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## The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment

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# THE MAGIC MIRROR OF “ORIGINAL MEANING”: RECENT APPROACHES TO THE FOURTEENTH AMENDMENT

*Bret Boyce*

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## THE MAGIC MIRROR OF “ORIGINAL MEANING”: RECENT APPROACHES TO THE FOURTEENTH AMENDMENT

Bret Boyce\*

### I. INTRODUCTION

Nearly a century and a half after its adoption, debate continues to rage over the original meaning of the Fourteenth Amendment’s guarantees of basic rights. Of the three clauses in the second sentence of Section One,<sup>1</sup> the latter two (the Due Process and Equal Protection Clauses) loom very large in modern Supreme Court decisions, while the first (the Privileges or Immunities Clause) is of minimal importance, having been invoked only once to strike down a state law.<sup>2</sup> Originalists—those who hold that the Constitution should be interpreted according to its original meaning—have often deplored this state of affairs. Many have argued that from the perspective of original meaning, the Privileges or Immunities Clause is not the least important but rather “the most important Clause in the Amendment.”<sup>3</sup> On this view, many of the constitutional rights today associated with the Due Process and Equal Protection Clauses were originally understood to be protected by the Privileges or Immunities Clause. For example, many originalists have criticized the substantive due process doctrine as oxymoronic.<sup>4</sup> Any protection of substantive rights, they insist, must be found in the Privileges or Immunities Clause, as the Due Process Clause is about *procedure* only.<sup>5</sup>

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1. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

2. See *Saenz v. Roe*, 526 U.S. 489, 502-11 (1999) (striking down state law limiting welfare benefits for new residents).

3. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1532 (2008); see also EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 106 (1990) (stating that during the framing of the Fourteenth Amendment, “the privileges and immunities provision was viewed as being the most significant in terms of the rights protected”); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 317 (2007) (“[T]he Privileges or Immunities Clause was supposed to be the Amendment’s major source for constitutional protection of both civil liberty and civil equality.”).

4. See, e.g., Calabresi, *supra* note 3, at 1531 (“[T]he very notion of substantive due process is an oxymoron.”); *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (suggesting that substantive due process is not a “constitutional right” but an “oxymoron”).

5. See, e.g., Calabresi, *supra* note 3, at 1531-34; see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (extensive recent originalist attack on the doctrine of substantive due process). But see Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009) (arguing that the due process right enshrined in the Fifth Amendment was widely understood to have a substantive component); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 414-17 (2010) (arguing that the original

Originalists have also argued that the Privileges or Immunities Clause, not the Due Process Clause, is the most plausible vehicle for the application of the guarantees of the Bill of Rights against the states.<sup>6</sup> Likewise, many originalists have maintained that the Privileges or Immunities Clause, not the Equal Protection Clause, is the most important general mandate of legislative equal treatment,<sup>7</sup> as the Equal Protection Clause requires only equality in the provision of the *protective* functions of government (which are principally executive and judicial), not in all legislative classifications.<sup>8</sup>

The Supreme Court's current narrow reading of the Privileges or Immunities Clause dates back to its very first decision interpreting the Fourteenth Amendment, the *Slaughter-House Cases*,<sup>9</sup> handed down only five years after the Amendment was ratified. In that decision the Court rejected the notion that the Clause protects a broad array of fundamental rights or that it generally prohibits discriminatory legislation; the decision has also been read to preclude incorporation through that Clause.<sup>10</sup> Thus, in the view of many originalists, the Due Process and Equal Protection Clauses have had to bear more weight than originally envisioned—due process was transformed from a procedural into a substantive guarantee, while the “equal protection of the laws” was transmogrified into the “protection of equal laws.”<sup>11</sup>

In *McDonald v. City of Chicago*,<sup>12</sup> the Supreme Court declined an invitation to

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understanding of the Due Process Clause of the Fourteenth Amendment (but not that of the Fifth Amendment) was broad enough to encompass a recognizable form of substantive due process).

6. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163-214 (1998).

7. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389-91 (1992).

8. See, e.g., Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 3 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 219-20 (2009). Cf. Harrison, *supra* note 7, at 1390 (arguing that the Equal Protection Clause requires equality in “the administration of laws” or in “laws that protect,” not equality in all legislation).

9. 83 U.S. (16 Wall.) 36 (1873).

10. The question at issue in *Slaughter-House*, whether the state had the power to create a corporation with a monopoly on the slaughtering of livestock in New Orleans, did not implicate the applicability of rights enumerated in the Bill of Rights to the states. But the Court maintained that the Privileges or Immunities Clause was not “intended as a protection to the citizen of a State against the legislative power of his own State.” *Id.* at 74. Rather, the Court insisted, it protected only such rights as “owe their existence to the Federal government, its National character, its Constitution, or its laws.” *Id.* at 79. The Court's partial enumeration of these rights in dicta consisted largely or entirely of rights vis-à-vis the federal government, but the Court did include “[t]he right to peaceably assemble and petition for redress of grievances, [and] the privilege of the writ of *habeas corpus*” on the list. *Id.* Some scholars have concluded therefore that *Slaughter-House* did not rule out incorporation through the Privileges or Immunities Clause. See, e.g., Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 648-49, 666-87(2000). But it is hardly clear that the Court meant that the right to petition state governments or obtain habeas relief against them was protected by the Clause. In any case, subsequent decisions, relying in part on *Slaughter-House*, seem clearly to preclude incorporation through the Privileges or Immunities Clause (although Newsom argues for a contrary reading). See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 549-53 (1876).

11. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

12. 130 S. Ct. 3020 (2010).

overrule *Slaughter-House* and restore what the plaintiffs contended was the original meaning of the Privileges or Immunities Clause.<sup>13</sup> In *McDonald*, the first incorporation case to come before the Court in several decades, there was little doubt that the Court was poised to hold the right in question (handgun possession in the home) applicable against the states.<sup>14</sup> However, the Court declined to reground the incorporation doctrine in the Privileges or Immunities Clause rather than the Due Process Clause.

Four Justices in the majority, led by Justice Alito, continued to adhere to the due process approach,<sup>15</sup> as did the four dissenting Justices.<sup>16</sup> The Alito plurality rejected the plaintiffs' originalist arguments centered on the Privileges or Immunities Clause with the laconic observation that the plaintiffs were "unable to identify the Clause's full scope" and that there was no "consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed."<sup>17</sup> Likewise, Justice Stevens agreed that the original meaning of the Privileges or Immunities Clause was too uncertain to provide a proper basis for

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13. See Brief for Petitioner at 65, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 4378912. While arguments based on the Privileges or Immunities Clause occupied 57 pages of the Argument section of the brief, arguments based on the Due Process Clause took up a mere seven pages. See *id.* at 72.

14. Two years earlier, the Court had held the right applicable against the Federal Government in *District of Columbia v. Heller*, 554 U.S. 570 (2008). It was clear already in *Heller* that the Court would proceed to incorporate this right against the states, because the Court there held (however implausibly) that individual self-defense was "the central component" of the Second Amendment right, and that that right applied especially to handguns because of their popularity. *Id.* at 599; see also *id.* at 628-29. In fact, much historical scholarship has rejected the notion that self-defense was central to the original understanding of the Second Amendment. See, e.g., Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1109, 1101-18 (2009); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1303-07 (2009). Rather, the Second Amendment right was understood as a civic right closely bound up with service in a well-regulated militia, not a purely individual right centered on personal self-defense, as Justice Scalia claimed in *Heller*. See SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 9-70 (2006). Even some originalists and gun-rights supporters have harshly criticized Justice Scalia's opinion in *Heller*. See, e.g., Nelson Lund, *The Second Amendment, Heller and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (criticizing the opinion as "transparently nonoriginalist" and "an embarrassment"); J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 274 (2009) (criticizing the opinion as "a form of judicial activism" that "cannot be justified by originalism because originalism did not dictate the outcome"). But many other originalists praised *Heller* as a vindication of their approach. See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 ("Justice Scalia's opinion [in *Heller*] is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 980 (2009) ("*Heller* is certainly the clearest and most prominent example of originalism in contemporary Supreme Court jurisprudence . . ."). And the *McDonald* majority continued to adhere to the historical analysis in *Heller*, which "point[ed] unmistakably" to the subsequent incorporation of the right. *McDonald*, 130 S. Ct. at 3036.

15. See *McDonald*, 130 S. Ct. at 3030-36, 3044-48, 3050 (Alito, J.) (plurality opinion).

16. See *id.* at 3088-120 (Stevens, J., dissenting) (focusing on substantive due process); *id.* at 3120-36 (Breyer, J. dissenting) (focusing on due process incorporation).

17. *Id.* at 3030 (Alito, J.) (plurality opinion).

modern incorporation doctrine.<sup>18</sup> Only Justice Thomas embraced the plaintiffs' originalist argument.<sup>19</sup> Thomas characterized the Court's continued reliance on the Due Process Clause for the protection of substantive rights as a "particularly dangerous" "legal fiction."<sup>20</sup> Restoration of the "original meaning" of the Privileges or Immunities Clause, Justice Thomas argued, would allow the Court "to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed."<sup>21</sup>

This Article argues that the intractable ambiguities surrounding the historical meaning of the Fourteenth Amendment made the Court's retreat from originalism in *McDonald* all but inevitable. As a majority of Justices there recognized, the original understanding of the Privileges or Immunities Clause is far from clear, despite the enormous scholarly attention devoted to uncovering its historical meaning. Even Justice Thomas, the Court's most doctrinaire originalist, has admitted that there is no scholarly consensus on this question.<sup>22</sup> Thomas' own analysis of that Clause, shifting among several inconsistent definitions of privileges and immunities without adequately exploring the differences among them,<sup>23</sup> hardly supports his claim that its meaning is clear and predictable. While conceding that the legislative history of the Clause is "less than crystal clear," Thomas drew selectively on a handful of statements in the historical record to conclude that the case for incorporation is unambiguous.<sup>24</sup> As this Article will show, the same

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18. See *id.* at 3089 (Stevens, J., dissenting) (arguing that "the original meaning of the Clause is not as clear as [plaintiffs] suggest" and reinvigoration of the clause would only invite judicial policymaking). Justice Breyer's dissent simply ignored the Privileges or Immunities Clause and focused entirely on the question of whether the right to private self-defense was "fundamental" for purposes of the standard Due Process Clause selective incorporation approach. See, e.g., *id.* at 3120 (Breyer, J., dissenting). At oral argument, even the avowed originalist Justice Scalia proved remarkably unreceptive to the plaintiffs' originalist arguments. To repeated outbursts of laughter, Justice Scalia dismissed the privileges or immunities argument as the "darling of the professoriate" and sarcastically suggested that perhaps the plaintiffs' counsel was "bucking for . . . a place on some law school faculty." Transcript of Oral Argument at 7, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). Observing that this argument was "contrary to 140 years of our jurisprudence," Scalia suggested that it would be better to rely on "substantive due process, which as much as I think it's wrong, I have—even I have acquiesced in it." *Id.*

19. See *McDonald*, 130 S. Ct. at 3088 (Thomas, J., concurring in part).

20. *Id.* at 3062. The Court's substantive due process jurisprudence, according to Justice Thomas, lacks any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *Id.* In particular, Justice Thomas suggested, there can be no serious claim that the Due Process Clause was originally understood to protect currently recognized rights of reproductive and sexual autonomy. See *id.* (citing with disapproval *Roe v. Wade*, 410 U.S. 113 (1973) and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

21. *Id.*

22. See *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.")

23. In the space of less than two pages, Thomas suggests that "privileges and immunities" were (1) nonspecific synonyms "used interchangeably" for rights in general; (2) synonymous terms denoting special rights enjoyed only by a particular subclass of persons; (3) nonsynonymous terms, where "immunities" referred to the residuum of natural rights retained in civil society while privileges referred to positive rights provided by society in lieu of relinquished natural rights. See *McDonald*, 130 S. Ct. at 3063-64 (Thomas, J., concurring in part).

24. *Id.* at 3075.

selectivity is evident in the work of many originalist scholars, leading to wildly differing interpretations of the Fourteenth Amendment.

It is not surprising, given its ambiguous text and history, that there is no consensus among scholars and historians regarding the original meaning of the Privileges or Immunities Clause and hence of the Fourteenth Amendment as a whole. Recent interpretations literally run the gamut from the claim that the Clause protected *no* new rights, to the claim that it protected an open-ended set of rights that can never be completely specified or enumerated. This Article focuses on the most prominent recent originalist interpretations,<sup>25</sup> which may be divided into two broad methodological groups.

In the first group, Philip Hamburger and Kurt Lash have undertaken a detailed review of the origins of the Fourteenth Amendment and have enhanced our understanding of its historical meaning in important ways. Yet they reach irreconcilable conclusions about the meaning of the Privileges or Immunities Clause. Hamburger argues that the Privileges *or* Immunities Clause of the Fourteenth Amendment simply recapitulated the rights already protected by the Comity Clause (the Privileges *and* Immunities Clause) of Article IV<sup>26</sup>—it merely reiterated the preexisting constitutional prohibition of discrimination against out-of-state residents in a limited class of state-conferred rights.<sup>27</sup> In contrast, Lash argues that during the antebellum period, the term “privileges or immunities of citizens of the United States” was used to refer not to state-conferred rights, but to rights “expressly conferred by the Federal Constitution.”<sup>28</sup> He maintains that John Bingham, the draftsman of Section One, purposely abandoned his original language directly tracking the Comity Clause (“privileges and immunities of citizens in the several States”) in favor of the language eventually included in the Fourteenth Amendment (“privileges or immunities of citizens of the United States”) in order to make clear that the latter referred to a completely different set of rights, namely the rights “textually enumerated” in the first eight amendments.<sup>29</sup> Finally, Lash argues that the public debates following Congress’ adoption of the Fourteenth Amendment, particularly during the election campaign of 1866, show that the original public meaning of the Privileges or Immunities Clause “referred to the personal rights enumerated in the federal Constitution.”<sup>30</sup> Lash’s views on the

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25. For a discussion of earlier scholarly interpretations of the Privileges or Immunities Clause, which similarly run the gamut from extremely narrow to quite expansive, see Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 987-1026 (1998).

26. Some scholars refer to both clauses as the “Privileges and Immunities Clause.” To avoid confusion, this article will distinguish in nomenclature between the Comity Clause (or Privileges *and* Immunities Clause) of Article IV and the Privileges *or* Immunities Clause of the Fourteenth Amendment.

27. See Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 61-62 (2011).

28. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1245 (2010) [hereinafter Lash, *Origins Part I*].

29. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 334 (2011) [hereinafter Lash, *Origins Part II*].

30. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1282 (2013) [hereinafter Lash, *Origins Part III*].

original meaning of that Clause have evolved considerably over time. Although he once wrote that it “seems tailor-made for the recognition of nontextual fundamental freedoms,”<sup>31</sup> he has since repudiated that position. His current view is that the Privileges or Immunities Clause protects “the substantive personal rights listed in the first eight Amendments, as well as the equal rights of sojourning citizens protected under the Comity Clause of Article IV.”<sup>32</sup>

The second methodological group is much less concerned with detailed historical inquiry. These scholars typically stress that what matters is the “original public meaning” of a constitutional provision rather than the framers’ specific expectations as to how it would be applied. Indeed, those specific expectations may be ignored where they contradict the “original public meaning.” Critically, scholars in this group tend to formulate the “original public meaning” at a very high and abstract level of generality, broad enough to justify results that the framers and ratifiers would not have contemplated and in many cases specifically disavowed. They typically rely on a handful of statements in the historical record as conclusive of the original public meaning, and hence they shed little new light on the Amendment’s historical meaning. But their methodology enables them to reach virtually any result that is consistent with current doctrine, as well as results that are more or less expansive. Such abstract approaches are not significantly less constraining than most nonoriginalist approaches; indeed, this “new originalism” is typically less constraining and more indeterminate than common law constitutionalism.

In this second group, Steven Calabresi has deployed such arguments to defend well-entrenched aspects of modern judicial doctrine while rejecting any major new extensions. For example, he proposes an originalist defense of the modern doctrine that the Fourteenth Amendment bans sex discrimination, despite the framers’ explicit disavowal that it would have that effect.<sup>33</sup> In general, Calabresi endorses those decisions whose repudiation would be a serious embarrassment for moderate conservatives (those banning school segregation and sex discrimination, or recognizing rights of contraception and racial intermarriage), while ruling out judicial protection of rights still widely rejected by conservative opinion (such as abortion or same-sex marriage).<sup>34</sup> According to Calabresi, “the Fourteenth Amendment is *not* a license to the Supreme Court to engage in transformative change.”<sup>35</sup> In contrast, Jack Balkin deploys a new originalist approach (which he calls “framework originalism”<sup>36</sup>) to defend politically liberal results, arguing provocatively that “the debate between originalism and living constitutionalism

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31. Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 485, 500 (1999).

32. Lash, *Origins Part III*, *supra* note 30, at 1282; *see also* Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 460 & n.49 (2009) [hereinafter *Beyond Incorporation*] (describing Lash’s evolution on this question).

33. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4-11 (2011).

34. *See* Steven G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice For All?*, 34 HARV. J.L. & PUB. POL’Y 149, 150-55 (2011).

35. *Id.* at 149.

36. JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).



rests on a false dichotomy.”<sup>37</sup> Balkin’s originalism not only defends most of the modern Court’s Fourteenth Amendment jurisprudence (including, perhaps most controversially, its abortion decisions<sup>38</sup>), but is open to further transformative doctrinal developments. Randy Barnett’s approach is even more revolutionary. He argues that the Privileges or Immunities Clause protects both “natural or inherent liberty rights” and positive law rights,<sup>39</sup> and that the natural rights thus protected are “literally boundless” and “unenumerable.”<sup>40</sup> Although a case can be made for each of those positions, this Article argues that a significant case can also be made against each of them. The historical evidence simply does not permit any confident assertion regarding the exact scope of the rights protected, or the abridgments prohibited, by the Privileges or Immunities Clause or by the Fourteenth Amendment as a whole.

Oliver Wendell Holmes wrote that in the law, “as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been!”<sup>41</sup> Given the vagueness and ambiguity of the Fourteenth Amendment’s text, the multifarious history of its framing and ratification, and the flexibility of current “public meaning originalism,” it is not surprising that public meaning originalists have reached such dramatically divergent conclusions about its proper interpretation and construction. When they peer into the magic mirror of its meaning, originalists tend to see reflected their own political philosophies and ideological presumptions.

This Article concludes that the absence of a clear original meaning of the Privileges or Immunities Clause (or of Section One as a whole) is a strong reason for rejecting originalism as a theory of constitutional interpretation. The second sentence of the Fourteenth Amendment is the central text on which the system of protection of individual rights in our constitutional order rests, and the failure of originalist scholars to construct a convincing and generally accepted account of its meaning is a powerful indictment of originalism.

For nearly a century and a half, the Fourteenth Amendment has been infused with meaning through an evolutionary process of common-law adjudication. The legitimacy of the doctrines thus established (such as incorporation, the prohibition of sex discrimination, the ban on racial segregation in public schools, the one-person-one-vote rule, or the unconstitutionality of miscegenation laws) does not rest on their compatibility with the original public meaning of the Fourteenth Amendment. However tenuously grounded in original meaning, such doctrines are secure as a matter of actual constitutional practice. That practice is characterized by an incrementalist and instrumentalist common-law approach<sup>42</sup> that, despite its flaws, has broadly provided both sufficient stability to guarantee the rule of law and

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37. Balkin, *supra* note 3, at 292.

38. *See id.* at 319-40.

39. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 63 (2004).

40. *Id.* at 55-57.

41. OLIVER WENDELL HOLMES, *The Law, in* SPEECHES BY OLIVER WENDELL HOLMES 17 (1891). Holmes’s dictum and his views about the importance of history for the understanding of law inspired the title for KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (2d ed. 2009).

42. *See, e.g.*, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3, 33-49 (2010) (describing the common law approach of constitutional interpretation and contrasting it with originalism).

the flexibility to permit evolutionary change and increasing protection of equality and human dignity within our constitutional order.

## II. RECENT ORIGINALIST INTERPRETATIONS

Over the past two decades, as various theorists have sought to refine and redefine originalism in response to internal and external criticism, the “new originalism” that has emerged has increasingly focused on theories of language and interpretation.<sup>43</sup> There exists today a wide variety of originalist approaches, so much so that some have argued originalism is losing its coherence and its usefulness as a descriptive term.<sup>44</sup> Thomas Colby has helpfully catalogued the most important theoretical moves of the new originalism as follows, with the caveat that while “[v]irtually every originalist has embraced at least some of these moves, . . . only a few have explicitly embraced all of them”:

(a) the move from original intent to original meaning; (b) the move from subjective meaning to objective meaning; (c) the move from actual to hypothetical understanding; (d) the embrace of standards and general principles; (e) the embrace of broad levels of generality; (f) the move from original expected application to original objective principles; (g) the distinction between interpretation and construction; and (h) the distinction between normative and semantic originalism.<sup>45</sup>

Indeed many of these moves are hardly “new.” For example, Justice Antonin Scalia and Robert Bork rejected “original intent” in favor of “original public meaning” as long ago as the 1980s, and most originalists have followed them.<sup>46</sup> But as Colby has pointed out, although collectively these moves have addressed many of the practical and theoretical defects of earlier forms of originalism, they have rendered modern originalism so indeterminate as to sacrifice “any pretense of a power to constrain judges to a meaningful degree.”<sup>47</sup>

Of the originalist scholars whose work is examined here, Hamburger and Lash pay closest attention to the historical record. Hamburger seems to eschew even the term “originalism” itself, as well as its recent theoretical apparatus, although he is clearly engaged in a search for the “historical meaning”<sup>48</sup> of the Constitution,

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43. Some influential representative examples of new originalist approaches include: KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999); and Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427 (2007).

44. See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 244-46, 256-67 (2009).

45. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 719-20 (2011).

46. See Justice Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in U.S. Dep’t of Justice, *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 101, 106 (1987) (suggesting a “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (arguing that originalists seek not the “subjective intention” of the framers but “what the public of that time would have understood the words to mean”).

47. Colby, *supra* note 45, at 714.

48. Hamburger, *supra* note 27, at 63.

which he treats as normatively binding. Lash embraces “‘original public meaning originalism’ as a normatively attractive approach to constitutional interpretation,” stressing that “the personal intentions of the framers . . . hav[e] weight only to the degree that they reflect or illuminate the likely public understanding of the text.”<sup>49</sup>

The remaining scholars discussed here embrace most or all of the hermeneutical moves of the new originalism.<sup>50</sup> Calabresi, Balkin, and Barnett all take as their starting point the position that only the original semantic *meaning* of the text (which they all construe at a high level of abstraction), not the framers’ expectations regarding the *application* of the text, is binding. Yet given the indeterminacy of the bare text of the Fourteenth Amendment, despite their rejection of expectations-based originalism, all rely heavily in practice not just on arguments about the semantic meaning of its language in its historical context, but on specific statements by the framers as perhaps the most important evidence of its likely public meaning. Yet rather than comprehensively canvassing the historical record, they tend to seize on a handful of specific statements to establish a highly abstract “original meaning,” upon which they proceed to erect a fairly elaborate superstructure of constitutional construction that is not closely tethered to the framers’ and ratifiers’ historical understandings.

#### A. HISTORICAL ORIGINALISM

##### 1. *Hamburger: Interjurisdictional Discrimination*

Philip Hamburger argues that the Privileges or Immunities Clause of the Fourteenth Amendment protected exactly the same rights as the Comity Clause (Privileges *and* Immunities Clause) of Article IV.<sup>51</sup> That is, the Privileges or Immunities Clause was not a guarantee of a fixed set of substantive rights (whether natural rights of property and contract, or, as incorporationists have argued, the specific rights protected in the federal Bill of Rights), nor was it a prohibition of discrimination by a state against its *own* citizens. Rather, “the Privileges or Immunities Clause protected Comity Clause rights”<sup>52</sup>—it served simply to prohibit states from discriminating against citizens (especially black citizens) from *other* states.

As Hamburger concedes, if this is really the “historical meaning of the Fourteenth Amendment’s Privileges or Immunities Clause,” it may “seem strangely redundant and poorly expressed.”<sup>53</sup> Hamburger’s interpretation does indeed make the Clause seem redundant, because it is unclear how it adds anything new to the Constitution. It is certainly true, as Hamburger amply documents, that during the antebellum period blacks seeking to travel interstate were denied Comity Clause rights (and often barred from entering other states altogether) on the ground that

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49. Lash, *Origins Part II*, *supra* note 29, at 338-39.

50. See BARNETT, *supra* note 39, at 89-130; JACK M. BALKIN, LIVING ORIGINALISM 3-125 (2011); Balkin, *supra* note 43; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

51. See Hamburger, *supra* note 27, at 122.

52. *Id.* at 145.

53. *Id.* at 68.

they were not citizens,<sup>54</sup> and there was doubt about whether Congress had the power to enforce the Comity Clause.<sup>55</sup> But the Citizenship Clause of the Fourteenth Amendment<sup>56</sup> made clear that blacks were indeed national and state citizens, while the Enforcement Clause<sup>57</sup> gave Congress the power to protect their rights. It is thus hard to see what the Privileges or Immunities Clause added, if it merely recapitulated the Comity Clause. And while the language of Article IV's Comity Clause<sup>58</sup> clearly protects *out-of-state* citizens when visiting another state, the language of the Fourteenth Amendment's Privileges or Immunities Clause<sup>59</sup> seems to protect *all* citizens of the United States in every state (whether citizens of the state in question or out-of-staters).

However, Hamburger argues that the Privileges or Immunities Clause must be understood within a "genealogy of ideas . . . from at least 1821 to 1866, that concerned the mobility of free blacks and that often was framed in terms of the privileges and immunities of citizens of the United States."<sup>60</sup> This genealogy of ideas, he argues, is not merely "*a* context but *the* context"<sup>61</sup> that furnishes the key to the Clause's meaning.

Hamburger's starting point is the debates in Congress following the admission of Missouri as a slave state under the Compromise of 1820. The new constitution of Missouri, which not only protected slavery but also required the exclusion of free blacks from the state, threatened to unravel that compromise, triggering a round of debates in 1821 focusing on the citizenship and Comity Clause rights of free blacks.<sup>62</sup> The new crisis was defused by the passage of a congressional resolution, drafted by Henry Clay, reciting that the Missouri Constitution "shall never be construed to authorize the passage of any law . . . by which any citizen, of either of the States in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."<sup>63</sup> Although this episode did little to resolve controversies over the meaning and scope of the Comity Clause or the rights of free blacks, its significance for Hamburger is that it raised the prospect that Comity Clause rights could be treated as national rights enforceable by the federal government.<sup>64</sup>

As Hamburger discusses, after the Missouri episode focused debate on the

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54. *See id.* at 83-100.

55. *See id.* at 121-22.

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

57. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

58. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

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

60. Hamburger, *supra* note 27, at 66.

61. *Id.* at 133.

62. *See id.* at 84-86.

63. 37 ANNALS OF CONG. 1830 (1821).

64. Hamburger, *supra* note 27, at 88 (the 1821 episode "forcefully refocused the debate about privileges and immunities on the question of federal citizenship").

interrelationship between rights and citizenship, and on the citizenship rights of blacks in particular, a number of U.S. attorneys general<sup>65</sup> and state courts<sup>66</sup> concluded that because free blacks were denied certain rights (especially political rights), they could not be regarded as citizens for statutory or constitutional purposes. In this context, Hamburger argues, the most famous antebellum Comity Clause decision, *Corfield v. Coryell*,<sup>67</sup> must be reevaluated. Although that case ostensibly had nothing to do with the rights of free blacks, Hamburger discerns a “racist” agenda behind Justice Washington’s opinion, which he considers “a precursor of *Dred Scott*.”<sup>68</sup> As a slaveholder anxious to exclude free blacks from citizenship, Hamburger argues, Justice Washington included suffrage among the privileges and immunities of citizens because “[p]olitical rights were the standard example of what blacks did not have.”<sup>69</sup>

Thus, Hamburger argues, those who opposed slavery and championed the rights of free blacks spoke increasingly of Comity Clause rights as privileges and immunities of citizens of the United States. For example, in an 1854 debate, Senator Sumner referred to the imprisonment and enslavement of black Massachusetts citizens in the South as a violation of “the privileges and immunities

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65. See *id.* at 89-93. The first of these opinions, by Attorney General William Wirt, argued that because free blacks in Virginia could not vote, hold office, testify against whites, serve in the militia, or marry white persons, they were not state citizens and hence not federal citizens. Rights of Free Virginia Negroes, 1 Op. Att’y Gen. 506, 506-09 (1821). Wirt’s analysis specifically referred to the Comity Clause. *Id.* at 507. Although Wirt’s opinion left open the possibility that *some* free blacks (those in states that granted them equal rights with whites) might be U.S. citizens, a later U.S. Attorney General, Roger B. Taney in 1832, went even further and insisted in an unpublished opinion (25 years before his decision in *Dred Scott*) that *no* blacks could be U.S. citizens. See CARL BRENT SWISHER, ROGER B. TANEY 154 (1935). Attorneys General John MacPherson Berrien and Caleb Cushing also issued opinions rejecting black citizenship. See Validity of the South Carolina Police Bill, 2 Op. Att’y Gen. 426 (1831) (Berrien); Relation of Indians to Citizenship, 7 Op. Att’y Gen. 746 (1856) (Cushing); Right of Expiration, 8 Op. Att’y Gen. 139 (1858) (Cushing). Hugh Legaré, who concluded that blacks were eligible to purchase federal lands reserved to citizens, but expressly declined to decide whether they were to be considered citizens for political purposes, was only a partial exception to this trend. See Pre-emption Rights of Colored Persons, 4 Op. Att’y Gen. 147 (1843). See generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 29 & n.84 (2006) (citing all these opinions); DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 361 (1978) (“[T]he general tendency of federal executive rulings had indeed been unfavorable to Negro citizenship.”). The view that blacks were not citizens was repudiated only in 1862, by Lincoln’s first attorney general, Edward Bates. See Citizenship, 10 Op. Att’y Gen. 382 (1862).

66. Hamburger focuses on *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 334 (1822), which held that free blacks could not be citizens, and *Crandall v. State*, 10 Conn. 339, 345-47 (1834), in which the Chief Justice of Connecticut reached the same conclusion. See Hamburger, *supra* note 27, at 91-93. He could have cited many more. In fact, “virtually every state court that ruled on black citizenship before 1857 [when *Dred Scott* was decided] concluded that free persons of color were neither state nor American citizens.” GRABER, *supra* note 65, at 29. Graber cites case law from 18 jurisdictions, including free states such as (in addition to Connecticut) Pennsylvania, California, and Indiana. See *id.* n.83. Indeed, “[t]he Supreme [Judicial] Court of Massachusetts was the only bench that, before *Dred Scott*, clearly indicated that free blacks were state citizens.” *Id.* (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849)).

67. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

68. Hamburger, *supra* note 27, at 146.

69. *Id.* at 96. See also *id.* at 97-100 (discussing *Dred Scott*); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 405-11 (1857) (Chief Justice Taney’s discussion of black citizenship).

of citizens of the United States.”<sup>70</sup> In 1858, free blacks in Boston petitioned the state legislature to protect black citizens of Massachusetts seeking to visit the South from violations of “privileges and immunities of citizens of the United States.”<sup>71</sup> In the 1859 debate over the admission of Oregon to the Union with a constitution that would have barred entry to free blacks, Representative John Bingham insisted that the proposed state constitution would violate the Comity Clause’s guarantee of the “privileges and immunities of citizens of the United States in the several States.”<sup>72</sup> Finally, Hamburger observes that during the same period that the Fourteenth Amendment was being drafted, Congress “briefly considered” a bill proposed by Representative Samuel Shellabarger “[t]o declare and protect all the privileges and immunities of citizens of the United States in the several States.”<sup>73</sup> Although Shellabarger’s Privileges and Immunities Bill received only very limited attention in Congress and was never enacted because of constitutional objections,<sup>74</sup> Hamburger views it as the “missing link” that connects the Fourteenth Amendment’s Privileges or Immunities Clause to the antebellum Comity Clause debates stretching back to the Missouri Compromise.”<sup>75</sup>

While Hamburger’s “genealogy of ideas” thus provides a context explaining how the Fourteenth Amendment’s Privileges or Immunities Clause could have been understood to refer simply to Comity Clause rights, it is far from clear that it provides, as he claims, *the* context. Hamburger concedes that “some statements in the debates could be understood as alluding to incorporation.”<sup>76</sup> The most important of these was the speech of Senator Jacob M. Howard introducing the Fourteenth Amendment on the floor of the Senate,<sup>77</sup> which forms the lynchpin of the originalist argument for incorporation. Howard began his discussion of the Privileges or Immunities Clause by referring to the rights protected by the Comity Clause. He observed that the Supreme Court had never resolved the “curious question”<sup>78</sup> of the scope of the Comity Clause, but quoted at length from the “very learned and excellent” Justice Bushrod Washington’s circuit court decision in *Corfield v. Coryell* as an authoritative exposition.<sup>79</sup> Howard then continued: “To

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70. Hamburger, *supra* note 27, at 108 (quoting the debate as reported in a black newspaper, 8 NAT’L ERA (D.C.) 119 (1854)).

71. *Id.* at 110 (quoting William C. Nell & Other Colored Citizens of Massachusetts, *Rights of Colored Citizens*, 29 LIBERATOR (Bos.) 11 (1859)).

72. *Id.* at 112 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 981, 984 (1859) (statement of Rep. John Bingham)).

73. *Id.* at 115 n.187 (quoting H.R. 437, 39th Cong. (as reported by H. Comm. on the Judiciary, Apr. 2, 1866)).

74. *See id.* at 117-22.

75. *Id.* at 116.

76. *Id.* at 131.

77. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

78. *Id.* at 2765.

79. *Id.* According to the passage in Justice Washington’s opinion quoted by Senator Howard, the privileges and immunities protected by the Comity Clause are confined

to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all

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 guarantied and secured by the first eight amendments of the Constitution,”<sup>80</sup> which he then proceeded to summarize. After observing that under existing law Congress had no power to enforce those provisions and that “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,” Howard concluded: “The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”<sup>81</sup> Howard thus seemed clearly to state that the Fourteenth Amendment incorporated the Bill of Rights.

Hamburger labors mightily to reconcile these statements with his view that the Privileges or Immunities Clause protects only Comity Clause rights. When Howard stated that the Fourteenth Amendment would compel the states to respect “the principles embraced in” the federal Bill of Rights, Hamburger argues he must have meant that the states would have to respect “these principles, as guaranteed in *state bills of rights*,” because the Fourteenth Amendment requires interjurisdictional and intrajurisdictional equality of treatment (under the Privileges or Immunities and Equal Protection Clauses respectively).<sup>82</sup> While clever, this reading seems forced and improbable. After all, Howard complained that the problem with relying on state constitutions was that they “may be altered from year to year,” and he asserted that the Fourteenth Amendment would remedy this by requiring the states “at all times” to respect those guarantees. The clear implication is that the Fourteenth Amendment would protect the rights guaranteed in the federal Bill of Rights from state infringement regardless of the vicissitudes of state law. Moreover, Howard suggested that the Amendment would supersede *Barron v. Baltimore*,<sup>83</sup> which had held that the federal Takings Clause did not bind the states.<sup>84</sup> But under Hamburger’s reading, the Fourteenth Amendment would not

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comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . .

*Id.* (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823) (No. 3,230)).

80. *Id.*

81. *Id.* at 2766.

82. Hamburger, *supra* note 27, at 131 (emphasis added).

83. 32 U.S. (7 Pet.) 243 (1833).

84. *Id.* at 2765 (“[I]t 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

supersede *Barron* (many state constitutions at the time had no takings clause).<sup>85</sup>

Hamburger argues that the historical and sociological context points to cross-jurisdictional equality rather than incorporation as the goal of the Privileges or Immunities Clause: “Blacks had little need for assurances of any particular substantive federal rights, let alone incorporation. But they had a great need for federal guarantees of voting, due process, and especially equality—both local equality and cross-jurisdictional equality.”<sup>86</sup> This is only half right. The overwhelming focus of the debates over both the Civil Rights Act of 1866 and the Fourteenth Amendment was unequal treatment, as embodied especially in the new Black Codes.<sup>87</sup> There was little discussion of the need for incorporation of

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State legislation, but applies only to the legislation of Congress.”). *Barron* was the leading such decision, although Howard did not refer to it by name.

85. The Maryland Constitution contained no takings clause, and while the trial court had granted relief, citing the state constitution’s due process provision and general principles of natural law, the Maryland Court of Appeals reversed. See Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 9-13 (2007). Thus, under Hamburger’s reading, the Fourteenth Amendment would have afforded the plaintiff in *Barron* no relief.

86. Hamburger, *supra* note 27, at 71.

87. The primary purpose of both the Civil Rights Act of 1866 and the Fourteenth Amendment was to prohibit the widespread restrictions on civil rights embodied in the Black Codes passed in the former Confederate states. For example, the drafter of the Civil Rights Bill, Senator Lyman Trumbull of Illinois, stated that its purpose was “to destroy all these discriminations” and to protect “[s]uch fundamental rights as belong to every free person.” CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Trumbull noted that the Comity Clause protected such rights against interstate discrimination but insisted that it was necessary to go further and protect them against intrastate discrimination: “[H]ow much more are the native born citizens of the State itself entitled to these rights!” *Id.* at 475. Likewise, Thaddeus Stevens of Pennsylvania, the most influential member of the House of Representatives, seemed to view the Fourteenth Amendment as a simple antidiscrimination provision. According to Stevens, the Amendment merely ensured that legislation must be “equal, impartial to all.” *Id.* at 1063. When Stevens introduced the Fourteenth Amendment in the House, he indicated that while some might say “[y]our civil rights bill secures the same things,” the Amendment, by enshrining the protections of the Civil Rights Act into the Constitution, secured them against repeal by a subsequent majority in Congress. *Id.* at 2459. Most speakers who discussed Section One in the ensuing debate in the House similarly argued, as Stevens had, that it simply constitutionalized the principles of the Civil Rights Act, or that it established beyond doubt Congress’ power to enact that Act. For example, Rep. James A. Garfield (R. Ohio) (future President of the United States) stated that the purpose of Section One was to protect the principles of the Civil Rights Act from repeal: “[W]e propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution . . .” *Id.* at 2462. Rep. Martin R. Thayer (R. Pa.) stated that the Amendment “is but incorporating in the Constitution of the United States the principle of the civil rights bill.” *Id.* at 2465. Rep. John H. Broomall (R. Pa.) indicated that the House had already voted for the principles underlying the Amendment “in another shape, in the civil rights bill,” and thus the House was merely asked to “put a provision in the Constitution which is already contained in an act of Congress.” *Id.* at 2498. Rep. Henry J. Raymond (R. N.Y.) indicated that the principle underlying Section One, “which secures an equality of rights among all the citizens of the United States” was “first embodied in” the Bingham Amendment, and then “came before us in the form of a bill, by which Congress proposed to exercise precisely the powers the amendment was intended to confer.” *Id.* at 2502. Raymond’s statement is interesting, because just like Bingham, he was one of the few Republicans to vote against the Civil Rights Act out of constitutional scruples, but he supported the principles behind it and voted in favor of the Fourteenth Amendment. Rep. Thomas D. Eliot (R. Mass.), who voted for the Civil Rights Act on the conviction that it was constitutional, supported Section One in order “to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.” *Id.* at 2511. Additionally, about a month after the Amendment had



substantive federal guarantees, but cross-jurisdictional equality was not the principal focus of concern either. Shellabarger's bill received only perfunctory consideration and was never passed, while the Civil Rights Act of 1866 was the subject of enormous attention and debate. Overwhelmingly, the framers were concerned about discrimination by the states against *their own* citizens. This was the focus of the Civil Rights Act, and speaker after speaker indicated that Section One simply constitutionalized the principles of that Act. It is true many were vague as to the precise meaning of each clause in Section One, and in many particular passages in the debates one often cannot rule out Hamburger's reading. But if the Privileges or Immunities Clause was simply a redundant recapitulation of the Comity Clause it is hard to see how it had the importance that the framers seemed to attribute to it. Hamburger's approach shifts the Amendment's primary guarantee of equal rights onto the Equal Protection Clause—a reading that is in line with modern doctrine but that arguably erases that Clause's original textual focus on protection.

It is worth remembering how limited the scope of the Comity Clause was as a guarantee of the rights of free blacks not only for the defenders of slavery (such as Chief Justice Taney), but also for its opponents. Justice Curtis, whose robust refutation of Taney in his dissenting opinion in *Dred Scott* elevated the idea of black citizenship to what Hamburger calls “a central antislavery position,”<sup>88</sup> had a surprisingly limited view of the rights attendant upon that citizenship:

To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way. One [State] may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women.<sup>89</sup>

This is a remarkably cramped and indeed almost empty vision of citizenship. The states may allocate or withhold rights among their citizens precisely as they see fit, freely abridging them on the basis of race or gender. Hamburger demonizes Justice Washington's position as “racist” and lionizes Justice Curtis as articulating the vision of privileges and immunities of citizenship “which would eventually . . .

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already passed the House, Rep. Henry Van Aernam (R. N.Y.) stated that it gave “constitutional sanction and protection to the substantial guarantees of the civil rights bill.” *Id.* at 3069. Democrats who opposed the measure did so because they likewise understood it as embodying the principles of the Civil Rights Act. *See, e.g., id.* at 2461 (remarks of Rep. William E. Finck (D. Ohio)) (arguing that necessity of adopting Section One showed that the Civil Rights Act was unconstitutional); *id.* at 2506 (remarks of Charles A. Eldridge (D. Wis.)) (also arguing that the amendment was an “admission” that the Civil Rights Act was unconstitutional); *id.* at 2467 (remarks of Rep. Benjamin M. Boyer (D. Pa.)) (“The first section embodies the principles of the civil rights bill . . .”); *id.* at 2530 (remarks of Rep. Samuel J. Randall (D. Pa.)) (“The first section proposes to make an equality in every respect between the two races . . .”); *id.* at 2538 (remarks of Rep. Andrew J. Rogers (D. N.J.)) (“[Section One] is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill . . .”).

88. Hamburger, *supra* note 27, at 104.

89. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 583 (1857) (Curtis, J., dissenting).

be secured in the Fourteenth Amendment.”<sup>90</sup> Yet the framers of the Fourteenth Amendment cited Justice Washington far more than Justice Curtis. Many of them evidently combined Curtis’s insistence on black citizenship with Washington’s claim that citizenship entails a broad and irreducible scope of substantive rights.

## 2. *Lash: The Bill of Rights*

In sharp contrast to Hamburger, Kurt Lash rejects the idea that the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment is rooted in the Comity Clause of Article IV. Instead, in Lash’s view, the term “privileges or immunities of citizens of the United States” refers to “rights expressly conferred by the Federal Constitution,” principally defined in the first eight amendments.<sup>91</sup> The effect of the Privileges or Immunities Clause was thus to nationalize those rights by making them applicable against the states.<sup>92</sup> However, Lash rejects the use of the “incorporation” to describe this process, because he insists that the focus should be not “on the meaning of the texts when first added to the constitution in 1791” (at the time of ratification of the first ten amendments), but rather on “how the rights represented by these texts were understood in 1868” (at the time of the ratification of the Fourteenth Amendment).<sup>93</sup> Thus, paradoxically, while Lash endorses “original public meaning originalism,”<sup>94</sup> he admits the possibility that the Fourteenth Amendment crystallized a transformation in the meaning of the rights protected through a process of nonoriginalist or common-law evolution.<sup>95</sup>

In the first article of a three-part series exploring the origins of the Privileges or Immunities Clause, Lash begins by examining the usage of the terms “privileges” and “immunities” at the time of the founding. Although in isolation these terms could be used interchangeably to refer to almost any sort of rights, Lash argues that the paired terms “privileges and immunities” referred to “rights belonging to a certain group of people or a particular institution.”<sup>96</sup> The dominant understanding of Article IV’s protection of the “Privileges and Immunities of Citizens in the several States” among antebellum judges and commentators was that it required only that states grant to out-of-state citizens “equal access to a limited set of state-protected rights.”<sup>97</sup> In *Corfield v. Coryell*,<sup>98</sup> Justice Washington continued to adhere to this approach, although he read the set of protected rights more broadly than his predecessors, as including political rights. Washington also referred to the class of protected rights as those “which are, in their nature,

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90. Hamburger, *supra* note 27, at 97.

91. Lash, *Origins Part I*, *supra* note 28, at 1245.

92. See Lash, *Beyond Incorporation*, *supra* note 32, at 460.

93. *Id.* at 455.

94. Lash, *Origins Part I*, *supra* note 28, at 1247.

95. See Lash, *Beyond Incorporation*, *supra* note 32, at 456-59 (arguing, by way of example, that while examination of theological questions by the courts would have been acceptable at the time of the Founding, by the time of Reconstruction it was seen as a violation of the non-establishment principle).

96. Lash, *Origins Part I*, *supra* note 28, at 1257.

97. *Id.* at 1260. As Lash observes, this was the approach taken in the leading early cases, including *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797), and *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812).

98. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). See *supra* note 79 and accompanying text.

fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states.”<sup>99</sup> But Lash argues that no court or commentator prior to the Civil War read *Corfield* as referring to a nationally mandated set of substantive rights—“[i]t was only after 1865 that radical Republicans, and proponents of women’s suffrage,” took that position.<sup>100</sup> Rather, courts continued to treat the Comity Clause as requiring equal access to a limited set of state-conferred rights, and the year after the Fourteenth Amendment was ratified, the Supreme Court endorsed that view in *Paul v. Virginia*.<sup>101</sup>

In contrast to Article IV’s “Privileges and Immunities of Citizens in the several States,” which referred to state-conferred rights, Lash argues that the Fourteenth Amendment’s “privileges or immunities of citizens of the United States” refers to “rights conferred by the Federal Constitution.”<sup>102</sup> Lash finds antecedents for the language of the Fourteenth Amendment’s Privileges or Immunities Clause in international treaties and implementing legislation.<sup>103</sup> For example, the Louisiana Cession Act promised to extend to the inhabitants of Louisiana “all the rights, advantages and immunities of citizens of the United States.”<sup>104</sup> Likewise, the Adams-Onís Treaty guaranteed to the inhabitants of Florida “all the privileges, rights, and immunities, of the citizens of the United States,”<sup>105</sup> and the Treaty of Guadalupe Hidalgo guaranteed to the inhabitants of Texas “all the rights of citizens of the United States.”<sup>106</sup>

Of course, the language of these treaties is not exactly the same as the language of the Privileges or Immunities Clause, and varies from one treaty to the next. Moreover, the context in which the treaties were framed is very different from the debates over civil rights during Reconstruction. As Hamburger puts it, the cession treaties and the Reconstruction-era debates over privileges and immunities “involved different problems, texts and meanings.”<sup>107</sup> Moreover, there is little reason to think that the rights guaranteed to new citizens under the cession treaties were limited to federal *constitutional* rights; surely they also included rights under international law and federal statutory rights, as well as rights of citizens under territorial law, and once the territory was admitted to statehood, under state law, as early decisions confirm.<sup>108</sup>

99. *Id.* at 551.

100. Lash, *Origins Part I*, *supra* note 28, at 1266.

101. 75 U.S. (8 Wall.) 168, 180 (1869). See Lash, *Origins Part I*, *supra* note 28, at 1280. As Lash notes, Chief Justice Taney’s theory of the Comity Clause in *Dred Scott* was also “quite conventional.” *Id.* at 1276 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857)).

102. Lash, *Origins Part I*, *supra* note 28, at 1282.

103. See *id.* at 1285-87.

104. Treaty Between the United States of America and the French Republic, U.S.-Fr., art. III, Apr. 30, 1803, 8 Stat. 200.

105. Treaty of Amity, Settlement, and Limits, U.S.-Spain, art. VI, Feb. 22, 1819, 8 Stat. 252.

106. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. IX, Feb. 2, 1848, 9 Stat. 922.

107. Hamburger, *supra* note 27, at 106.

108. See, e.g., *Desbois’ Case*, 1 Mart. (o.s.) 285 (La. 1812) (right to practice law); *U.S. v. Lavery*, 26 F. Cas. 875, 875-77 (C.C.D. La. 1812) (No. 15,569a) (immunity from restrictions imposed on alien enemies).

Lash finds support for his argument that the Privileges or Immunities Clause refers specifically to federal constitutional rights in arguments made in Congress in 1819 over a proposal by Representative James Tallmadge to condition the admission of Missouri on the gradual abolition of slavery.<sup>109</sup> Opponents of this proposal argued, among other things, that it violated the Louisiana Cession Treaty's promise of the "rights, advantages and immunities of citizens of the United States," on the theory that the citizens of the new state of Missouri should have the same right as the citizens of other states to institute slavery under their chosen republican institutions.<sup>110</sup> Proponents, such as Daniel Webster and David Morill, retorted that the right to establish slavery depended on state law rather than the federal Constitution, and was therefore not protected by the treaty.<sup>111</sup> Because both sides in this debate focused on federal constitutional rights, Lash concludes that they all "distinguished the national rights, privileges and immunities" guaranteed under the Cession Treaty "from the state-conferred rights, privileges, and immunities guarded under Article IV."<sup>112</sup>

It is not clear that this rather obscure debate sheds any light on the eventual meaning of the Privileges or Immunities Clause. Only a small part of the debate over the Tallmadge proposal focused on the clause in the cession treaty, which in any case was worded differently from the Privileges or Immunities Clause. The fact that the discussion of the cession treaty clause focused on federal constitutional rights is not surprising. Missouri was not yet a state, so no rights under state law yet existed, much less issues involving sojourning citizens from out of state. But as Lash himself points out, Webster's and Morill's discussions of federal constitutional rights involved "structural guarantees of federalism and access to federal courts,"<sup>113</sup> not the guarantees of the first eight amendments.

In the second article in his series, Lash explores the development of John Bingham's ideas in the debates over the Fourteenth Amendment and the reception of those ideas by Bingham's colleagues in Congress.<sup>114</sup> As Lash observes, "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."<sup>115</sup> While early in the debates of 1866 Bingham claimed that his proposed amendment was based on the Comity Clause, by 1871, well after the Fourteenth Amendment had been ratified, he stated that the Amendment protected completely different rights than the Comity Clause, namely the rights guaranteed by the first eight amendments.<sup>116</sup> While in 1866 Bingham treated the Comity Clause as part of the "bill of rights," in 1871 he limited the "bill of rights" to the first eight amendments to the Constitution, more or less tracking the modern definition.<sup>117</sup> While in 1866 he seemed to ignore or reject the doctrine of *Barron v.*

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109. See Lash, *Origins Part I*, *supra* note 28, at 1288-96.

110. See *id.* at 1288-90.

111. See *id.* at 1290-93.

112. *Id.* at 1293.

113. *Id.*

114. See Lash, *Origins Part II*, *supra* note 29, at 334.

115. *Id.* at 335.

116. See *id.*

117. See *id.*

*Baltimore*, in 1871 he “described *Barron* as ‘rightfully’ decided.”<sup>118</sup>

Because Bingham was the principal draftsman of Section One of the Fourteenth Amendment, his views are important. Unfortunately, as Lash recognizes, he was often less than fully clear and consistent. To his credit, Lash seeks to explore and explain these inconsistencies, rather than to deny that they exist, as many originalist incorporationists have done.

To assess Lash’s approach, it is useful first to survey Bingham’s contributions to the debates during and after the adoption of the Fourteenth Amendment. Bingham first proposed a constitutional amendment on December 6, 1865, but it languished in committee for more than two months. As eventually reported out in February 1866, Bingham’s amendment provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).<sup>119</sup>

This prototype of the Fourteenth Amendment, known as the “Bingham Amendment,” was extensively debated from February 26 to 28, 1866. Bingham opened the debate by claiming that “[e]very 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.”<sup>120</sup> This was of course not exactly true. To substantiate his claim, Bingham specifically quoted the Article IV Comity Clause and the Fifth Amendment’s Due Process Clause; but curiously, the February proposal did not mention due process, and conversely, of course there was no equal protection provision in the antebellum Constitution. Repeatedly in these early debates Bingham seemed to conflate the ideas of privileges and immunities, due process, and equal protection, making it difficult to discern precisely what meaning he attached to each of the three corresponding clauses in the final version. He also claimed that the substantive requirements imposed by the new amendment—not just the Article IV obligations, but much more controversially those drawn from the Fifth Amendment (with the extra-textual gloss of equal protection)—were already binding on the states “by the very letter of the Constitution.”<sup>121</sup>

Unfortunately, Bingham continued, it was well established “by every construction of the Constitution, . . . that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.”<sup>122</sup> What did Bingham mean by this reference to the “bill of rights”? The grammatical antecedent of the phrase “these great provisions of the Constitution, this immortal bill of rights”

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118. *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871)).

119. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (1914). The parenthetical references to the Constitution were included in the version passed by the Committee but removed in the version ultimately reported back out to the House on February 3.

120. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

121. *Id.*

122. *Id.*

appears to be the Article IV Comity Clause and the Fifth Amendment's Due Process Clause just quoted.<sup>123</sup> In other words, when in February 1866 Bingham invoked "this immortal bill of rights" he appeared to refer to the Comity and Due Process Clauses, not the first eight (or ten) amendments.

Those who assert that from beginning to end Bingham consistently and clearly advocated incorporation of the first eight amendments have scoffed at this idea, arguing that the term "bill of rights" must have meant in 1866 what it means today.<sup>124</sup> But that is profoundly anachronistic. In 1866 the term "bill of rights" had a wide range of meanings in constitutional discourse, not the fixed and uniform meaning it has today. Before the adoption of the Fourteenth Amendment, the Supreme Court *never* used the term "bill of rights" to refer to the first eight (or ten) amendments, although it did repeatedly use the term to refer to the guarantees of Article I, Section 10 of the unamended Constitution.<sup>125</sup> Joseph Story noted that that the opponents of the 1789-91 amendments argued that the unamended Constitution "itself, was, in every rational sense . . . a Bill of Rights for the Union."<sup>126</sup> In 1865, Senator Charles Sumner (R.-Mass.) referred to the Due Process Clause of the Fifth Amendment as "in itself alone a whole Bill of Rights."<sup>127</sup> In his influential *Manual of the Constitution*, which was exactly contemporaneous with the Fourteenth Amendment, Timothy Farrar uses the term "bill of rights" much more expansively, to refer to provisions in the 1789 Constitution (such as the Contracts Clause, the Habeas Corpus Clause, and the Comity Clause) as well as various provisions in the 1791 amendments, although elsewhere he uses the term in its modern sense.<sup>128</sup> On the other hand, we can also point to examples in the debates in Congress during the framing of the Fourteenth

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123. Charles Fairman was the first scholar to call attention to Bingham's use of the term "bill of rights" in this context. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 26, 33-34 (1949).

124. See, e.g., William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 25, 27-28 (1954) (arguing that the words "these great provisions of the Constitution, this immortal bill of rights" in Bingham's speech "did not have any antecedent," and that Bingham was probably waving a copy of the constitution at the time he uttered them); AMAR, *supra* note 6, at 183 ("[I]t is astonishing that some scholars . . . have suggested that when Bingham invoked 'the bill of rights,' he didn't mean what he said.").

125. See AMAR, *supra* note 6, at 164, 284-88.

126. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 256 (Boston, Marsh, Capen, Lyon & Webb 1840). Story explained: "It specifies, and declares the political *privileges* of the citizens in the structure and administration of the Government. It defines certain *immunities* and modes of proceeding, which relate to their personal, private, and public rights and concerns." *Id.* (emphasis added). Of course, this argument did not satisfy the proponents of amendments.

127. CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1864).

128. See TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 510-14 (Boston, Little, Brown & Co. 1867). Elsewhere Farrar uses the term in its modern sense, but refers to the amendments as "[a]rticles, in the nature of a bill of rights," suggesting that the term "bill of rights" did not have a fixed meaning at the time. *Id.* at 392. Francis Lieber's 1865 proposal of amendments to the Constitution, which foreshadow the Thirteenth and Fourteenth Amendments in interesting ways, refers to the English Bill of Rights and states that the Declaration of Independence "may be considered as the American Bill of Rights," but does not refer to the 1791 Amendments as a bill of rights. FRANCIS LIEBER, AMENDMENTS OF THE CONSTITUTION, SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE 6, 11, 18 (New York, Loyal Publication Society 1865).

Amendment, and in contemporary treatises, where the term “bill of rights” is used in its modern sense.<sup>129</sup> Thus it is clear from contemporary sources that “bill of rights” did not have a fixed meaning, and that sometimes even the same writer can use the term to refer to different provisions in different contexts.

When, after two days of debate, Bingham delivered the final speech on his proposal, he once again referred to “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.”<sup>130</sup> Bingham also made clear that he read an extra-textual right of equal protection into the “bill of rights.” He referred to “the bill of rights that all shall be protected alike in life, liberty and property” and twice later referred to “equal protection to life, liberty and property” or “equal protection . . . in the rights of life, liberty and property” as guaranteed by the existing “bill of rights.”<sup>131</sup> Thus, although during this speech Bingham repeatedly invoked “the bill of rights” or “this sacred bill of rights” or “these provisions of the bill of rights,”<sup>132</sup> he seemed clearly to include both the Comity Clause and an extra-textual right of “equal protection” in life, liberty and property in “the bill of rights.” He never made it entirely clear whether he included all of the first eight (or ten) amendments.

Those who argue that Bingham understood his proposal to make the Bill of Rights (in the modern sense) applicable to the states point to a passage in this speech where Bingham observed that in *Barron v. Baltimore* and its progeny, the Supreme Court had repeatedly held that the first ten amendments “are not applicable to and do not bind the states.”<sup>133</sup> But those amendments, Bingham insisted, “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, and now that he is dead, sleeps alone in his honored tomb by the sounding sea.”<sup>134</sup> Bingham then quoted at length from the “grand argument” of the “immortal” Daniel Webster to the effect that the Constitution was created by the people, not the states, that it imposes “injunctions and prohibitions” on the states, and that state legislators are required to swear to support it.<sup>135</sup> These oaths were disregarded in the former slave states, Bingham concluded, and the “whole question” was “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

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129. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 1064 (1866) (remarks of Rep. Hale); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 256 (Boston, Little, Brown & Co. 1868); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 144 (New York, Hurd & Houghton 1868). As discussed below, Bingham clearly used the term bill of rights in the modern sense in an 1871 speech. See *infra* notes 155-159 and accompanying text.

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

131. *Id.* at 1089.

132. *Id.* at 1089-90.

133. *Id.* (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), and *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833)).

134. *Id.* at 1090.

135. *Id.*

Constitution?”<sup>136</sup>

What is one to make of this convoluted argument? It may well be that Bingham believed that, despite *Barron*, the personal rights guaranteed in the first eight amendments were binding on the states, although the federal government had no power to enforce them. And it seems likely that Bingham intended something like the protections of the Fifth Amendment’s Due Process Clause to be made applicable to the states, although the text of his proposal did not yet contain the words “due process.” Those who cite this speech as proof that Bingham intended to make all the personal guarantees of the first eight amendments enforceable against the states tend to argue that Bingham regarded them as included in (or coextensive with) the “privileges and immunities of citizens in the several states.” But if that is true, Bingham did not make himself clear, and based on the debates, it does not seem that his colleagues understood him. Nor did Bingham explain why the guarantees of the first eight amendments, which generally protect the rights of all *persons* against violation by the federal government, should be extended only to *citizens* in the case of violation by the states. In any case, Bingham failed to convince not only Democrats, but also moderate Republicans, and was forced to agree to the tabling of his proposal.<sup>137</sup>

After the failure of the Bingham Amendment in February, the Joint Committee on Reconstruction again took up the task of drafting a constitutional amendment. On April 21, Thaddeus Stevens introduced in the Committee a five-part proposal drafted by the abolitionist and utopian socialist Robert Dale Owen,<sup>138</sup> the first part of which declared that “[n]o 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>139</sup> Later that day Bingham proposed to add the language that eventually became the second sentence of Section One of the Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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>140</sup>

In a puzzling series of votes over the course of the next week, this language was first approved, then removed and also rejected as a free-standing proposal, then adopted in place of the language originally proposed by Stevens.<sup>141</sup>

Stevens and most other participants in the debates seemed to understand this language primarily as an antidiscrimination provision tracking the Civil Rights Act

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136. *Id.*

137. See MALTZ, *supra* note 3, at 59-60.

138. For fuller discussion of Owen’s proposal, see GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 196-204 (2006).

139. KENDRICK, *supra* note 119, at 83.

140. *Id.* at 87.

141. See *id.* at 87, 98, 101, 106. Because the *Journal* of the Joint Committee records only the texts of the various proposals and the votes on them, but not the actual debates, one can only speculate as to the reason for these moves.



of 1866.<sup>142</sup> But Bingham evinced a much more idiosyncratic understanding. According to Bingham, the Amendment was needed to empower Congress “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>143</sup> What were these privileges and immunities? Perplexingly, Bingham stated that the elective franchise is “one of the privileges of a citizen of the Republic,” but “is exclusively under the control of the States,” so long as they do not violate the Article IV guarantee of a republican form of government.<sup>144</sup> He suggested that the Amendment would enable Congress to furnish a remedy for state infliction of “cruel and unusual punishments.”<sup>145</sup> And he maintained that the original Comity Clause of Article IV protected, among other privileges, “the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property.”<sup>146</sup> We have here an indication, then, that Bingham regarded the Fourteenth Amendment as incorporating against the states at least some of the protections of the first eight amendments (notably the Fifth Amendment’s Due Process Clause and the Eighth Amendment’s Cruel and Unusual Punishments Clause). But he did not clearly indicate that *all* these amendments were incorporated, and his enumeration of covered rights included some derived from other constitutional provisions (the Republican Guarantee Clause) and others not clearly spelled out in the constitutional text (the right of protection by the government, the right “to bear true allegiance to the Constitution”). He still did not make a clear distinction here between the Comity Clause’s “privileges and immunities of citizens in the several States” and the Fourteenth Amendment’s “privileges and immunities of citizens of the United States.” Rather, he continued confusingly to conflate the two.

Although Bingham’s statements during the 1866 debates often seem vague and ambiguous, some of his later statements referred more clearly to incorporation. In 1867, during a debate on a bill to prohibit flogging, he alluded to the *Barron* doctrine, under which the “personal rights” in “the first ten articles of amendment” (such as the Takings Clause of the Fifth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment) limited Congress only, but could not be enforced by Congress against the states.<sup>147</sup> Bingham indicated that the Fourteenth Amendment, once ratified, would change this situation, making these provisions binding on the states and empowering Congress to enforce them.<sup>148</sup> Oddly, though, in this speech he cited only the Equal Protection Clause, not the

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142. *See supra* note 87.

143. CONG. GLOBE, 39th Cong., 1st Sess. at 2542.

144. *Id.* Bingham noted that because Section Two contemplated that the elective franchise might be abridged (with a corresponding reduction in representation), the Amendment did not give Congress the power of regulating it, but suggested that Congress might intervene in cases where the right to a republican government was wholly subverted. *See id.*

145. *Id.*

146. *Id.*

147. CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867).

148. *See id.*

Privileges or Immunities Clause, as the vehicle for incorporation.<sup>149</sup>

However, in early 1871, Bingham presented a report on behalf of the House Judiciary Committee that seems completely inconsistent with incorporation. This report urged rejection of a petition by Victoria Woodhull calling for the federal protection of women's suffrage as a privilege or immunity of citizens of the United States under the Fourteenth Amendment. The Committee could simply have taken the position that Bingham and other proponents of the Amendment had taken in 1866, namely that the elective franchise is not one of the privileges or immunities protected by Section One. Instead, the Committee went much further, stating that the Privileges or Immunities Clause "does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2."<sup>150</sup>

Yet just two months later, during the debates over the Ku Klux Klan Bill, Bingham endorsed incorporation much more clearly than he had ever done before.<sup>151</sup> In those debates, Samuel Shellabarger defended the constitutionality of provisions in the Klan Bill prohibiting private acts of terrorism by relying on the Privileges or Immunities Clause of the Fourteenth Amendment, which he evidently understood as nationalizing the natural or inherent rights protected by the Comity Clause as explicated in *Corfield v. Coryell*.<sup>152</sup> John Farnsworth did not dispute Shellabarger's basic reading of the Privileges or Immunities Clause, but argued that the bill went beyond Congress' enforcement power because it reached purely private action.<sup>153</sup>

In response to Farnsworth, Bingham defended the constitutionality of the Bill,

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149. See *id.* Bryan Wildenthal has maintained that this 1867 speech indicates "with crystal clarity" Bingham's "goal of incorporating the first eight amendments." 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, 1599 & n.295 (2007). Wildenthal criticizes my earlier work for "erroneously claiming that Bingham never clearly stated, during 1866-68, the goal of incorporating the first eight amendments." *Id.* at n.295 (citing Boyce, *supra* note 25, at 1006-07). The exact words used in the passage to which Wildenthal refers were "during the actual adoption of the Amendment" (not "during 1866-68), and in that passage I was summarizing the views of Charles Fairman, who correctly stated during the debates in Congress in 1866 prior to Congress' adoption of the Amendment, Bingham was far from clear about total incorporation of the Bill of Rights. Boyce, *supra* note 25, at 1006-07 (citing Fairman, *supra* note 123, at 136). In any case Bingham's brief and somewhat cryptic 1867 statement, made outside the context of the 1866 congressional debates over the adoption of the Amendment, with its reference to the "first ten articles of amendment" (how exactly is the Tenth Amendment supposed to be incorporated?) and to *equal protection* rather than privileges or immunities, is less than "crystal clear." As Wildenthal concedes, Bingham's 1867 remarks "may have received little attention outside Congress" and that "the evidence from the ratification struggle seems vague and scattered when it comes to supporting any strong public awareness of nationalizing the *entire* Bill of Rights." Wildenthal, *supra*, at 1600 & n.295.

150. H.R. REP. NO. 41-22, at 1 (1871).

151. Kurt Lash has argued that the Woodhull Report may not represent Bingham's own view of the Privileges or Immunities Clause. Rather, Lash suggests, Bingham merely agreed "with the majority's bottom line" that the clause did not protect the elective franchise. Lash, *Origins Part II*, *supra* note 29, at 418.

152. See CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871).

153. See *id.* at app. 113-15. Eventually the House agreed to several amendments addressing Rep. Farnsworth's concerns and he voted in favor of the final version. See *id.* at 522.

but he also rejected Shellabarger's interpretation of the Privileges or Immunities Clause. For the first time, Bingham explained why he had abandoned the language debated in February 1866 ("The *Congress shall have power* to make all laws which shall be necessary and proper to secure to citizens of each State all the privileges and immunities of citizens *in the several States*") in favor of the language eventually adopted in June ("*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens *of the United States*"). After the struggle in February, Bingham explained, he reread the opinion of Chief Justice Marshall in *Barron v. Baltimore*,<sup>154</sup> and "noted and apprehended as [he] never did before, certain words in that opinion."<sup>155</sup> In *Barron*, Marshall stated that if the framers had intended the first eight amendments to limit the states, they would have inserted specific words to that effect, as the framers of the original Constitution had done in prefacing the prohibitions of Article I, Section 10 with the words "No State shall."<sup>156</sup> Therefore, Bingham explained, in his revised text of the Fourteenth Amendment he began with those same words.<sup>157</sup> Furthermore, Bingham explained that "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States," which he then proceeded to quote in full.<sup>158</sup> Bingham insisted that the Fourteenth Amendment secures "other and different privileges and immunities" than the Comity Clause of Article IV, as construed by antebellum courts and commentators.<sup>159</sup>

Thus in this 1871 speech Bingham finally stated quite clearly (much more clearly than he ever had during the framing and ratification in 1866-68) that the Fourteenth Amendment's Privileges or Immunities Clause served principally to make the guarantees of the first eight amendments applicable to the states. At the same time, Bingham's new explanation suggests that his first proposal, which exactly tracked the language of the Comity Clause, could not have been understood to effect incorporation.

Was Bingham's 1871 speech an accurate characterization of his views in 1866, or was he simply trying to impose some coherence on his earlier inchoate statements? James Garfield (the future President, who served as a Republican Congressman from Ohio from 1863 to 1880) was skeptical. Garfield was present throughout the debate in 1866 and had recently "read over, with scrupulous care, every word of it as recorded in the *Globe*."<sup>160</sup> As he said to Bingham, "My colleague can make but he cannot unmake history."<sup>161</sup> Moreover, as another Republican, Horatio C. Burchard of Illinois, was quick to point out, by 1871 Bingham's views on the Amendment had clearly shifted: he was now evidently willing to support federal legislation reaching purely private conduct, an idea he

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154. 32 U.S. (7 Pet.) 243 (1833).

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

156. *Barron*, 32 U.S. at 248-49.

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

158. *Id.*

159. *Id.*

160. *Id.* at app. 151.

161. *Id.*

had expressly repudiated in 1866.<sup>162</sup> Burchard discussed three possible interpretations of the privileges or immunities clause: (1) that it protected a limited set of rights, such as the rights protected in the Civil Rights Act of 1866; (2) that it protected a broader set of rights as outlined in *Corfield* (Shellabarger's position); or (3) that it protected specifically those rights listed in the first eight amendments (Bingham's current claim).<sup>163</sup> Of the three positions, Burchard noted, Bingham's current stance made the least sense as an argument in support of the Ku Klux Klan bill, because the rights protected in the first eight amendments were not general guarantees of "life and personal security" but merely "specific limitations, relating to the mode of procedure or jurisdiction" in criminal cases.<sup>164</sup> As this debate shows, by 1871 a wide range of views still existed about the meaning of the Privileges or Immunities Clause among its Republican supporters.

Unlike many originalist incorporationist scholars, who have implausibly argued that Bingham's views were completely consistent throughout this period, Lash admits that Bingham was inconsistent and argues that this inconsistency "reflects a change of mind—an epiphany,"<sup>165</sup> which led Bingham to abandon his earlier draft tracking the language of the Comity Clause ("privileges and immunities of citizens in the several States") in favor of the final version ("privileges or immunities of citizens of the United States"). By this change of language, Lash argues, Bingham sought to protect the personal rights listed in the first eight amendments to the federal Constitution, but not "common law civil rights" or "a broad range of unenumerated individual natural rights."<sup>166</sup>

Unfortunately, Lash's argument about Bingham's "epiphany" does not completely account for all of Bingham's inconsistencies or for the extent to which his constitutional theories were not fully thought out. Lash argues that Bingham drew a "critical" distinction between the "natural rights of *all* persons" and the particular "rights of *United States citizens*."<sup>167</sup> Thus, the Due Process and Equal Protection Clauses protect the former, while the Privileges or Immunities Clause protects the latter. But Bingham did not always consistently adhere to this distinction. For example, in his final speech of February 28, 1866 on his first proposal, he referred to the right of equal protection in life, liberty and property both as a right of "persons" and a right of "citizens."<sup>168</sup> Moreover, with the

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162. *See id.* at app. 315.

163. *See id.* at app. 314.

164. *Id.*

165. Lash, *Origins Part II*, *supra* note 29, at 336.

166. *Id.* at 432.

167. *Id.* at 347.

168. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). In this speech Bingham refers to the right of "all *persons*, whether citizens or strangers" to "equal protection . . . in the rights of life and liberty and property," but then in the very next paragraph to "the *citizens'* rights to life, liberty, and property." *Id.* (emphasis added). He then again refers to the rights of "all *persons* . . . to equal protection in the rights of life, liberty, and property," before reverting to the statement that no state "has any right to deny protection to any free *citizen* of the United States . . . in the rights of life, liberty, and property." *Id.* (emphasis added). There is not necessarily any *logical* inconsistency here, as citizens are of course persons, but there is a *terminological* inconsistency, making Bingham's distinction between the rights of citizens and persons hard to follow.

possible exception of the Second Amendment,<sup>169</sup> the first eight amendments *do* protect the rights of all persons, not just citizens: the word “person” or “people” occurs in the Second, Fourth, and Fifth Amendments, while the word “citizen” does not appear there at all. If Bingham understood the Privileges or Immunities Clause to make the rights in the first eight amendments applicable against the states, he never explained why those rights should protect all “persons” against the federal government, but should protect only “citizens” against the states.<sup>170</sup>

Bingham also maintained throughout the debates that “the 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. They are both provided for and guarantied in your Constitution.”<sup>171</sup> But he insisted that even under the Fourteenth Amendment “the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.”<sup>172</sup> Bingham had in fact *opposed* the Civil Rights Bill as “oppressive” and “unjust” because it prohibited “discrimination in civil rights,” which he insisted included the elective franchise, and he attacked its proponents for claiming the franchise was not included.<sup>173</sup> Yet he engaged in similar inconsistency himself with respect to the Privileges or Immunities Clause, by admitting that the elective franchise was a privilege of national citizenship, yet denying that the Clause prohibited its abridgement.

Lash recognizes that Bingham’s early invocations in the debates in February 1866 of the “bill of rights” referred not to the first eight amendments (as other incorporationist scholars have maintained), but to the Comity Clause of Article IV and the Due Process Clause of the Fifth Amendment.<sup>174</sup> But he argues that this “idiosyncratic view”<sup>175</sup> would have mystified Bingham’s colleagues: “no one else, in or outside Congress, appears to have shared Bingham’s view that Article IV was

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169. The Second Amendment is anomalous because militia service was generally limited to a select class of citizens only. *See, e.g.,* CORNELL, *supra* note 14, at 65 (“[T]he right to keep and bear arms was a civic right inextricably linked to the public responsibility to participate in a well-regulated militia.”); AMAR, *supra* note 6, at 48 (arguing that at the time the Second Amendment was adopted, “the right to bear arms had long been viewed as a political right, a right of First-Class Citizens,” analogous to the right to vote, hold office, and serve on juries). However, Amar argues that by the time of Reconstruction, arms bearing was no longer seen as a political right. *See id.* at 258-59. Even the modern Supreme Court, in its recent decision recognizing a personal right to handguns for self-defense, restricted the right as to “members of the political community” who are “law-abiding citizens.” *District of Columbia v. Heller*, 554 U.S. 570, 580, 625, 644 (2008). *But see* Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1524 (2010) (arguing that the modern Court’s characterization of the right as a right to armed self-defense is inconsistent with its restriction to citizens).

170. Indeed, as noted above, one of the reasons Bingham attacked the draft version of the Civil Rights Bill was that it limited to “citizens” rights that belonged to all “persons.” CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). *See supra* notes 143-146 and accompanying text.

171. *Id.* at 2542.

172. *Id.*

173. *Id.* at 1291.

174. *See* Lash, *Origins Part II*, *supra* note 29, at 355-58.

175. *Id.* at 355.

part of the Bill of Rights.”<sup>176</sup>

Even more confusing than his shifting textual references to the “bill of rights” were Bingham’s effusive statements regarding extra-textual privileges and immunities. Lash argues that “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.”<sup>177</sup> It is true that Bingham repeatedly claimed throughout the debates that his proposed amendment imposed no new obligation “which is not now enjoined upon them by the very letter of the Constitution.”<sup>178</sup> This might have been a useful argument in convincing moderate or conservative Republicans who were concerned about radical change. But Bingham’s claim was obviously not true. Neither the language of Bingham’s amendment, nor his understanding of it, simply recapitulated textually recognized rights.

The antebellum Constitution contained no equal protection provision. Moreover, Bingham often equated the privileges and immunities of citizens with natural rights, and in defining them did not limit himself to the constitutional text but brought in a wide range of unenumerated rights. As early as 1859, in an extensive argument that racially discriminatory provisions in the proposed Oregon constitution violated the Comity Clause, Bingham said:

The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests—its sure foundation and defense. . . . Before your constitution, sir, as it is, as I trust it ever will be, all men are sacred, whether white or black, rich or poor, strong or weak, wise or simple. Before its divine rule of justice and equality of natural rights, Lazarus in his rags is as sacred as the rich man clothed in purple and fine linen; the peasant in his hovel, as sacred as the prince in his palace, or the king on his throne.<sup>179</sup>

Bingham’s florid natural rights rhetoric and his willingness to read unenumerated rights into the Constitution were at war with any claim that he sought carefully to limit the Amendment to “those rights already expressly guaranteed.”<sup>180</sup>

The crux of Lash’s argument is that by substituting for the language debated in February 1866 (“privileges and immunities of citizens in the several states”) the language debated in the House in April and ultimately adopted in the Fourteenth Amendment (“privileges or immunities of citizens of the United States”), Bingham sought to make clear that the Privileges or Immunities Clause protected not Comity Clause rights as interpreted in cases like *Corfield*, but rather the rights protected by the first eight amendments.<sup>181</sup> As early as January 1866, Bingham indicated that he viewed the Comity Clause as protecting rights of national rather than state citizenship. He parsed its language as follows: “The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and

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176. *Id.* at 356.

177. *Id.* at 353.

178. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

179. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

180. Lash, *Origins Part II*, *supra* note 29, at 353.

181. *See id.* at 351, 357-59, 397.

immunities of citizens (supplying the ellipsis ‘of the United States’) in the several States.”<sup>182</sup> In Lash’s view, Bingham’s first proposal used the exact language of the Comity Clause, because under Bingham’s “ellipsis” theory, the Comity Clause protected “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.”<sup>183</sup> The problem was, as the debates in February revealed, “Bingham’s ‘ellipsis’ theory of Article IV was so odd and idiosyncratic, it appears that no other Republican followed his argument.”<sup>184</sup> Instead, Bingham’s Republican colleagues generally read the Comity Clause language through the traditional lens of the case law as protecting an open-ended set of fundamental common law civil rights (as specified in state law), such as the rights of property and contract.<sup>185</sup> Lash argues that while radical Republicans favored nationalizing the protection of all civil rights, conservatives and moderates (including Bingham), whose votes were needed for the two-thirds supermajority, rejected such an approach as an undue extension of federal power.<sup>186</sup>

His colleagues’ incomprehension thus forced Bingham to withdraw his original proposal, and, Lash argues, triggered an “epiphany” which led him to abandon reliance on the Comity Clause and “to make a critical change in his proposed constitutional text.”<sup>187</sup> In the second draft, “Bingham abandoned the language of Article IV and instead embraced the previously unstated ‘ellipsis.’”<sup>188</sup> By the change in language, Lash argues, Bingham sought to ensure that his Amendment would be understood as protecting the Bill of Rights.<sup>189</sup> Thus Lash accepts Bingham’s 1871 statements during the Ku Klux Klan Act debate—in which Bingham tacitly conceded that his “original reading of Article IV was incorrect,”<sup>190</sup> and that the redrafted Privileges or Immunities Clause “protected a completely different set of rights than those protected under Article IV,” namely the rights guaranteed “in the first eight amendments to the Constitution”<sup>191</sup>—as an accurate account of Bingham’s views during the debates in April and May of 1866, after his supposed “epiphany” had taken place.<sup>192</sup>

The difficulty with this argument is that Bingham continued to conflate references to the “bill of rights” with references to the Comity Clause right up to very end of the debates in May, just as he had done earlier in February. In his very last speech in the House on the Fourteenth Amendment, delivered minutes before the final vote, just after complaining about state infliction of “cruel and unusual punishments,” Bingham invoked the Comity Clause:

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182. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

183. Lash, *Origins Part II*, *supra* note 29, at 372.

184. *Id.* at 369.

185. *See id.* at 350-51, 358.

186. *See id.* at 358-68, 374-78.

187. *Id.* at 336.

188. *Id.* at 397.

189. *See id.* at 401.

190. *Id.* at 427.

191. *Id.* at 424.

192. *See id.* at 429 (“It is not as if scholars have dismissed this speech as post-adoption spin.”). In fact, many have. *See, e.g.,* Hamburger, *supra* note 27, at 134-35, 144.

Sir, the words of the Constitution that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States” include, among other privileges, the right to bear true allegiance to the Constitution and the laws of the United States, and to be protected in life, liberty, and property.<sup>193</sup>

Bingham then quoted from the South Carolina Nullification Ordinance of 1833, which empowered the legislature to punish any citizen of the state who bore allegiance to any government but the state’s.<sup>194</sup> Unfortunately, he lamented, Congress lacked the power to restrain South Carolina from punishing its own citizens for bearing allegiance to the federal government, even though the Ordinance clearly violated the Comity Clause.<sup>195</sup> Fortunately, however, the missing power “is supplied by the first section of this amendment.”<sup>196</sup>

These were Bingham’s final words on Section One before it was passed by the House. If he had really undergone an “epiphany” that caused him to discard his original reading of Article IV and abjure any equation between the privileges and immunities of the Comity Clause and those protected in the Fourteenth Amendment, why did he continue to focus on the *Comity Clause* in his very last statement before the Amendment was adopted? Why did he continue to claim right up to the very end of the debates that the Fourteenth Amendment would empower Congress to enforce Comity Clause rights?

Moreover, speaker after speaker in the House had stated that Section One merely constitutionalized the Civil Rights Act, a position perfectly consistent with the view that the Comity Clause and the Privileges or Immunities Clause, with their very similar language, referred to the same set of basic rights. If Bingham truly believed in April and May of 1866, as Lash contends, that the Privileges or Immunities Clause “protected a completely different set of rights” than the Comity Clause, is it really plausible that he would not only fail to correct his colleagues, but that he would himself rely on the Comity Clause in his final defense of Section One?

Lash struggles valiantly to make sense of Bingham and has contributed much to our understanding of the complex evolution of his thought. He rightly rejects the efforts of other incorporationist originalists to impose a Procrustean consistency on Bingham’s idiosyncratic statements.<sup>197</sup> But his “epiphany” hypothesis is ultimately

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

194. *See id.*

195. *See id.* at 2542-43.

196. *Id.* at 2543.

197. *See, e.g.,* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 69, 74 (1993) (claiming that “Bingham consistently espoused a cogent theory of the content of protected privileges and immunities,” and that “Bingham’s views . . . were not idiosyncratic”). Bryan Wildenthal suggests that one should not criticize an important politician such as Bingham for inconsistency: “Important historical actors . . . make sense to those around them; that is why they are important actors. The historian’s task is to bring out their sense, not to denounce them as fools.” Wildenthal, *supra* note 149, at 1539 (quoting Michael Zuckert, *Book Review*, 8 CONST. COMMENT. 149, 161 (1991)). But in Wildenthal’s reading, almost *any* statement by proponents about the meaning of Section One supports incorporation. If proponents stated, as many did, that it simply constitutionalized the Civil Rights Act, that supports incorporation, because “the Civil Rights Act itself was widely understood to substantively protect Bill of Rights guarantees.” *Id.* at 1576 n.223. If proponents (such as Senator Luke Poland) stated that it did not go beyond the Comity Clause of Article



unconvincing. By 1871, well after ratification, Bingham was quite clear that the Privileges or Immunities Clause protected all the rights in the first eight amendments and did not refer to the same rights as the Comity Clause. However, up to the very moment that the House passed the Fourteenth Amendment in 1866 he was much more ambiguous. He repeatedly invoked the “bill of rights” and even specific textual guarantees found in the first eight amendments, such as the prohibition against cruel and unusual punishments. Yet he also invoked in his references to the “bill of rights” or “privileges and immunities” textual guarantees outside the first eight amendments, such as the Comity Clause, the elective franchise (although paradoxically he did not regard it is protected by Section One), as well as extra-textual rights, including equal protection, “the right to bear true allegiance” to the national government, and perhaps also “the right to live,” the “right to know,” “the right to work and enjoy the product of their toil.”<sup>198</sup>

Lash argues that the required two-thirds majorities of both houses of the Thirty-Ninth Congress would not support an amendment that was understood to protect citizens against discrimination by their own states in the fundamental common law rights that were the focus of the Comity Clause.<sup>199</sup> Yet Congress had done just that by statute in the Civil Rights Act, enacting it by supermajorities and overriding President Johnson’s veto. Bingham, of course, voted against the Civil Rights Act, but that merely demonstrates just how conservative and how isolated among his Republican colleagues he was. Invocation of the “bill of rights” may have been a powerful rhetorical tool in the debates, but the main concern expressed by Republicans who supported the Amendment was the discrimination in state law civil rights of property, contract, mobility, right to work, personal safety, and access to the courts—the very rights that the Comity Clause had protected *interjurisdictionally*, and that the Civil Rights Act protected *intrajurisdictionally*. It seems only natural that the Fourteenth Amendment’s Privileges or Immunities Clause would have been widely understood as prohibiting states from engaging in racial discrimination with respect to these same rights, which is exactly the understanding of the clause that many participants in the 1866 debates expressed.<sup>200</sup>

The third and final article in Lash’s series focuses on the 1866 election campaign as the key to the original public meaning of the Fourteenth Amendment.<sup>201</sup> The debates in Congress provide confusing and often contradictory evidence of the Amendment’s original meaning, and the scanty or nonexistent records of the ratification debates in the state legislatures offer little clarification.<sup>202</sup>

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IV, “more than likely” that supports incorporation, under the “view that the Bill of Rights was properly understood to apply to the states even before the Civil War—a view based largely on their unorthodox reading of the Article IV Clause.” *Id.* at 1569.

198. See *supra* notes 143-146 and accompanying text.

199. See Lash, *Origins Part II*, *supra* note 29, at 358-363.

200. See *supra* note 142 and accompanying text.

201. Lash, *Origins Part III*, *supra* note 30, at 1281.

202. See *id.* at 1278 (discussing the “‘sounds of silence’ in the state ratifying conventions [sic]” and observing that “there is little we can glean from ratification assemblies in the states, and those assemblies themselves seem to lack the same kind of popular legitimacy as those that met at the time of the founding.”) See also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 145 (1986) (“Most of the state legislatures that considered the

The solution to this conundrum, Lash argues, is to look at the election for evidence of the original meaning. Lash starts with historian Eric Foner's statement that "[m]ore than anything else, the election became a referendum on the Fourteenth Amendment."<sup>203</sup>

Foner's own discussion of the debates in Congress, the state legislatures, and the electoral campaign, however, suggests that the search for a precise "original meaning" of Section One may be misguided. Foner explains that, in Congress, "compared with the now-forgotten disqualification and representation clauses, the first section inspired relatively little discussion."<sup>204</sup> Moreover,

Republicans did not deny one Democrat's description of the Amendment as "open to ambiguity and . . . conflicting constructions" . . . On the precise definition of equality before the law, Republicans differed among themselves. Even moderates, however, understood Reconstruction as a dynamic process, in which phrases like "privileges and immunities" were subject to changing interpretation. They preferred to allow both Congress and the federal courts maximum flexibility in implementing the Amendment's provisions . . .<sup>205</sup>

Likewise, in Foner's account, debates over the Fourteenth Amendment during the election of 1866 focused largely on the representation and disqualification clauses.<sup>206</sup>

Lash's own account of these public debates does not clearly show that the main focus was on protection of rights constitutionally enumerated in the Bill of Rights. In the summer of 1866, he observes, Republican advocates of the Fourteenth Amendment "dealt in vague generalities."<sup>207</sup> Many "expressly tied Section I . . . to the Civil Rights Act of 1866."<sup>208</sup> Republicans generally "avoided specifics in regard to the Privileges or Immunities Clause, preferring instead to stress the general rights of due process and equality under law."<sup>209</sup>

Lash's main evidence regarding the original public meaning of Section One during ratification focuses on the reactions to the police-led riots in Memphis in May and in New Orleans in July 1866, in which dozens of blacks, unionists and Republicans were massacred.<sup>210</sup> Lash argues that during the months leading up to the election, and in its immediate aftermath, many loyalists and Republicans viewed these events as abridgements of the rights of free speech and assembly, demonstrating the need for ratification of the Fourteenth Amendment.<sup>211</sup> After the crushing Republican electoral victory, President Johnson proposed an alternate version of the Fourteenth Amendment that would have retained the Citizenship,

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Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it shed little light on their understanding of its meaning.").

203. Lash, *Origins Part III*, *supra* note 30, at 1276 n.2 (quoting ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 267 (1st ed. 1988).

204. FONER, *supra* note 203, at 257.

205. *Id.* at 257-58.

206. *See id.* at 268-70.

207. Lash, *Origins Part III*, *supra* note 30, at 1304.

208. *Id.* at 1305.

209. *Id.* at 1307.

210. *See id.* at 1307-13.

211. *See id.* at 1313-27.

Equal Protection and Due Process Clauses, but would have replaced the clause protecting the “privileges or immunities of citizens of the United States” with a simple restatement of the language of Article IV’s Comity Clause.<sup>212</sup> This counter-amendment and the Republicans’ rejection of it demonstrate, in Lash’s view, that both sides understood the Fourteenth Amendment’s Privileges or Immunities Clause as protecting enumerated constitutional rights but not unenumerated natural rights.<sup>213</sup>

Unfortunately, the implications of this history are far more ambiguous than Lash maintains. The police-led massacres in Memphis and New Orleans were not examples of the states “making” or “enforcing” laws abridging the privileges and immunities of citizens of the United States. They were not, in fact, based on any legal authority, and are thus better understood as deprivations of life, liberty and property without due process of law and gross breaches of the duty to provide equal protection of the law. Therefore, Republican arguments that adoption of the Fourteenth Amendment was needed to prevent such abuses do not tell us much about the original meaning of the Privileges or Immunities Clause.

It is true that Republicans referred to the freedom of speech, press, and assembly in discussing these events. But those rights were understood as natural rights and not just rights enumerated in the First Amendment. There is little evidence that the ratifiers of the Fourteenth Amendment understood the Privileges or Immunities Clause to protect non-natural rights enumerated in the Constitution, such as the criminal and civil procedural protections found in the Fifth, Sixth, and Seventh Amendments. If the Fourteenth Amendment had been widely understood to make all of the guarantees of the first eight amendments of the federal Constitution applicable to the states, one would certainly have expected discussion of that fact, especially when it would have required changes in existing practices in criminal and civil procedure. Yet, at the time the Amendment was adopted, many states did not require indictment by grand jury, or trial by petit jury in all criminal prosecutions or in all civil actions at common law where the amount in controversy exceeded twenty dollars.<sup>214</sup> The nineteenth-century trend in the states toward abolition not only of the grand jury, but also of the privilege against self-incrimination, was unaffected by the adoption of the Fourteenth Amendment.<sup>215</sup> As one scholar has observed, if the Amendment had been widely understood to make such provisions of the Fifth, Sixth and Seventh Amendments applicable to the states, one would expect “that the issue would have been discussed”; yet “[t]he historical record contains only silence.”<sup>216</sup>

At the same time, no one seems to have argued that the Fourteenth

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212. *Id.* at 1327-29.

213. *See id.* at 1328-29.

214. *See* Charles Fairman, *supra* note 123, at 82-132.

215. *See* Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 478-500 (2009).

216. George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 153 (2001). Indeed, as Thomas observes, during the decade after the Fourteenth Amendment was enacted, “five states . . . took action to modify or eliminate their grand jury requirements.” George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1654 (2007).

Amendment did not protect natural rights not specifically enumerated in the Constitution. Against the background of public discussions largely identifying the Fourteenth Amendment and the Civil Rights Act, and the broad natural rights rhetoric often deployed by Bingham and many others, this fact seems critical. Of course, Lash argues that the change in language from Bingham's first draft, which tracks the language of the Comity Clause ("privileges and immunities of citizens in the several states") to his second draft ("privileges or immunities of citizens of the United States") was meant to exclude unenumerated rights. Yet he also argues that the privileges or immunities protected in the final version *include* Comity Clause rights. The final draft thus seems broader, not narrower, than the initial one. If the language of the first version could be understood to protect unenumerated natural rights, why not also the language of the final version? If unenumerated natural rights were excluded, surely we would expect clearer discussion of that fact.

Finally, Lash cites President Johnson's statements as proof that all sides understood the Privileges or Immunities Clause as referring exclusively to enumerated constitutional rights. When Johnson vetoed the Civil Rights Act of 1866, he asked: "Can it be reasonably supposed that [the freed slaves] possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?"<sup>217</sup> As Lash observes, this is the first appearance in the 1866 debates of the phrase "privileges and immunities of citizens of the United States," which would later become part of the Fourteenth Amendment.<sup>218</sup> But Johnson did not make clear what he meant by that phrase. He did not connect it in any way with the Bill of Rights, which, after all, protects the rights of all persons, not just citizens. The phrase "Citizen of the United States" in the antebellum Constitution occurs only in reference to the qualifications for federal office.<sup>219</sup> Johnson's fears seemed to center on the potential exercise of civic rights by blacks, such as the elective franchise and the franchise of office, because he complained about "discrimination against large numbers of intelligent, worthy and patriotic foreigners, and in favor of the negro" when the latter is "less informed as to the nature and character of our institutions."<sup>220</sup>

In early 1867 Johnson proposed an alternative to the Fourteenth Amendment. Johnson's counterproposal, as Lash puts it, "erased the Privileges or Immunities Clause and replaced it with a passive restatement of Article IV's Comity Clause," while retaining the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>221</sup> Lash claims that this episode proves that Johnson understood the Privileges or Immunities Clause as protecting enumerated rights only. But it does not show how Johnson understood the Clause, much less that a common understanding of the Clause existed. Johnson could have rejected the Clause because he saw it as protecting unenumerated natural rights, enumerated rights, or some combination thereof. Andrew Johnson may well have opposed it for the same reason that Reverdy Johnson opposed it in the Senate: "simply because I do

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217. CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

218. Lash, *Origins Part III*, *supra* note 30, at 1290 (emphasis omitted).

219. U.S. CONST. art. I, § 2, cl. 2 (Representatives); art. I, § 3, cl. 3 (Senators); art. II, § 1, cl. 5 (President).

220. CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

221. Lash, *Origins Part III*, *supra* note 30, at 1328.

not understand what will be the effect of that.”<sup>222</sup> It is entirely probable that he had no very clear theory of its meaning, but opposed it because he saw it as somehow embodying the Republican and Radical principles of his enemies.

## B. ABSTRACT ORIGINALISM

### 1. Calabresi: *A Conservative Fourteenth Amendment*

Recently, Steven Calabresi and Julia Rickert have questioned the prevailing judicial and scholarly consensus that originalism cannot justify the current constitutional prohibition of sex discrimination.<sup>223</sup> Their argument proceeds as follows. “[O]riginalists ought to begin and end all analysis with the original public meaning of constitutional texts.”<sup>224</sup> However, they maintain that this does not require us to determine what the enacting Congress thought the text meant; indeed, “Congress often enacts texts into law without understanding what those texts mean” and has “great incentives to legislate ambiguously in order to please most of the people, most of the time.”<sup>225</sup> Nevertheless, relying on a few selected statements of the framers, ratifiers, and early interpreters, Calabresi and Rickert conclude that “the original public meaning of the Fourteenth Amendment is that it bans all systems of caste and of class-based lawmaking.”<sup>226</sup> While they concede that the framers and ratifiers of the Fourteenth Amendment did not generally recognize sex discrimination as a form of caste, they insist that “[t]he question of whether sex discrimination was (or was not) a form of caste was purely a question of fact,”<sup>227</sup> and observe that some nineteenth-century feminist writers did analogize between the two.<sup>228</sup> Finally, they argue that the adoption of the Nineteenth Amendment resolved the factual question that the Fourteenth Amendment (in their view) left open. Once the Nineteenth Amendment gave “women the right to vote it became implausible to read the no-caste rule of the Fourteenth Amendment as allowing discrimination on the basis of sex with respect to civil rights.”<sup>229</sup> Thus, “the adoption of the Nineteenth Amendment permanently changed the way in which the Fourteenth Amendment ought to be read.”<sup>230</sup> The authors conclude that “[t]he original public meaning of the Fourteenth Amendment, when read in light of the Nineteenth Amendment, renders sex discrimination as to civil rights unconstitutional.”<sup>231</sup>

Almost every move in this argument is highly questionable. If originalist argument must begin and end with the original public meaning of constitutional

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222. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

223. Calabresi & Rickert, *supra* note 33, at 2-3; see also Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1231 (2000) (providing a detailed argument that the Court’s modern sex discrimination jurisprudence is “not strictly originalist”).

224. Calabresi & Rickert, *supra* note 33, at 4.

225. *Id.* at 7.

226. *Id.* at 11.

227. *Id.* at 14.

228. See *id.* at 57-60.

229. *Id.* at 67.

230. *Id.* at 15.

231. *Id.* at 101.

texts, it is curious that Calabresi and Rickert are unwilling to state precisely which text forms the basis of the anticaste principle. As they note, the text does not use the terms “caste” or “class discrimination,” and the framers “were, for the most part, vexingly silent on the independent operation of Section One’s clauses.”<sup>232</sup> The prohibition of caste and class legislation, they argue, might be found in the Privileges or Immunities Clause, or the Equal Protection Clause, or some combination of the two.<sup>233</sup> The historical record is unclear, and they are unwilling to commit to a specific answer. Indeed, they are remarkably insouciant about the specific public meaning of individual clauses: “Fortunately, settling which clause or combination of clauses the Framers and contemporary readers of Section One understood to prohibit unequal legislation is not necessary to our argument.”<sup>234</sup>

Yet if the text itself is not specifically framed in terms of an anticaste principle, and the understanding of the enacting Congress is not dispositive because Congress often does not understand what it is doing, how do we know that the original public meaning of the Fourteenth Amendment is that it bans all systems of caste and of class-based lawmaking? Calabresi and Rickert cite various statements by proponents of the Amendment, most notably Senator Howard, that it would do away with caste and class legislation.<sup>235</sup> But of course, a fuller account of the legislative history would disclose many other possible understandings of the Amendment’s main provisions. As discussed above, many proponents of Section One argued that it simply recapitulated the protections of the Civil Rights Act of 1866.<sup>236</sup> Much of the framers’ discussion of the Privileges or Immunities Clause seems to focus, as Hamburger has argued, on Comity Clause rights.<sup>237</sup> Much of the discussion of the Equal Protection Clause is consistent, as Christopher Green has argued, with a narrow focus on the purely protective functions of government, rather than a broad prohibition of all types of discriminatory legislation.<sup>238</sup> Calabresi and Rickert do not attempt a detailed justification of their selection of a handful of particular statements from the legislative history as establishing *the* original public meaning. Indeed, if, as they claim, “it is the public understanding of the ratifiers of the Fourteenth Amendment that establishes its original public meaning,”<sup>239</sup> the paucity of references to the anticaste principle during ratification would seem to be a devastating difficulty. They cite very few specific references to such a principle during ratification, and concede that “it is impossible to know how often the Amendment’s anticaste rule was discussed in state legislatures or how many legislators were consciously aware of its existence.”<sup>240</sup>

While embracing Senator Howard’s statement that the Fourteenth Amendment prohibits caste and class legislation as an authoritative exposition of its original public meaning, Calabresi and Rickert simply dismiss or ignore the statements of

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232. *Id.* at 20.

233. *See id.* at 20-24.

234. *Id.* at 23.

235. *See id.* at 34-35.

236. *See supra* note 87 and accompanying text.

237. *See* Hamburger, *supra* note 27, at 62-68.

238. *See supra* note 8 and accompanying text.

239. Calabresi & Rickert, *supra* note 33, at 36.

240. *Id.* at 40.

leading proponents, such as Howard, Stevens, Bingham, and many others, that it would not require equal treatment of women as *irrelevant* to the Amendment's meaning.<sup>241</sup> They freely concede that the Amendment's congressional proponents almost universally maintained that it did not require gender equality.<sup>242</sup> But they insist that this fact is relevant only to the expected *application* of the anticaste principle and not to its *meaning*.<sup>243</sup>

Calabresi and Rickert never adequately justify this critical move. Arguably, the framers' statements on gender establish that the original meaning of the anticaste principle itself was narrower than the one they favor. As Jack Balkin has put it, their approach "begs the question whether the adopters' views and statements of purpose and principle involve *mistakes* about *facts*, or actually demonstrate *disagreements* with our present-day judgments about *values*. That might be so because interpretive judgments often mingle factual and normative premises together."<sup>244</sup>

Calabresi and Rickert's insistence that the framers' discussions of gender equality may be disregarded because they are irrelevant to original meaning is arbitrary and unsupported. Indeed, all scholars of the Fourteenth Amendment are in agreement that Section One was principally designed to prohibit certain forms of racial discrimination. How do we know this, when Section One does not mention the word "race"? Because the legislative history makes clear that this was the principal intended application. Yet on what grounds can we accept evidence of expected applications indicating that race *was* covered and yet reject it when it indicates that gender *was not* covered?

Calabresi and Rickert's interpretation of the Fourteenth Amendment as a ban on caste and class legislation raises vast problems that they do not adequately explore. They claim that "[c]lass legislation and caste were often used interchangeably by those who contemplated the Fourteenth Amendment."<sup>245</sup> In fact, their own evidence shows that while the terms were often used together, they were not interchangeable. Dictionary definitions and other contemporary sources clearly establish that in the nineteenth century (as today) the primary meaning of "caste" referred to the Hindu caste system, but the word could also be applied to orders of society, while the term "class" was much broader, potentially referring to any social division or grouping.<sup>246</sup>

Calabresi and Rickert prefer to focus on caste, the narrower of the two terms. Astonishingly, they claim that "[l]ooking first to the original caste system, that of India, we find that in its earliest sense, the term *caste* was an apt description of the status of women."<sup>247</sup> This is flatly incorrect, and they concede that "[s]ex and caste

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241. See *id.* at 51-55; cf. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (statement of Rep. Bingham dismissing concerns about restrictions on married women's property rights).

242. See Calabresi & Rickert, *supra* note 33, at 51.

243. *Id.* at 52.

244. Jack M. Balkin, *Originalism and Sex Discrimination, or, How Thick is Original Public Meaning?*, BALKINIZATION (Dec. 8, 2011), <http://balkin.blogspot.com/2011/12/originalism-and-sex-discrimination-or.html>.

245. Calabresi & Rickert, *supra* note 33, at 17 n.72.

246. See *id.*

247. *Id.* at 57.

were not identical.”<sup>248</sup> The term “caste” has a very specific historical content. It refers to hereditary social divisions in Hindu society characterized by endogamy, commensality, and craft-exclusiveness.<sup>249</sup> Such a term could easily be extended to race in American society, but is rather more difficult to extend to gender, except in the most metaphorical sense. Race was hereditary in that the offspring of blacks were considered black; gender is not hereditary in the same sense, in that the offspring of women are not necessarily women. Racial endogamy and commensality were also enforced through miscegenation and segregation laws; the opposite was the case with gender. “Caste” might be readily analogized to the modern constitutional concept of “discrete and insular minorities,”<sup>250</sup> while, as has often been observed, women are neither insular nor a minority. Certainly, one may draw analogies between caste and gender, or between race and gender, as nineteenth-century feminists often did. Indeed, Calabresi and Rickert cite one nineteenth-century feminist who wrote of the “caste of sex,” stating that “[m]en are the Brahmins, women the Pariahs, under our existing civilization.”<sup>251</sup> But it is not clear that these references are more than an analogy or a metaphor. Gender discrimination is *like* caste discrimination or race discrimination in certain respects (particularly in confining women to certain roles and occupations), but that is not the same as saying that gender discrimination *is* caste discrimination.

If the term “caste” is arguably too narrow to comfortably include gender, the term “class” is much broader. Calabresi and Rickert focus primarily on “caste,” perhaps because the term “class” is *too* broad for their purposes. The term “class legislation” as used in nineteenth-century legal discourse could refer to any special-interest legislation.<sup>252</sup> For the Jacksonian Democrats, who crystallized opposition to class legislation, the creation of the Second Bank of the United States was the paradigmatic case of class legislation.<sup>253</sup> As embraced by nineteenth-century courts, legal commentators and political actors of all stripes, “class legislation” could refer to any law singling out an individual or group for special benefits without adequately promoting the general welfare.<sup>254</sup> The difficulty with such a doctrine from a modern perspective, as Melissa Saunders has pointed out, is that it is very difficult to distinguish laws improperly singling out groups for special benefits from those that promote the general welfare: a broad prohibition of class legislation in this nineteenth-century sense thus seems flatly incompatible with “modern political theory’s teaching that the democratic process is nothing but a struggle between competing interest groups.”<sup>255</sup> Judicial enforcement of such a broad principle would revolutionize constitutional law and empower courts to invalidate almost any legislation, with unpredictable results. Unsurprisingly, while

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248. *Id.* at 58.

249. See R.K. PRUTHI, INDIAN CASTE SYSTEM 76 (2004).

250. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

251. Calabresi & Rickert, *supra* note 33, at 59-60 (quoting MATILDA JOSLYN GAGE, PRECEDING CAUSES (1881), *reprinted in* THE CONCISE HISTORY OF WOMEN SUFFRAGE 51, 52 (Mari Jo Buhle & Paul Buhle eds., 2005)).

252. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251-68 (1997).

253. See *id.* at 257.

254. See *id.* at 260-61.

255. *Id.* at 262.



Calabresi and Rickert do not exactly repudiate this principle, they do not embrace it either.<sup>256</sup> Yet surely, if the central meaning of the Fourteenth Amendment is that it bans caste *or class* legislation, its potentially unlimited sweep is a serious problem that they ought to have addressed.

Finally, it is unclear why, from an *originalist* perspective, the adoption of the Nineteenth Amendment alters the applicability of the Fourteenth Amendment to sex discrimination.<sup>257</sup> The Nineteenth Amendment prohibits sex discrimination with respect to the right to vote. Calabresi and Rickert argue that it is irrational to prohibit sex discrimination in political rights, but not in ordinary civil rights.<sup>258</sup> Yet from an originalist perspective, it is not clear why unconstitutionality follows from irrationality. The framers of the Nineteenth Amendment knew that the Supreme Court had declined to read the Fourteenth Amendment as a general prohibition of sex discrimination, yet they failed to enact such a general prohibition.

Anticipating this objection, Calabresi and Rickert argue that the Court had never specifically held that the Fourteenth Amendment permitted sex discrimination,<sup>259</sup> suggesting perhaps that a broader subsequent constitutional prohibition of sex discrimination was unnecessary. However, as they recognize, the Court was squarely presented in *Bradwell v. Illinois*<sup>260</sup> with the argument that sex discrimination violates the Fourteenth Amendment, and chose to ignore it. In *Bradwell*, the majority, following *Slaughter-House*, rejected Myra Bradwell's claim for admission to the bar on the ground that the practice of law was not one of the privileges or immunities protected by the Fourteenth Amendment.<sup>261</sup> Yet Justice Bradley, who had *dissented* in *Slaughter-House*, urging a broad scope for the Fourteenth Amendment much more in line with modern originalist views,<sup>262</sup> did specifically hold that it permitted sex discrimination.<sup>263</sup> Bradley denied that "it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life."<sup>264</sup> Rather, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."<sup>265</sup> In light of this and similar decisions, the need for a constitutional amendment to prohibit sex discrimination generally was clear.

The Nineteenth Amendment, however, only addressed women's suffrage, not

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256. See Calabresi & Rickert, *supra* note 33, at 18 n.73 (noting that the authors' argument that the Fourteenth "Amendment bans caste does not preclude understanding the Amendment also to ban class legislation as described by Professor Saunders, although, her claim is in some respects a more ambitious one.").

257. See generally Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. SEE ALSO 269 (2012).

258. See Calabresi & Rickert, *supra* note 33, at 70-85.

259. See *id.* at 60-66.

260. 83 U.S. (16 Wall.) 130, 135-36 (1873).

261. *Id.* at 139.

262. See, e.g., Calabresi & Rickert, *supra* note 33, at 44 (stating that Bradley's dissent was "more in touch with the original meaning").

263. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring in judgment).

264. *Id.* at 140.

265. *Id.* at 141.

women's rights generally. That was the most that was politically feasible at the time. Its own proponents did not understand it to prohibit sex discrimination generally, and began almost immediately to campaign for a broader provision in the form of the Equal Rights Amendment.<sup>266</sup> It is certainly true that supporters of the Nineteenth Amendment sought full equality for women and sought to build on the legacy of the Reconstruction Amendments, but as Calabresi and Rickert concede, "the very people responsible for guaranteeing women the vote did not think that the Constitution prohibited sex discrimination as to civil rights."<sup>267</sup>

Calabresi and Rickert claim simply to be "following Justice Scalia's methodology completely"<sup>268</sup> with regard to ascertainment of the original public meaning of the Constitution. Yet they argue that the proper application of this methodology leads to the conclusion that Justice Ginsburg was right and Justice Scalia was wrong in the *VMI* case, the Court's most important recent decision on sex discrimination.<sup>269</sup> Justice Scalia would certainly be surprised by Calabresi and Rickert's claim that they are following his methodology. Scalia's approach to originalism is fundamentally static. It accords primacy to "those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."<sup>270</sup> Thus, under Scalia's approach, if there is an unbroken tradition of state-supported single sex education, it *cannot* violate the Fourteenth Amendment. After all, the Amendment's text is ambiguous in that it completely fails to specify exactly which forms of discrimination are prohibited.

Calabresi and Rickert disagree with Justice Scalia, but they also crucially disagree with each other on the application of this ambiguous constitutional text. Indeed, Calabresi's approach is only slightly less static than Scalia's. For Calabresi, the Nineteenth Amendment is critical to the recognition of sex discrimination as a form of caste, and therefore only race and sex discrimination are prohibited.<sup>271</sup> Rickert would allow the courts to recognize other forms of caste discrimination.<sup>272</sup>

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266. See KATHARINE H. ADAMS & MICHAEL L. KEENE, *ALICE PAUL AND THE AMERICAN SUFFRAGE CAMPAIGN* xv (2008).

267. Calabresi & Rickert, *supra* note 33, at 67 n.314. See also Ed Whelan, *Critique of Calabresi's "Originalism and Sex Discrimination"—Part 3*, BENCH MEMOS (Nov. 30, 2011, 12:04 PM), <http://www.nationalreview.com/bench-memos/284466/critique-calabresi-s-originalism-and-sex-discrimination-part-3-ed-whelan> (arguing that it is much more plausible from an originalist perspective to understand the Nineteenth Amendment as "ensur[ing] that the views of women, as one-half of the voting populace, would be fully taken into account in the political processes and that those processes, flawed as they inevitably are, would be the vehicle for working out which interests should be protected as rights.").

268. Calabresi & Rickert, *supra* note 33, at 4.

269. See *id.* at 96 (discussing *United States v. Virginia (VMI)*, 518 U.S. 515 (1996)).

270. *VMI*, 518 U.S. at 568 (Scalia, J., dissenting).

271. Calabresi is slightly coy in this regard, suggesting that a group qualifies as a caste "only" where a constitutional amendment (such as the Nineteenth Amendment) singles them out for special protection, but later in the same paragraph suggests merely that such an amendment "is almost a prerequisite" for protection under the Fourteenth Amendment. Calabresi & Rickert, *supra* note 33, at 97.

272. See *id.* As one commentator has observed, "[t]hat Calabresi and Rickert disagree on this fundamental point (almost in passing) . . . deserves more scrutiny." Blackman, *supra* note 257, at 281.

In a second recent article (coauthored with Andrea Matthews),<sup>273</sup> Calabresi applies similar methods while purporting to deploy “Scalia-style originalism”<sup>274</sup> to defend the result in *Loving v. Virginia*,<sup>275</sup> which struck down a ban on interracial marriage. Again, this is a “Scalia-style originalism” that has little in common with Scalia’s own presumption of constitutionality for longstanding practices not unambiguously prohibited by the constitutional text. The authors insist that “Scalia-style originalists . . . should reject the use of any legislative history as a tool in . . . constitutional interpretation.”<sup>276</sup> In practice, however, they do resort to legislative history so long as it provides a predicate for their preferred interpretation; they reject it only insofar as it demonstrates that the framers of the Fourteenth Amendment rejected their conclusions.

The predicate for their analysis is the widely-accepted proposition that the “Fourteenth Amendment constitutionalized the Civil Rights Act of 1866.”<sup>277</sup> But how do we know that this proposition is true? After all, the language of the Fourteenth Amendment is quite different from the language of the Civil Rights Act. We know that the Fourteenth Amendment was understood to constitutionalize the Civil Rights Act, as Calabresi and Matthews point out, because the framers of the Amendment repeatedly said so.<sup>278</sup> So much for the rejection of resort to legislative history.

Now, Calabresi and Matthews would claim that they can establish this meaning without resorting to legislative history. They examine the definitions of “privilege” and “immunity” in Noah Webster’s 1828 dictionary and claim that both definitions refer to “positive law rights and not natural law rights.”<sup>279</sup> However, the definitions quoted do not exactly say this (it is a gloss supplied by Calabresi and Matthews), and even if they did, it is not clear how that would advance their case. After all, the text of the Fourteenth Amendment itself, which contemplates the denial of voting rights for women and some men, makes perfectly clear that it does not protect all positive law rights.

So which positive law rights were protected? According to Calabresi and Matthews, the “conclusion is inescapable” that an “objective reader” would look to the rights protected by Article IV, Section 2 to determine “the positive law privileges or immunities of state citizenship.”<sup>280</sup> But if resort to legislative history is prohibited, it is hardly clear why such a conclusion is inescapable. First, the text of the amendment refers to “privileges or immunities of citizens of the United States,” not “privileges or immunities of state citizenship.” Why would an objective reader, with no access to the legislative history, not read this as a reference to a different set of rights than the Article IV privileges and immunities of state citizenship, namely, to privileges or immunities of federal citizenship, as

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273. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393 (2012).

274. *Id.* at 1395.

275. 388 U.S. 1 (1967).

276. Calabresi & Matthews, *supra* note 273, at 1395.

277. *Id.* at 1409.

278. *See id.*

279. *Id.* at 1416.

280. *Id.* at 1417.

Kurt Lash, for example, has argued? On the other hand, even if Calabresi and Matthews are right that an objective reader would identify the Fourteenth Amendment's privileges or immunities with Article IV's privileges and immunities, the latter were protections only against interstate discrimination, not against discriminations by a state among its own citizens (this is Philip Hamburger's basic point). Calabresi and Matthews may well be right about the likely original meaning of the Fourteenth Amendment's Privileges or Immunities Clause, but they simply cannot prove their point by consulting dictionaries and engaging in jejune textual analysis without resort to the legislative history.

Having asserted that the Amendment constitutionalized the 1866 Act, the authors then observe that the Act guaranteed to all citizens "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."<sup>281</sup> Now, "the right to marry is just a subset of the right to make a particular form of contract".<sup>282</sup> ergo, it was protected by the 1866 Act and hence the Fourteenth Amendment. Therefore, "[i]f a white citizen could contract to marry a white citizen, then according to the plain words of the Civil Rights Act of 1866 [and hence the Fourteenth Amendment] African Americans must have the identical right."<sup>283</sup>

The difficulty with this argument from an originalist perspective is that the framers and supporters of the Fourteenth Amendment repeatedly confronted it and rejected it<sup>284</sup> for two reasons. First, they typically insisted that marriage was a civil right, not a social right, and hence not covered by the Civil Rights Act or the Fourteenth Amendment.<sup>285</sup> Second, they argued that a ban on interracial marriage was not a form of discrimination, because it applied equally to blacks and whites by forbidding them to marry outside their race.<sup>286</sup>

Nowadays we tend (rightly, in my view) to regard discrimination in marriage rights as a violation of fundamental civil rights. Indeed, the argument that Calabresi and Matthews make is identical in structure to a major argument for the unconstitutionality of same-sex marriage—that it discriminates on the basis of sex because if a male citizen can marry a female citizen, a female citizen should have the same right. However, the debates surrounding the framing and ratification of the Fourteenth Amendment suggest that its supporters understood its meaning more narrowly, as protecting the right to engage in commercial contracts but not

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281. *Id.* at 1410 (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27).

282. *Id.* at 1412.

283. *Id.* at 1424-25.

284. See generally Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

285. For example, Rep. Samuel W. Moulton (R. Ill.) argued that the Freedman's Bureau Bill's protection of "civil rights" did not include the rights to marry or to sit on juries. The right to marry, according to Moulton, was a "social right," not a "civil right," although he confusingly also insisted that "the right to marry is not strictly a right at all." CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866).

286. This argument was made by supporters of the Civil Rights Act in response to objections by a leading Democratic opponent, Reverdy Johnson (D. Md.), who made exactly the same arguments about marriage that Calabresi and Matthews do. Supporters of the Civil Rights Act such as Senator Lyman Trumbull insisted that miscegenation laws involved "no discrimination," and Senator William P. Fessenden (R. Me.) likewise argued that miscegenation laws did not discriminate, because a black man had "the same right to make a contract of marriage with a white woman that a white man has with a black woman." *Id.* at 505.

marriage, and as prohibiting asymmetrical but not symmetrical forms of discrimination.

According to Calabresi and Matthews, “[i]ronically, the strongest arguments for the equality of all contract rights, including rights to enter into marriage contracts, is [sic] perhaps best articulated by the detractors of the Civil Rights Act.”<sup>287</sup> There is in fact nothing ironic about this. Democratic opponents of the Act and the Fourteenth Amendment knew that they stood little chance of passage if they were understood to outlaw bans on interracial marriage. Proponents of these measures uniformly insisted that they would not have that effect. Calabresi and Matthews insist that those proponents were wrong about that, adding that they “do not know or care whether the framers of the Civil Rights Act were fools, knaves, or crafty abolitionists.”<sup>288</sup> But they seem to utterly discount the possibility that the framers honestly characterized their own understanding of the meaning of the Act and the Fourteenth Amendment.

Calabresi’s originalist methodology undertakes a puzzling series of moves that are very difficult to explain except as dictated by a predetermined political agenda. He seeks to rescue for originalism those decisions that are now regarded as fixed landmarks in the law, and whose repudiation would be an embarrassment, while drawing the line at further developments. He is able to do so only by resorting to arbitrary manipulation of interpretive levels of generality and a selective and tendentious use of evidence including, where necessary, post-enactment evidence, to achieve desired results.

## 2. Balkin: *Living Originalism*

In a provocative recent body of work, Jack Balkin has argued that “the debate between originalism and living constitutionalism rests on a false dichotomy.”<sup>289</sup> Like Calabresi and Barnett, Balkin insists that originalists are bound only by the original meaning of the constitutional text, not the original expected applications of those who adopted it.<sup>290</sup> Balkin refers to his constitutional theory as “framework originalism” and his theory of interpretation and construction as the “method of text and principle.”<sup>291</sup> Originalism mandates “[f]idelity to ‘original meaning,’” in Balkin’s view, only in the sense of the “semantic content of the words” in the constitutional text.<sup>292</sup> But the text consists of provisions of varying levels of abstraction: specific “rules,” broader “standards,” and even more general “principles.”<sup>293</sup> When the text states a specific rule, such as “the president must be thirty-five,” it can be applied directly.<sup>294</sup> However, when the text states a general principle, such as “freedom of speech” or “equal protection,” those principles can be implemented only through the articulation of “underlying” or “subsidiary”

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287. Calabresi & Matthews, *supra* note 273, at 1456.

288. *Id.* at 1424.

289. Balkin, *supra* note 3, at 292.

290. *See id.* at 292-93.

291. BALKIN, *supra* note 36, at 3.

292. *Id.* at 13.

293. *Id.* at 6, 14.

294. *Id.* at 6.

principles.<sup>295</sup> Additional underlying principles, such as democracy, separation of powers, and checks and balances may be derived from the text, structure, and history of the Constitution as a whole, rather than from any particular provision.<sup>296</sup>

For Balkin, while originalism mandates fidelity to the original semantic meaning of the rules, standards and principles in the constitutional text (constitutional “interpretation-as-ascertainment”), it leaves to future generations the articulation of underlying principles and doctrines needed to implement the text as law (constitutional “interpretation-as-construction”).<sup>297</sup> While these underlying principles are not fixed and binding in the same sense as the text is, Balkin nonetheless argues that we should look at history in constructing them<sup>298</sup> and that they should be articulated “at roughly the same level of generality as the text” that they “support and explain.”<sup>299</sup>

Balkin contrasts his “framework originalism,” which understands the Constitution as a framework for government that must be filled in through a process of constitutional construction by the political branches, the judiciary, and mobilized popular movements, with “skyscraper originalism,” which “views the Constitution as more or less a finished project” that can be extended only through constitutional amendment.<sup>300</sup> It is construction, not interpretation-as-ascertainment, that does most of the heavy lifting in Balkin’s “framework originalism,” and construction is not limited to the approaches of the framers. Rather, subsequent political and social movements play a critical role in constitutional construction, invoking constitutional text and principles in new ways that transform their practical meaning.<sup>301</sup> Over time, this process holds out hope of redeeming the Constitution’s promise of “a more perfect Union” as each generation adapts it to its own needs and makes it its own.<sup>302</sup> It is in this sense that Balkin’s approach is both originalist and living constitutionalist.

By insisting that constitutional construction should draw on history in articulating underlying principles, but only at roughly the same level of generality as the text, and that it should not be bound by original expected applications, Balkin erects a theory capacious enough to justify virtually any doctrine of modern constitutional law. His theory privileges a highly abstract approach to the process of constitutional interpretation of the most doctrinally important constitutional clauses, which are themselves abstract texts. In practice, he relies on history for the construction of constitutional doctrine, but is free to discard those portions of the historical understanding that are ill-suited to modern purposes. As he describes it, “[t]he difference between [his] framework originalism and conservative originalism is the difference between viewing history as a *resource* and viewing it as a *command*.”<sup>303</sup>

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295. *Id.* at 14.

296. *See id.* at 14-15.

297. *Id.* at 4-5.

298. *See id.* at 260-63.

299. *Id.* at 263.

300. *Id.* at 21-22.

301. *See id.* at 81-93.

302. *See id.* at 69-81.

303. *Id.* at 229.

Indeed, Balkin freely concedes that any resort to “original meaning” in legal interpretation necessarily selects only a portion of the rich array of cultural meanings of the text in its original historical setting and discards the rest.<sup>304</sup> “There is no natural and value-free way to make this selection.”<sup>305</sup> Moreover, although public-meaning originalism rejects reliance on the subjective intentions of the framers and ratifiers, “interpretation of a legal text always involves an ascription of purpose or intention to an author.”<sup>306</sup> However, legal “practices of interpretation are . . . always anachronistic and selective because we are interpreting for a (present-day) purpose.”<sup>307</sup>

Given that Balkin is “a liberal defending the modern state,”<sup>308</sup> it is not surprising that for him this anachronistic and selective practice of interpretation yields expansive grants of power to the federal government as well as expansive protections for individual rights. In this comprehensive theory, his treatment of the former (particularly the Commerce Clause) furnishes a crucial context for the latter (including the Fourteenth Amendment). Balkin’s interpretation of the Commerce Clause takes as its starting point the idea that “commerce” is “intercourse,” an equation found not just in *Gibbons v. Ogden*,<sup>309</sup> but also in Samuel Johnson’s eighteenth-century dictionary.<sup>310</sup> “Intercourse” included not just economic transactions but “interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation.”<sup>311</sup> For Balkin, the “*animating purpose*” behind the list of enumerated powers found in Article I, Section 8 is stated in the resolution (Resolution VI) originally introduced by Edmund Randolph at the Philadelphia Convention and later slightly reworded by Gunning Bedford: to grant Congress the power “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>312</sup> Thus, the Commerce Clause includes the power to regulate transactions with foreign nations or affecting more than one state that “require a federal solution” because leaving them to the individual states would produce “collective action problems” or harmful “spillover effects.”<sup>313</sup>

Other originalists object that Balkin’s approach in effect substitutes the broad extra-textual power to legislate for the “general interests of the Union” for the narrower specific grants of power actually found in the constitutional text.<sup>314</sup> It is true that “commerce” can bear the meaning of “interaction,” and as Balkin demonstrates, that meaning was substantially more common in the eighteenth

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304. Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 828.

305. *Id.*

306. *Id.* at 829.

307. *Id.*

308. *Id.* at 867.

309. 22 U.S. (9 Wheat.) 1, 189-90 (1824).

310. See BALKIN, *supra* note 36, at 149.

311. *Id.*

312. *Id.* at 144-45.

313. *Id.* at 147.

314. See, e.g., Kurt T. Lash, “Resolution VI”: The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8, 87 NOTRE DAME L. REV. 2123 (2012).

century than it is today. Yet the primary meaning of the English word “commerce” (like its Latin source “commercium”) has always referred to trade or exchanges of merchandise (Latin “merx, mercis”). For the semantic originalist, in choosing between the primary and secondary meanings, the question, according to Balkin, is how the term “was generally and publicly used when the text was adopted.”<sup>315</sup> Randy Barnett, surveying every use of the term in the Philadelphia convention, *The Federalist*, and the ratification conventions, concluded that it was always used in the sense of trade and not in any broader sense.<sup>316</sup> In light of this evidence, Barnett argues, the Bedford Resolution cannot alter the original semantic meaning of “commerce” as “trade.”<sup>317</sup> Balkin largely does not dispute Barnett’s evidence of usage.<sup>318</sup> But if Barnett is correct about the original semantic meaning of “commerce,” it poses a devastating difficulty for Balkin’s entire liberal living originalist theory.

As for the Fourteenth Amendment, Balkin, like other new originalists, relies heavily on the exposition of Senator Howard introducing the Amendment to the Senate.<sup>319</sup> Balkin begins with the Privileges or Immunities Clause, “which the framers . . . designed to be its central guarantor of civil rights and civil liberties.”<sup>320</sup> This Clause, he argues, is a guarantee both of equality and substantive liberties, but it is “*declaratory*—its language does not specify the rights it protects but merely asserts their existence.”<sup>321</sup> As Balkin explains:

It uses a common law method to identify rights . . . [and] thus relies on tradition, but the tradition is often an invented tradition, or, at the very least, it is a tradition selectively viewed and interpreted from the standpoint of the present. . . . It treats tradition not as providing fixed rules but rather as offering legal and rhetorical resources for making arguments about justice in the present.<sup>322</sup>

The Clause thereby protects against state infringement of not only all textually enumerated individual rights guaranteed in the Constitution (such as those in the Bill of Rights), but also fundamental unenumerated rights.<sup>323</sup> But given that there is no general agreement on the scope of unenumerated rights, how are they to be ascertained? Balkin suggests that “[o]ne way to do this—although not the only

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315. BALKIN, *supra* note 36, at 46.

316. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

317. Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623, 644-48.

318. See Balkin, *supra* note 304, at 868. Balkin’s main riposte to Barnett is that Barnett’s theory would leave Congress without any general powers to regulate foreign relations, interstate and international communications or perhaps even navigation. See *id.* at 868-74. With regard to the latter, Balkin argues that in order to reach navigation, Barnett’s “trade” theory of commerce requires us to interpret “commerce” metonymically (or to resort to the necessary and proper clause). See *id.* at 869. Balkin claims that his approach is preferable because “[i]f ‘commerce’ means ‘intercourse,’ . . . we do not have to assume that the word was used nonliterally.” *Id.* But Balkin’s equation of commerce with intercourse (in the broad sense of “interaction”) is a nonliteral or metonymic usage.

319. See BALKIN, *supra* note 36, at 192-93, 195-97, 220-21.

320. *Id.* at 191.

321. *Id.* at 199.

322. *Id.* at 199-200.

323. See *id.* at 200-19.



way—is to look at the kinds of rights that have historically or traditionally been protected by states, or rights that almost all of the states have recognized or protected.”<sup>324</sup> Thus, “[u]nenumerated rights will come and go over very long periods of time” and even the scope of enumerated rights “will depend on constitutional constructions that may also change over time.”<sup>325</sup> In this “dynamic conception . . . [r]ights become fundamental and timeless . . . when the time is right for them.”<sup>326</sup>

A critical role in the “ebb and flow of unenumerated rights” in this model is played by “sustained political or social mobilization” for or against them.<sup>327</sup> Even the scope of *enumerated* rights will ebb and flow in response to social and political mobilizations.<sup>328</sup> Balkin cites the Court’s repudiation of Lochnerian freedom of contract in 1937 as an example of the way constitutional rights can contract as well as expand.<sup>329</sup> As a descriptive model, it is not clear that Balkin’s living originalism explains constitutional practice better than common-law constitutionalism. The *Lochner* Court recognized freedom of contract as a fundamental right not *because* of social and political mobilizations *in favor* of that result, but *despite* major mobilizations *against* it. The Supreme Court in the Progressive Era was not a Progressive Court. And once the Court recognized freedom of contract as a fundamental right, it tended to be self-perpetuating, at least until the economic catastrophe of the 1930s led to a constitutional crisis.

The Equal Protection Clause, in Balkin’s view, is directed not just at discriminatory executive enforcement or remedies, but also at discriminatory legislation.<sup>330</sup> This broad scope (which accords with modern doctrine), is, in Balkin’s view, inherent in the original semantic meaning—laws, and not just officials, “protect.” Of course, other originalists have made the opposite argument,<sup>331</sup> but according to Balkin, “[t]he words ‘equal protection’ mean the same today as they did in 1868”<sup>332</sup>—“the original meaning of ‘equal protection’ is ‘equal protection.’”<sup>333</sup> “Interpretation-as-ascertainment” yields an empty tautology. A nonoriginalist might look to current doctrine for the meaning, but if we are not constrained by doctrine, the possibilities are endless. As David Strauss has argued, a socialist or social democrat might argue that “equal protection” requires massive redistribution of wealth,<sup>334</sup> a free-market fundamentalist might argue that it prohibits redistribution; under current doctrine it neither requires nor prohibits redistribution. Under Balkin’s approach, originalist interpretation-as-ascertainment does nothing to narrow these possibilities. The real work is done by construction,

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324. *Id.* at 210.

325. *Id.* at 211.

326. *Id.*

327. *Id.* at 210.

328. *See id.* at 211.

329. *See id.*

330. *See id.* at 220.

331. *See supra* notes 7, 8 and accompanying text.

332. BALKIN, *supra* note 36, at 37.

333. *Id.* at 104.

334. *See* David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1163, 1165 (2012).

and we are free to reject original constructions and adopt new ones.<sup>335</sup>

Finally, according to Balkin, the Due Process Clause guaranteed not just “fair procedures” but also “‘vested’ rights” and “equality before the law.”<sup>336</sup> It therefore overlaps to a certain extent with the other two clauses.

With this theoretical armory at his disposal, Balkin is able to defend virtually all the results of modern Fourteenth Amendment doctrine, including the holding in *Roe v. Wade*,<sup>337</sup> the *bête noire* of conservative originalists. Laws banning abortion, he argues, violate equal protection because they “impose special burdens on women not suffered by men,” and force women to become mothers against their will, keeping them in a “socially dependent status.”<sup>338</sup> These laws thus constitute caste and class legislation. Secondly, Balkin argues, while the right to abortion may not have been a privilege or immunity of citizens in 1973, when *Roe* was decided, there is a “far stronger case” for such a conclusion today.<sup>339</sup> While in 1973, when *Roe* was decided, only a minority of states recognized a right to abortion, “today, it is likely” that even if *Roe* were overruled, “an overwhelming majority of the states would protect some kind of right to abortion.”<sup>340</sup>

Balkin’s originalism avoids a close adherence to the specific political and ideological commitments of the framers. The fact that many proponents of the Fourteenth Amendment argued that it simply constitutionalized the Civil Rights Act of 1866, Balkin argues, does not demonstrate that the Amendment should be construed simply to track the Act.<sup>341</sup> The Amendment is worded at a higher level of generality than the Act. Likewise, the framers’ statements that the Fourteenth Amendment would not require integrated public schools, or legalize racial intermarriage, may be dismissed as original expected applications not binding on semantic originalists. But underlying those expectations was in fact a theory or general principle, the distinction between civil, social and political rights, or what Balkin calls the “tripartite theory of citizenship.”<sup>342</sup> This theory is a general principle that accounts for many of the framers’ original expected applications. Nevertheless, Balkin maintains, it is a constitutional construction rather than a textual principle. Moreover, he argues, the distinctions it embodies are at odds with our modern understanding of economic and racial equality in the wake of the New Deal and the civil rights revolution.<sup>343</sup> Thus Balkin rejects this original construction as unacceptable to modern Fourteenth Amendment jurisprudence.

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335. See BALKIN, *supra* note 36, at 222. It is significant that while Calabresi and Rickert argue that the prohibition of caste discrimination is part of the original semantic meaning (and hence binding), Balkin contends that the prohibition of caste and the other types of unequal treatment are original constructions (nonbinding, but to be adopted as normatively desirable). See Balkin, *supra* note 244. From a logical and historical perspective, Balkin’s approach is more readily defensible, because, as discussed above, Calabresi and Rickert resort to expected applications (which they claim to eschew) to establish their posited semantic meaning.

336. BALKIN, *supra* note 36, at 246–49.

337. 410 U.S. 113 (1973).

338. Balkin, *supra* note 3, at 323–24.

339. *Id.* at 336.

340. *Id.* at 334.

341. See BALKIN, *supra* note 36, at 264.

342. *Id.* at 222 (emphasis omitted).

343. See *id.* at 230–31.

Balkin's originalism, which allows for enormous discretion in constitutional interpretation, is unlikely to prove attractive to most other originalists. While Balkin seeks to deploy originalist arguments in favor of the right to abortion, he concedes that "[o]f course people can also use the same interpretive method to argue against the right to abortion."<sup>344</sup> The same could be said about most other salient constitutional issues—when the textual meaning and associated “underlying principles” are articulated at a high enough level of generality, almost any result that is within the broad scope of current constitutional discourse can be defended. The rise of originalism and its wide appeal in certain circles is closely connected with the claim that it alone is able to furnish the constitution with a “fixed meaning,” and avoid the “invitation to apply current societal values.”<sup>345</sup> Thus, it is not surprising that other originalists have sharply criticized Balkin's approach,<sup>346</sup> which seems largely to collapse the distinction between originalism and nonoriginalism.<sup>347</sup>

At the same time, while many nonoriginalists may find Balkin's embrace of the transformational role of social movements attractive, they are unlikely to be fully convinced that originalism is compatible with the living Constitution. Balkin argues that the most important and productive provisions of the Constitution, such as the Commerce Clause and the First and Fourteenth Amendments, are framed at a high level of generality and that any supporting or underlying principles should be framed at a similarly high level of generality. But what if the best historical evidence shows that this is not the case? What if “commerce” was understood not as embracing all social interactions but only trade and navigation? What if terms such as “freedom of speech,” “privileges or immunities,” or “equal protection” were understood not as broad general principles but as legal terms of art? As we have seen above, in the case of the Privileges or Immunities Clause, *Hamburger* and *Lash* have made different arguments along these lines, yielding different and much narrower accounts of the Clause's meaning than the one proposed by Balkin. Is the binding semantic meaning ascribed to the Clause to vary according to the latest historical account to find favor with a given judge or other interpreter?

Arguably, Balkin's account of the original semantic meaning of the Fourteenth Amendment is broader than the text warrants. He claims that the framers' tripartite distinction between civil, social, and political rights is not part of the original meaning, but merely a construction that may be freely rejected by modern originalists. Yet as Balkin concedes,<sup>348</sup> the distinction between civil and political

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344. Balkin, *supra* note 3, at 294.

345. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

346. See, e.g., John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 381 (2007) (stating that it is “difficult to see what is left of a recognizable originalism” in Balkin's approach); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 723, 725 (2009) (arguing that the original public meaning approach of such scholars as Balkin and Barnett enables the Constitution to be interpreted “in a way congenial to the aspirations of [the] interpreter,” leading to a wide array of “starkly different pictures of the Constitution.”).

347. See Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 709 (2011) (commenting that “there is no obvious distinction, at least in practice and possibly in theory, between new originalism [of scholars such as Balkin and Barnett] and non-originalism”).

348. See BALKIN, *supra* note 36, at 237.

rights is presupposed by the text of the Fourteenth and Fifteenth Amendments. Section Two of the Fourteenth Amendment contemplates that states might freely abridge the political rights of women, and that they might abridge the political rights of black males merely upon penalty of reduced representation. The Fifteenth Amendment further confirms that the Fourteenth Amendment did not prohibit racial discrimination in voting rights, for otherwise it would have been unnecessary. The Fourteenth Amendment's textual authorization of discrimination in political rights suggests that the tripartite distinction, or at least the distinction between civil and political rights, is not just a *construction*, but a core part of the Amendment's original semantic *meaning*. Under Balkin's theory, semantic meaning is unalterable.

Balkin does suggest a solution to this problem, but it will not convince everyone. The successive extensions of the franchise in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, he argues, give rise to a "general structural principle" that "there should be no distinction between political and civil equality for adult citizens without a compelling justification."<sup>349</sup> The reasoning Balkin employs here is not unlike Justice Douglas' claim in *Griswold v. Connecticut* that a broad constitutional right of privacy arises from "penumbras, formed by emanations" from specific textual guarantees found in the First, Third, Fourth, Fifth and Ninth Amendments.<sup>350</sup> Perhaps Justice Douglas' formulation does not really deserve all the scorn that has been heaped upon it, but the common criticism is that the specific guarantees in the text indicate that it does not contain a broad guarantee of the right to privacy at the level that Justice Douglas articulated in *Griswold*. After all, one could equally well construct a Lochnerite fundamental right to contract and property prohibiting any attempts to redistribute wealth or equalize bargaining power out of "penumbras and emanations" from the Contracts, Coinage, and Credit Clauses of Article I, section 10, and the Due Process and Takings Clauses of the Fifth Amendment.<sup>351</sup> Likewise, one may object that the four amendments extending the franchise did so in specific and limited ways and did not establish a broad guarantee of voting rights at the level of generality suggested by Balkin. It is hard to see how his theory is really more satisfying than the view that the courts, in response to social movements in the past century and a half, have gradually given meaning to the indeterminate text of the Fourteenth Amendment, which is now read (contrary to the original understanding) to prohibit irrational discrimination in all sorts of rights, including political rights. The voting rights decisions of the Warren Court, which invoked the Fourteenth Amendment to strike down state poll taxes<sup>352</sup> and the malapportionment of state legislatures,<sup>353</sup> are

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349. *Id.* at 238. Balkin also suggests a second argument for extending the Fourteenth Amendment to political rights. He argues that political rights, like the right to marry, are fundamental interests (although not fundamental rights) that "once provided by the state, must be provided equally," and that it is a "reasonable construction" to extend the Fourteenth Amendment's prohibition on the abridgment of fundamental rights to fundamental interests. *Id.* at 239-40. Like much else in Balkin's theory, this argument makes sense as a matter of logic or political morality, although its relation to the original meaning of the Fourteenth Amendment is unclear.

350. 381 U.S. 479, 484 (1965).

351. See, e.g., KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 500 (18th ed. 2013).

352. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

among the most legitimate exercises of judicial power in American history. But they are very difficult to justify under any originalist theory.

Moreover, Balkin's preferred construction of the Privileges or Immunities Clause is utterly unmoored from the original theory underlying the text. As he observes, the framers tended to cling to a conception of natural rights that "preexist governments" and that the people "'have always' had."<sup>354</sup> To the extent that the Privileges or Immunities Clause was viewed as protecting such rights, they were seen as fixed, unchanging, and eternal. Of course, the idea that natural rights could form the basis of a workable legal system was criticized by perspicacious observers even in the Eighteenth Century<sup>355</sup> and seems quaint to most people today.

Balkin, on the other hand, looks to positive law to identify protected privileges or immunities, which in his conception are emphatically *not* a set of "fixed rules."<sup>356</sup> Rather, he suggests that unenumerated fundamental rights may be identified by looking at what rights the states have "historically or traditionally" protected, or what rights "almost all of the states have recognized or protected."<sup>357</sup> This is a decidedly positivist conception of rights at odds with the *jusnaturalist* assumptions of the framers. Such rights will "ebb and flow," they will "come and go" over time: Balkin cites freedom of contract as an example.<sup>358</sup> But in an era where a majority of jurisdictions treated freedom of contract as a fundamental right, Balkin's nose-counting approach would tend to continue to impose it even in the face of broad social mobilizations against it. That is essentially what happened for more than three decades under *Lochnerism*. So although Balkin argues that his approach to the Privileges or Immunities Clause is dynamic, it has great potential to be deployed to protect the status quo.<sup>359</sup> It provides no general principle to distinguish fundamental from nonfundamental rights based on their *nature*, but simply protects those rights that *have been* and *are* already protected.

### 3. Barnett: *The Libertarian Constitution*

Randy Barnett has embraced nearly all the moves that distinguish the new originalism from its earlier forerunners.<sup>360</sup> He disavows reliance on the subjective intentions of the framers in favor of inquiry into "the public or objective meaning that a reasonable listener would place on the words used in the constitutional

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353. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

354. BALKIN, *supra* note 36, at 199.

355. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) ("The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject . . ."); JEREMY BENTHAM, *Nonsense Upon Stilts*, in *RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION* 330 (Philip Schofield et al., eds., Clarendon Press 2002) (1795) ("Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts").

356. BALKIN, *supra* note 36, at 199-200.

357. *Id.* at 210.

358. *Id.* at 210-11.

359. Cf. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2049-50 (2012) (book review) (arguing that Balkin's *Living Originalism* embraces a Burkean justification of judicial review as preserving the political status quo).

360. See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (referring to Barnett as "one of the most prominent New Originalists").

provision at the time of its enactment.”<sup>361</sup> This hypothetical meaning is generally to be determined by reference to such sources as “dictionaries, common contemporary meanings, an analysis of how particular words and phrases are used elsewhere in the document or in other foundational documents and cases, and logical inferences from the structure and general purposes of the text.”<sup>362</sup> A “richly detailed legislative history” is not generally required, and “original meaning originalists need not concern themselves” with the specific intended applications of the language used, except as “circumstantial evidence” of the meaning of technical words and phrases.<sup>363</sup>

In practice, however, Barnett’s analysis of key constitutional provisions, including the Necessary and Proper Clause,<sup>364</sup> the Commerce Clause,<sup>365</sup> the Ninth Amendment,<sup>366</sup> and the Privileges or Immunities Clause,<sup>367</sup> relies heavily on the same sort of resort to legislative history and statements of subjective understandings as the old originalism. Based largely on evidence drawn from legislative history (though not a terribly “richly detailed” one),<sup>368</sup> Barnett concludes that the Privileges or Immunities Clause protects a broad set of rights that include both natural rights (enumerated and unenumerated) and positive-law rights.<sup>369</sup> The Privileges or Immunities Clause of the Fourteenth Amendment, by importing the language of the Privileges and Immunities Clause (Comity Clause) of Article IV, incorporated the antebellum understanding exemplified in such decisions as *Corfield v. Coryell*,<sup>370</sup> which identified these rights as consisting both of the natural rights retained by the people, as well as “such positive civil rights as the ‘protection of government’ that one receives in exchange for surrendering one’s power of enforcement” of natural rights to the state.<sup>371</sup> Barnett highlights the repeated reliance on Article IV and *Corfield* by the leading proponents of the Civil Rights Act of 1866, such as Senator Trumbull and Representatives Wilson and Lawrence.<sup>372</sup> Finally, he points to Senator Howard’s speech, which quoted at

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361. BARNETT, *supra* note 39, at 92.

362. *Id.* at 93 (citations omitted).

363. *Id.*

364. *See id.* at 155-90.

365. *See id.* at 278-94.

366. *See id.* at 235-42.

367. *See id.* at 60-68.

368. Cf. Jack N. Rakove, Book Review, 1 N.Y.U. J.L. & LIBERTY 660, 667 (2005) (“Barnett’s examination of the framing of the Fourteenth Amendment is too cursory to satisfy anyone who wants to reason from robust evidence rather than imaginative inference.”). Barnett’s discussion contains some careless errors. *See, e.g.*, BARNETT, *supra* note 39, at 61 (referring to Representative John A. Bingham of Ohio, the principal draftsman of section 1 of the Fourteenth Amendment, as “Senator” Bingham); *id.* at 193 (referring to Bingham as “John Bingham of New York” (Bingham never lived in New York)); *id.* at 63-64 (repeatedly referring to Senator Lyman Trumbull of Illinois, the principal draftsman of the Civil Rights Act of 1866, as Lyman “Trumbell”).

369. *See* BARNETT, *supra* note 39, at 61 (arguing that “while ‘privileges or immunities’ includes natural rights, it is a broader term that includes additional rights.”).

370. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa.1823) (No. 3,230).

371. BARNETT, *supra* note 39, at 63.

372. *See id.* at 63-64. While these legislators stressed that the Civil Rights Act protected natural rights, Barnett cites Lawrence as confirming that the privileges and immunities protected by Article IV included positive rights as well. *See id.* at 65. Lawrence did state, as Barnett observes, that privileges and immunities include both rights “inherent in every citizen of the United States, and such others as

length from *Corfield*'s explication of privileges and immunities (a set of rights that "cannot be fully defined in their entire extent and precise nature"), and added to those "the personal rights guaranteed and secured by the first eight amendments of the Constitution."<sup>373</sup>

Given the vagueness of the text of the Privileges or Immunities Clause,<sup>374</sup> Barnett's resort to legislative history to elucidate its meaning is understandable. Yet a more careful and richly detailed account of these same materials (which Barnett eschews as unnecessary) would cast doubt on his claim that the very broad meaning he attributes to the Privileges or Immunities Clause is the meaning that a reasonable contemporary observer would attribute to it. Although various legislators referred to natural rights, and Howard and (more obliquely) Bingham adverted to incorporation or something similar, the most common meaning attributed to the Clause was that it simply prohibited discrimination in the same limited set of positive state law rights (such as property, contract, and access to the courts) protected by the Civil Rights Act.<sup>375</sup> The more closely one looks at the debates over framing and ratification of the Fourteenth Amendment, the more difficult it is to assert that there existed a single widely-held historical understanding of its meaning or to declare with confidence exactly what "objective meaning" a "reasonable listener" would attach to its language.

Under Barnett's theory, the Ninth Amendment requires "the strict construction of any power that restricts the exercise of individual liberty, whether that liberty is enumerated or unenumerated,"<sup>376</sup> and the Privileges or Immunities Clause of the Fourteenth Amendment refers to "the same set of unenumerable rights."<sup>377</sup> Yet Barnett cites no statements during the framing and ratification of the Fourteenth Amendment linking its Privileges or Immunities Clause to the Ninth Amendment. The only specific support he cites for equating the two is a post-ratification remark by Senator John Sherman that "the privileges, immunities, and rights . . . of citizens of the United States," as the Ninth Amendment recognizes, are "innumerable," and must be sought not only in the Constitution, but also in "every scrap of American history," in "the history of England," and in "the common law."<sup>378</sup>

Yet as Kurt Lash has argued, although one can point to some "sporadic attempts to read the Ninth" Amendment during Reconstruction as a guarantee of

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may be conferred by local law and pertain only to the citizen of the State." CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866). But in the next sentence he "conced[es], as the courts have held, that the privileges referred to in the Constitution are such as are fundamental civil rights, not political rights nor those dependent on local law." *Id.*

373. BARNETT, *supra* note 39, at 65 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard)).

374. *See, e.g.,* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 51-52, 60 (1988) (arguing that the language of Privileges or Immunities Clause was vague and ambiguous and that as a consequence the text of "[s]ection one simply fails to specify at all the particular rights to which it applies.").

375. *See supra* note 87 and accompanying text; *see also* Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 381 (2009) ("The single most frequently expressed understanding of the proposed amendment was that it constitutionalized the Civil Rights Act of 1866.").

376. BARNETT, *supra* note 39, at 242.

377. *Id.* at 66.

378. *Id.* at 67 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman)).

personal rights capable of being incorporated against the states, there “are far more numerous statements on (and applications of) the Ninth as a federalist rule of construction.”<sup>379</sup> If the Ninth Amendment were understood as a broad guarantee of individual rights, it is certainly odd that the antislavery constitutionalists, otherwise so creative in their interpretation of the text, never relied on it, and that the leading proponents of the Fourteenth Amendment cited as favoring incorporation, such as Howard and Bingham, never referred to it.<sup>380</sup> However, Lash notes, the Ninth Amendment *was* frequently invoked by slaveholders and secessionists.<sup>381</sup> Although central to Barnett’s constitutional theory, the Ninth Amendment appears to have been of marginal importance for the framers and ratifiers of the Fourteenth Amendment.

If the terms privileges or immunities (separately or in combination) *were* understood to refer to natural rights (or to positive rights acquired in exchange for the loss of certain natural rights), that tells us little specifically about what those rights were. While natural rights theorists often speak as if the concept of natural rights is a perfectly clear one on which a stable and determinate legal doctrine can be based, that has never been the case. As Justice Iredell wisely said: “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject . . . .”<sup>382</sup>

Barnett argues that while the *Slaughter-House Cases*<sup>383</sup> departed from the original meaning of the Privileges and Immunities Clause, the doctrine of substantive due process that emerged in the Supreme Court’s jurisprudence in the late nineteenth and early twentieth centuries largely repaired the damage, “restor[ing] rather than violat[ing] the original historical meaning of Section 1 of the Fourteenth Amendment taken as a whole.”<sup>384</sup> Barnett enthusiastically endorses the Court’s jurisprudence during this era, including the decision that most modern scholars have treated as emblematic of judicial overreaching: *Lochner v. New York*.<sup>385</sup> According to Barnett, “[t]he majority’s position [in *Lochner*] can most accurately be characterized as adopting the conception of civil rights or ‘privileges or immunities’ held by the framers of the Fourteenth Amendment.”<sup>386</sup> The *Lochner* Court deployed what Barnett calls a “Presumption of Liberty”<sup>387</sup> that included vigorous judicial protection of contract and property rights. In the wake of the New Deal, the Court abandoned this approach in favor of a general presumption of constitutionality and currently grants heightened protection only to specifically enumerated rights and to a “judicially favored”<sup>388</sup> subset of unenumerated rights deemed fundamental.

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379. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 645 n.222 (2005).

380. *See id.* at 647-48; *see also* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 144 (1988) (noting failure of abolitionists to invoke Ninth Amendment).

381. *See* Lash, *supra* note 379, at 648.

382. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.).

383. 83 U.S. (16 Wall.) 36 (1873).

384. BARNETT, *supra* note 39, at 208.

385. 198 U.S. 45 (1905).

386. BARNETT, *supra* note 39, at 215.

387. *Id.* at 259.

388. *Id.* at 232.



The choice between the *Lochner* era's "Presumption of Liberty" and the modern presumption of constitutionality, Barnett writes, "is largely a matter of constitutional construction" rather than interpretation, because the constitutional text "does not explicitly establish any presumption."<sup>389</sup> Yet elsewhere he suggests the opposite: the modern Court's presumption of constitutionality is "incompatibl[e] . . . with the text of the Constitution"<sup>390</sup> and "violate[s]" the Ninth Amendment.<sup>391</sup>

Of course, the presumption of liberty cannot be absolute, for otherwise government could scarcely exist. Barnett recognizes that government must have the power "to prohibit wrongful or regulate rightful activity."<sup>392</sup> So where is the line between rightful and wrongful activity, and between proper and improper regulation? Barnett argues that the line is largely (though perhaps not entirely) that drawn by judge-made common law: "The freedom to act within the boundaries provided by one's common law or 'civil' rights may be viewed as a central background presumption of the Constitution."<sup>393</sup> He is willing to admit that legislation "can occasionally be used"<sup>394</sup> to alter the common law, but insists that such legislation should be "comparatively rare."<sup>395</sup> The more the legislature acts to alter common-law rights, the greater judicial skepticism is warranted.<sup>396</sup>

Barnett's constitutional presumption of liberty, which he concedes is a matter of construction rather than interpretation, seems to derive, as Trevor Morrison has argued, "not from the Constitution itself, but from the libertarian ideology Professor Barnett reads into the Constitution."<sup>397</sup> Furthermore, while the framers cherished the common law and undoubtedly incorporated many common-law institutions (such as trial by jury and the writ of habeas corpus) into the Constitution, Barnett provides little support for his sweeping claim that the common law establishes general background presumptions against which the constitutional propriety of legislation may be measured. Madison emphatically rejected the notion that the common law was "adopted or recognized by the constitution."<sup>398</sup> For example, the common law of seditious libel treated criticism of the government as wrongful, but it is far from clear that the First Amendment incorporates that view. As Madison said, "[i]f it be understood that the common law is established by the constitution" then "all its incongruities, barbarisms, and bloody maxims would be inviolably saddled on the good people of the United States."<sup>399</sup> Barnett seems to envisage that the line between rightful and wrongful

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389. *Id.* at 223.

390. *Id.* at 224.

391. *Id.* at 242; *see also id.* at 252 (arguing that the modern Court's approach, unlike the presumption of liberty, "is a construction that runs afoul of the text").

392. *Id.* at 262.

393. *Id.* at 263.

394. *Id.*

395. *Id.* at 264.

396. *See id.*

397. Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 856 (2005) (book review).

398. JAMES MADISON, *Report on the Alien and Sedition Acts*, in WRITINGS 608, 641 (Jack N. Rakove ed., 1999).

399. *Id.* at 639.

conduct should be determined by reference to state common law<sup>400</sup> rather than some general or federal common law, which only raises additional problems. As Madison recognized, state common law cannot provide a uniform standard by which to measure the constitutionality of legislation under the federal Constitution, because even prior to the Revolution, “[t]he common law was not the same in any two of the colonies.”<sup>401</sup> Since that time, the number of state jurisdictions, and the divergences among them, have only multiplied. State common law cannot provide a unified standard for adjudication of federal constitutional rights and powers, much less a fixed one.<sup>402</sup>

Barnett’s approach, which is deeply suspicious of legislation, extends and elevates to constitutional status the maxim that statutes in derogation of the common law are to be strictly construed. But it is unclear why judge-made private law should set the constitutional contours of public legislative power. Certainly neither constitutional text nor original meaning establishes any such presumption. The founders did not make a fetish of the common law,<sup>403</sup> much less elevate it to constitutional status.<sup>404</sup>

Despite these problems there is much of value in Barnett’s constitutional vision. He is certainly right to seek to ground his theory of constitutional interpretation not in assertions of the authority of the framers to bind their posterity, but rather in an inquiry into the constitutional foundations of a just and workable political order. He makes a persuasive case for a wider scope for constitutional liberty in many areas, for example, as a check on our cruel, wasteful, and counterproductive drug laws.<sup>405</sup> But his argument for a revival of the Lochnerian protections of property and contract rights is not textually or historically persuasive. Such an approach, by entrenching the power of economically powerful elites, is more likely to restrict than enhance the liberty of most ordinary people.

### III. CONCLUSION

By casting Section One in the language of privileges or immunities and due process, the framers could claim that it effected no radical change but simply made already existing constitutional guarantees enforceable. Differences between

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400. See BARNETT, *supra* note 39, at 263 (stating that articulation of common-law “rules and principles” distinguishing rightful from wrongful conduct is “primarily made by state court judges”).

401. MADISON, *supra* note 398, at 633.

402. See Morrison, *supra* note 397, at 863-64 (“By allowing private law doctrines of tort, contract, and property to define constitutional rights, Professor Barnett necessarily assumes that constitutional rights will change over time. . . . [T]his is an originalism that only a ‘living constitutionalist’ could love.”).

403. For example, Jefferson was quite suspicious of common-law adjudication, and “trusted the legislature more than the judges.” David Thomas König, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 97, 116 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

404. As Trevor Morrison has argued, the common law, which is largely “designed to mediate relationships between private parties,” may prioritize goals such as economic efficiency over constitutionally paramount values such as liberty and equality. Morrison, *supra* note 397, at 864-65.

405. See BARNETT, *supra* note 39, at 349-50. Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (arguing that the drug laws have created a new caste system in America).

radicals, moderates, and conservatives were submerged in a text that all could agree upon, because each member of Congress and of the ratifying public was free to read it in his own way. The Fourteenth Amendment was a mirror in which each found reflected his own political views and vision of a just constitutional order. This phenomenon is typical in constitution-making. We are able to agree on abstract terms such as “freedom of speech,” prohibition of “cruel and unusual punishments,” protection of the “privileges and immunities of citizens,” “due process,” and “equal protection” precisely because we attach our own meanings to these terms.

The basic difficulty in seeking to elucidate the original understanding of the Fourteenth Amendment is that, as William Nelson put it, “[s]ection one simply fails to specify at all the particular rights to which it applies.”<sup>406</sup> The framers and ratifiers were agreed on a basic principle of equality but could not agree on its specific content. Indeed, the “ultimate emptiness” of the principle was a condition “essential to creating the supermajorities” required to assure passage and ratification.<sup>407</sup> In particular, the Amendment does not specify the rights protected, the nature of the protection (whether absolute or only against discriminatory treatment), or the criterion for determining protected classes. Judicial decisions over the course of the last one hundred forty years have succeeded in resolving these questions in substantial detail. An attempt to return to the original understanding would completely unsettle the law and create utter chaos in the constitutional protection of human rights.

If the framing generation had no common understanding of Section One, it is hardly surprising that a century and a half later there is no consensus among scholars as to its original meaning. Indeed, the quest for a single “original meaning” is a misguided one. The diversity of original understandings presents intractable difficulties that cannot be overcome by the fiction of a single original “objective” meaning that a hypothetical “reasonable observer” would attribute to the text. We are forced to inquire: What are the political and ideological commitments of that reasonable observer? In what contexts does the observer situate the text? What is the observer’s understanding of existing constitutional and legal norms? There is no neutral or objective way of answering these questions. Any attempt to reduce the multiplicity of possible original understandings to a single original meaning is a distortion and ultimately a falsification of history.

In addition to abandoning the search for actual historical meaning in favor of a hypothetical “objective” meaning, recent originalist scholars also deploy the distinction between interpretation and construction. This distinction enables them to dismiss as mere “constructions” or “subjective expected applications” statements by the framers that privileges and immunities did not include political rights (such as the right to vote or serve on juries) or social rights (such as the right to intermarry or attend common schools), or that gender discrimination involves no inequality. But if these statements can be dismissed as mere subjective expected applications, why not also statements by the framers that the Amendment protected core civil rights to hold property, or to move about freely, or to testify in court, or

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406. NELSON, *supra* note 374, at 60.

407. *Id.* at 80.

that it prohibited racial discrimination with respect to those rights? Given the vagueness of the text, the distinction between interpretation and construction is arbitrary and almost infinitely manipulable. It can be used to contract or expand the meaning of the Fourteenth Amendment at will.

On the one hand, a modern interpreter cannot help viewing the text in light of the meanings it has acquired over decades of constitutional interpretation by the people, their elected representatives, and the courts. We tend to view central tenets of modern doctrine as essential components of the original meaning, so that, for example, originalists tend to insist that the Amendment prohibits racial segregation in public education, as the Court held in *Brown v. Board of Education*, even if the framers almost universally rejected that view.<sup>408</sup> Originalist inquiry is inevitably subject to what a contemporary of the framing of the Fourteenth Amendment sardonically called “the law of retrospection, which presents all the past as a preparation for the accomplished fact.”<sup>409</sup>

On the other hand, the originalist scholar will often tend to emphasize the historical evidence that best accords with her own ethical and political values and commitments. This phenomenon of “confirmation bias” is one that philosophers have long been familiar with and is amply confirmed in the psychological literature.<sup>410</sup> It is not necessarily the case that originalists consciously select and emphasize only that evidence that supports their own commitments, but as human beings they often do so unintentionally and even unwittingly.

In reading the debates and discussions of the Fourteenth Amendment and the Civil Rights Act of 1866, one cannot help being struck by participants’ seriousness, learning, foresight, and oratorical skill, and by their determination to forge a more free and just world. Our own age, with its debased and trivial political and journalistic culture, has much to learn from theirs, if only we would listen. The leaders of the Radical Republicans, such as Thaddeus Stevens and Charles Sumner, and the great nineteenth-century advocates for human rights like Frederick Douglass, Elizabeth Cady Stanton, and Susan B. Anthony, though lesser known, deserve the title of founders of our nation as much as Washington, Jefferson, Adams, and Madison. Yet we also find in these debates, even among the Republicans, examples of petty bigotry, political cravenness, and opportunism. Our Constitution will be enriched if we draw upon the best of their legacy but do not seek to stifle and simplify it by a reductionist quest for a single original meaning.

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408. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing, primarily based on *post-enactment* evidence, that the school desegregation decisions are consistent with the original understanding of the Fourteenth Amendment). For discussion, see Boyce, *supra* note 25, at 998-1001.

409. LEO TOLSTOY, *WAR AND PEACE* 709 (Richard Pevear & Larissa Volokhonsky trans., Vintage Books 2007) (1869).

410. See, e.g., Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). As Nickerson observes, Francis Bacon accurately described this phenomenon nearly four centuries ago: “The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects . . .” *Id.* at 176 (quoting Francis Bacon, *Novum Organum*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 24, 36 (Edwin A. Burt ed., 1939)).

The various meanings ascribed to the Fourteenth Amendment by its framers and ratifiers are a starting point of an ongoing process by which its meaning has evolved to this day and will continue to evolve in the future. Their struggles for freedom and equality should remain a constant source of inspiration to their posterity. But to insist that their multifarious understandings can be reduced to a single original meaning is to traduce our own history and constitutional traditions. Moreover, we should not ignore the ways in which the Amendment's meaning has been enriched by the struggles of succeeding generations. Through the gradual evolution of its meaning, our living Constitution has come to embody the accumulated wisdom of past and present generations, over time rendering its protections of liberty and equality broader, more concrete, and more secure.