amendment, it remained a major issue of debate whether Congress had power to pass such an act. Although Radical Republicans sometimes argued that Section 2 of the Thirteenth Amendment authorized the Act, their primary argument involved a construction of the original Constitution, in particular the implied power to enforce the Privileges and Immunities Clause of Article IV. Antebellum Supreme Court cases like *Prigg v. Pennsylvania* established an unenumerated congressional power to pass the Fugitive Slave Act in furtherance of Article IV, Section 2.<sup>127</sup> The same reasoning, Radical Republicans argued, now supported congressional efforts to protect the privileges and immunities of newly freed blacks.<sup>128</sup> According to Congressman James Wilson, the floor manager of the Civil Rights Bill and Chairman of the House Judiciary Committee, the Supreme Court’s decision in *Prigg v. Pennsylvania*<sup>129</sup> authorized unenumerated federal power to enforce the “natural rights of man” protected under the Privileges and Immunities Clause of Article IV and described in detail by Justice Washington in *Corfield v. Coryell*.<sup>130</sup> Noting that the *Prigg* doctrine had once upheld the Fugitive Slave Law, Wilson declared, “I cannot yield up the weapons which slavery has placed in our hands now that they may be wielded in the holy cause of liberty and just government. We will turn the artillery of slavery upon itself.”<sup>131</sup> Taking a similarly broad view of federal power, the author of the Civil Rights Act, Senator Lyman Trumbull argued that Congress had power to protect the rights of national citizenship under its power to establish a uniform rule of naturalization.<sup>132</sup> Citing Washington’s opinion in *Corfield* as establishing the rights of sojourning citizens, Trumbull declared, “how much more are the native born citizens of the State itself entitled to these rights!”<sup>133</sup> Citing Justice Washington’s language in *Corfield* which referred to the “fundamental” rights of all free men, Trumbull insisted that Article IV was a statement of the basic civil rights of all free men which Congress had power to enforce under Section Two of the Thirteenth Amendment.<sup>134</sup>

## 2. *Moderate and Conservative Views of Corfield and Article IV*

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<sup>127</sup> See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>128</sup> According to Senator Lane:

It is true that many of the provisions in this bill of this bill, changed in their purpose and object, are almost identical with the provisions of the fugitive slave law . . . All these provisions were odious and disgraceful in my opinion, when applied in the interest of slavery, when the object was to strike down the rights of man. But here the purpose is changed. These provisions are in the interest of freemen and freedom, and what was odious in the one case becomes highly meritorious in the other. It is an instance of poetic justice and of apt retribution that God has caused the wrath of man to praise Him. I stand by every provision of this bill, drawn as it is from that most iniquitous fountain, the fugitive slave law of 1850.

Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., s.p. 602 (Feb. 2, 1866) (remarks of Mr. Lane).

<sup>129</sup> 41 U.S. 539 (1842).

<sup>130</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1117-18.

<sup>131</sup> *Id.* See also *id.* at 602 (remarks of Sen. Lane of Indiana) (“It is an instance of poetic justice and of apt retribution that God has caused the wrath of man to praise Him. I stand by every provision of this bill, drawn as it is from that most iniquitous fountain, the fugitive slave law of 1850.”).

<sup>132</sup> Maltz, *supra* note 21 at 63.

<sup>133</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 474-75.

<sup>134</sup> See *id.* (remarks of Sen. Trumbull) (citing, among others, the interpretation of Article IV in *Campbell*, *Abbott*, and *Corfield* in support of congressional power to regulate civil rights in the states under powers granted by the Thirteenth Amendment).

These were extremely broad interpretations of federal power, for they opened the door to federal power to both define *and* protect every conceivable civil right in the States.<sup>135</sup> Most members of the Thirty-Ninth Congress, however, were unwilling to embrace either *Prigg* or the concept of unenumerated federal power.<sup>136</sup> Democrats, of course, vociferously objected to the Bill and the reasoning presented on its behalf. According to Delaware’s Democratic Senator Willard Saulsbury, the Bill was “one of the most dangerous that was ever introduced into the senate of the United States.”<sup>137</sup> Moderates such as Christopher Delano of Ohio, were also concerned. By allowing Congress power to define and protect the “civil rights” of citizenship, Delano warned,

“[Y]ou render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority which will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.”<sup>138</sup>

One particular line of argument directly challenged the supporters’ interpretation of the Privileges and Immunities Clause of Article IV. According to Senator Garret Davis of Kentucky, Trumbull and other supports of the Bill were wrong to rely on Article IV as a source of power to define and enforce national privileges and immunities. The Comity Clause involved nothing more than the right of sojourning citizens to receive the same state-conferred rights as in state citizens.<sup>139</sup> In support of this traditional reading of Article IV, Davis spent “an hour of his speech”<sup>140</sup> quoting from and explaining the courts’ holdings in cases like *Campbell*, *Abbott*, and *Corfield*.<sup>141</sup> After quoting the “fundamental rights” section of Washington’s *Corfield* opinion, Davis declared that “[a]ll of these rights and privileges are attributed by the decision of the court to the citizens of one State going into another State. . . . The opinion relied on by the honorable Senator do not establish any other proposition.”<sup>142</sup> Confronted with the case law, Trumbull conceded that Davis was right about the traditional antebellum interpretation of Article IV, but maintained nevertheless that the rights of national citizenship (which congress had power to protect) had to be at least as broad as the rights of sojourning citizens.<sup>143</sup>

These early debates over the initial version of the Civil Rights Act of 1866 illuminate a number of issues which are important to understanding the subsequent debate over the Fourteenth Amendment. To begin with, they help to explain why one cannot rely on radical Republican’s use of *Corfield* as representing a consensus view of Article IV privileges and immunities in the Thirty-Ninth Congress. From the earliest days of the Thirty-Ninth Congress, the meaning of *Corfield* and Article IV was in dispute. Some (though not all) radical Republicans attempted to read Washington’s language regarding “fundamental rights” as a reference to fundamental *national* rights which Congress had implied power to enforce against state abridgement under the theory announced by the Supreme Court in *Prigg*. Moderate and conservative Republicans, on the other hand, rejected this reading of *Corfield* and Article IV, citing the many antebellum

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<sup>135</sup> See, e.g., Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1072 (Remarks of Mr. Nye) (insisting that Congress had “necessary and proper” power to “restrain the respective states from infracting” both enumerated and unenumerated “natural and personal rights.”).

<sup>136</sup> See Maltz, *supra* note 21 at 64-65.

<sup>137</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 477.

<sup>138</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. at app. 158.

<sup>139</sup> See Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 595 (Feb. 2, 1866) (Speech of Senator Garret Davis of Ky.).

<sup>140</sup> See *id.* at 600 (Feb. 2, 1866) (Sen. Trumbull responding to Davis’ speech).

<sup>141</sup> *Id.* at 595-97. (remarks of Sen. Davis).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 600.

precedents which read the Privileges and Immunities Clause of Article IV as providing nothing more than equal access to a set of state-conferred rights.

This dispute over the meaning of *Corfield* and Article IV in the Thirty-Ninth Congress has been completely missed in contemporary Fourteenth Amendment scholarship.<sup>144</sup> The disagreement undermines any attempt to use the many references to *Corfield* in the debates as evidence of a broad consensus in support of the radical Republican reading of Washington’s opinion and the privileges and immunities of Article IV. In fact, as we shall see, the radical theory of *Corfield* was decisively rejected—a result reflected in the final language of both the Civil Rights Act of 1866 and the final language of the Fourteenth Amendment. Before discussing that outcome, however, we are now ready to address the early debates regarding the Fourteenth Amendment—debates which took place at the same time as the debates over the initial version of the Civil Rights Act.

## F. The Response to Bingham’s Initial Draft of the Fourteenth Amendment

### 1. Initial Skirmishes

In January of 1866, Congress passed a bill to extend the life of the Bureau of Freedman, Refugees and Abandoned Land, an Act which had vested Congress with “control of all subjects relating to refugees and freedmen in the rebel states.”<sup>145</sup> The new Bill not only extended the Act, it also extended congressional jurisdiction of the Bureau to freedman throughout the United States and authorized the commissioner to provide freedmen with forty-acre plots of land.<sup>146</sup> On February 19, however, President Johnson vetoed the Bill, citing federalism based concerns about unwarranted intrusion on the reserved powers and rights of the States.<sup>147</sup> The message was persuasive enough to convince eight Republicans who had voted in favor of the Bill to now support Johnson’s veto. As a result, the vote to override Johnson’s veto failed in the Senate by two votes.<sup>148</sup> The failure of the Freedman’s Bureau Bill had immediate implications for the debates on both the Civil Rights Act and the Fourteenth Amendment, with both sides recognizing the need to craft their arguments in a manner which would appeal to the moderate vote.<sup>149</sup>

Seeking to build momentum against further intrusion on state autonomy, on February 26, the conservative Democratic Congressman Andrew Jackson Rogers spoke out against Bingham’s proposed Fourteenth Amendment. According to Rogers, “[t]he effect of this proposed amendment is to take away the power of the States; to interfere with the internal policy and

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<sup>144</sup> Most contemporary historical legal scholarship which discusses references *Corfield* in the Thirty-Ninth Congress cites various instances in which the case came up, but ignore the deep disagreements between members regarding the proper reading of the case and the antebellum jurisprudence of Article IV. See, e.g., Amar, *THE BILL OF RIGHTS*, *supra* note \_\_\_ at 176-78; Randy Barnett, *RESTORING THE LOST CONSTITUTION*, *supra* note \_\_\_ at 60-68 (citing several references to *Corfield* in the Reconstruction Congress and concluding that *Corfield* described “natural and inherent rights” and that Congress viewed Article IV and Section One as protecting the same set of rights); John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28-29 (1980); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 *Loyola L.A. L. Rev.* 1143, 1145-46 (1992).

<sup>145</sup> Maltz, *supra* note 21 at 48.

<sup>146</sup> *Id.*

<sup>147</sup> See Andrew Johnson, *President Johnson’s Veto of the Civil Rights Act, 1866*, *Cong. Globe*, 39th Cong., 1st Sess. 1679 (1866).

<sup>148</sup> Maltz, *supra* note 21 at 49.

<sup>149</sup> *Id.*

regulations of the States: to centralize a consolidated power in this federal Government which our fathers never intended should be exercised by it.”<sup>150</sup> Republicans seeking to advance the cause of civil rights in the states could generally ignore conservative Democrats like Rogers. However, given the failed override of Johnson’s veto only days before, Republicans could no longer afford to be so sanguine. Making matters worse, radical Republicans based their support of the Amendment on *Prigg*-based theories of unenumerated power to identify and enforce the entire category of natural and civil rights in the states, as well as a broad natural rights reading of *Corfield* and Article IV<sup>151</sup>—theories guaranteed to trigger opposition from those members whose votes were critical to the passage of the Amendment.

In response to claims that the proposed Amendment would authorize federal take-over of common law rights in the states, mainstream Republicans insisted that the Amendment would do nothing more than authorize federal enforcement of the Comity Clause of Article IV as *traditionally* understood. According to Republican Congressman William Higby:

If [Article IV] had been enforced heretofore, how different would have been the condition of the various States of this Union. Had that provision been enforced, a citizen of New York would have been treated as a citizen in the State of South Carolina; a citizen of Massachusetts would have been regarded as a citizen in the State of Mississippi or Louisiana. The man who was a citizen in one State would have been considered and respected as a citizen in every other State of the Union. . . . The intent of this amendment is to give force and effect and vitality to that provision of the Constitution which has been regarded heretofore as nugatory and powerless.”<sup>152</sup>

According to Iowa Republican Congressman Hiram Price, Bingham’s proposed Amendment “mean[s] simply this: if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years.”<sup>153</sup> Even the Radical Republican Frederick Woodbridge of Vermont, a man who otherwise embraced broad theories of natural rights, nevertheless accepted the traditionally narrow reading of Article IV. According to Woodbridge:

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<sup>150</sup> Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess., app. at 134.

<sup>151</sup> According to Pennsylvania Congressman William Kelley, for example, Bingham’s proposed amendment should be supported but was unnecessary because congressional power to protect civil rights in the states had already been granted under the original constitution. Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 1057. According to Kelley, the powers granted under the original constitution should be liberally construed as would a remedial statute, since the purpose was to fix the errors of the Articles of Confederation. Id. at 1058. More, powers were granted to congress to guarantee a republican form of government in the states, and “power to enforce every right, privilege and immunity accorded to the people, and to guarantee a republican form of government to each State.” Id. In the Senate, Senator Nye took an even broader view of Congressional power. In addressing congressional power to control the conditions upon which the states could readmitted to the Union, Nye argued that the Constitution provides for broad federal “superintending power of control over the States.” Id. at 1072. Nye, like over strong nationalists in the Reconstruction Congress, found such power through a combination of the Republican Guarantee Clause, the Necessary and Proper Clause and the Supremacy Clause. Id. This was not power limited to responding to an emergency like the civil war, but instead allowed congress to legislate for the protection of *all* personal and natural rights—a list of unlimited subject matter.

<sup>152</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1054 (Feb. 27 1866) (remarks of Rep. Higby). According to Richard Aynes, Higby was “a lawyer and a Republican from California”—and occasionally racist in his worries about creating state majorities of black voters. See Aynes, Unintended Consequences, *supra* note 5 at 610. See also Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1056 (“The Chinese are nothing but a pagan race. . . . You cannot make good citizens of them.”).

<sup>153</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1066 (Feb. 27, 1866) (remarks of Rep. Price).

What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give a citizen of the United States in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property *which is extended to the other citizens of the State.*"<sup>154</sup>

Woodbridge believed that Article IV protected "the natural rights which necessarily pertain to citizenship," but interprets the Clause as doing nothing more than requiring states to guarantee citizens the same rights which were "extended to the other citizens of the State." Thus, Woodbridge, like Price and Higby (another radical) defended Bingham's proposal on the assumption that the proposal did nothing more than enforce Article IV as traditionally understood. None of them repeated, much less defended, Bingham's claim that the Privileges and Immunities Clause of Article IV was part of the Bill of Rights, or that the amendment would provide substantive protection of the Bill of Rights against state action. Instead, they viewed the amendment as providing federal power to enforce the Comity Clause as that Clause had been interpreted in cases like *Campbell, Livingston, Corfield and Abbott* and by treatise writers like Chancellor James Kent and Joseph Story.<sup>155</sup>

Conservative Republicans like Robert Hale of New York, however, remained unconvinced. On February 27, Congressman Hale delivered a major speech against the proposed amendment which was reprinted in full a few days later by the *New York Times*.<sup>156</sup> Hale's speech is important for a number of reasons. It came from a member who was not opposed to states having to comply with the Bill of Rights and who did not oppose the final, and significantly changed, version of the Fourteenth Amendment.<sup>157</sup> Thus, we can presume that Hale's objections were sincere and not presented simply to avoid any additional restrictions on the states. Hale's speech also serves as yet another example of an influential Republican member of the Thirty-Ninth Congress<sup>158</sup> who insisted that any proposed amendment preserve the traditional federalist structure of the Constitution and preserve the autonomous rights of the states.

As reported in the *Times*, Congressman Hale's principle objection was that the proposed amendment threatened to "utterly obliterate State rights and State authority over their own

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<sup>154</sup> *Id.* at 1088. (Feb. 28, 1866) (remarks of Mr. Woodbridge). Woodbridge uses the language of equal protection specifically in regard to the rights of property, but it is clear from his context that he sees the same principles extending to all due process rights. Woodbridge's remarks also make for a good cautionary example regarding references to natural rights in the debates of the Thirty-Ninth Congress. Woodbridge starts with natural rights language but quickly cashes out the reference as meaning only equal protection of state-conferred rights. Thus, although natural rights arguments could be quite broad, the application of natural rights principles was often quite constrained, particularly in light of the political realities facing the amendment's proponents in the Thirty-Ninth Congress.

<sup>155</sup> Lash, *Privileges and Immunities as an Antebellum Term of Art*, *supra* note 84.

<sup>156</sup> See *New York Times*, Mar. 2, 1866, p.2. On February 28, the *Times*, under its front-page "Washington News" headline, provided a sub-headline, "Debate in the House on the Constitutional Amendment," highlighting the "Clear and Forcible Speech by Mr. Hale Against its Adoption."

<sup>157</sup> Although Hale spoke out against the initial version, and voted against it, he did not speak out against Bingham's second version, and did not vote at all when the House voted 128-37 in support of Bingham's second draft. See *Cong. Globe*, 39<sup>th</sup> Congress, 1<sup>st</sup> Sess. 2545. See also Maltz, *supra* note 21 at 94.

<sup>158</sup> Earl Maltz credits Hale with delivering the "main critique" of Bingham's proposed amendment. Maltz, *supra* note 21 at 56.

internal affairs.”<sup>159</sup> Hale began his speech by insisting that federalism and states’ rights remained a critical component of American constitutional government.<sup>160</sup> Under Bingham’s amendment, this dualist system of government would be destroyed by “a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution.”<sup>161</sup>

Ignoring the first part of Bingham’s Amendment which used the language of Article IV, Hale focused his objections on the language “The Congress shall have power to make all laws which shall be necessary and proper to secure to . . . all persons in the several States equal protection in the rights of life, liberty, and property.” Rejecting the limited interpretations offered by previous defenders of the Amendment, Hale insisted “[i]t is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.”<sup>162</sup> To Hale, this flipped the Bill of Rights on its head:

Now, what are these amendments to the Constitution, numbered from one through ten, one of which is the fifth article in question? What is the nature and object of these articles? They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions on power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation. They are not matters upon which legislation can be based.<sup>163</sup>

To Hale, using the Bill of Rights as a basis for federal legislation destroyed the original purpose of the Bill. His statement, however, indicates that he believed Bingham’s attempt to hold the states accountable to the Fifth Amendment was unnecessary: Hale assumed that the Bill of Rights *already* “limit[ed] the power of Federal and State legislation.” Bingham immediately challenged Hale’s assertion that the States were bound to enforce the Bill of Rights under the original Constitution.<sup>164</sup> In response, Hale admitted that he knew of no case which supported his assumption. However, he had “somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we were so protected. Of course, I may be entirely mistaken in all this, but I have certainly somehow had that impression.”<sup>165</sup>

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<sup>159</sup> New York Times, Feb. 27 (reporting on Hale’s speech).

<sup>160</sup> According to Hale:

Now, Mr. Speaker, what is the theory of our Constitution? . . . In general terms, is it not that all powers relating to the existence and sovereignty of the nation, power relating to our foreign relations, power relating to peace and war, to the enforcement of the law of nations and international law, are the powers given to Congress and to the Federal Government by the Constitution, while all powers having reference to the relation of the individual to municipal government, the powers of local jurisdiction and legislation, are in general reserved to the States?

Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 1063.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1063-64.

<sup>163</sup> *Id.* at 1064.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Resuming his main critique, Hale criticized the “vague and general language” of the final half of the proposed amendment which “confer on the Federal Congress powers . . . to legislate upon all matters pertaining to life, liberty, and property of all the inhabitants of the several States, I put it to the gentleman, whom I know sometimes at least to be disposed to criticize this habit of liberal construction, where he apprehends that Congress and the courts will stop in the power they may arrogate to themselves under this proposed amendment.”<sup>166</sup> It was not that Hale opposed an effort to “protect the liberty of the citizen—the humblest as well as the highest—the negro, the late slave, as well as others. In every such desire on his part I most fully and cordially concur.” In fact, Hale did not oppose the final version of the Fourteenth Amendment.<sup>167</sup> This initial draft, however, entrenched upon “other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. I believe that whatever most clearly distinguishes our Government from other Governments in the extent of individual freedom and the protection of personal rights we owe to our decentralized system.”<sup>168</sup>

## 2. *Bingham’s Defense of His Initial Draft of the Fourteenth Amendment*

Bingham’s speech of February 28 was his final attempt to defend his initial draft of the Fourteenth Amendment. Only days before, conservative Republicans had switched sides on the Freedman’s Bill and supported Johnson’s federalism based veto.<sup>169</sup> Over the last two days, Bingham had listened to conservative Democrats and Republicans attempt to use the same federalism-based arguments to defeat his proposed Amendment. The vote would be just as close; like the veto-override, a proposed amendment requires a two-thirds majority vote in the House and Senate before being qualified for submission to the states for ratification.

Bingham had to overcome two separate and opposite problems in his effort to shepherd the Amendment to a successful vote. First, he had to counter conservative claims that the amendment authorized broad congressional power to define and enforce civil rights in the states—rights which most agreed had properly been left to the states under the original Constitution. Countering these over-breadth arguments required Bingham to explain how the amendment had a more limited scope than that claimed by radicals, or feared by the moderates and conservatives. A separate problem, however, required an opposite effort: In their zeal to downplay the scope of the Amendment and win Republican support, some Republicans members had claimed that the proposed amendment did nothing more than grant federal power to enforce the Comity Clause as traditionally understood. If this were the case, then the amendment would do nothing more than authorize federal power to force the states to provide equal access to state-conferred rights. Bingham, however, had a much broader goal in mind for the first part of his proposed amendment, one based on his peculiar understanding of the Comity Clause of Article IV. According to Bingham’s “ellipsis” understanding of the Comity Clause, the privileges and immunities of citizens (of the United States) in the several states included all federally enumerated rights, especially those listed in the first eight amendments. From Bingham’s point of view, Republicans like Higby, Price and Woodbridge wrongly narrowed the scope of the proposed amendment when they claimed it did nothing more than authorize federal enforcement of the Comity Clause, traditionally understood.

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<sup>166</sup> Id. at 1065.

<sup>167</sup> According to Maltz, Hale voiced no objections to the later revised draft of the Fourteenth Amendment. See Maltz, *supra* note 21 at 94. Hale did not vote on the final version. Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2545.

<sup>168</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1065.

<sup>169</sup> Maltz, *supra* note 21 at 49. See also Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 943 (1866).

Unfortunately, Bingham’s “ellipsis” theory of Article IV was so odd and idiosyncratic, it appears that no other Republican followed his argument. Because his initial proposal used the exact language of the Comity Clause, members naturally assumed that the proposed amendment referred to the same Article IV rights which had been identified and discussed by antebellum courts. Radical Republicans naturally gravitated to the broad language of Justice Washington’s opinion in *Corfield*, while mainstream Republicans relied on the traditional consensus reading of the Comity Clause (and *Corfield*) found in cases like *Campbell*, *Livingston* and *Abbott*, and in legal treatises like those of Kent and Story. Bingham, of course, had neither goal in mind. His effort was to protect the constitutionally guaranteed privileges and immunities of citizens of the United States, a category which Bingham believed included the Bill of Rights, as well as provide all persons their natural right to equal protection and due process of law.

In his speech, Bingham needed to explain why protecting the Bill of Rights against state action was necessary (a wholly non-controversial goal even to conservative Republicans like Robert Hale) while at the same time assuring moderates that the only rights to be protected against state action were those which the Constitution had already placed beyond the proper scope of state power. This final limitation was critical, for it would rescue Bingham’s proposal from the fatal accusation that the amendment would obliterate the properly reserved powers and rights of the states.

### 3. *Bingham’s Speech of February 28*

Bingham began by addressing the most critical problem facing the amendment’s passage: federalism based concerns of conservative Republicans:

I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any state any right that belongs to him under that Constitution. The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It “hath that extent—no more.”<sup>170</sup>

Right out of the gate, Bingham threads the needle by rejecting both unduly narrow and unduly broad readings of the proposed amendment. The goal was to secure far more than just equal state-conferred rights; he sought nothing less than the enforcement of the Bill of Rights against the states. On the other hand, his amendment had nothing to do with radical efforts to nationalize the countless common law and natural rights traditionally regulated by the States. His proposed amendment sought only “to enforce the Bill of Rights as it stands in the Constitution today. It “hath that extent—no more.”

Quoting the Article IV and Fifth Amendment derived language of his proposal, Bingham challenged his colleagues:

What do gentlemen say to these provisions? ‘Oh, we favor that; we agree with the President that the basis of the American system is the right of every man to life, liberty and the pursuit of happiness; we agree that the Constitution declares the right of every citizen of the

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<sup>170</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1088 (Feb. 28<sup>th</sup>, 1866) (Speech of John Bingham).

United States to the enjoyment of all privileges and immunities of citizens in the several States, and of all persons to be protected in life, liberty and property.’

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty or property without due process of law; but they say, ‘We are opposed to its enforcement by act of Congress under the amended Constitution as proposed.’ That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose on him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States.<sup>171</sup>

There are four key moves to Bingham’s argument. First, he had based the language of his proposal on the text of the original Constitution: The Comity Clause and the Fifth Amendment. Second, the privileges and immunities which were protected against state abridgement by the Comity Clause included provisions in the Bill of Rights. Third, state officials take an oath to uphold the Constitution, including the Comity Clause, making state enforcement of the clause obligatory. Fourth, because states are obliged to enforce the Comity Clause and provisions like the Fifth Amendment under the original Constitution, federal enforcement of these rights does not intrude upon the reserved powers and rights of the States.

Bingham’s second “move,” his assumption that the Comity Clause was part of the Bill of Rights, was critical to the success of his overall argument. Neither the Fifth Amendment nor any other of the first eight amendments mentioned the states. This lack of an express language binding the states led the Supreme Court in *Barron v. Baltimore* to conclude that the Bill of Rights bound only the federal government. The Comity Clause, on the other hand, *does* expressly require the States to protect the “privileges and immunities of citizens in the several States.” If these privileges and immunities included the rights listed in the Bill, then this provides the textual basis for requiring the states to enforce the Bill. Bingham achieved such a reading of the Comity Clause by adding an “ellipsis”: states shall not violate the “privileges and immunities (of citizens of the United States) in the several States.” Since the Bill of Rights clearly involves the rights of citizens of the United States, the Comity Clause (read with the ellipsis) must include the Bill. The result is a Comity Clause which binds the states to protect the Bill of Rights. Although extremely complicated, Bingham’s reading of Article IV allowed him to plausibly claim that his proposed amendment did not “take away from any state any right that belongs to it.”

If the reasoning was complicated, the ultimate goal was neither complicated nor unpopular. Bingham shared the widespread idea that States, if not expressly bound to respect the Bill of Rights, nevertheless ought to protect such fundamental rights of American citizenship. Here Bingham draws upon antebellum judicial and political rhetoric which increasingly viewed the Bill of Rights as declaring rights which ought to be respected by all levels of government. Bingham was so certain that his fellow members agreed with this idea that he made their

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<sup>171</sup> Id. at 1089.

assumed acceptance a key part of his argument--“Gentlemen admit the force of the provisions in the bill of rights . . .” Although interruptions were common during these debates, and Bingham *would* be interrupted during this particular speech, there was no interruption or disagreement with Bingham’s nationalist reading of the Bill of Rights.<sup>172</sup>

Instead, the objections of conservative Republicans involved the potential nationalization of common law civil rights which most members believed ought to remain under the control of the states. Placing the enumerable subjects of the common law under federal control would destroy the traditional separation of federal and state power. Bingham, of course, believed that the only substantive rights addressed by his proposal were the “privileges and immunities (of citizens of the United States) in the several states”—a set of rights which Bingham insisted included *only* the Bill of Rights. His proposal left the general protection of common law civil rights to the control of the states subject only to the requirement that the states provide all persons due process of law. Since according to Article IV states were *already* obliged to protect the privileges and immunities of citizens of the United States, Bingham insisted that his proposal took away no rights properly belonging to the states under the original Constitution.<sup>173</sup> In the remainder of his speech, he continued to hammer on this point regarding the need to protect the Bill of Rights.

Believing that he had established the limited goals of the amendment, Bingham next turned to Hale’s argument that states were already bound to enforce the Bill. Here Bingham cited Supreme Court cases like *Barron v. Baltimore* and *Livingston v. Moore* in which the Court had held that the Bill of Rights in general, and the Fifth Amendment in particular, were not applicable to the States.<sup>174</sup> Bingham then quickly pivoted and explained that, although the Bill was not judicially enforceable against the States, the States nevertheless remained obligated to enforce the Bill as part of their oath to uphold the Federal Constitution:

Sir, I stand relieved to-day from entering into any extended argument in answer to these decisions of your courts, that although as ruled the existing amendments are not applicable to and do not bind the States, they are nevertheless to be enforced and observed in States by the grand utterance of that immortal man, who, while he lived, stood alone in intellectual power among the living men of his country, . . . I refer to that grand argument never to be answered while human language shall be spoken by living man, wherein Mr. Webster says . . . “[t]he Constitution utters its behests in the name and by the authority of the people, and it

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<sup>172</sup> It is possible, of course, that the lack of interruption was due to a failure to understand Bingham’s argument.

<sup>173</sup> According to Bingham:

It will be noticed [that Mr. Hale of New York] takes care not to utter one single word in opposition to that part of the amendment which seeks the enforcement of the second section of the fourth Article of the Constitution of the United States, but by his silence gives his assent to it. But the gentleman reiterates the old cry of State rights, and says, ‘You are impairing State rights.’ I would like to know, and when the gentleman comes to make another argument on this subject, I respectfully ask him to inform us whence he derives the authority for supposing, if he does so suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?

Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1089. In his speech of the previous day, Hale had begged off addressing Article IV when prompted by Bingham. See *supra* note 164 and accompanying text.

<sup>174</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1089-90.

does not exact from States any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty and individual conscience. It incapacitates any man to sit in the Legislature of a State who shall not first have taken his solemn oath to support the Constitution of the United States. From the obligation of this no State power can discharge him.”<sup>175</sup>

According to Bingham, “[t]hose oaths have been disregarded; those requirements of our Constitution have been broken; they are disregarded this day in Oregon; they are disregarded to-day, and have been disregarded for the last five, ten, or twenty years in every one of the eleven States, recently in insurrection.”

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws . . . Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven states, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.<sup>176</sup>

Since the original Constitution properly interpreted already bound the states, the only thing missing “to secure the enforcement of these provisions of the bill of rights in every State” was a grant of congressional power to enforce the Bill. Bingham claimed that such power would have been granted in the original Constitution “but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons” (and thus protected by the Due Process Clause of the Fifth Amendment)<sup>177</sup> In brief, “gentlemen who oppose this amendment oppose the grant of power to enforce this bill of rights.”<sup>178</sup>

In addition to protecting the rights of citizens, Bingham’s proposed amendment also protected the rights of “all persons in the several states” to “equal protection in the rights of life, liberty and property.” Bingham also occasionally used the language of equal protection in regard to citizenship rights as well.<sup>179</sup> The lion’s share of his speech, however, went to establishing the pre-existing constitutional obligation laid upon the states to respect the substantive guarantees in the Bill of Rights as part of the privileges and immunities of citizens of the United States. Bingham’s speech was published in newspapers such as the New York Times (Mar. 1, 1866) and it was also published as separate pamphlet.<sup>180</sup> There seems good reason to believe informed members of Congress and the public were aware of Bingham’s arguments. The critical issues, however, involve 1) whether people *understood* his arguments regarding Article

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<sup>175</sup> Id. at 1090 (quoting “3 Webster’s Works, p. 471”).

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id.

<sup>179</sup> See id. at 1089 (“The gentleman did not utter a word against the equal right of all citizens of the United States in every State to all privileges and immunities of citizens.”).

<sup>180</sup> See entitled “One Country, One Constitution, and One People: Speech of the Hon. John A. Bingham of Ohio, in the House of Representatives, February 28, 1866, In support of the proposed amendment to enforce the Bill of Rights.” See also Legislative Acts or Legal Proceedings ; Paper: Philadelphia Inquirer, published as The Philadelphia Inquirer; Date: 03-01-1866; Page: 8; Location: Philadelphia, Pennsylvania (reporting on Bingham’s speech). Professor Amar treats this pamphlet as if it presented the traditional understanding of the Bill of Rights, and thus supports incorporation. See Amar, AMERICA’S CONSTITUTION, *supra* note 116 at 387.

IV and its relationship to his original draft of the Fourteenth Amendment and 2) whether they *agreed* with his arguments. It appears that neither was the case.

#### 4. *Objections by Moderate Republicans: The Speech of Giles Hotchkiss*

Soon after Bingham finished his defense of his first draft of the Fourteenth Amendment, New York Republican Giles Hotchkiss rose in opposition to the proposed amendment. Hotchkiss' opposition had to be devastating to Bingham. As a mainstream Republican, Hotchkiss' support of the Amendment was critical to its success.<sup>181</sup> In fact, immediately after Hotchkiss spoke in opposition, Bingham agreed to indefinitely postpone discussion of his proposal (it was never reintroduced).<sup>182</sup> Understanding the reasons for Hotchkiss' opposition is important. His speech triggered a decision by Bingham to withdraw the amendment and go back to the drawing board. Weeks later, Bingham produced a new draft that responded to the concerns of Republicans like Hotchkiss and Hale.

Hotchkiss began by asserting his “desire to secure every privilege and every right to every citizen in the United States that the gentleman who reports this resolution desires to secure.” He then stated what he believed was the purpose behind Bingham's amendment:

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

This explanation must have stunned Bingham. He had just spent considerable time on the floor of the House explaining how he wished to accomplish far *more* than simply the equal protection of state-conferred rights. His speech was a detailed explanation regarding how the Comity Clause should be read as containing an ellipsis which referred to the rights of citizens of the United States—rights which included the substantive protections listed in the Bill of Rights which states had taken an oath to enforce. Hotchkiss completely ignored Bingham's complicated “ellipsis” argument and instead read the amendment as an effort to enforce the Comity Clause as traditionally understood. It is unlikely that Hotchkiss would have opposed protecting the Bill of Rights against state action—indeed, he never claimed to oppose such an effort. Instead, he simply misconstrued what Bingham was trying to accomplish and presumed that what was on the floor was nothing more than an effort to authorize federal enforcement of the Comity Clause.

This led to a second problem. As had Higby, Price, Woodridge and Hale, Hotchkiss presumed that by using the language of the Comity Clause, the proposed amendment granted federal

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<sup>181</sup> According to Earl Maltz, Hotchkiss was a “mainstream Republican.” Maltz, *supra* note 21 at 39. See also *id.* at 39-40 (“In the political context of the early Reconstruction era, the position taken by such men [such as Thomas Davis, Roscoe Conkling, Giles W. Hotchkiss and William M. Stewart] was to prove decisive.”). According to Michael Kent Curtis, Hotchkiss's speech opposing Bingham's amendment was “particularly influential.” See Michael Kent Curtis, *The Klan, The Congress and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism*, *A Brief Historical Review*, 11 U. Pa. J. of Const. L. 1381, 1390 (2009).

<sup>182</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 1095.

power to enforce equal protection of those rights which antebellum courts had identified as protected under the Comity Clause. Conservatives opposed such a result because it allowed too great an intrusion into the reserved powers and rights of the States. Hotchkiss, however, opposed this idea due to his fear that Republicans might not always be a majority of the federal Congress. As Hotchkiss explained

I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power. Congress already has the power to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy. That is as far as I am willing that Congress shall go. The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority. It is not indulging in imagination to any great stretch to suppose that we have a Congress here who would establish such rules in my State as I should be unwilling to be governed by. Should the power of this Government, as the gentleman from Ohio fears, pass into the hands of the rebels, I do not want rebel laws to govern and be uniform throughout this Union.

At this point, Bingham interrupted Hotchkiss and gamely repeated his “ellipsis” reading of the Comity Clause and his argument that the proposal would do nothing more than authorize federal enforcement of rights already listed in the Constitution. “The gentleman will pardon me,” interjected Bingham, . . .

The amendment is exactly in the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States. It is not to transfer the laws of one State to another State at all. It is to secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States. If the State laws do not interfere, these immunities follow under the Constitution.

In reply, Hotchkiss ignored Bingham’s effort to explain the “ellipsis” reading of the Comity Clause and simply retorted “[c]onstitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them; they should be so plain that the common mind can understand them.”<sup>183</sup> Defeated, Bingham sat down and had nothing more to say prior to his joining the majority and voting to indefinitely table his proposal.<sup>184</sup>

Hotchkiss, however, had more to say. He supported the effort to “to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be incorporated into the Constitution.” As drafted, however, the nature of these equal rights was left to the control of Congress and subject to federal legislation. This was improper. The goal of the amendment should be “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not

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<sup>183</sup> Id. at 1095.

<sup>184</sup> According to Earl Maltz, “[t]he fact that criticism came from the Republican as well as the Democratic side of the aisle made it clear that the Bingham amendment could not obtain the two-thirds majority necessary for passage. In order to avoid outright defeat, on February 20 Bingham joined in voting to postpone final consideration of his proposal.” Maltz, *supra* note 21 at 59-60.

upon two thirds of Congress and three fourths of the States.”<sup>185</sup> Hotchkiss insisted that the Republicans should use their current political numbers and “secure those rights against accident, against the accidental majority of Congress.” Drawing laughter from the other members, Hotchkiss explained:

Mr. Speaker, I make these remarks because I do not wish to be placed in the wrong on this question. I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon this subject. I think he is a conservative. [Laughter] I do not make the remark in any offensive sense. But I want him to go to the root of this matter.

His amendment is not as strong as the Constitution now is. The Constitution now gives equal rights to a certain extent to all citizens. This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment. . . .

Let us have a little time to compare our views upon this subject and agree upon an amendment that shall secure beyond question what the gentleman desires to secure. It is with this view, and no other, that I shall vote to postpone this subject for the present.<sup>186</sup>

Hotchkiss’ objections revealed the fatal flaw in Bingham’s attempt to draft an amendment based on the wording of the Comity Clause. Although using the language of Article IV had the advantage of using the text of the original Constitution as a means of reassuring the conservatives, it had the disadvantage of calling into play antebellum case law which construed the Comity Clause as involving nothing more than equal access to state-conferred rights. Bingham’s efforts to make the language include the national rights contained in the first eight amendments required the addition of an “ellipsis” which referred to the “privileges and immunities *of citizens of the United States*.” Since members were either unable or unwilling to embrace Bingham’s “ellipsis,” this left members debating the merits of federal control of state-conferred common law rights—an outcome conservatives would never accept and which Bingham himself wanted to avoid.

Realizing his initial effort could not succeed, Bingham withdrew the amendment.<sup>187</sup> While his reason for voting with the majority may have been strategic, Bingham may also have realized his proposal was fatally flawed and would not accomplish his objectives *even if passed*. Hotchkiss, someone who described himself as a friend of the proposal and the goals Bingham was trying to accomplish, did not read the first section as establishing equal rights among classes within a state, much less protecting substantive national rights. He read it as doing

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<sup>185</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1095.

<sup>186</sup> Id. On March 1, the New York Times reported “Mr. Hotchkiss explained why he should vote in a manner that might be regarded as inconsistent with his usual vote. He did not regard the proposed amendment as permanently securing the rights and privileges of every citizen, and was, therefore, in favor of its postponement until there could be further conference with the friends of the measure and some means devised by which these rights could be secured beyond question.” The Times then reported the positive vote for postponement.

<sup>187</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1095. Scholars attribute Bingham’s vote as strategic. See Maltz, *supra* note 21 at 60 (“In order to avoid outright defeat, on Feb [28] Bingham joined in voting to postpone final consideration of his proposal.”). According to Bingham himself, “I made the motion myself to postpone and make it an order for that day, but I did not choose to call it up.” See Cong. Globe, 42 Cong., 1<sup>st</sup> Sess, 115 (March 31, 1871). Bingham, however, allowed the proposal to die—it was never revived. See *id.* (Remarks of Mr. Farnsworth) (Bingham’s amendment “slept the sleep that knows no waking”).

nothing more than authorizing congressional enforcement of Article IV rights as commonly described in antebellum case law. He clearly *did not* read any ellipsis into the Comity Clause, and he believed the first half of Bingham’s proposal “confer[ed] no additional powers” upon Congress. This made the proposal under-inclusive in terms of what Bingham wanted to accomplish. Secondly, Hotchkiss read the second section as going way beyond what Bingham or anyone else wanted in terms of federal power to interfere with the states.

The testimony from Bingham’s Republican colleagues suggested that the language of the Comity Clause was—and probably would be— understood in a manner quite different than what Bingham hoped. In fact, as the debates continued on the Civil Rights Bill, it became increasingly clear that no one in the Thirty-Ninth Congress shared Bingham’s “ellipsis” reading of Article IV.<sup>188</sup>

#### IV. INTERMEZZO: THE CIVIL RIGHTS ACT DEBATE

Following the postponement of Bingham’s initial draft of the Fourteenth Amendment, debate continued on an early draft of the Civil Rights Act of 1866. The unsuccessful effort to adopt Bingham’s Amendment, as well as the earlier failure to override Johnson’s veto of the Freedman Bureau Bill, colored the debates regarding the Civil Rights Act. Even if the Act secured majorities in the House and Senate, overcoming a Presidential veto would require the support of every Republican in Congress, including those who remained skeptical about Congress’ power to regulate civil rights in the States.

##### A. Using Article IV as a Source of Federal Power

On March 1, House Sponsor James Wilson rose to defend the following version of the Act:

There shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property and to 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.

Wilson stressed that the Act would leave the “political right” of suffrage “the control of the several States.”<sup>189</sup> Nor would the Act affect force racial integration of juries and schools because “these are not civil rights or immunities.”<sup>190</sup> The Act’s protection of civil rights meant “simply the absolute rights of individuals” which treatise writer James Kent defined as:

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<sup>188</sup> According to the Springfield Republican, “No sane man supposes that the states would ratify such an amendment” and that “the people welcome every indication that Congress discards this policy and the leaders who urge it.” The Springfield Republican (Mar. 2, 1866), p. 2. See also Maltz, *supra* note 21 at 60.

<sup>189</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1117.

<sup>190</sup> *Id.*

‘The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.’ ‘Right itself in civil society, is that which any man is entitled to have or to do, or to require from others, within the limits of prescribed law.’<sup>191</sup>

Such civil rights, declared Wilson, were “the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.”<sup>192</sup> The term “immunities,” on the other hand “merely secures to citizens of the United States equality in the exemptions from the law. A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike.”<sup>193</sup>

As expansive as this list of equal civil rights might appear, Wilson insisted that the Act “merely affirms existing law. We are following the Constitution.” Co-opting the assurances of John Bingham, Wilson maintained that “[w]e are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.” Like Bingham, Wilson grounded the act in the language of the original Constitution. Quoting the Comity Clause of Article IV, Wilson argued that had the states enforced Comity Clause as interpreted in cases like *Corfield v. Coryell* “there would be no need for this bill.”<sup>194</sup> Here Wilson partially quoted Washington’s list of fundamental rights which would be protected under the Act:

‘[T]he right of 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; 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; to be exempt from higher taxes or impositions than are paid by the other citizens of the State.’<sup>195</sup>

Wilson’s reading of *Corfield* was quite different than the manner in which the case had been understood by antebellum authorities. Instead of guaranteeing out-of-state visitors equal access to a limited set of state-conferred rights, Wilson insisted that “a citizen does not surrender these rights because he may happen to be a citizen of a State that would deprive him of them.” Here Wilson went beyond Article IV’s protection of sojourning citizens and treats *Corfield*’s common law rights as if they were substantive national rights which states must provide their own citizens.

Although the Constitution conferred no power on Congress to protect such rights, Wilson did not believe that this posed any barrier to the adoption of the Civil Rights Act. Federal power to “protect a citizen of the United States against a violation of his rights by the law of a single State . . . permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to the citizens of the United States.” Rejecting the very concept of enumerated federal power, Wilson insisted that “the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect; that we possess the same latitude in respect to the selection of means through which to exercise this

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<sup>191</sup> Id. (quoting Kent’s Commentaries, vol. 1, p. 199.).

<sup>192</sup> Id.

<sup>193</sup> Id.

<sup>194</sup> Id. at 1117-18.

<sup>195</sup> Id. (citing “*Corfield v. Coryell*, 4 Washington’s Circuit Court Reports, p. 350”).

power that belongs to us when a power rests upon express delegation; and that the decisions which support the latter maintain the former.”<sup>196</sup>

This was not the kind of argument likely to reassure wavering moderate Republicans. Conservative Democrats saw their opening and immediately attacked. Radical (as in radically conservative) Democrat Andrew Jackson Rogers pointed out that discussion of the draft version of the Fourteenth Amendment had been postponed until April, but that it was the argument of those pushing that amendment that it was necessary in order to pass laws precisely like the Civil Rights Bill. Therefore, it appeared that Congress did not, presently, have power to pass the bill.<sup>197</sup>

“Is there any member on the other side of the House who, on the honor of a man of conscience and integrity, can make himself believe that this Congress has the right to control the privileges and immunities of every citizen of these States, as contemplated in this bill, without a change in the organic law of the land?”<sup>198</sup>

Rogers also turned Wilson’s use of *Corfield* against him. Wilson had denied the Act would give blacks the political right of suffrage and then had selectively quoted from Washington’s opinion for examples of the civil rights which would be protected under the Act. Rogers argued that political rights were but a subcategory of “civil rights” and pointed out that “it has been decided by the circuit court of the United States, in the case of *Corfield vs. Coryell*, 4 Washington’s Circuit Reports, page 380 and 381, that the elective franchise is included in the words privilege and immunities.”<sup>199</sup> Roger’s use of *Corfield* against the Civil Rights Act illustrates how that the case went from an asset to the Radical Republicans to a potential liability. At this point in the Reconstruction Debates, any Bill which opened the door to black suffrage was doomed to fail. Washington’s opinion in *Corfield*, however, suggested that suffrage was a privilege or immunity protected under Article IV.<sup>200</sup> If *Corfield* was the standard by which the Civil Rights Acts protections were to be measured, this now became a reason for mainstream and conservative Republicans to oppose the Act. Accordingly, as the debates went forward, advocates of the Act reduced their reliance on *Corfield* and embraced less pregnant discussions of the Comity Clause found in the treatises of James Kent and Joseph Story, and antebellum cases like *Abbott v. Bayley*.<sup>201</sup>

Other members joined Rogers in attacking Wilson’s broad view of the rights protected under the Comity Clause and federal enforcement power. According to Indiana Congressman Michael Kerr, power to pass the Act could not be found in Section 2 of the Thirteenth Amendment, since the prohibited discrimination addressed by the Bill could be found in both northern free states as well as former members of the rebellion.<sup>202</sup> This left Article IV as the only plausible source of federal power and the provision “chiefly” relied upon by its supporters.<sup>203</sup> According to Kerr, however, advocates had badly over-read both the Comity Clause and its antebellum case law. The Comity Clause, explained Kerr, “relates to the privileges and immunities which

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<sup>196</sup> Id. at 1119.

<sup>197</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1120.

<sup>198</sup> Id. at 1120-21.

<sup>199</sup> Id. at 1122.

<sup>200</sup> *Corfield*, 6 Fed. Cas. at 551-52.

<sup>201</sup> In his next speech, for example, James Wilson omitted any reference to *Corfield*. See *infra* note \_\_\_ at \_\_\_. Likewise, when searching for an antebellum decision representing a consensus view of Article IV, advocates of civil rights legislation turned to *Abbott v. Bayley*. Id.

<sup>202</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1268.

<sup>203</sup> Id.

the citizen of *each* State shall enjoy when in any of the *other* States.”<sup>204</sup> Thus, its protections involved only those rights which a state conferred upon its own citizens.

I understand its primary object [Art. IV] to be to secure equal privileges and immunities to the citizens of each State while temporarily sojourning in any other State, and its secondary and only other purpose is to prevent any State from discriminating in its laws in favor of or against the citizen of any other State merely because they are citizens of such other State, or in other words, for mere sectional reasons. For example, Indiana cannot form any tacit or express alliance or friendship with Kentucky which shall require or justify Indiana in giving to the citizens of Kentucky who shall settle in Indiana any privileges or immunities it does not equally give to the same class of citizens from any other State.

Kerr’s argument was amply supported by antebellum treatises and case law, an advantage he pressed at length. Quoting from James Kent’s *Commentaries on American Law* and Joseph Story’s *Commentaries on the Constitution*, Kerr insisted that the vision of Article IV presented by advocates of the Bill was “contrary [to] both the law and the practice throughout the Union.”<sup>205</sup> After quoting numerous antebellum cases and legal treatises, Kerr summed up the case against the Bill:

[L]et it be remembered that in all these authorities it is assumed that the privileges and immunities referred to as attainable in the states are required to be attained, if at all, according to the laws or constitutions of the states, and never in *defiance* of them. This bill rests upon a theory utterly inconsistent with and in direct hostility to every one of these authorities. It asserts the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States, and determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it. The right of the State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens, is denied. If Congress can declare what rights and privileges shall be enjoyed in the States by the people of one class, it can by the same kind of reasoning determine what shall be enjoyed by every class. . . . Congress, in short, may erect a great centralized, consolidated despotism in this capital.<sup>206</sup>

Kerr next addressed the argument presented by Mr. Thayer of Pennsylvania that the first eleven amendments are sources of congressional power to enforce rights in the states.

Hitherto, those amendments have been supposed, by lawyers, statesmen and courts, to contain only *limitations* on the power of Congress. . . . They were not intended to be, and they are not, limitations on the powers of the States. They are bulwarks of freedom, erected by the people between the States and the Federal Government, and this bill is an attempt to prostrate them. What right has Congress to invade a State, and dictate to it how it shall protect its citizens in their right not to be deprived of life, liberty, or property without due process of law?

When challenged by Thayer to explain the value of the Bill of Rights if “there is no power to maintain it,” Kerr responded by quoting John Marshall’s opinion in *Barron v. Baltimore*:

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<sup>204</sup> *Id.* at 1268.

<sup>205</sup> *Id.* at 1269.

<sup>206</sup> *Id.* at 1270 (emphasis in original).

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. . . . Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.<sup>207</sup>

Finally, Kerr pointed out that, however much the proponents of the Bill assured members that the Act would receive only a limited construction, by using the open ended term “civil rights and immunities,” the Act opened the door to later legislative and judicial adventurism.

[The Bill] does not define the term “civil rights and immunities.” What are such rights? One writer says civil rights are those which have no relation to the establishment, support, or maintenance of the Government. Another says they are the rights of a citizen; rights due from one citizen to another, the privation of which is a *civil injury* for which redress may be sought by a *civil action*. Other authors define all these terms in different ways, and assign to them larger or narrower definitions according to their views. Who shall settle these questions? Who shall define these terms? Their definition here by gentlemen on the floor is one thing; their definition after this bill shall have become a law will be quite another thing.<sup>208</sup>

Kerr’s arguments not only illustrate the deep fissures in the Thirty-Ninth Congress regarding the meaning of decision like *Corfield v. Coryell*, his concerns about the broad and undefined category of “civil rights” signaled a problem which ultimately threatened the passage of the Act.

## **B. John Bingham’s Opposition to the Civil Rights Bill**

Immediately following Kerr’s speech, John Bingham rose and moved that the terms “civil rights and immunities” be removed from the Bill. The following day, Bingham explained his reasons for doing so in a speech which illustrates his continued goal of protecting the bill of rights against state abridgment while maintaining the traditional separation of power between national and state government. Bingham’s commitment to federalism—a central part of his opposition to the Civil Rights Act—explains why he must have been particularly troubled by Hotchkiss’ claim that his original draft of the Fourteenth Amendment opened the door to federal regulation of civil rights in the states. Bingham opposed the Civil Rights Bill for the same reason.

According to Bingham, his proposed removal of the terms “civil rights and immunities” was an effort “to take from the bill what seems to me it’s oppressive and I might say its unjust provisions.”<sup>209</sup> Bingham reminded his colleagues that he did not oppose “any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in the Constitution. I know that the enforcement of the bill of rights is the want of the republic.”<sup>210</sup> Under the current Constitution, however, “the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State

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<sup>207</sup> Id. (quoting *Barron v. Baltimore*).

<sup>208</sup> Id. at 1270-71.

<sup>209</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1291 (March 9, 1866) (remarks of Rep. Bingham).

<sup>210</sup> Id.

tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States.”<sup>211</sup> This reservation of power was made clear by the Tenth Amendment: Because the Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States,” this left enforcement of the Bill “as the reserved power of the States, to be by them exercised.”<sup>212</sup>

Radical Republicans had argued that states should be required to respect all natural rights, including the principles of the Declaration of Independence and the catalogue of common law rights listed in Washington’s opinion in *Corfield v. Coryell*. Bingham rejected such a view as destructive of the basic federalist structure of the Constitution. “The prohibitions of power by the Constitution to the States,” Bingham explained “are *express* prohibitions, as that no State shall enter into any treaty, &c., or emit bills of credit, or pass any bill of attainder, &c. The Constitution does not prohibit States from the enactment of laws for the general government of the people within their respective limits.”<sup>213</sup> As much as Bingham shared “an earnest desire to have the bill of rights in your Constitution enforced everywhere,” he insisted “that it be enforced in accordance with the Constitution of my country.”<sup>214</sup>

Not only did the draft Civil Rights Bill purport to regulate rights listed in the Bill such as due process, the bill also regulated “civil rights.” This term swept well beyond the rights in the bill and included all manner of rights which properly fell within the control of the states. According to Bingham, “the term civil rights includes every right that “pertains to the citizen under the Constitution, laws and Government of this country,” including the political rights of suffrage.<sup>215</sup> The bill would thus prohibit state suffrage laws which discriminated on the basis of race—a fact that would affect almost every state in the Union.<sup>216</sup> Although Bingham desired “that every State should be just; it should be no respecter of persons,” remedying the situation required a constitutional amendment.<sup>217</sup>

To the extent that the Bill was limited to protecting *citizens* from deprivations of life, liberty and property without due process of law, Bingham believed that this wrongly departed from the language and principles of the Fifth Amendment which guaranteed the natural rights of due process to *all persons*.<sup>218</sup> Even if based on the Fifth Amendment, however, the Supreme Court had ruled that the Fifth Amendment limited the power of the federal government and not the states.<sup>219</sup> Although the original Freedman’s Bureau Bill had provided similar protections “in the insurrectionary states,” that bill had been limited both in its geographic scope (only rebel states) and in duration (ceasing upon “the restoration of those insurrectionary States to their constitutional relations with the United States”).<sup>220</sup> “But when peace is restored,” Bingham insisted, “justice is to be administered under the Constitution, according to the Constitution, and within the limits of the Constitution.”

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 1292.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

What is that limitation, sir? Simply this, that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your federal Constitution, is in the States, and not in the federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.<sup>221</sup>

Bingham closed his remarks with an extended paean to constitutional virtues of federalism. “To show that I am not mistaken on this subject,” Bingham read a passage from Chancellor James Kent, one of “those grand intellects who during life illustrated the jurisprudence of our country, and has left in his works a perpetual monument of his genius, his learning, and his wisdom”:

“The judicial power of the United States is necessarily limited to national objects. The vast field of the law of property, the very extensive head of equity jurisdiction, the principle rights and duties which flow from our civil and domestic relations fall within the control, and we might almost say the exclusive cognizance of the State governments. We look essentially to the State courts for protection to all these momentous interests. They touch, in their operation, every chord of human sympathy, and control our best destinies. It is their province to reward and to punish. Their blessings and their terrors will accompany us to the fireside, and be in constant activity before the public eye.”<sup>222</sup>

Bingham fully agreed with Kent’s praise of federalism. “Sir, I have always so learned our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.”<sup>223</sup> The draft Civil Rights Bill, however, shattered the idea of limited federal power and the reserved rights of the States. The Bill proposed “[t]o reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws.” Bingham agreed that “there should be no such inequality or discrimination even in the penalties for crime, but what power have you to correct it?”<sup>224</sup>

Bingham’s proposed deletion of the terms “civil rights and immunities” would allow Congress to “submit this proposition in its least objectionable form to the final decision of the Federal tribunals of the country.”<sup>225</sup> But even a Bill focused on the rights of due process in the Fifth Amendment subjects of life, liberty, and property still faced the problem of no enumerated federal power of enforcement. Thus, even though Congress adopted Bingham’s proposed rescission, Bingham still could not bring himself to vote for the amended Civil Rights Bill.<sup>226</sup>

Bingham’s argument is premised on the idea that the Constitution places some matters within the control of the federal government, while preserving others in the hands of the people in the

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<sup>221</sup> Id.

<sup>222</sup> Id. at 1292 (quoting from “1 Kent, Lecture 19, sect. 446”).

<sup>223</sup> Id. at 1293.

<sup>224</sup> Id.

<sup>225</sup> Id. at 1291.

<sup>226</sup> See id. at 1367 (Bingham voting against passage). Bingham also did not support the vote to override President Johnson’s veto of the Act. See id. at 1861 (vote on veto override, Bingham not voting).

states. Civil rights in general are matters for state regulation, and thus may differ from state to state. This was not only true under the original Constitution, Bingham had no desire to alter this arrangement through an amendment. Enumerated rights like those listed in the due process clause of the Fifth Amendment to the Constitution, on the other hand, were part of the national Bill of Rights which citizens of the United States had a right to expect throughout the United States. Bingham did desire an amendment to accomplish national protection of the Bill of Rights, but he believed Congress had no power to enforce such rights prior to an amendment. Finally, just as all persons could expect due process from the federal government, so all persons in the states should have the equal expectation that their life, liberty and property would not be deprived without due process of law. Once again, however, enforcing this natural right as a matter of law required an amendment which would extend such a right to all persons.

As he had done in the past, Bingham speaks of protecting the enumerated liberties in the federal Bill of Rights. There is no call for the nationalization of natural rights, and Bingham says nothing about *Corfield* and general civil rights other than to insist that state-conferred common law rights involved matters *rightfully* left to state control under the Tenth Amendment. This is not a grudging “we’ll make do with federalism until we can amend it out of the Constitution” speech. Bingham’s entire argument is based on federalist constitutional principles which he clearly values and which had been praised by prior legal “geniuses” like James Kent. However much states ought to do justice in their administration of law, Bingham believed that it remained an important aspect of the dualist Constitution that states retain control over the various subjects of the common law and civil rights—subject only to the “express” limitations on state action enumerated in the Constitution. As he had attempted to accomplish in his initial draft of the Fourteenth Amendment, Bingham again sought a middle course that protected rights in the states while maintaining a federalist government of limited national power.

### **C. James Wilson’s Second Speech Defending the Civil Rights Bill: The Rights of Citizens of the United States**

Bingham’s concerns about the terms “civil rights and immunities” infringing upon the reserved rights of the states was repeated by other members of the House.<sup>227</sup> In light of the defeat of the

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<sup>227</sup> According to George Latham:

This section provides further ‘That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.’ Though by the wording of this clause it might not refer to discriminations by the State or other local law, yet it is very evident from its connections, and from the entire bill, that its reference is to such discriminations. No one, I presume, doubts the power of Congress to place all the inhabitants of the United States on an equal footing as to all matters within the legitimate scope of congressional legislation, and consequently Congress may provide that there shall be no discrimination on account of race, color or previous condition of slavery in civil rights or immunities which may be constitutionally defined or regulated by Congress; or in other words, that all may stand upon an equal footing in the Federal courts. But as the right to define and regulate the “civil rights and immunities” of the inhabitants in the several States is not among “the powers delegated to the United States by the Constitution, nor prohibited by it to the States,” it is by the Tenth Amendment “reserved to the States respectively or to the people.” My conviction, then, is that Congress has no right under the Constitution to interfere with the internal policy of the several States so as to define and regulate the “civil rights and immunities among the inhabitants” therein. If I am correct in this opinion, this clause is without constitutional warrant, and the balance of the section, being based upon it, necessarily falls with it.

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Freedman's Bureau Bill, as well as the reaction to Bingham's proposed Amendment, it was incumbent on the supporters of the Act to respond to claims that the Civil Rights Bill exceeded federal power and unjustifiably intruded upon the properly reserved rights of the States.

Perhaps sensing that his original remarks had not helped the prospects of the Civil Rights Bill, on March 9, James Wilson, returned to the floor and delivered an altogether different defense for the Act. This time, Wilson used reasoning that was much more likely to persuade the moderate and conservative Republicans. In his initial speech, Wilson had stressed federal power to protect the state-conferred common law rights "of citizens in the states" such as those protected under Article IV and as discussed in Washington's opinion in *Corfield v. Coryell*. In this second speech, Wilson avoided any mention of *Corfield* and nationalizing Article IV privileges and immunities of citizens in the several states. Instead, Wilson now claimed that the Act protected only "those rights which belong to men as *citizens of the United States* and none other" such as those rights protected by the Fifth Amendment to the federal Constitution.<sup>228</sup> Wilson's move away from Article IV rights "of citizens in the several states" and towards the constitutionally enumerated rights of "citizens of the United States" foreshadows a similar shift in language by John Bingham in his second and final draft of the Fourteenth Amendment.

Recognizing the danger posed by the opposition of moderates like John Bingham, Wilson focused his remarks on Bingham's federalism-based concerns about the Civil Rights Act:

The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the Government; that in the term are embraced those rights which belong to a citizen of a State as such; and that this bill is not intended mere to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. My friend is too sound a lawyer, is too well versed in the Constitution of his country, to endorse that proposition on calm and deliberate consideration. He knows, as every man knows, ***that this bill refers to those rights which belong to men as citizens of the United States and none other***; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as a result of which this bill can only relate to matters within the control of Congress.<sup>229</sup>

In the above passage, Wilson distinguishes "those rights which belong to a citizen of a state as such" and "those rights which belong to men as citizens of the United States." Or, to use the language of Bill, Wilson insisted that there was a difference between the "civil rights and immunities of citizens of the several states" and the "civil rights and immunities of citizens of the United States." Only the latter involved a matter "within the control of Congress."

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I consider this as one of a series of measures which have been introduced into this Congress, which, if adopted, would change not only the entire policy, but the very form of our government, by a completely centralization of all power in the national government, and as most dangerous to the liberties of the people and the reserved rights of the States.

Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1295 (March 9, 1866) (Remarks of Rep. George R. Latham).

<sup>228</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1294 (March 9, 1866) (Remarks of James Wilson).

<sup>229</sup> *Id.*

Education laws, jury laws, and the laws of suffrage, on the other hand, were rights “which properly and rightfully depend on state regulation and laws.”<sup>230</sup>

Having limited the Civil Rights Act to the civil rights and immunities of citizens of the United States, Wilson proceeded to define “the great civil rights to which the first section of the bill refers.” Abandoning his earlier invocation of the rights of common law, Wilson now invoked the federal Bill of Rights:

I find in the bill of rights which the gentleman [John Bingham] desires to have enforced by an amendment to the Constitution that “no person shall be deprived of life, liberty, or property without due process of law.” I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.<sup>231</sup>

By turning the focus of the Civil Rights Act away from the nationalization of the common law and towards the protection of the Fifth Amendment subjects of life, liberty and property, Wilson sought to bring his defense of the Act into line with the goals of moderate Republicans. Republicans like Hale believed that the Bill *already* bound the states, and men like Bingham believed that, if this were not the case, then the Bill of Rights *ought* to bind the states. Where Bingham believed federal enforcement of the Bill required an amendment, Wilson believed such power already existed under the (previously despised) doctrine of *Prigg*.<sup>232</sup>

Now sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen possessed of them is entitled to a remedy. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.<sup>233</sup>

Wilson’s turn towards the Bill of Rights in defense of the Civil Rights Act is important for a number of reasons. To begin with, it illustrates the uncontroversial nature of the idea that States ought to respect the Bill of Rights—an idea that had grown increasingly accepted among northern antebellum legal and political writers. Wilson relied on the assumed support of his colleagues for a nationalized Bill in his efforts to secure support for the Civil Rights Act. Secondly, Wilson invoked the antebellum distinction between the rights and immunities “of citizens of the several states” and the rights and immunities “of citizens of the United States.”

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Robert Kaczorowsky argues that Wilson’s view of *Prigg* and *McCulloch* represents the Republican’s theory of congressional power to enforce the Bill and, therefore, the 14<sup>th</sup> Amendment. See Robert J. Kaczorowsky, Congress’ Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted, Harv. J. Legis. at 201-02, 03 (2005) (“Wilson concluded the point with a statement of the social contract: these protective remedies, he said, “must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the government.” The framers of the Civil Rights Act and the Fourteenth Amendment thus affirmed the theories of the Marshall and Taney Courts that attributed to Congress the plenary power and the constitutional duty to enforce the rights secured by the Constitution, theories which also considered the duty to enforce constitutional rights to be one of the ends for which the federal government was established.”). Kaczorowsky’s account, however, leaves out the counter-views of John Bingham, the objections to the original draft, the changes in the draft, and Wilson’s own concessions regarding the changes.

<sup>233</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1294.

State-conferred civil rights such as those covered by Article IV constituted the former, while the provisions of the Fifth Amendment and the Bill of Rights constituted the latter. As we shall see, Bingham's second draft of the Fourteenth Amendment abandoned the language of Article IV and invoked the "privileges or immunities of citizens of the United States"—rights which Bingham insisted were altogether different from the state-conferred rights protected under Article IV and which included the protections enumerated in the Bill of Rights. Finally, Wilson also adopted the moderate view that there remained an area of civil rights which was *not* properly a matter of federal cognizance. By doing so, Wilson accepted (as a matter of political reality, if not personal preference) the basic federalist structure of the Constitution—a necessary move if he was to secure the support of the moderate and conservative Republicans.

#### **D. Deleting “civil rights and immunities” from the Civil Rights Act**

In his speech, Wilson insisted that the “civil rights and immunities” language in the Act would receive a narrow interpretation and he emphasized the relationship between the rights specifically protected in the Act and the Fifth Amendment’s protection of life, liberty and property. This theme of narrow interpretation and emphasis on constitutionally enumerated rights was echoed by later supporters as well. Ohio Representative Samuel Shellabarger, for example, insisted that “if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people.” Instead, the Act did nothing more than protect “indispensable rights of American citizenship” such as “the right to petition and the right of protection in such property as is lawful for that particular citizen to own.”<sup>234</sup> The right to petition is found in the First Amendment to the Constitution, while the rights of due process in the protection of property is found in the Fifth Amendment.<sup>235</sup> Even here, Shellabarger believed that the substantive content of rights was a matter of state regulation, subject only to the Acts requirement that such rights be equally protected.

Both Wilson and Shellabarger’s arguments presumed a narrow construction of the Act’s reference to protecting “civil rights and immunities” in the states. Other members, however, were not so sanguine about such open-ended phrases receiving a narrow construction once enacted. On its face, the Act seemed to presume congressional power to define and protect *all* civil rights, whatever their nature and regardless of whether such rights were political in nature or were derived from the common law rather than constitutional text. Concerns that such a broad reading would obliterate the reserved powers and rights of the people in the states led proponents of the Act to delete the terms “civil rights and immunities” from the first section of the Bill. According to James Wilson:

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<sup>234</sup> *Id.* at 1293 (ironically quoting Chief Justice Taney).

<sup>235</sup> See also, remarks of Rep. Hart:

The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall “establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty;” a government whose “citizens shall be entitled to all privileges and immunities of other citizens;” where “no law shall be made prohibiting the free exercise of religion;” where “the right of the people to keep and bear arms shall not be infringed;” where “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated,” and where “no person shall be deprived of life, liberty, or property without due process of law.

*Id.* at 1629.

When the bill was up before I did offer such an amendment, that nothing in the bill contained should be construed to affect the rights of suffrage in the several States. I will explain. Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To obviate that difficulty *and the difficulty growing out of any other construction beyond the specific rights named in the section*, our amendment strikes out all of those general terms and leaves the bill with the rights specified in this section.”

Although scholars have noted that the deletion of the “civil rights and immunities” language came in response to concerns about black suffrage,<sup>236</sup> Wilson expressly notes that objection to the term went beyond matters of suffrage and included federalism-based concerns regarding federal power to regulate “other rights” beyond those specific civil rights listed in the Bill.

Following President Johnson’s veto of the amended version of the Civil Rights Act, Senator Lyman Trumbull delivered an extended speech defending the Act against Johnson’s objections that the Act expanded federal power beyond the proper subjects of national regulation.<sup>237</sup> As had Wilson, Trumbull avoided any mention of *Corfield* and Justice Washington’s troubling reference to suffrage as a protected right. Although Trumbull insisted that the federal government had power to protect the fundamental civil rights of American citizens, he denied that these rights included political rights such as suffrage. “The right to vote and hold office in the States,” explained Trumbull, “depends upon the legislation of the various States.”<sup>238</sup>

In describing the rights of American citizenship, Trumbull followed the example of Wilson and invoked the rights listed in the Fifth Amendment. According to Trumbull, the rights of American citizenship were the fundamental natural rights of equal protection of one’s life, liberty and property. Although Trumbull referred to Kent’s discussion of Article IV Privileges and Immunities as an example of the fundamental natural rights of citizenship, he clearly accepted Kent’s view that such rights were not substantive, but involved only the principle of non-discrimination:

This bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.<sup>239</sup>

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<sup>236</sup> See, e.g., Harrison, *Reconstructing the Privileges or Immunities Clause supra* note 7 at 1405 n.64.

<sup>237</sup> See In his Veto message, after warning that conceding power to prohibit racial discrimination would concede the power to regulate all forms of discrimination in the listed subjects, President Johnson declared:

Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States. They are matters which in each State concern the domestic condition of its people, varying in each according to its own peculiar circumstances, and the safety and well being of its own citizens. I do not mean to say that upon all these subjects there are not federal restraints, as for instance, in the State power of legislation over contracts . . . . But where can we find a federal prohibition against the power of any State to discriminate, as do most of them, between aliens and citizens, between artificial persons called corporations and natural persons, in the right to hold real estate?

President Johnson’s Veto Message re Civil Rights Bill, *Cong. Globe*, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1680.

<sup>238</sup> *Cong. Globe*, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess., 1757 (remarks of Senator Trumbull).

<sup>239</sup> *Id.* at 1760.

Like Wilson, Trumbull sought to assure moderates and conservative Republicans that the Bill would respect the basic structure of federalism: “This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most states of the Union.”<sup>240</sup> Also like Wilson, Trumbull linked the non-discrimination provisions of the Act to rights protected under the Fifth Amendment. After quoting Blackstone’s admonition that the restraints on civil liberty “should be *equal to all*,” Trumbull then cited the treatise of Chancellor Kent:

“The privileges and immunities conceded by the Constitution of the United States to citizens of the several States were to be confined to those which were, in their nature, fundamental, and belonged of right to the citizens of all free governments. Such are the rights of protection of life and liberty, and to acquire and enjoy property.”<sup>241</sup>

Trumbull’s argument presumes a close link between natural rights and the right to equal protection of the rights of life, liberty and property. As we shall see, Bingham shared this view and extended such rights to *all persons* in his final version of the Fourteenth Amendment. At this point in the debates, however, advocates of the Civil Rights Act claimed no more than the power to protect United States citizens in the exercise of *their* natural rights. In seeking to secure the needed votes, proponents like Trumbull and Wilson narrowed their definition of the rights of American citizenship to rights expressly enumerated in the Bill of Rights.<sup>242</sup> Even with the assurance of maintaining the principle of limited federal power and the reserved rights of the states, the vote to over-ride Johnson’s veto succeeded by only the narrowest of margins.<sup>243</sup>

Serious concerns remained whether Congress had power to pass the Act, even narrowly construed. John Bingham, for example, voted against the Act and refused to support overriding Johnson’s veto. Other members voiced their concerns as well. As Congress took up consideration of a new draft of the Fourteenth Amendment, it did so facing the possibility that the Civil Rights Act might be struck down by the Supreme Court as exceeding federal power. As other scholars have noted, many members of the Thirty-Ninth Congress (though apparently not John Bingham<sup>244</sup>) looked to the Fourteenth Amendment as establishing a source of federal

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<sup>240</sup> *Id.* at 1761.

<sup>241</sup> *Id.* at 1757.

<sup>242</sup> Ohio Congressman Lawrence delivered a speech on April 7, 1866, in which he followed the general theory of Wilson in supporting an override of Johnson’s veto, including the arguments that 1) native born persons are citizens, 2) the Privileges and Immunities Clause protects citizens in their fundamental rights in all states, including their own, 3) fundamental rights includes life, liberty and property, and 4) Congress has implied power to enforce such rights under the court’s reading of congressional power in *Prigg* regarding the fugitive slave clause. See Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1832-37.

<sup>243</sup> According to Earl Maltz, the senate voted on April 6, 1866, to override Johnson’s veto “by a slim 33 to 15 margin.” See Maltz, *supra* note 21 at 70.

<sup>244</sup> This fact alone seems to call into question efforts to use the Civil Rights Act as a tool for understanding the terms of Section One of the Fourteenth Amendment. The two provisions were proposed and debated on separate tracks and the man who drafted Section One, John Bingham, refused to support the Civil Rights Act. This does not render the Civil Rights Act irrelevant to the search for the original meaning of Section One—clearly some members believed there was a link between the two. The specific language of Section One, however, was not drafted with the Civil Rights Act specifically in mind. It is not surprising, therefore, to find individual members later taking different positions on exactly which aspect of Section One authorized the Civil Rights Act. Some looked to the Equal Protection Clause (Bingham) while others looked to the Privileges

authority to pass the Civil Rights Act. What scholars have generally missed, however, is that the final version of the Act was not linked to *Corfield* and some conception of fundamental common law rights. Instead, supporters of the Act expressly linked its provisions to the natural right of equal protection in the exercise of one’s right to life, liberty and property—rights enumerated in the Fifth Amendment and declared to be the rights of citizens of the United States.

## V. JOHN BINGHAM’S SECOND DRAFT OF THE FOURTEENTH AMENDMENT.

### A. Creating the Second Draft

When the Joint Committee on Reconstruction renewed consideration of what would become the Fourteenth Amendment, it did so fully aware of their colleagues’ objections to national control of common law civil rights. Concerns about such broad federal power doomed Bingham’s initial draft and forced a change in language to the Civil Rights Act. Any new draft of the Fourteenth Amendment would have to avoid raising similar concerns. There is no record of the discussions by members of the Joint Committee regarding their views on the various forms of the new draft, but we do have a record of the drafts they considered, as well as the votes of individual members. The initial draft originated as a proposal by Indiana Congressman Robert Dale Owen<sup>245</sup>:

“Section 1. No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.”<sup>246</sup>

John Bingham immediately moved to amend the proposal by broadening the equal protection principle beyond race and adding a substantive liberty from the Bill of Rights: “Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.”<sup>247</sup> After Bingham’s motion to amend failed, he joined a majority vote in favor of the original proposal.<sup>248</sup>

Owen’s proposal closely tracked the suggestion of Giles Hotchkiss who had opposed Bingham’s original proposal on the grounds that 1) he presumed Bingham wished only to require equal protection of civil rights in the states but, 2) Bingham’s original proposal left both the creation and enforcement of the subject in the politically driven hands of Congress rather than specifically creating a constitutional *right* of equal protection which Congress could only enforce. The Owens proposal remedied these problems by expressly binding the states to protect equal rights and providing congressional enforcement power in a separate section. Although the new draft met Hotchkiss’s concerns, Hotchkiss himself had been wrong about Bingham’s intentions regarding the original draft amendment. Although Bingham’s original draft used the language of Article IV—a provisions generally regarded as an equal protection provision—Bingham repeatedly expressed his desire to protect the substantive liberties listed in the Bill of Rights. As drafted, the Owen’s proposal fell far short of Bingham’s goal, thus

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or Immunities Clause. It is likely there was no consensus position on the matter. I plan to focus on this particular issue in some detail in the third part of this project.

<sup>245</sup> For a discussion of Robert Owen and his presentment of a draft Fourteenth Amendment to Thaddeus Stevens, see Epps, *supra* note 245 at 198-99.

<sup>246</sup> Journal of the Joint Committee, *supra* note 93 at 28.

<sup>247</sup> *Id.* at 29.

<sup>248</sup> *Id.*

Bingham's immediate, if unsuccessful, effort to add the substantive right of just compensation for government takings of private property.

Having failed in his initial attempt to add language protecting substantive rights, Bingham ultimately succeeded in convincing his fellow committee members to replace Owen's proposal with an entirely different proposal:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.<sup>249</sup>

Bingham's amendment survived a back-and-forth series of votes which first adopted, then rejected, then readopted his proposal.<sup>250</sup> This new draft followed Hotchkiss' suggestion that the provision use the language of positive constitutional rights, rather than granting federal subject matter authority. Bingham also used language that expressly bound the states. As he later explained, his reason for doing so was in order to follow the rule of construction announced by the Supreme Court in *Barron v. Baltimore* whereby constitutional language is presumed *not* to bind the states unless expressly stated in the text. Finally, in a move which reflected federalism concerns he had raised in regard to the early drafts of the Civil Rights Act, Bingham's new version of the Fourteenth Amendment removed the general reference to "civil rights"

Bingham's final version of the Fourteenth Amendment also distinguished between the natural rights of "all persons" and the particular "privileges and immunities" of "citizens." As did most other Republicans, and as he had explained during the debates over the Civil Rights Act, Bingham believed that *all* persons had a natural right to equal protection of the law and due process in matters relating to life, liberty and property. The rights of citizens of the United States included all such natural rights *in addition* to those rights conferred as a matter of American citizenship. In his first draft of the Fourteenth Amendment, Bingham had attempted to protect the rights of American citizens by using the through the exact language of Article IV—language which Bingham had insisted included the unstated ellipsis "of citizens of the United States." In this second draft, however, Bingham abandoned the language of Article IV and instead embraced the previously unstated ellipsis. His proposed amendment now expressly protected "the privileges or immunities of *citizens of the United States*."

This was no small change. In his remarks defending his first draft of the Fourteenth Amendment, Bingham had stressed how his proposal tracked the specific language of the original Constitution. Using the language of Article IV and the Due Process Clause of the Fifth Amendment helped make plausible Bingham's claim that he was not taking away any rights which belonged to the states under the original Constitution. But that language and the argument supporting it had been tested and found wanting in the first debate. If Bingham wished to protect the privileges and immunities of *citizens of the United States*, his amendment would have to say so explicitly. Bingham's goal of protecting the natural rights of all persons and the substantive rights of American citizens thus required new language and an argument that focused on something other than Article IV.

## **B. Bingham's Discussion of the Second Draft in the House of Representative**

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<sup>249</sup> Id. at 30.

<sup>250</sup> Id. For an account of the various votes, see Maltz, *supra* note 21 at 82.

When John Bingham presented his view of the new version of the Fourteenth Amendment to the House of Representatives on May 10, it had been only a few weeks since the failure of his first draft. It is not clear whether Bingham at this point had personally changed his mind about the most persuasive understanding of Article IV, or whether he simply altered the language to reflect the predominate views of his colleagues in the Thirty-Ninth Congress. In his speech explaining the new draft, for example, one can find remnants of his earlier ellipsis view of Article IV.<sup>251</sup> One thing, however, is clear. Bingham no longer believed that Article IV was relevant to generating support for the new amendment. Unlike his initial speech, Bingham now ignores Article IV. Instead, in discussing the privileges and immunities of citizens of the United States, Bingham invoked liberties actually listed in the federal Constitution, including provisions in the Bill of Rights. As he explained a few months later, his second draft guaranteed that “no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of *every article and section of the Constitution*.”<sup>252</sup>

In a rarely noted passage at the beginning of his speech, Bingham telegraphed his theory of the Privileges or Immunities of Citizens of the United States. Here, Bingham pointed out that, although “[t]he franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives in Congress or presidential electors,” the people residing in states which had joined the rebellion could not exercise such rights until Congress determined the appropriate conditions for readmission.<sup>253</sup> Bingham’s reference to the textually granted right of federal representation as a privilege and immunity of citizens of the United States echoes the arguments of Bingham’s legal hero, Daniel Webster. During the debates over the admission of Missouri, Webster had insisted that the rights of citizens of the United States were those expressly listed in the federal Constitution, such as the right of the people of each state to elect representatives to the federal legislature.<sup>254</sup> Following Webster’s textualist understanding of federal rights, Bingham’s explained that the right to vote or run for federal office was “provided for and guaranteed *in your Constitution*.”<sup>255</sup> In this, Bingham shared the views of other antebellum political theorists who considered all textually granted rights (whether in Article I or in the Bill of Rights) constituted the federal rights, privileges and immunities of citizens of the United States.

As far as suffrage was concerned, Bingham adopted the moderate position that, once readmitted, the regulation of the federal franchise would be “exclusively under the control of the States.”<sup>256</sup> This was in keeping with Bingham’s consistently federalist view of the

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<sup>251</sup> See *supra* note \_\_ and accompanying text.

<sup>252</sup> Cong. Globe, 39th Cong., 2d Sess. 811 (1867).

<sup>253</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2542.

<sup>254</sup> According to Daniel Webster:

The obvious meaning therefore of the clause [Article III] is, that the rights derived under the federal Constitution shall be enjoyed by the inhabitants of Louisiana in the same manner as by the citizens of other States. The United States, by the Constitution, are bound to guarantee to every State in the Union a republican form of government; and the inhabitants of Louisiana are entitled, when a State, to this guarantee. Each State has a right to two senators, and to representatives according to a certain enumeration of population pointed out in the Constitution. The inhabitants of Louisiana, upon their admission into the Union, are also entitled to these privileges.

Daniel Webster, A Memorial to the Congress of the United States, on the subject of restraining the increase of slavery in new states to be admitted to the Union (Dec. 3, 1819) (Early American Imprints, Series 2, no. 47390). See also, Lash, Privileges and Immunities as an Antebellum Term of Art, *supra* note 84.

<sup>255</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2542.

<sup>256</sup> *Id.*

Constitution; in addition to individual rights, the people also retained the right to local self government. Absent a constitutional amendment, the issue of suffrage remained one of these retained regulatory rights. Unlike radical Republicans who excoriated the very idea of states' rights, Bingham believed the independent sovereignty of the states was a critical aspect of properly functioning constitutional government. Thus, according to Bingham, the purpose of this new draft of the Fourteenth Amendment was "to secure the safety of the Republic, *the equality of the States*, and the equal rights of all the people under the sanctions of inviolable law."<sup>257</sup> As Bingham declared a few months later, "I would say once for all, that this dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it."<sup>258</sup>

Reconstructing the Union, however, required an amendment which would ensure protection of basic rights against state action. According to Bingham, "[t]here was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply":

What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.<sup>259</sup>

As he had insisted when defending his original draft, Bingham once again declared "that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."<sup>260</sup> To Bingham, equal protection of the law was a natural right belonging to "all persons" which no state could rightly deny. This natural right was expressly protected in the new version of Section One under the Due Process and Equal Protection Clauses. Section Five of the new proposal granted Congress power to enforce those rights. This enforcement power was broad enough to cover the non-discrimination provisions of the Civil Rights Act—a fact Congress took advantage of by passing the Civil Rights Act following the ratification of the Fourteenth Amendment.<sup>261</sup>

As he had done in his speech defending his earlier draft of the Fourteenth Amendment, Bingham distinguished the Privileges or Immunities of United States citizens from the natural rights which belong to "all persons." Although the protections of due process and equal protection should be extended to all regardless of citizenship, the privileges or immunities of *citizens* of the United States embraced a set of substantive rights. Although Congress now had the power to enforce such rights against state abridgment, Bingham continued to insist that his proposal "takes from no State any right that ever pertained to it." This obviously would not be true if the entire category of unenumerated natural and civil rights were to be nationalized and placed under federal control. Bingham's claim about not intruding upon states rights was plausible only because he continually limited the privileges and immunities of citizens of the

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<sup>257</sup> *Id.*

<sup>258</sup> Cong. Globe, 39<sup>th</sup> Cong., 2d Sess. at 450 (Jan. 14, 1867).

<sup>259</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2542.

<sup>260</sup> *Id.*

<sup>261</sup> See David Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 463 (2008).

United States to those rights and privileges which were expressly listed in the original Constitution. For example, Bingham described federal franchise rights as among the “privileges of citizens of the United States” which were “provided for and guaranteed *in your Constitution*.”<sup>262</sup> Bingham had also long insisted that the liberties expressly enumerated in the Bill of Rights also constituted privileges of citizens of the United States. In defending the necessity for this new amendment, Bingham continued to make this claim.

[I]t has been suggested, not here, but elsewhere, if this section does not confer suffrage the need of it is not perceived. To all such I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatsoever. *Contrary to the express letter of your Constitution, “cruel and unusual punishments” have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.*<sup>263</sup>

Bingham explained that among the various privileges and immunities protected under Article IV, citizens had the “the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.”<sup>264</sup> This combination right and duty had been denied those citizens residing in states such as South Carolina during the Nullification crisis when the state demanded that its citizens “abjure their allegiance to every other government or authority than that of the State of South Carolina.”<sup>265</sup> Bingham’s point was not that South Carolina somehow violated Article IV. His central argument was that punishing someone for declaring their allegiance to the national government constituted a “cruel and unusual punishment” in violation of one of the “express” provisions in the Bill of Rights--the Eight Amendment to the Federal Constitution. Bingham assumed that states were obligated to respect the rights listed in the federal Constitution, but that until now there had been no power to force them to do so—a problem remedied by this new draft of the Fourteenth Amendment:

It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the *degrading punishment* inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent it hath, no more.<sup>266</sup>

As he had in his first speech, Bingham insisted that requiring the States to conform to the liberties expressly listed in the federal Constitution did not infringe on any reserved right of the States. Although Bingham’s claim is almost certainly incorrect as a matter of original understanding, the idea that states were, or at least ought to be, so bound had gained considerable traction during the antebellum period. In pursuing his goal of protecting the Bill of Rights against State action, Bingham originally had used the language of Article IV. None of colleagues, however, appeared to understand his “ellipsis” argument regarding Article IV.

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<sup>262</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2542.

<sup>263</sup> Id.

<sup>264</sup> Id. at 2542-43.

<sup>265</sup> Id. at 2543.

<sup>266</sup> Id.

Instead, most of the members of the Thirty-Ninth Congress read the language of Article IV in light of antebellum case law which interpreted the provision as doing nothing more than providing a degree of equal protection for state conferred rights. With his new draft of the Fourteenth Amendment, Bingham's goal of protecting the Bill of Rights remained the same, but his choice of language to accomplish that goal had changed. Ensuring that his amendment would be understood as protecting the rights of citizens of the United States such as those listed in the Bill of Rights forced Bingham to abandon the language of Article IV (and his obscure "ellipsis" argument) and instead clearly and expressly declare that states were bound to protect the "the privileges or immunities of citizens of the United States."

Bingham closed his discussion of Section One by repeating his claim that this newly drafted section *only* protected federal privileges and immunities such as those listed in the Bill of Rights. "That is the extent it hath, no more."<sup>267</sup> Bingham refused to join those who sought to nationalize the substantive content of natural rights or general common law civil rights. As he had insisted during the debates over the Civil Rights Act, the substance of such rights were left to state control, subject only to the requirement that they be protected equally with the procedural rights of due process. Anything more would not only contradict Bingham's own theory of divided government, it would doom the amendment by alienating the votes of moderate and conservative Republicans.

On the other hand, Bingham appears to simply *declare* that expressly enumerated constitutional rights such as the ban on cruel and unusual punishments are rights which states must respect. He has abandoned his earlier convoluted "ellipsis" argument regarding Article IV and the Bill and instead simply presumes that his colleagues agree with his claim that rights listed in the Bill such as the Eighth Amendment are federal rights which ought to be protected against state action. There is a conundrum here, for if Bingham is claiming the Bill had always bound the states, he is almost certainly incorrect as a matter of historical understanding.<sup>268</sup> On the other hand, if Bingham's statements represent a broadly held public understanding that such rights *were in fact* privileges and immunities of United States citizens, then however incorrect as a matter of original understanding, this was the view constitutionalized through the adoption of the Fourteenth Amendment.<sup>269</sup>

### C. The Speech of Jacob Howard Introducing the Second Draft to the Senate

Probably the most studied speech of the Thirty-Ninth Congress regarding the Fourteenth Amendment is that of Michigan's Republican Senator Jacob Howard. Howard was a member of the Joint Committee which adopted Bingham's final draft of Section One and, due to an unexpected change in circumstances, it fell upon Howard's shoulders to introduce the Amendment to the full Senate. The original plan had been for Senator William Pitt Fessenden to present the amendment, but Fessenden had suddenly fallen ill, leaving Howard to serve as a last-minute stand-in. Despite Howard's own confession that he was not the best person to explain the thinking behind the Joint Committee's proposal, scholars have generally relied heavily on his remarks as representing not only the thinking of the Committee, but the Thirty-Ninth Congress as a whole—and beyond.

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<sup>267</sup> Id.

<sup>268</sup> See, Amar, THE BILL OF RIGHTS, *supra* note 5 at 33.

<sup>269</sup> Whether such a view actually *was* part of the public understanding of the Fourteenth Amendment will be the subject of a subsequent article.

Howard's speech seems to have been considered "good enough" to his fellow Senators on the Joint Committee, for it went uninterrupted at the time of its delivery and uncontradicted in the debates and speeches which followed.<sup>270</sup> Still, the last minute nature of his speech counsels a degree of caution, and perhaps a degree of charity, in considering the place of Howard's remarks in the canon of evidence regarding the original understanding of the Privileges or Immunities Clause.

Howard began by apologizing for Fessenden's absence; he had hoped that Fessenden "should take the lead, and the prominent lead, in the conduct of this discussion."<sup>271</sup> Nevertheless, Howard promised to present "in a very succinct way, the views and the motives which influenced that committee, so far as I understand those views and motives, in presenting the report which is now before us for consideration, and the ends it aims to accomplish."<sup>272</sup>

Beginning with the Privileges or Immunities Clause, Howard explained that "[t]he first clause of this section relates to the privileges and immunities of the citizens of the United States as such, and as distinguished from all other persons who are not citizens of the United States."<sup>273</sup> Conceding that "[i]t is not, perhaps, very easy to define with accuracy what is meant by the expression, 'citizen of the United States,'"<sup>274</sup> Howard did his best to recount how the Founders had approached the issue of national citizenship. Because it had been possible that the original states might treat visitors from other "foreign" states as aliens, Howard explained, the Founders had added Article IV to the Constitution "[w]ith a view to prevent such confusion and disorder, and to put the citizens of the several states on an equality with each other as to all fundamental rights."

The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. . . . They are, by constitutional right, entitled to these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union.<sup>275</sup>

This was not the same "ipso facto" argument regarding Article put forth by John Bingham during the debates of the initial draft. Howard here was simply echoing the discussion of Article IV found in Joseph Story's Commentaries on the Constitution. According to Story, the Privileges and Immunities Clause of Article IV established a kind of national citizenship since citizens in the states were, "ipso facto," citizens of the United States.<sup>276</sup>

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<sup>270</sup> According to a New York Times editorial, Howard's speech was "frank and satisfactory. His exposition of the considerations which led the Committee to seek the protection, by a Constitutional declaration, of the privileges and immunities of the citizens of the several States of the Union, [sic; no opening quotation mark in original] was clear and cogent. To this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance." Editorial, The Reconstruction Committee's Amendment in the Senate, N.Y. Times, May 25, 1866, at 4. See also Bryan H. Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67, 68 Ohio St. L. J. 1509, 1577 (2007).

<sup>271</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2764-65 (May 23, 1866).

<sup>272</sup> Id. at 2765.

<sup>273</sup> Id.

<sup>274</sup> Id.

<sup>275</sup> Id.

<sup>276</sup> See, Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 565-66 (1833) (Reprint, Rothman 1999).

In fact, Howard declined to analyze the particular content of Article IV privileges and immunities. According to Howard, such a discussion was not worth the time and, presumably, was of little current importance to the members of the Thirty-Ninth Congress:

It would be a curious question to solve what are the privileges and immunities of the citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution for some good purpose. It certainly has in view some results beneficial to the citizens of the several states or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or the extent of the privileges and immunities thus guaranteed. Indeed, if my recollection serves me, that court, on a certain occasion not many years since, when this question seemed to present itself to them, very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise.<sup>277</sup>

If Section One proposed to *nationalize* the corpus of state-conferred rights covered by Article IV and (under Section 5) authorize congressional regulation of the same, the specific content of Article IV rights would have been a subject of tremendous importance to the Senate. Howard's dismissive treatment of Article IV privileges and immunities (exploring such rights would constitute a "barren" discussion) suggests nothing so momentous was at hand.

Rather than defining Article IV rights, Howard rather weakly suggests that Article IV "has in view *some* results beneficial to the citizens of the several states or it would not be found there."<sup>278</sup> Instead, Howard then referred the Senate to Justice Washington's opinion in *Corfield* which, he explained, probably represented the approach the Supreme Court would take should it find itself having to define Article IV. After quoting Washington's "fundamental rights" passage in *Corfield*, Howard then presented his view of the rights protected under the Privileges or Immunities Clause of Section One. Because this passage has played such an important role in Fourteenth Amendment scholarship, it warrants an extended quotation:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution.; such as the freedom of speech and of the press; the rights of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here are 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; and it is a fact well worthy of attention that the

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<sup>277</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2765.

<sup>278</sup> Id. (emphasis added).

course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint of prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.<sup>279</sup>

From the above, it appears that Howard read the Privileges or Immunities Clause as protecting rights listed both in Article IV as well as the first eight amendments to the Constitution. For that reason, scholars have pointed to Howard's speech as evidence the members of the Thirty-Ninth Congress believed they were nationalizing both the Bill of Rights and Justice Washington's list of natural and common law rights from *Corfield*.<sup>280</sup> Putting aside the questionable attribution of Howard's views to the rest of the Joint Committee, much less the full Thirty-Ninth Congress, there actually is nothing in Howard's speech which necessarily indicates that he read Section One as transforming Article IV privileges and immunities into substantive national rights. To begin with, the nationalization of *Corfieldian* common law rights was opposed by the moderate and conservative Republicans. If Howard was trying to claim this would be the result of adopting Section One, then if his colleagues believed him this would have almost certainly doomed the amendment.

There is, however, an alternative explanation of Howard's invocation of *Corfield* which scholars seem not to have considered. Howard may have viewed the Privileges or Immunities Clause of Section One as including both the equal protection rights of Article IV and the substantive "personal rights" of the first eight amendments. This view fits with the antebellum understanding of "privileges and immunities of citizens of the United States." Daniel Webster and other antebellum abolitionist writers had insisted that federal rights and immunities were those listed in the Constitution, including the rights of representation in Article I and the right to access federal courts listed in Article III.<sup>281</sup> In his commentaries, Joseph Story also had described Article IV rights as belonging to "citizens of the United States," as had antebellum courts.<sup>282</sup> This reading did not treat Article IV rights as substantive national rights. Instead, it simply reflected the fact that citizens of the United States had a right of equal access to a limited set of state-conferred rights when traveling to a state other than their home state. Treating the equal protection principle of Article IV as one of the constitutionally enumerated Privileges and Immunities of citizens of the United States also fits with Bingham's speech introducing Section One to the House, in particular Bingham's assertion that the amendment threatened none of the reserved rights and powers of the States. Finally, and most importantly, federal enforcement of this traditional reading of Article IV would not have threatened the successful passage of the Amendment. Indeed, it would explain Howard's nonchalant treatment of the issue.

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<sup>279</sup> Id.

<sup>280</sup> See, e.g., Daniel Farber, *Constitutional Cadenzas*, 56 Drake L. Rev. 833, 842-43 (2008) ("The debates confirm that, by referring to privileges or immunities, the supporters of the Fourteenth Amendment were drawing a link to the 'P & I' Clause of the original Constitution . . . . In the House, Bingham explained that the effect of the Amendment was "to protect by national law . . . the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." In introducing the Fourteenth Amendment in the Senate, Senator Howard emphasized the Privileges or Immunities Clause and explicitly tied this Clause to Bushrod Washington's sweeping language in the *Corfield v. Coryell* case.").

<sup>281</sup> See Lash, *The Origins of the Privileges or Immunities Clause*, Part I, *supra* note 84.

<sup>282</sup> See id.

Although inclusion of Article IV's pre-existing equal protection as one of Section One's privileges and immunities of citizens of the United States might seem redundant, the advocates of the Fourteenth Amendment would not have viewed it that way. As Bingham and other advocates repeatedly insisted, the problem was not so much a failure of the original Constitution to list federal privileges and immunities, as it was a failure to provide congressional power to *enforce* constitutionally enumerated rights. As Howard explained to his colleagues:

Now, sir, there *is* no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course, do not come within the sweeping clause of the Constitution, authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect,<sup>283</sup> while at the same time, the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.<sup>284</sup>

Section Five of the Fourteenth Amendment granted the federal Congress power to enforce the rights of Section One. Thus, the Amendment would empower Congress to enforce the equal protection principles of Article IV along with the substantive rights of the first eight amendments: the entire "mass" of rights, privileges and immunities found in Article IV and the Bill of Rights. It is important to recognize that Howard's speech can be read in a manner that both fits with Bingham's presentation in the House of Representatives, and avoids transforming Article IV rights of equal access to substantive national rights. As we have seen from the debates over the original draft of the Fourteenth Amendment, and the debates over the language of the Civil Rights Bill (as well as the failed extension of the Freedman's Bureau Act), such an understanding would have doomed the amendment since no one other than the most radical of Republicans would have believed such federal regulatory control was necessary or appropriate.

Equal enforcement of Article IV was another matter, and one far less controversial. During the debates over the Civil Rights Act, speakers repeatedly pointed out the state's failure to *equally* protect Article IV common law rights as demanded by the Privileges and Immunities Clause, a problem to be remedied by the Civil Rights Act. 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. Bingham, of course, *also* wanted to protect the substantive rights listed in the first eight amendments. Both 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.<sup>285</sup>

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<sup>283</sup> Although it not clear, Howard may have adopted (or was explaining) Bingham's view that Article IV and the first eight amendments collectively constituted the "Bill of Rights."

<sup>284</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2765-2766. Howard's speech was widely reported. For a list of newspaper accounts of Howard's speech, see Wildenthal, *Nationalizing the Bill*, *supra* note \_\_\_ at 1564. According to Akhil Amar, "Both the New York Times and the New York Herald (the nation's bestselling newspaper in 1860) gave Howard's explanation front page coverage and reprinted in full his Bill of Rights discussion." Amar, *AMERICA'S CONSTITUTION*, *supra* note 116 at 388.

<sup>285</sup> It is also possible that Howard *did in fact* believe that Section One transformed and nationalized the common law rights listed in *Corfield*. If so, this may have been simply a mistaken understanding of what Bingham and Joint Committee were trying to accomplish. Bingham's final draft had been supported by

Howard's later speeches in the Thirty-Ninth Congress strongly support a conclusion that Howard's reference to Article IV involved equal protection, and not substantive national liberties. Only a few months later, the same Thirty-Ninth Congress debated what conditions ought to be placed on the admission of Nebraska to the Union, in particular whether the state should be required to grant blacks the right to vote. In support of such a condition, some members argued that Congress had the power to place any condition it wished on the admission of a new states, and that the condition could not be thereafter altered without the consent of Congress. Howard was appalled by such arguments, for they suggested that Congress could regulate all manner of subjects which were expressly reserved to the people in the states. According to Howard, if Congress could require a state to provide equal voting rights for a black man, it could also require equal voting rights for women.<sup>286</sup> The same power would allow Congress to control state regulation of how real estate can be distributed among a decedent's heirs, and the legal proceedings in regard to the collection of debt.<sup>287</sup> "Indeed," objected Howard, "we may go through all the details of state policy, state regulation, and *individual rights*, as regulated by the constitutions of the States."<sup>288</sup>

"What, then, becomes of State rights? . . . It denies to the people of the States almost all, yes, all, substantially, of those original and immemorial rights which have been exercised by the people of the States ever since the dissolution of our connection with Great Britain."<sup>289</sup>

Such a state rights oriented objection would be odd, if Howard believed that his committee had already proposed adding an amendment to the Constitution which transformed all natural and common law rights in the States into substantive national liberties, with federal power to enforce the same. More likely, Howard understood the proposed Fourteenth Amendment as leaving the general regulation of individual rights to the discretion of the people in the states, subject only to the equal access requirements of Article IV and the protection of the substantive rights listed in the first eight amendments.

## VI. POST-DEBATE DISCUSSION OF *CORFIELD* AND ARTICLE IV IN THE THIRTY-NINTH CONGRESS

Legal historians have long looked to *Corfield* and Justice Washington list of "fundamental" rights as a template for understanding the Privileges and Immunities Clause of Section One of the Fourteenth Amendment. Some scholars, for example, believe that members of the Thirty-Ninth Congress intended to transform Justice Washington's list of "fundamental rights" into substantive national rights, including the entire category of natural and civil rights previously left to state control.<sup>290</sup> Having studied the actual debates in the Thirty-Ninth Congress, we can see why such assertions are, at least as a historical matter, deeply problematic. To begin with, Radical Republicans who pressed for a broad natural rights reading of *Corfield* were immediately challenged by colleagues who cited actual antebellum case law which read both

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conservatives on the Committee (and opposed by some radicals). See Maltz, *supra* note 21 at 82. This would make no sense if theory behind the Clause involved the nationalization of the common law along with federal power to regulate the same.

<sup>286</sup> Cong. Globe, 39<sup>th</sup> Cong., 2d Sess. 219.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See, e.g., Barnett, *supra* note 7 at 62-68.

*Corfield* and Article IV in a far more limited fashion. It is not surprising, therefore, that proponents of the Civil Rights Act and Section One tended to avoid references to *Corfield* as the debates progressed and it became clear that the passage of both required the support of moderates and conservative Republicans who resisted any calls for the nationalization of natural or common law civil rights.

### A. Samuel Shellabarger's Civil Rights Bill

Probably the clearest example of *Corfield's* status in the Thirty-Ninth Congress as presenting nothing more than an “equal access to state conferred rights” interpretation of Article IV came only a few months after Bingham proposed the second draft of the Fourteenth Amendment. In July (while the Fourteenth Amendment remained pending before the states), Ohio Representative Samuel Shellabarger proposed a new civil rights bill which would “enforce that demand of the Constitution which declares ‘the citizens of each State shall be entitled to all privileges and immunities of citizens’ [of the United States] ‘in the several states.’ The bill occupies this single ground, and aims at nothing beyond.”<sup>291</sup> Shellabarger distinguished his bill from the original Civil Rights Act (which Johnson had vetoed two weeks previously) on the grounds that the latter “insures equality in *certain* civil rights,” whereas his newly proposed bill “protects *all* the fundamental rights of the citizen of one State who seeks to enjoy them in another State.”<sup>292</sup>

Like other Radical Republicans,<sup>293</sup> Shellabarger believed that the “fundamental rights” guaranteed to sojourning citizens under Article IV were the substantive rights of “national citizenship” which a state could no more deny its own citizens than it could deny them to visitors from other states.<sup>294</sup> Shellabarger conceded, however, that Article IV as traditionally interpreted by antebellum courts and treatise writers *did not* protect substantive rights. Since his bill proposed to do nothing more than enforce the privileges and immunities of Article IV as *traditionally understood*,<sup>295</sup> its scope was limited to guaranteeing sojourning citizens equal access to a limited set of state-conferred rights.

In presenting his Bill, Shellabarger must have been aware that he had to carefully circumscribe the scope of his Bill if it was to have any chance of passage. He thus embarked on an extended examination of antebellum case law and commentary regarding Article IV as a limited

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<sup>291</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293 (July 25, 1866). Shellabarger had originally proposed his bill some months earlier, but the House had delayed consideration until July. See, A Bill to declare and protect all the privileges and immunities of citizens of the United States in the several states, H.R. 437, Printer's No. 116, §I (39<sup>th</sup> Cong., 1<sup>st</sup> Sess.) (April 2, 1866). See also Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *Fordham L. Rev.* 153, 222, n.305 (2004). The bill was never passed.

<sup>292</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293.

<sup>293</sup> See Maltz, *supra* note 21 at 39 (describing Shellabarger as a Radical Republican).

<sup>294</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293. (discussing how the rights protected by the bill were “fundamental” rights which states could not rightfully deny to their own citizens).

<sup>295</sup> Although, the states had yet to ratify the Fourteenth Amendment, Shellabarger believed that Congress had implied power to enforce any right listed in the Constitution. *Id.* (“as these rights grow out of and belong to national citizenship and not out of state citizenship, and as the Constitution expressly enjoins that every citizen of the United States “shall be entitled” to them “in the several states,” therefore it is within the power and duty of the United States to secure by appropriate legislation these fundamental rights.”). See also *id.* at 295 (citing the Supreme Court's decision in *Prigg* as precedent for unenumerated federal power to enforce enumerated rights). Although this view of federal power was embraced by a number of Radical Republicans, it was not shared by a majority in the Thirty-Ninth Congress. It is not surprising therefore that this particular bill was never passed.

provision providing nothing more than equal access to a limited set of state conferred rights. Instead of Justice Washington's opinion in *Corfield*, Shellabarger relied upon *Lemmon v. The People* as his primary example of the proper meaning of Article IV:

This clause, therefore, enacts that all "the privileges and immunities" of a "general" or "national" citizenship shall be enjoyed in every State by the citizens of the United States. Again, it was the design of this clause, as is expressed by the court of appeals of New York, in *Lemmon v. The People*, (6 Smith's Reports, 626, 627) to secure to the citizens of every State within every other State the "privileges and immunities (whatever they might be) accorded in each to its own citizens."<sup>296</sup>

As I have explored elsewhere, *Lemmon* represents an important example of the traditional antebellum reading of the Comity Clause as providing no more than equal access to state-conferred rights.<sup>297</sup> Shellabarger goes on to quote the same interpretation of Article IV presented in Joseph Story's<sup>298</sup> and Chancellor Kent's legal commentaries,<sup>299</sup> and explained that "[t]he same thing is decided in *Livingston vs. Van Ingen*, (9 John. R., 507) and in numerous other cases."<sup>300</sup> Shellabarger's exposition on the jurisprudence of Article IV reflects the remarkably stable jurisprudence of the Privileges and Immunities Clause both before and after the Civil War.<sup>301</sup>

As far as the specific content of Article IV privileges and immunities, Shellabarger quotes Chancellor Kent's discussion of *Corfield*, as well as Justice Washington's discussion of "the rights of protection of life and liberty, and to acquire and enjoy property, and to pay no higher impositions than other citizens, and to pass through or to reside in the State at pleasure; and to enjoy the elective franchise according to the regulations of the laws of each State."<sup>302</sup> In order to make sure that his use of *Corfield* was not construed as suggesting Article IV protected a set of substantive natural (and national) rights, Shellabarger assured the House:

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<sup>296</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293.

<sup>297</sup> See Lash, Privileges and Immunities as an Antebellum Term of Art, *supra* note 84.

<sup>298</sup> Id. ("Judge Story (2 Commentaries, section 1806) expresses this design in these words: "The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which citizens of the same State would be entitled to under like circumstances.")

<sup>299</sup> Id. ("Chancellor Kent (2 Commentaries, page 71) says the same thing in these words: "If they [that is native or naturalized citizens of the United States] remove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and to none other.")

<sup>300</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293.

<sup>301</sup> For a detailed look at the antebellum jurisprudence of the Privileges and Immunities Clause, see Lash, Privileges and Immunities Clause as an Antebellum Term of Art, *supra* note 84.

<sup>302</sup> According to Shellabarger:

This I copy from Chancellor Kent's enumeration. 2 Kent, s.p. 710) He takes this enumeration of rights from the opinion of Judge Washington, in the case of *Corfield vs. Coryell*, (4 Washington's Circuit Court Reports, 371) in which case Chancellor Kent says:

"It was decided that the privileges and immunities conceded by the Constitution of the United States to citizens in the several States were to be confined to those which were fundamental, and which belonged of right to the citizens of all free governments. Such are the rights of protection of life, liberty, and to acquire and enjoy property, and to pay no higher impositions than other citizens, and to pass through or reside in the State at pleasure, and to enjoy the elective franchise according to the regulation of the law of the State."

Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., app. at 293.

To this enumeration of fundamental rights [from *Corfield*] Story adds what I have already noted, to wit: “all such as citizens of the same State would be entitled to under like circumstances.”<sup>303</sup>

For his part, Shellabarger believed that the rights which Chancellor Kent and others described as fundamental “cannot be taken away from any citizen of the United States by the laws of any State, neither from its own citizens nor from those coming in from another State,” and that these rights were ones “which every citizen of the United States holds as the gift of his national Government, and which neither any individual nor any State can rightfully deprive him of.”<sup>304</sup> This was not, however, a reading that Shellabarger derived from the Privileges and Immunities Clause of Article IV.<sup>305</sup> Shellabarger conceded that *that* particular clause protected nothing more than equal access to a limited set of “fundamental” state-conferred rights. Thus, in order “to avoid any doubtful exercise of power by the United States, and not to assume or trench upon the powers of the States” Shellabarger limited his Bill to federal enforcement of Article IV, *as that clause had been traditionally understood*:

[The Bill] protects no one except such as seek to or are attempting to go either temporarily or for abode from their own State into some other. It does not attempt to enforce the enjoyment of the rights of a citizen within his own State, against the wrongs of his fellow citizens of his own State after the injured party has become or when he is a citizen of the State where the injury was done. This is because the bill is confined to the enforcement of this single clause of the Constitution. Without determining what further powers the Government may have in enforcing rights of “national citizenship” in favor of all its citizens, without regard to the fact of their passing from one State into another, it was thought best to make this act single and compact in its scope and structure, and to that end to confine its provisions to the single object of seeing that this clause of the Constitution was executed throughout the Republic. In *Abbott vs. Bayley*, (6 Pick. R. 92) it is decided “that the privileges and immunities of ‘the citizens in each State,’ in every other State can, by virtue of this clause, only be applied in case of removal from one State to another.” To conform the bill to this view of this constitutional provision, it was deemed best to limit it in accordance with that decision, and to make it secure to all the people those great international rights which are embraced in unrestrained and secure inter-State commerce, intercourse, travel, sojourn, and acquisition of abode.”<sup>306</sup>

Shellabarger’s speech was delivered to the same Congress that debated and adopted Bingham’s draft of the Fourteenth Amendment. As a radical Republican, Shellabarger would be expected to take the broadest plausible view of national privileges and immunities and federal power to enforce the same.<sup>307</sup> Yet even Shellabarger admitted that the Privileges and Immunities Clause, at least it had been interpreted by antebellum courts, protected nothing more than equal access to state-conferred rights. Shellbarger’s list of Article IV cases placed *Corfield* along side of traditional interpretations of the Privileges and Immunities Clause in cases like *Lemmon* and *Livingston*, and similar discussions of the Clause in works by Joseph Story and Chancellor Kent. Finally, in seeking a case that best represented the consensus view of Article IV among

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Shellabarger likely derived such a right from his reading of the Republican Guarantee Clause.

<sup>306</sup> *Id.*

<sup>307</sup> And he would do so in the future. See *infra* note 331 and accompanying text (discussing Shellabarger’s arguments regarding the 1871 Ku Klux Klan Act).

his colleagues in the Thirty-Ninth Congress, Shellbarger passed over *Corfield* and chose the equal state-rights interpretation presented in *Abbott v. Bayley*.

A number of scholars have tried to find a fundamental rights reading of *Corfield* and Article IV in Section One of the Fourteenth Amendment. Some have suggested that post-Civil War cases like *Paul v. Virginia* rejected an earlier fundamental rights reading of the Clause and replaced it with an altogether new equal state-conferred rights reading of Article IV, and that this affected later discussion of Article IV in the Reconstruction Congress.<sup>308</sup> The historical record, however, shows that long before the Court decided *Paul*, most members of the Thirty-Ninth Congress accepted the consensus antebellum construction of the Privileges and Immunities Clause and viewed *Corfield* as simply one of a number of cases which viewed Article IV as an equal state rights provision. *Paul v. Virginia* had no effect whatsoever on the consensus view of Article IV either inside or outside of Congress.

## **B. John Bingham's Altered View of Article IV**

John Bingham used the language of Article IV in his first draft of the Fourteenth Amendment due to his belief that Article IV (in combination with the Oath Clause), obligated the states to protect substantive national rights such as those found in the Bill of Rights. He withdrew his draft in the face of withering criticism by both friend and foe that he had misread Article IV. His second draft abandoned the language of Article IV, suggesting that he had either changed his view of Article IV, or realized that his interpretation was not shared by his colleagues in the Thirty-Ninth Congress. In fact, following his introduction of the second draft of Section One, Bingham made a number of statements which reveal a new and altogether different reading of Article IV and its relationship to the Privileges or Immunities of Citizens of the United States.

A few months after his introduction of the final version of the Fourteenth Amendment, Bingham delivered a speech supporting the admission of Nebraska as the thirty-seventh state. Addressing those who insisted that Nebraska be admitted upon the condition that “that non-resident citizens of the United States should be subject to no other or higher rate of tax than resident citizens or be denied the immunities or privileges of citizens therein,” Bingham pointed out that such a condition was unnecessary—protection from this form of discrimination against *non-residents* was already guaranteed by Article IV. According to Bingham:

It is urged also that states have been admitted upon the condition that non-resident citizens of the United States should be subject to no other or higher rate of tax than resident citizens or be denied the immunities or privileges of citizens therein. But this is simply a carrying out of that provision of the Constitution which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens [of the United States] (supplying the ellipsis) in the several States.”<sup>309</sup>

This is a wholly conventional reading of Article IV's protection of sojourning citizens along the same lines as that expressed in cases like *Livingston v. Van Ingen*, *Abbott v. Bayley*, *Lemmon v. The People* and the commentaries of Story and Kent. Bingham reads Article IV as guaranteeing non-resident citizens the same rights as those provided by a state to its own resident citizens. Although Bingham once again refers to an unstated “ellipsis” in Article IV, he does so not in order to prove the existence of substantive national rights, but only to point out that the equal-protection guarantees of Article IV are bestowed on all United States citizens.

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<sup>308</sup> See, e.g., Curtis, NO STATE SHALL ABRIDGE, *supra* note 20 at 161.

<sup>309</sup> Cong. Globe, 39<sup>th</sup> Cong., 2d Sess. 450 (Jan. 14, 1867).

This approach tracked the commonly cited views of Joseph Story who, in his commentaries, wrote that Article IV’s “citizens in the several states” were “ipso facto” citizens of the United States.<sup>310</sup> Thus, Bingham’s continued reading of Article IV as representing the equal rights of “citizens (of the United States) in the several states” was wholly conventional and reflected the same equal protection reading of Article IV found in antebellum case law and commentary.

Bingham’s apparent embrace of the conventional reading of Article IV in his Nebraska speech is quite different than the reading Bingham relied upon in defense of his first draft of the Fourteenth Amendment. Not only had Bingham since changed the language of the Fourteenth Amendment, he also seems to have changed his mind about the proper interpretation of Article IV. Nor had Bingham taken his reading from post-Fourteenth Amendment decisions by the Supreme Court: his discussion of Article IV occurred more than a year before the Supreme Court articulated the same view of Article IV in *Paul v. Virginia*.<sup>311</sup>

## VII. JOHN BINGHAM’S FINAL WORD ON SECTION ONE: THE SPEECH OF 1871

### A. Disputes in the Reconstruction Congress Regarding the Relationship Between Article IV and Section One of the Fourteenth Amendment

The history recounted above suggests that, at the time of the adoption of the Fourteenth Amendment, there existed a fairly stable consensus both inside and outside the halls of Congress regarding the meaning of the Privileges and Immunities Clause of Article IV. The Comity Clause was broadly understood as establishing the right of equal access to a set of “fundamental” state conferred rights. Like all consensus readings of the Constitution, this view was not held by all people at all times. One can find both broader and narrower readings. Still, there appears to be an impressive list of courts, commentators and major players in the Thirty-Ninth Congress who embraced the equal state-rights reading of Article IV.

As much as modern scholars continue to try and read *Corfield* as a broad statement of unenumerated substantive national rights—and by extension attribute that reading to Section One, an abundance of historical evidence suggests this was not the common understanding of either *Corfield* or Article IV in 1866. The evidence is so broad and deep that it seems quite reasonable to view the “equal access to state conferred rights” reading of Article IV to be the (very) likely public understanding of Article IV at the time of the ratification of the Fourteenth Amendment. If the Privileges or Immunities of Section One was understood as doing nothing more than allowing federal enforcement of Article IV privileges and immunities, then the

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<sup>310</sup> See Story, III COMMENTARIES, *supra* note 68 at Section 1687, p. 565. One can also find courts during this period who expressly read Article IV’s “citizens in the several states” as meaning “citizens (of the United States) in the several states.” For example, in *Davis v. Pierse* (1862), 7 Min. 13 (1862), the Minnesota court explained that the “citizens” of Article IV were indeed “citizens of the United States”—even if the rights protected were state-conferred rights, and not the enumerated federal rights of citizens of the United States. *Id.* at \*6. Note that this court limited the scope of the Privileges and Immunities Clause to the same kind of non-discrimination reading found in the writings of Story and Kent, and read *Corfield* as establishing this same principle.

<sup>311</sup> 75 U.S. (8 Wall) 168 (1869).

original understanding of the Privileges or Immunities Clause would not have included the Bill of Rights or any other substantive right. Some scholars have suggested as much.<sup>312</sup>

There is, in fact, some historical evidence in support of the “equal protection only” reading of the Privileges or Immunities Clause. For example, Vermont Senator Luke Poland declared his belief during the Thirty-Ninth Congress that “[t]he clause of the first proposed amendment, that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” secures nothing beyond what was intended by the original provision in the Constitution, that “the citizens in each state shall be entitled to all privileges and immunities of citizens in the several states.”<sup>313</sup> The Privileges or Immunities simply remedied the previous lack of federal power to enforce Article IV—a situation which had rendered Article IV “a dead letter.”<sup>314</sup> According to Poland, Congress had attempted to enforce the equal-protection principles of Article IV in the Civil Rights Act, but that “[t]he power of Congress to do this has been doubted and denied by persons of high consideration.” Thus, it was “desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the foundation of all republican government if they be denied or violated by the states.”<sup>315</sup> Poland’s claim that the Civil Rights Act enforced Article IV indicates that he, like most members, viewed Article IV as an equal protection clause. However, his insistence that the Privileges or Immunities Clause secured “nothing” beyond the equal access rights of Article IV means that he did not understand the Clause as embracing any substantive national right, including those listed in the first eight amendments.

## **B. The Woodhull Report**

The same “nothing but Article IV privileges and immunities” also informs a Report presented by John Bingham on behalf of a majority of the Judiciary Committee in early 1871. The Report responded to a petition by Victoria Woodhull calling for a federal statute protecting women’s right to suffrage as a privilege or immunity of citizens of the United States.<sup>316</sup> The majority reported against Woodhull’s request and, in so doing, took the position that the Privileges or Immunities of Section One protected nothing other than the privileges and immunities of Article IV.<sup>317</sup> If the majority of the committee held the most commonly held view of Article IV (and it seems almost certain that they did), then this would mean that the majority did not believe the Clause protected substantive national rights, including the rights listed in the first eight amendments.<sup>318</sup> As we have seen, other members of Congress such as Senator Poland held such a view. The problem, however, is that the man who presented the Report, John Bingham, expressly rejected such a limited view of the Privileges or Immunities Clause, both before and immediately after he delivered the Report. Grappling with such a conundrum requires a closer look at the Report.

In her memorial to the House and Senate, Victoria Woodhull had requested “the passage of a law carrying into execution the right vested by the Constitution in citizens of the United States

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<sup>312</sup> See Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 7. Professor Harrison’s account of the Privileges or Immunities Clause focuses on equal protection, though he does not exclude the possibility that the clause may have also protected substantive rights.

<sup>313</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2961 (June 5, 1866).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> H.R. Rep. No. 41-22 (Jan. 30, 1871). Representatives William Loughridge and Benjamin Butler dissented.

<sup>317</sup> *Id.*

<sup>318</sup> As some scholars have argued. See, e.g., Raoul Berger, *The “Original Intent”—as Perceived by Michael McConnell*, 91 *Nw. U. Law Rev.* 242, 250 (1992).

to vote, without regard to sex.”<sup>319</sup> According to the petition, any denial of the right to vote on account of sex was inconsistent with the rights of female citizens of the United States as established by Section One of the Fourteenth Amendment. In response, a majority of the committee insisted that the “privileges or immunities” of Section One were no different than the “privileges and immunities” of Article IV—and these did not include the political rights of suffrage. Here is the relevant passage of the Report:

The [Privileges or Immunities Clause of the] fourteenth amendment, does not in the opinion of the committee refer to privileges and immunities of citizens of the United States other than those privileges 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 express limitations on 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.<sup>320</sup>

In rejecting the rights of suffrage as protected privileges or immunities of United States citizens, the Report tracks John Bingham’s long-stated belief that the political rights of suffrage were not covered by Section One of the Fourteenth Amendment. On the other hand, the majority’s insistence that Section One Privileges or Immunities were *no different* than Article IV Privileges and Immunities raises a host of questions. If the majority held the most common view of Article IV, then this meant the majority did not believe that Section One protected any substantive federal right, including those listed in the Bill of Rights. Such a position would directly contradict Bingham’s earlier statements regarding one of the purposes of the Fourteenth Amendment, and he would expressly reject such a limited understanding of Section One only a few weeks after he delivered the majority Report.

Pro-incorporationist scholars have downplayed the significance of the Woodhull Report, and perhaps reasonably so.<sup>321</sup> Although delivered to the House by John Bingham, the Report presents itself as representing the consensus views of a majority, and not Bingham’s own particular views. Bingham himself may not have drafted the Report but, as Chair, he was obligated to submit the Report on behalf the majority. Bingham was on record as agreeing with the majority’s bottom line: no one, including women, had been granted the rights of suffrage through the adoption of the privileges or immunities clause. Thus, he might have been willing to present the majority’s limited view of the Privileges or Immunities Clause given that the difference of opinion among the majority made no difference to the particular issue before the Judiciary Committee.

Still, there is much about the Report which has to be taken seriously as evidence against an incorporationist understanding of the Privileges or Immunities Clause. Although Bingham

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<sup>319</sup> See, Memorial of Victoria C. Woodhull praying the passage of a law carrying into execution the right vested by the Constitution in citizens of the United States to vote, without regard to sex. (Dec. 21, 1870)(available in US Cong. Series)( Serial Set Vol. No. 1442, Session Vol. No.1; 41st Congress, 3rd Session; S.Misc.Doc. 16; -- Referred to the Committee on the Judiciary and ordered to be printed.).

<sup>320</sup> H.R. Rep. No. 22, 41st Cong., 3d Sess. (Jan. 30, 1871) (majority report presented by Rep. Bingham). Michael Kent Curtis drops a footnote at the critical point where the Report declares that the P or I clause protects nothing but the rights in Article IV. Here Curtis notes “[Bingham and other Republicans had read this clause as making Bill of Rights guarantees at least a moral limit on the states.]” See Curtis, 38 B. C. L. Rev. 1, Resurrecting the Privileges or Immunities Clause and Revising the Slaughterhouse Cases, at 78 fn. 271.

<sup>321</sup> See, e.g., Curtis, NO STATE SHALL, *supra* note 20 at 168.

himself may not have shared his fellows' specific views regarding the relationship between Article IV and Section One, it appears that at least a plurality of the Committee believed they protected the same set of rights. Even if one discounts the evidence as coming five years after the original debates, the record in support of incorporation is already fairly sparse; the Woodhull Report seems at the very least to increase the burden of proof on those who argue in favor of incorporation of the Bill of Rights.

Because the majority Report contradicts express claims made by John Bingham both during the debates and shortly following the issuance of this Report, I join those scholars who do not believe the Report's statement about Article IV and Section One represents Bingham's understanding of the Privileges or Immunities Clause. However, when placed alongside of views like those of Senator Poland, it suggests that a number of members of Congress, both during and soon after the adoption of the Amendment, embraced a narrow "equal protection" reading of the Privileges or Immunities Clause. This in turn suggests that if the original understanding of Section One did not follow the views of John Bingham, the next most likely reading of the Privileges or Immunities Clause was as an equal protection provision and not, as some have argued, a source of substantive natural rights. Although in the years following the adoption of the Fourteenth Amendment one can also find examples of natural rights readings of the Privileges or Immunities Clause, it appears that such views were a distinct minority.<sup>322</sup>

On the other hand, it appears that members of the Reconstruction Congress espoused a variety of views regarding the proper reading of the Privileges or Immunities Clause of the Fourteenth Amendment and its relationship to Article IV. We have already seen how some reduced the meaning of the new provision to the same equal access to state conferred rights reading of Article IV—the only difference being that Congress now had power to enforce these Article IV rights through the adoption of Section 5 of the Fourteenth Amendment. This view excluded incorporation of the Bill of Rights. Others believed that, not only did the Privileges or Immunities Clause include all rights listed in the original Constitution, it also protected unenumerated substantive rights, such as those originally listed in Justice Washington's Article IV opinion in *Corfield*. For example, in 1871, Representative George F. Hoar (whose father had been famously run out of South Carolina) insisted that the Privileges or Immunities Clause of Section One "[m]ost clearly [] comprehends all the privileges and immunities declared to belong to the citizen by the Constitution itself."<sup>323</sup> But Hoar went further and also noted his personal belief that the Clause "comprehends those privileges and immunities which all republican writers of authority agree in declaring fundamental and essential to citizenship. I will here cite the weighty and pregnant words of Judge Washington, in the case of *Corfield v. Coryell*."<sup>324</sup>

This is not the place to comprehensively explore the various readings of Section One which emerged in the years following the adoption of the Fourteenth Amendment. It is enough for

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<sup>322</sup> Literally so in the case of the Woodhull Report. The two dissenting members of the Committee, Representatives William Loughridge and Benjamin Butler, distinguished Article IV privileges and immunities from Section One privileges or immunities, and argued that the latter included fundamental rights, including the rights of women's suffrage. Serial Set Vol. No. 1464, Session Vol. No.1; 41st Congress, 3rd Session; H. Rpt. 22 ; Title: Victoria C. Woodhull. January 30, 1871. -- Recommitted to the Committee on the Judiciary and ordered to be printed.(p. 10) ("these privileges of the citizen exist independent of the Constitution. They are not derived from the Constitution or the laws, but are the means of asserting and protecting rights that existed before any civil governments were formed—the right of life liberty and property."). This, however, was a distinctly minority position among members of Congress at the time of Reconstruction.

<sup>323</sup> Cong. Globe, 42 Cong. 1<sup>st</sup> Sess. at 334.

<sup>324</sup> Id.

this paper that readers are aware that such readings ran the gamut from extremely narrow to extremely broad. Scholars such as William Nelson have argued that the precise meaning was never agreed upon and that it was up to courts to liquidate the meaning of Section One over time.<sup>325</sup> I will present my own take on the public reception of the Clause, both at the time of its adoption and afterwards, in a forthcoming paper. For now, I hope only to have presented enough evidence to suggest that by 1871, there were competing visions of the Privileges and Immunities Clause.

This helps explain why John Bingham in March of 1871 found himself obligated to explain to his colleagues—many of whom were not members of the Thirty-Ninth Congress--the reasoning behind the second draft of the Fourteenth Amendment. According to Bingham, neither the narrow nor the expansive readings of Section One were correct. Substantive rights were protected under the Privileges or Immunities Clause, but only those expressly listed in the Constitution.

### C. The Ku Klux Klan Act Debates of 1871

Where the Civil Rights Act of 1866 had focused on the discriminatory actions of state governments, the Ku Klux Klan Act of 1871 went much further. As proposed by Samuel Shellabarger, the Act criminalized private conspiracies to violate the “rights, privileges or immunities of another person.”<sup>326</sup> Shellabarger’s Bill listed a number of specific acts which fell under the proposal, including “murder, manslaughter, mayhem, robbery, assault and battery, perjury and subornation of perjury.”<sup>327</sup>

According to Eric Foner, “[t]he Ku Klux Klan Act pushed Republicans to the outer limits of constitutional change.”<sup>328</sup> The proposal triggered immediate objections by state rights advocates who insisted that Congress had no power to regulate ordinary criminal activity in the states. The exercise of such power would destroy the independent existence of the states and create a federal government of general police powers.<sup>329</sup> Moreover, it was not at all clear that Section Five’s power to enforce Section One of the Fourteenth Amendment authorized Congress to regulate private interference to constitutional rights; the text of Section One forbade *states* from abridging privileges or immunities, due process and the equal protection of the law.

In his speech presenting the Ku Klux Klan Bill to the House of Representatives, Shellabarger insisted that Congress had power to enact the law under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment. Although the specific actions regulated by the Act were not expressly mentioned under either amendment, Shellabarger believed that the proper “rule of interpretation” of those amendments should not be one of “strict construction,” but should instead follow the common law maxim that remedial statutes ought to be “liberally and beneficently construed.”<sup>330</sup>

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<sup>325</sup> See Nelson, *The Fourteenth Amendment*, *supra* note 35 at 8.

<sup>326</sup> Cong. Globe, 42 Cong. 1<sup>st</sup> Sess., app. 68 (remarks of Mr. Shellabarger). For the final version, see *Ku Klux Klan Act of 1871*, ch. 22, 17 Stat. 13.

<sup>327</sup> Cong. Globe, 42 Cong. 1<sup>st</sup> Sess., app. 68.

<sup>328</sup> Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* at 455 (1989).

<sup>329</sup> *Id.* at 456.

<sup>330</sup> Cong. Globe, 42 Cong. 1<sup>st</sup> Sess., app. 68.

Abandoning the limited reading of *Corfield* and Article IV that he had adopted in the summer of 1866, Shellabarger now insisted that Justice Washington’s opinion in *Corfield* listed the “fundamental elements of citizenship” which Congress had power to protect under the Privileges or Immunities Clause of Section One.<sup>331</sup> Although his prior speech had presented a long line of antebellum discussion of Article IV which presented a very different reading of the Comity Clause, Shellabarger now omitted any mention of antebellum case law beside *Corfield*—and he stressed Justice Washington’s statement that the privileges and immunities of citizens included the rights of *protection*—whether or not such power of protection was expressly enumerated in the Constitution. Protection against common crimes, Shellabarger explained, was an essential aspect of citizenship “in every free government.”<sup>332</sup> To the degree that members still questioned whether there was express authority to pass the Ku Klux Klan Bill, Shellabarger reminded them of the Supreme Court’s decision in *Prigg v. Pennsylvania* which held that Congress had implied power to enforce the provisions of Article IV regarding runaway slaves.<sup>333</sup>

I appeal to [the ruling in *Prigg*] as fixing the interpretation of the Constitution in this regard and as authorizing affirmative legislation in protection of the rights of citizenship under federal law, since now these rights of citizenship are brought by the Fourteenth Amendment, under the care of the Constitution itself, as to all citizens, just as the old Constitution, protected such of them as went from one State to another, by the clause as to their rights in the several States.<sup>334</sup>

Shellabarger’s attempt to equate the Privileges and Immunities of Article IV with the Privileges or Immunities of Section One met with an immediate challenge. As he had done in response to unduly broad readings of *Corfield* in the Thirty-Ninth Congress, Indiana Representative Michael Kerr objected that antebellum judicial decisions had never embraced such a reading of Article IV. Quoting Chancellor Kent’s Commentaries and the Supreme Court’s recent opinion in *Paul v. Virginia*, Kerr explained that nothing in Article IV suggested that the protected privileges and immunities were anything other than what an individual state chose to bestow on its own citizens.<sup>335</sup> Kerr went so far as to suggest that the protection of individual rights was a matter for the courts, and not a matter for national legislation.<sup>336</sup>

Republican Representative John F. Farnsworth of Illinois (described by Michael Curtis as having views which ranged from radical to conservative<sup>337</sup>) objected to Shellabarger’s attempt to transform the equal protection principles of Article IV into a set of substantive national rights. Farnsworth had supported the original Fourteenth Amendment with the understanding that it did nothing more than protect *equal rights* in the states.<sup>338</sup> Farnsworth was astonished to hear the amendment he had so recently supported being cited in support of a law which he believed would destroy the reserved rights of the people in the States. He reminded those members who had served with him the Thirty-Ninth Congress that John Bingham’s *first* draft of

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<sup>331</sup> Cong. Globe, 42 Cong. 1<sup>st</sup> Sess., app. 68.

<sup>332</sup> Id. at 69.

<sup>333</sup> Id. at 70.

<sup>334</sup> Id. at 70.

<sup>335</sup> Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., at app. 47-48.

<sup>336</sup> Id. at 48.

<sup>337</sup> See Curtis, NO STATE SHALL ABRIDGE, *supra* note 20 at 39, 39 n.88 (citing Michael Les Benedict at 342, 345, 350).

<sup>338</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 2539 (“So far as this section [Section One] is concerned, there is but one clause in it which is not already in the Constitution, and it might as well in my opinion read “No state shall deny to any person within its jurisdiction the equal protection of the laws.”).

the Fourteenth Amendment threatened to empower Congress to regulate civil rights in the states. This initial draft, Farnsworth pointed out, had been roundly criticized as undermining the principles of limited federal power and ultimately it was rejected.<sup>339</sup> When Bingham rose to object that his original draft had not been rejected, but only withdrawn and recomposed, Farnsworth cuttingly responded, “Why was it put in another form? Did the gentleman put it in another form to deceive somebody?”<sup>340</sup> Ignoring Bingham’s promise to explain why he redrafted the Fourteenth Amendment, Farnsworth simply declared what he believed to be the original understanding of Section One:

Why, sir, we all know, and especially those of us who were members of Congress at that time, that the reason for the adoption of this amendment was because of the partial, discriminating and unjust legislation of those States under governments set up by Andrew Johnson, by which they were punishing and oppressing one class of men under different laws from another class.<sup>341</sup>

In support of this “equal rights” reading of Section One, Farnsworth quoted Congressman Poland’s statement that Section One “secures nothing beyond what was intended by the original provisions in the Constitution, that ‘the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.’”<sup>342</sup> “The gentleman from Vermont,” Farnsworth assured the House, “did not dream that the provision went any further than that.”<sup>343</sup>

#### **D. John Bingham’s Defense of the Act and Explanation of the Second Draft of the Fourteenth Amendment**

Bingham faced a delicate task when he rose in defense of the proposed Ku Klux Klan Act. He supported Shellabarger’s efforts to pass the Bill, but Shellabarger’s argument in favor of the Bill conflicted with Bingham’s views of the Constitution in several ways. Shellabarger’s effort to read Justice Washington’s list of privileges and immunities in *Corfield* and Article IV mirrored similar efforts by James Wilson and other radical Republicans in the Thirty-Ninth Congress. Those efforts had been easily turned aside by members who simply quoted antebellum case law and legal treatises. Following Shellabarger’s speech, Kerr simply cited the same authorities—to which Shellabarger had no response. How could he? Although he had omitted them from his most recent speech, he had quoted the same authorities himself five years earlier. More, Shellabarger’s attempt to portray Congress as having broad supervisory power over the states in any matter relating to civil rights (including the right to happiness, according to Justice Washington’s list in *Corfield*), would likely not generate a positive response in a Congress that had already grown weary of the heavy task of Reconstruction.<sup>344</sup> Bingham himself had expressly rejected such broad assertions of federal power during the debates over the Civil Rights Act of 1866, not only because Congress lacked the power, but also because the very idea conflicted with what Bingham believed was the essential federalist division of power between state and national governments.<sup>345</sup>

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<sup>339</sup> Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., at app. 115.

<sup>340</sup> Id.

<sup>341</sup> Id. at 116

<sup>342</sup> Id.

<sup>343</sup> Id.

<sup>344</sup> See Foner, *Reconstruction*, *supra* note 329 at 450-52.

<sup>345</sup> See *infra* note 209 and accompanying text.

But if Shellabarger’s reading of the Fourteenth Amendment was problematic, the statements of Kerr and Farnsworth were even more worrisome. Both men agreed with Shellabarger that Article IV was the touchstone for understanding Section One, but they had a far more convincing understanding of Article IV. They were quite right that Article IV had traditionally been understood as nothing more than a statement of equal treatment of sojourning citizens. This made their assertions about the Fourteenth Amendment all the more plausible and, thus, all the more dangerous to someone like Bingham. Bingham had composed the second draft of the Fourteenth Amendment in order to avoid confusion with the equal rights language of Article IV. The one theme that runs through all of Bingham’s speeches for both versions of the Fourteenth Amendment involve his effort to secure the substantive rights listed in the first eight amendments to the Constitution. If men like Kerr and Farnsworth had their way, Bingham’s efforts to secure a national Bill of Rights would fail.

Bingham thus was faced with the task of delivering a speech which supported the proposed Ku Klux Klan Act, but also explained the errors of both the Acts supporters (Shellabarger) and its opponents (such as Kerr and Farnsworth). Bingham’s speech of 1871 is famous for its invocation of the theory of incorporation of the Bill of Rights. What has gone unaddressed, however, was the *purpose* of Bingham’s speech—the need to counter both unduly broad and unduly narrow readings of the Privileges or Immunities Clause.

Bingham opened his remarks by pointing out the daunting task in front of him: “No man is equal to the task of discussing, as it ought to be discussed, the issue before this House within the limits of a single hour. I scarcely hope that I shall have done more than touch the hem of the garment of the argument when my hour shall have expired.”<sup>346</sup> He then refuted Kerr’s argument that protecting federal constitutional rights against state action was a matter for the courts, and not the federal legislature. According to Bingham, even under the “constitution as it was, it always was competent for the Congress of the United States, by law, to enforce every affirmative grant of power and every express negative limitation imposed by the Constitution on the states.”<sup>347</sup> As an historical example, Bingham cited Section 25 of the Judiciary Act of 1789, by which Congress empowered the Supreme Court to hear cases arising out of State court involving an individual federal right. As for this particular statute, Bingham believed it was a justified use of Section 5 powers to enforce the “express negative limitation” placed on the states by the Equal Protection Clause of the Fourteenth Amendment. Providing equal protection included the power to ensure the equal protection of “life, liberty and property as provided in the supreme law of the land, the Constitution of the United States.” Congressional power to enforce the Equal Protection Clause through legislation, Bingham insisted, “is as full as any other grant of power to Congress.”<sup>348</sup>

Bingham then addressed the claim that the first and fifth sections of the Fourteenth Amendment did nothing more than empower Congress to enforce the Comity Clause of Article IV. Here, Bingham explained why the debate between Shellabarger, Kerr and Farnsworth regarding the proper reading of Article IV was wholly irrelevant to determining the meaning of Section One. The Privileges or Immunities Clause of the Fourteenth Amendment protected a completely different set of rights than those protected under Article IV. The key to understanding the Clause was not to be found in Justice Washington’s list, but in the first eight amendments to the Constitution.

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<sup>346</sup> Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., app. 81.

<sup>347</sup> Id. at 81.

<sup>348</sup> Id. at 83.

Taking up Farnsworth challenge to explain why he had abandoned his original draft of the Fourteenth Amendment, Bingham explained that he had reread “the great decision of Marshall” in *Barron v. Baltimore* and realized that his original draft would not accomplish his desired goal of protecting the Bill of Rights against infringement by the States.<sup>349</sup> According to cases such as *Barron* and *Livingston v. Moore*, “the first eight amendments were not limitations on the power of the States.”<sup>350</sup> Despite their importance, “it had been decided, and rightfully, that these amendments, defining and protecting the rights of men and citizens, were only limitations on the power of Congress.”<sup>351</sup> Nevertheless, these eight amendments which Jefferson had “well said” “constituted the American Bill of Rights” were critical for American liberty. They not only “secured the citizens against any deprivation of any essential rights of person,” they secured “all the rights dear to the American citizen.”<sup>352</sup> The purpose of the Privileges or Immunities Clause was to ensure, for the first time, that these rights were protected against state action.

In this section of his speech, Bingham makes a number of important points, many of which have gone unnoticed by historians. First of all, Bingham abandoned the definition of the Bill of Rights which he used at the time of his first draft of the Fourteenth Amendment. At that time, Bingham has claimed that Article IV as part of the Bill of Rights. Bingham now adopts Thomas Jefferson’s view that *the first eight* amendments constitute the American Bill of Rights. Secondly, Bingham claims that *only* the first eight amendments constitute the Bill of Rights—he leaves out the Ninth and Tenth Amendments. His omission of the Ninth is particularly important as it significantly undermines an argument made by some scholars that the Privileges or Immunities Clause protects the same category of unenumerated natural rights that some scholars believe informed the original Ninth Amendment.<sup>353</sup> This certainly was not the understanding of the man who drafted the Clause.

The Ninth Amendment speaks of “other” rights “retained by the people,” while the Tenth Amendment reserves all non-delegated powers to the people in the states. Today, most scholars tend to view these amendments as being in tension, with the Ninth protecting individual rights, and the Tenth protecting state rights. As recent historical investigations have shown, however, in the period between the Founding and the Reconstruction, the Ninth and Tenth Amendments were views as working in tandem to limit the construction of federal power and preserve the autonomy of the States.<sup>354</sup> In his famous speech defending the right of secession, for example, Judah P. Benjamin relied on both the Ninth and Tenth Amendments as supporting the retained right of the people in the states to leave the Union.<sup>355</sup> Given the standard antebellum reading of these two amendments as co-guardians of the retained rights of local self-government, it is not surprising that Bingham left both Amendments off his list of provisions protecting “the essential rights of person.”

The omission of the Ninth Amendment is telling for another reason. In this section and throughout his speech, Bingham stressed the critical link between the rights of American citizens and an express textual enumeration in the Constitution. Bingham declared that the first eight amendments listed *all* the rights dear to the American citizen. As we shall see, Bingham

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<sup>349</sup> *Id.* at 84.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> See, e.g., Randy Barnett, *RESTORING THE LOST CONSTITUTION*, *supra* note 7 at 62-68.

<sup>354</sup> For a detailed study of the original understanding of the Ninth and Tenth Amendments, see Kurt Lash, *The Lost History of the Ninth Amendment* (Oxford University Press, 2009).

<sup>355</sup> *Id.* at 227.

did not limit the privileges and immunities of United States citizens to just those listed in the first eight amendments, but over and over again, he stressed that those rights which citizens *did* possess were expressly enumerated in the Constitution.

This leads to Bingham's next point: The Bill of Rights originally did not bind the states. In *Barron v. Baltimore*, Bingham explained, "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."<sup>356</sup>

In reexamining that case of *Barron*, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the power of 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"; imitating their example and imitating it to the letter, I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: "No state shall . . ."<sup>357</sup>

Scholars generally read this passage as Bingham explaining how he used *Barron v. Baltimore* as a drafting guide to Section One of the Fourteenth Amendment. In fact, it is much more. Bingham's original view of the Bill of Rights was that states *were* obligated to enforce the Bill, due to a combination of Article IV's declaration of the "privileges and immunities of citizens [with the ellipsis "of the United States"] in the several states," and the constitutional requirements that state officials take an oath to uphold the federal Constitution as the supreme law of the land. In the first round of debates over the Fourteenth Amendment, this reading of Article IV was roundly rejected by both friend and foe—thus Bingham's reference to his "struggle" of February 1866. Thus, just as he omitted any reference to Article IV in his defense of the second version in May 1866, Bingham again says nothing about Article IV.

Bingham continued to believe that states had no actual *right* to violate the first eight amendments, and he still apparently believed that the states had at least a moral duty to respect the Bill of Rights as part of their oath to uphold the federal Constitution.<sup>358</sup> However, Bingham no longer argued that this obligation flowed from Article IV. Instead, Bingham expressly accepts Marshall's decision in *Barron v. Baltimore* as a correct reading of the original Constitution. According to Bingham, the "*great decision*" of *Barron* was "*rightfully*" decided. Whatever their moral obligations, States had full power to ignore the Bill of Rights under the original Constitution if they chose to do so.

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<sup>356</sup> Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., app. 84 (1871).

<sup>357</sup> Id.

<sup>358</sup> See id. at 85 ("The states never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all state officials are by the Constitution required to be bound by oath or affirmation to support the Constitution."). In his February 1866 speech defending his Article IV based draft of Section One, Bingham expressly relied on Article IV, as well as the oath clause, as binding the states to follow the "Bill of Rights." See *infra* note 170 and accompanying text. Hear, Bingham says nothing about Article IV. That he would nevertheless believe that States had a moral obligation to respect the Bill of Rights makes sense given Bingham's belief that such rights were, in fact, essential aspects of American citizenship, even if not enforceable (prior to the Fourteenth Amendment) as a matter of constitutional law.

In fact, Bingham’s renewed appreciation of *Barron* seems to have triggered a kind of epiphany: If *Barron* was “rightfully” decided and the original Constitution did not bind the states to enforce the Bill of Rights, then this meant that Bingham’s original reading of Article IV was incorrect—it did *not* obligate the states to follow the Bill of Rights and Bingham had erred in using this language in his initial draft of the Fourteenth Amendment. His new-found appreciation of Marshall’s reasoning in *Barron* convinced him that not only did he need to draft a clause which expressly bound the states, he also needed to use language that pointed away from the state-conferred rights of Article IV and towards the “the essential” *federal* rights of American citizenship.

Confusion on this issue threatened Bingham’s core purpose for the Privileges or Immunities Clause, protecting the Bill of Rights against state action. The meaning of the Privileges or Immunities Clause had already appeared before the federal courts,<sup>359</sup> and the speeches of Congress were public record to which the courts had recourse to learn the views of the men who drafted and adopted the Fourteenth Amendment. Bingham probably believed it was important, therefore, to set the record straight and clearly explain the distinction between the Privileges and Immunities Clause of Article IV (which Bingham now viewed in the traditional manner) and the Privileges or Immunities Clause of Section One. If members like Kerr and Farnsworth had their way, Section One would be forever tied to the traditional understanding of Article IV and read as providing only a degree of protection and *not* as protecting the substantive liberties listed in the Bill of Rights. Bingham therefore proceeded to make the distinction crystal clear:

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, *as contradistinguished from citizens of a State* [the language of Article IV] are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:<sup>360</sup>

Bingham then quoted, word for word, Amendments One through Eight. His rendition takes up almost an entire column in the Congressional Globe. This list of substantive rights, Bingham explained, was altogether different from the privileges and immunities protected under Article IV. As Bingham put it, the substantive privileges or immunities “of citizens of the United States” as listed in the federal Bill of Rights must be “contradistinguished from” the privileges and immunities of *citizens of a State* which, under Article IV received only a degree of equal protection.

Having established why Kerr and Farnsworth were wrong to treat the Privileges or Immunities Clause as nothing more than an equal rights provision, Bingham now turned to Samuel Shellabarger’s suggestion that Section One transformed Justice Washington’s list of civil rights in *Corfield* into substantive national rights:

Mr. Speaker, that decision in the fourth of Washington’s Circuit Court Reports, to which my learned colleague [Mr. Shellabarger] has referred is only a construction of the second section of the fourth article of the original Constitution, to wit, “The citizens of each State

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<sup>359</sup> See *Live-Stock Dealers v. Crescent City Live-Stock Landing and Slaughter*, 1 Abb. U.S. 388, 15 F. Cas. 649 (1870) (Justice Bradley riding on Federal Circuit).

<sup>360</sup> Cong. Globe, 42d Cong. 1<sup>st</sup> Sess. app. at 84.

shall be entitled to all privileges and immunities of citizens in the several States.” In that case, the court only held that in civil rights the State court not refuse to extend to citizens of other States the same general rights secured in its own.<sup>361</sup>

Here, Bingham repeats the reading of Article IV he presented during his speech on the admission of Nebraska. This is the traditional antebellum reading of the Privileges and Immunities Clause as an equal rights provision. After quoting the legal arguments of Daniel Webster as well as Story’s Commentaries on the Constitution, Bingham concluded, “[i]s it not clear *that other and different privileges and immunities* than those to which a citizen of a State was entitled are secured by the provisions of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?”<sup>362</sup> In sum, Bingham presents a view of Section One which not only goes beyond the equal protection principles of Article IV, he insists that the Amendment protects a completely different set of rights.

Given the clarity and extensive nature of these passages, it is surprising that legal historians and scholars have so frequently claimed that John Bingham understood his Privileges or Immunities Clause as federalizing the state-conferred right of Article IV. His abandonment of the language of Article IV in his second draft alone seems to call into question such claims. This speech, however, removes all doubt. It is not as if scholars have dismissed this speech as post-adoption spin. Rather, Bingham’s extended explanation of the distinction between Article IV and Section One has gone almost completely unnoticed.

Although Bingham delivered his speech a few years after the adoption of the Fourteenth Amendment, there seems to be no reason to doubt the sincerity of Bingham’s explanation for the altered language of the Privileges or Immunities Clause. It is simply a fact that Bingham *did* abandon the language of Article IV and he *did* oppose efforts to federalize state-level common law rights in the Thirty-Ninth Congress. Nothing in his speech of 1871 conflicts with any of goals and principles Bingham declared during the Thirty-Ninth Congress. Nor can one attribute his 1871 view of Article IV to post-1866 Supreme Court decisions such as the 1868 case of *Paul v. Virginia*. We have already seen how Bingham held this view as early as 1867, and we know that Bingham had never relied on *Corfield*, much less radical readings of *Corfield*, during the 1866 debates (or anytime before). Finally, the *Paul* case itself was not a departure from common understanding of Article IV: The Court simply repeated what had been the common antebellum reading of Article IV, and relied upon antebellum cases such as *Lemmon v. The People*.<sup>363</sup> It was radical Republicans like Shellabarger who tried to overread *Corfield* both in the Thirty-Ninth and in the Forty-Second Congress—only to be rebuffed both times.

Finally, it is important to recognize the textualism of John Bingham’s theory of federal privileges or immunities. Over and over again, Bingham refers to the privileges and immunities of citizens of the United States in a manner that references the express enumerated rights of the Constitution. The enumerated rights of the Bill “secured all the rights dear to the American citizen.” These enumerated rights were the “essential rights of person” which the founding generation had enshrined in the Constitution. According to Bingham, Congress “may

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.* (emphasis not in original).

<sup>363</sup> For a discussion of *Paul v. Virginia*, see Lash, Privileges and Immunities as an Antebellum Term of Art, *supra* note 84.

safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing *all the privileges and immunities* of citizens of the United States, as guaranteed by the amended Constitution and *expressly enumerated in the Constitution*.<sup>364</sup> Congress had full power “to make laws to enforce [the citizen’s] guaranteed ‘privileges’ under the Constitution, *as defined therein* and assured by the Fourteenth Amendment.”<sup>365</sup> “What would this government be worth if it must rely upon the States to execute its grants of power, its limitations of power upon the States, and *its express guarantees of rights to the people*.”<sup>366</sup> After providing an extensive list of rights in the first eight amendments which Congress now had the power to enforce, Bingham concluded “these are the rights of citizens of the United States *defined in the Constitution* and guaranteed by the Fourteenth Amendment.”<sup>367</sup>

This text-based understanding of the privileges or immunities of United States citizens fits with Bingham’s rejection of arguments by members like Samuel Shellabarger and James Wilson who insisted on federal power to generally regulate the substance of civil rights in the States.<sup>368</sup> Such a nationalization of common law civil liberties was anathema to Bingham’s belief in “our dual system of government” which was “essential to our national existence.”<sup>369</sup> Bingham thus occupied a middle ground between radicals like Shellabarger and conservatives like Kerr. The Fourteenth Amendment did in fact protect a category of substantive national rights, but only those rights listed in the Constitution itself. Although these federal privileges and immunities rights were “chiefly defined in the first eight amendments,” they also included others “expressly” defined in the Constitution, such as the limitations on State power listed in Article I, section 10.<sup>370</sup> Although one could also view the Privileges and Immunities Clause of Article IV as also constituting an expressly guaranteed privilege of American citizens, enforcing the Comity Clause involved no more than providing sojourning citizens equal access to a limited set of state-conferred rights—the substance of such rights being left to individual state control.

## CONCLUSION

One of the themes running through the debates of the Thirty-Ninth Congress was the need to produce a proper *text*. Both the Civil Rights Act of 1866 and the Fourteenth Amendment went through similar cycles of proposal, debate, withdrawal, redrafting, submission and adoption. These were not legal realists. The members of the Reconstruction Congress took seriously the idea that different words would have, and ought to have, very different results in terms of later judicial and legislative interpretation and enforcement. Accordingly, the *meaning* of different texts became the subject of intense debate, with members deploying all the tools of nineteenth century lawyers. The members of the Thirty-Ninth Congress were politicians, of course, and thus can be expected to have presented arguments which favored their particular constituency or point of view. However, the need to secure sufficient votes to override a presidential veto or propose a constitutional amendment forced each member, whatever their political preference, to craft legal arguments that were both persuasive in terms of nineteenth century textual interpretation *and* would entrench principles acceptable to a sufficient number of moderate and conservative Republicans. Not surprisingly, then, both the initial Civil Rights Act and the first

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<sup>364</sup> Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., app. at 84.

<sup>365</sup> Id. at 85.

<sup>366</sup> Id.

<sup>367</sup> Id.

<sup>368</sup> See also, Wildenthal, *Revisiting*, *supra* note 270, at 1618-19.

<sup>369</sup> Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., app. at 84.

<sup>370</sup> Cong. Globe, 42d Cong., 1<sup>st</sup> Sess., app. at 84.

draft of the Fourteenth Amendment went through significant textual change as arguments in favor of broad federal control of civil rights in the states met with moderate and conservative opposition. The resulting *amended* texts advanced the cause of liberty in the states, but did so without unduly interfering with those rights and powers which a critical number of members believed ought to remain retained by the people in the states.

Historical scholarship on the Privileges or Immunities Clause of the Fourteenth Amendment tends to miss the important give and take between the various factions of the Reconstruction Congress, and the significance of how these debates forced a change in text. This is most likely due to an illusion created by the specific terms “privileges” and “immunities.” Because these terms can be found in Article IV, as well as in the first and second drafts of the Fourteenth Amendment, the temptation has been to equate *all three texts*. Compounding this mistaken conflation of three very different legal texts has been the tendency to treat the broadest reading of a single Article IV case, *Corfield v. Coryell*, as the template by which all three texts are to be understood. The illusory role of *Corfield* appears to have become rooted in Fourteenth Amendment scholarship due to the simple fact that the case is cited and discussed during the Reconstruction debates more than any other cases involving the Comity Clause of Article IV. This combination--the use of similar terms in Article IV and in both drafts of the Fourteenth Amendment as well as repeated references to *Corfield* during the Reconstruction debates—seems to have been enough to convince a number of scholars that there must be a straight line running from Justice Washington’s list of “fundamental” rights to the final draft of the Privileges or Immunities Clause.

When one follows the lead of the Thirty-Ninth Congress, and focuses on the actual words of Bingham’s first and second drafts of the Fourteenth Amendments, a very different—and more complicated—picture emerges. Article IV and *Corfield* were in fact often discussed by the members of the Thirty-Ninth Congress, but this was because their meaning was hotly *contested*. Far from representing a consensus view of Article IV, the broad radical interpretation of *Corfield* and Washington’s list embraced by men like Samuel Shellabarger and James Wilson was expressly rejected by moderate and conservative Republicans. When faced with extended quotations of antebellum legal and scholarly works, radicals conceded the issue and altered their arguments accordingly. Likewise, when John Bingham found his initial interpretation of Article IV either rejected or misunderstood, he too was forced to concede the matter, withdraw his proposed amendment, and work on a new draft that would meet with the approval of moderate Republicans.

What the debates ultimately reveal is that the most significant part of the Privileges or Immunities Clause is not the words which can be found elsewhere in the Constitution, but the words which can be found nowhere else: “*of citizens of the United States*.” These are the words which distinguish the clause from Article IV and which invoke a strain of legal thought which extends all the way back to the 1803 Treaty with France. The privileges and immunities of citizens of the United States are *federal* rights conferred by *federal* texts. As John Bingham’s hero Samuel Webster wrote in 1819, the “rights, advantages and immunities of citizens of the United States” protected in the 1803 Treaty, “must, from the *very force of the terms of the clause*, be such as are recognized or communicated by the Constitution of the United States, such as are common to all citizens, and are uniform throughout the United States.”<sup>371</sup> Or, as

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<sup>371</sup> Daniel Webster, A Memorial to the Congress of the United States, on the subject of restraining the increase of slavery in new states to be admitted to the Union (Dec. 3, 1819) (Early American Imprints, Series 2, no. 47390).

Bingham himself insisted, the rights of citizens of the United States were “*defined in the Constitution* and guaranteed by the Fourteenth Amendment.”<sup>372</sup> Neither Bingham nor the moderates had any intention of federalizing common law civil rights, and they choose a text that would avoid such a result. Instead, Bingham crafted the Privileges or Immunities Clause in order to protect the personal rights expressly listed in the Constitution, in particular the first eight amendments of the Bill of Rights. Scholars who read the Privileges or Immunities Clause as protecting a broad range of unenumerated individual natural rights invoke not the theory of John Bingham, but the unsuccessful theories of men like Shellabarger and Wilson.

This is not to say, however, that Bingham’s view prevailed as the public understanding of the Fourteenth Amendment. As I explained in the initial section of this article, even if one determines the intention of the framers, this is not the same thing as determining the original public understanding of a constitutional text. The goal of contemporary originalism, goals which I share, seek the likely understanding of the public which considered and ratified the text. The views of those who debated and adopted the text are certainly relevant to this effort, as is the antebellum understanding of the terms which they employed. Still, determining the public meaning of Bingham’s text requires more analysis than can be provided in this already substantial paper. Accordingly, this will be the focus of a third and final paper on the original understanding of the Privileges or Immunities Clause.

The goals of this particular paper are thus modest, but extremely important to the success of the broader project. Part I of this project explored a common antebellum distinction between Article IV’s protection of state-conferred “privileges and immunities of citizens in the several states” and federally conferred “privileges and immunities of citizens of the United States.” One of the goals of this paper was to determine whether this distinction survived the Civil War and the adoption of the Fourteenth Amendment. It seems clear that the man who drafted the Privileges or Immunities Clause strongly embraced this antebellum distinction. John Bingham’s reading of the Privileges or Immunities thus had far more in common with Justice Miller’s analysis in *Slaughterhouse* than it did with the natural rights position unsuccessfully advocated by Samuel Shellabarger and James Wilson. At the very least, this calls into question contemporary efforts to draft John Bingham to the cause of overruling *Slaughterhouse* and replacing it with a broad natural rights reading of Section One.<sup>373</sup>

The record also suggests that Bingham himself deserves both fairer and deeper study than he has generally been accorded in past scholarship. With one foot planted in abolitionism and the other in what he called the “dualist” Constitution, John Bingham may well embody the Reconstruction compromise between those who would wholly preserve the pre-civil war Constitution and those who would dismantle it altogether.

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<sup>372</sup> Cong. Globe, 42 Cong., 1<sup>st</sup> Sess., app. 85.

<sup>373</sup> See Petitioner’s Brief, *McDonald v. City of Chicago*, No. 08-1521, p.6-9 (Nov. 16, 2009).