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Incorporation, Total Incorporation, and Nothing but Incorporation?

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INCORPORATION, TOTAL INCORPORATION, AND NOTHING BUT INCORPORATION?

Christopher R. Green*

ABSTRACT

Kurt T. Lash’s *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (2014) defends the view that the Fourteenth Amendment’s “privileges or immunities of citizens of the United States” cover only rights enumerated elsewhere in the Constitution. My own book, however, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* (2015), reads the Clause to guarantee equality broadly among similarly situated citizens of the United States. Incorporation of an enumerated right into the Fourteenth Amendment requires, I say, national consensus such that an outlier state’s invasion of the right would produce inequality among citizens of the United States. Lash and I agree about a great deal, but this Article provides a focused explanation of the clash between our two books.

Searchable electronic databases have produced an amazing variety of new evidence and argument related to the Fourteenth Amendment’s original meaning and the enumerated-right controversy. Lash’s book vividly shows that there is an enormous amount that the last seventy years of discussion of incorporation failed to uncover. Here, I raise six problems for Lash’s enumerated-rights-only view: (1) the gulf between the constitutional needs of the Founding and Reconstruction; (2) the inherent unabridgeability of federally enumerated rights through state action; (3) textual and historical complications for sharply distinguishing Article IV from the Fourteenth Amendment; (4) equality-focused interpretations of the Louisiana Cession language and of the Privileges or Immunities Clause, explaining the Clause in terms of the Civil Rights Act of 1866; (5) 1866 disputes over voting rights and indefiniteness, incomprehensible on the enumerated-rights-only view; and (6) subsequent-interpretation evidence, especially the use of the enumerated-rights-only view against the Civil Rights Act of 1875.

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INTRODUCTION

Kurt T. Lash’s excellent new book, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship*,¹ argues that the Fourteenth Amendment’s “privileges or immunities of citizens of the United States”² are those personal rights textually enumerated elsewhere in the Constitution, mainly in the Bill of Rights, but some are elsewhere, like the habeas rights of Article I, Section 9, Clause 2³ or the comity rights of Article IV, Section 2, Clause 1.⁴ “Incorporation” has become the shorthand term for the use of the Fourteenth Amendment to apply rights like those in the Bill of Rights, against the states. Lash, however, prefers to refer to his view in terms of “enumerated rights,” rather than “incorporation,” which he takes to suggest an exclusive association with the Bill of Rights, rather than habeas and comity rights

¹ See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014).

² U.S. CONST. amend. XIV, § 1, cl. 2.

³ U.S. CONST. art. I, § 9, cl. 2.

⁴ U.S. CONST. art. IV, § 2, cl. 1. See generally LASH, *supra* note 1.

as well.⁵ Foregoing the nicely pronounceable acronym “ITINBI” (incorporation, total incorporation, and nothing but incorporation), I will thus refer to his view and its kin as the “enumerated-rights-only” view of the Privileges or Immunities Clause, leaving the “total incorporation” idea—that *all* federally enumerated rights count as Fourteenth Amendment privileges under the view—as implicit.

Scholars devoted a great deal of attention⁶ to an enumerated-rights-only reading of the Privileges or Immunities Clause following Justice Hugo Black’s adoption of a form of the view in his dissents in *Adamson v. California*⁷ and *Griswold v. Connecticut*,⁸ and his concurrence in *Duncan v. Louisiana*.⁹ However, Lash makes clear that the debate is far, far from exhausted. Neither Justice Black nor his opponents were able to consider nearly as much data as Lash has been able to consider with the aid of modern searchable databases.

Lash’s version of the enumerated-rights-only view attaches a great deal of importance to 1868, when the Fourteenth Amendment was ratified (on the standard view).¹⁰ The 1868 understanding of enumerated rights, not what they expressed in 1788 or 1791, is what matters for Lash.¹¹ Moreover, on Lash’s reading, 1868 is critical not just for states but for Congress as well.¹² The Privileges or Immunities Clause functions, on Lash’s reading, as a sort of rebooting of the entire Bill of Rights so that we should interpret the words “freedom of speech,” either as a restriction on Congress or as a restriction on states based on what those words expressed in 1868, not 1791.¹³

⁵ LASH, *supra* note 1, at vii–xv.

⁶ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 243 (1998); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

⁷ 332 U.S. 46, 85–86 (1947) (Black, J., dissenting).

⁸ 381 U.S. 479, 516–21 (1965) (Black, J., dissenting).

⁹ 391 U.S. 145, 166 (1968) (Black, J., concurring) (“[T]he words ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’ seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.” (quoting U.S. CONST. amend. XIV, § 1, cl. 2)).

¹⁰ For my contrarian view that the Fourteenth Amendment actually became law on February 12, 1867, when three-fourths of the states represented in Congress had ratified it, see Christopher R. Green, *Loyal Denominatorism and the Northern-Authorized Fourteenth Amendment: Reconstruction History* (Aug. 28, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2317471>.

¹¹ LASH, *supra* note 1, at 296 (“[W]e should be asking whether the claimed right was understood to be a privilege or immunity of citizens of the United States in 1868.”).

¹² *Id.* at 295 (By enacting the Fourteenth Amendment, the people entrenched their understanding of the rights of national citizenship and, in so doing, reconfigured the meaning and scope of the Original Bill of Rights.”).

¹³ *Id.* at 290–96.

I am not a neutral observer of the Privileges or Immunities Clause. My own book on the Clause reads it to forbid states to shorten the rights of citizens of the United States relative to similarly situated fellow citizens, either in the same state or in other states.¹⁴ The same-state component would reproduce much current equality law (allowing the Equal Protection Clause to focus on literal “protection of the laws,” as I advocate);¹⁵ the other-states component would guard fundamental rights against outliers from the American tradition of civil liberty, thus producing incorporation of most privileges in the Bill of Rights in virtue of their prevalence in that tradition but not necessarily in the precise form they bind Congress.

Despite our disagreements, Lash and I have a great deal in common. We both seek what the constitutional text expressed to reasonable observers at its enactment, and we both advocate the reinvigoration of the Privileges or Immunities Clause to do (some of) the work accomplished today by substantive due process.¹⁶ We agree that the restrictive language of the text—“of citizens of the United States”—is far more important to the Privileges or Immunities Clause than are the mere terms “privileges” and “immunities,” and thus that provisions like the Louisiana Cession’s promise of the “rights, advantages, and immunities of citizens of the United States” are textually closer to the Privileges or Immunities Clause than is the text of the Comity Clause.¹⁷ We agree that the Privileges or Immunities Clause goes beyond comity but does not go so far as to constitutionalize natural rights as such.¹⁸

Lash’s argument defies easy summary; his case is cumulative. Lash commendably does not claim that he can reconcile *all* the relevant evidence to support his thesis, but seeks only the most prevalent patterns of usage. Much evidence he unearths is new; his creative readings of old evidence are generally able to dislodge at least some of my prior confidence in contrary readings. He hits many controversies:

1. Lash presents a large volume of evidence demonstrating the close relation of “privileges” and “immunities” to concepts like “rights” or “advantages.”¹⁹ Lash is therefore right to focus on the precise restrictive language used, i.e., “of citizens of the United States.”²⁰

¹⁴ See generally CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* (2015).

¹⁵ See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 3–15 (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, 219–24 (2009). Lash notes this view without endorsing or rebutting it. See LASH, *supra* note 1, at 171 n.402, 260 n.111.

¹⁶ See LASH, *supra* note 1, at ix.

¹⁷ See, e.g., *id.* at 20–26, 47–52.

¹⁸ *Id.* at ix.

¹⁹ *Id.* at 14–20.

²⁰ U.S. CONST. amend XIV, § 1, cl. 2.

2. Lash comprehensively surveys the history of the interpretation of the Comity Clause: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²¹ The Comity Clause variously inspired abolitionists and others with influence on the Republican Party, but it used different language from the Fourteenth Amendment.²² Lash creatively reads Howard’s Fourteenth-Amendment-introducing speech not (as most read Howard) to make *Corfield v. Coryell*’s²³ 1825 list of the Comity Clause rights into absolutely protected national rights, but only as taking the Comity Clause itself, i.e., comity, as a privilege of citizens of the United States.²⁴
3. Lash carefully considers the interpretation of treaty provisions, such as the Louisiana Cession’s promise of the “rights, advantages, and immunities of citizens of the United States,”²⁵ which Daniel Webster and others limited to textually enumerated constitutional rights during the Missouri debates of 1819 and 1820.²⁶
4. Lash covers in detail Bingham’s Comity Clause-language-tracking February 1866 proposal, equated by Bingham with enforcement of the “Bill of Rights,”²⁷ and gives this evidence pride of place at the final conclusion of Lash’s book.²⁸
5. Lash unearths a great deal of generally neglected details regarding the Civil Rights Act of 1866, especially Andrew Johnson’s veto message and responses to it.²⁹ Johnson used the language of the privileges and immunities of citizens of the United States; in response, both Lyman Trumbull and William Lawrence invoked treaties such as the Louisiana Cession.³⁰
6. Lash highlights public discussion of the Fourteenth Amendment, especially discussion of the speech and assembly-and-petition rights grossly violated in New Orleans in July 1866 and seen as paradigmatic Fourteenth-Amendment privileges.³¹ As a public-meaning originalist, this is the evidence Lash stresses most.
7. While he downplays the significance of subsequent-interpretation evidence, Lash touches on a few elements, such as Bingham’s incorporation-focused speech of March 1871,³² and works heroically to explain difficult

²¹ U.S. CONST. art. IV, § 2, cl. 1; *see also* LASH, *supra* note 1, at 20–47.

²² *See infra* Part III.B.1.

²³ 6 F. Cas. 546 (E.D. Pa. 1825).

²⁴ LASH, *supra* note 1, at 155–60.

²⁵ Louisiana Purchase Treaty, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200, 202.

²⁶ LASH, *supra* note 1 at 47–59; *see also infra* Part IV.A.

²⁷ LASH, *supra* note 1, at 102–08; *see also infra* Part V.C.

²⁸ LASH, *supra* note 1, at 301–03.

²⁹ *Id.* at 137–40; *see also infra* Part IV.C.

³⁰ LASH, *supra* note 1, at 140–44, 143 n.311; *see also infra* Part IV.C.

³¹ LASH, *supra* note 1, at 197–210.

³² *Id.* at 246–52 (discussing CONG. GLOBE, 42d Cong., 1st Sess. app. 81–84 (1871)).

Bingham evidence from his January 1871 Judiciary Committee report on women's voting.³³

Lash's book is an extremely impressive scholarly achievement, but I see several areas in which both the enumerated-rights-only view and Lash's arguments for it run into trouble. I see six difficulties, to my mind insurmountable:

1. The gulf between the contexts of 1791 (and 1787 to 1788) and 1868, making the Bill of Rights an ill fit as a catalogue of the most essential rights of new citizens of the United States during Reconstruction, and causing particular trouble for Lash's distinctive view that the Bill of Rights itself was republished with new meaning in 1868;³⁴
2. The inherent unbridgeability of federally enumerated rights through state action, causing tension between the enumerated-rights-only view and the Privileges or Immunities Clause's "which shall abridge" language;³⁵
3. The possibly adverbial "in the several States" in the Comity Clause and 1867 and 1869 evidence from Bingham and Howard linking the Fourteenth Amendment to the Comity Clause, undermining the sharp textual distinction Lash sees between the two;³⁶
4. Equality-focused interpretations of the Louisiana Cession language and of the Privileges or Immunities Clause itself, especially explanations of the Privileges or Immunities Clause in terms of the Civil Rights Act of 1866;³⁷
5. Two very prominent features of the 1866 public debate—whether the Privileges or Immunities Clause applied to voting, and whether it was too indefinite—which the enumerated-rights-only view accommodates poorly,³⁸ and
6. Subsequent-interpretation evidence, especially the emergence of the enumerated-rights-only view of the Privileges or Immunities Clause as a Democratic attack on the Civil Rights Act of 1875.³⁹

Remaining sections of this Article tackle each of these problems.

I. 1791 v. 1868

One major issue with rooting Fourteenth Amendment privileges in the enumerations elsewhere in the Constitution, and particularly in the list of personal rights in the

³³ *Id.* at 236–41 (discussing H.R. REP. NO. 41-22 (1871)).

³⁴ *See infra* Part I.

³⁵ *See infra* Part II.

³⁶ *See infra* Part III.A.

³⁷ *See infra* Part IV.

³⁸ *See infra* Part V.

³⁹ *See infra* Part VI.

Bill of Rights, is the existence of important differences between the contexts of the Founding and Reconstruction. The rights in the Bill of Rights were crafted and selected in a very different setting than the one confronting Congress and the freedmen in 1868.

Someone once said that a handsaw is a good thing, but not to shave with⁴⁰:

A HANDSAW IS A GOOD THING, BUT NOT TO
SHAVE WITH.

Using a Bill of Rights designed only to confirm and supplement limited federal power as the chief means of greatly *expanding* federal power by shielding new citizens of the United States from oppressive states poses a shaving-with-a-handsaw difficulty.

The contexts of 1787 and 1791 were very different from that of 1868. The Bill of Rights (and other rights set out in the federal-constitutional text, like the habeas rights of Article I, Section 9, Clause 2)⁴¹ was intended to safeguard citizens against the new federal government of limited powers, and a goal distinct from providing a catalogue of the rights most important against government generally. The Ninth Amendment is a strong hint that the privileges of citizens of the United States are not set out exclusively in the constitutional text.⁴²

⁴⁰ See CHARLES H. SPURGEON, JOHN PLOUGHMAN'S PICTURES: OR, MORE OF HIS PLAIN TALK FOR PLAIN PEOPLE 43 (Phila., Henry Altemus 1896).

⁴¹ U.S. CONST. art. I, § 9, cl. 2.

⁴² U.S. CONST. amend. IX.

Senator John Sherman made exactly this point on February 6, 1872,⁴³ the same day that his rhyming fellow Ohio Senator, Allen Thurman, first deployed the enumerated-rights-only view against the civil-rights proposals that became the Civil Rights Act of 1875.⁴⁴ Sherman argued:

It was made one of the great objections to this Constitution, by the anti-Federalists of the school of Patrick Henry, that this Constitution was a Constitution of powers and not of rights; that it secured no rights to the citizen. The answer of the Federalists was that the rights of the citizens were amply secured by giving to the citizen of one State the rights and privileges of the citizens of any other State; but that was not satisfactory to the anti-Federalists, and they insisted upon the old amendments to the Constitution which bristle all over with the word "rights," and which do secure to the American citizen certain important rights.

But these amendments to the Constitution do not define all the rights of American citizens. They define some of them. The Constitution itself amply secures some of the rights of American citizens, but the ninth amendment expressly provides that—

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

There are certain rights enumerated in these articles of amendment, but they are not all the rights of the American citizen; very far from it. Where do we find the record of those rights? The fourteenth amendment then coming in says:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

What are these privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. The great fountain head, the great reservoir of the rights of an American citizen is in the common law, the old charters that were wrenched by our ancestors five hundred years ago and two hundred years ago from English kings. Our rights are not limited to those given by the Constitution. What are those rights? Sir, they are as innumerable as the sands of the sea. You must go to

⁴³ CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872).

⁴⁴ *Id.* at app. 26. For more on Thurman, see *infra* notes 339–47 and accompanying text.

the common law for them, the source from which my friend can draw the inspiration of genius and of eloquence.⁴⁵

Federalists warned during ratification that a Bill of Rights seen as a comprehensive list of important rights would provoke a negative inference for other rights and for limited federal power.⁴⁶ The Ninth Amendment was a reminder that there were other rights just as important as, or even more important than, those that were textually enumerated.⁴⁷ A later constitutional author *could*, of course, say that “No State shall interfere with any rights hitherto binding only the federal government,” but the Ninth Amendment makes it *a priori* unlikely.

This is not to suggest, of course, that the Ninth Amendment is itself incorporated against the states via the Fourteenth Amendment. That would press the Ninth Amendment beyond its original function. Rather, the Ninth Amendment confirms the special situation of the Founding; the textual enumeration of rights in the Constitution should not be pressed beyond *its* original function.

Lash’s own excellent, earlier Ninth Amendment scholarship, arguing that the Ninth Amendment was chiefly a clarification of the special role of the Bill of Rights in our scheme of limited federal power, confirms the wide gulf between the roles of statements of rights in 1791 and 1868.⁴⁸ Because states possess a general legislative power, protection of the rights of freedmen against state oppression required a more-all-encompassing provision than was required against an enumerated-powers-only federal government.⁴⁹

Now, for Lash’s particular version of the enumerated-rights-only thesis, there is a smaller gulf between the Bill of Rights and the constitutional rights seen as most important during Reconstruction, because he would update the content of the Bill of Rights based on their understanding in 1868.⁵⁰ The *selection* of rights would thus be made based on the composition of text in 1791, but the *content* of those rights would be specified in 1868. Congress and the states would, moreover, still be bound by the same rules because this updating would also apply to Congress. Rather than requiring states anachronistically to party like it’s 1791, Lash applies a party-like-it’s-1868 rule to both federal and state action.⁵¹

⁴⁵ CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (quoting U.S. CONST. amends. IX, XIV).

⁴⁶ See, e.g., THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.”).

⁴⁷ U.S. CONST. amend. IX.

⁴⁸ See generally KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009).

⁴⁹ See James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 FORDHAM L. REV. 217, 231 (1991).

⁵⁰ LASH, *supra* note 1, at 299–300.

⁵¹ *Id.* at 295–96.

This tremendously important aspect of Lash's version of the enumerated-rights-only view is set out only at the end of Lash's book.⁵² After defending the idea that the 1868 understanding of enumerated rights should bind states, he then considers whether states and the federal government might be subject to different requirements, as consistently advocated by Justice John Marshall Harlan II, and as allowed in cases like *Apodaca v. Oregon*,⁵³ but then rejected in cases like *McDonald v. City of Chicago*.⁵⁴ Lash sides with *McDonald*.⁵⁵ The implication, however, is that Congress, as well, is subject not to the 1791 but to the 1868 understandings of the Bill of Rights (and other enumerated rights).

Here is Lash's explanation of this key part of his view:

The Fourteenth Amendment did not simply address the relationship between citizens and the states; it also established one's relationship to the federal government. The opening sentence of the Amendment declares that all persons born or naturalized are *citizens of the United States*. It then asserts that no state shall abridge the privileges or immunities of citizens of the United States. This is, and was understood as, a declaration that the current rights of citizens of the United States shall not be abridged by the States. If we follow the anti-incorporationist reading of this sentence, there is nothing to apply against the states because the current enumerated rights in the Bill of Rights are not rights that constrain state action. We have already concluded, however, that this does not reflect the original meaning of the Privileges or Immunities Clause. If, then, the amendment properly understood includes the enumerated rights of the first eight amendments as now binding the states, this amounts to a new communication of the Bill of Rights, this time as an announcement of the Privileges or Immunities of citizens of the United States. In this way, the passage of the Fourteenth Amendment amounts to a second adoption of the Bill of Rights. That being the case, the privileges and immunities that bind the federal government are the same privileges or immunities that bind the States.⁵⁶

⁵² *Id.*

⁵³ 406 U.S. 404 (1972).

⁵⁴ 561 U.S. 742 (2010); *see also* LASH, *supra* note 1, at 294–95.

⁵⁵ *See* LASH, *supra* note 1, at 294–95.

⁵⁶ *Id.* Lash is not entirely alone in this view; Akhil Reed Amar briefly suggested such a view in both his 1992 article and 1998 book on the Bill of Rights, though not as explicitly as Lash. Amar noted that “the Fourteenth Amendment has a doctrinal ‘feedback effect’ against the federal government, despite the Amendment’s clear textual limitation to *state* action.”

Although this move alleviates the gulf between the contexts of the Fourteenth Amendment and that of the original Constitution, Lash's view of 1868 as a rebooting of the Bill of Rights is both devoid of historical support during Reconstruction and destructive of originalism with respect to the Bill of Rights.

It would perhaps be odd to bind states to 1791 understandings of free speech, the right to keep and bear arms, and so on, but this is simply the result of adding the enumerated-rights-only view to originalism about the original Bill of Rights. The enumerated-rights-only view limits the Privileges or Immunities Clause's restraint on states to *words chosen* in 1791 (and some words chosen earlier); it would be natural for an originalist to then claim that states are only bound by *meanings expressed* by those words in 1791. Lash's solution, however, abandons Bill-of-Rights originalism in the name of Fourteenth-Amendment originalism.

This is a Bill-of-Rights non-originalism, moreover, of a very odd sort; we are to understand constitutional text like "the freedom of speech" neither by what those words expressed in 1791 (as would most originalists), nor by what they express today (as would Alexander Meiklejohn),⁵⁷ nor by what they correspond to in moral reality (as would Ronald Dworkin),⁵⁸ nor by what they express throughout history (as would Jed Rubenfeld).⁵⁹ I know of *no one* in 1868 (or any other time prior to Akhil Amar) who thought that the Fourteenth Amendment reauthored the Bill of Rights as a restriction on Congress. This does not, of course, *necessarily* mean the view is wrong, but the complete lack of historical support, in a book executed with such admirable attention to historical detail, is striking.

II. A SHORT ARGUMENT ABOUT "ABRIDGE": THE SET OF FEDERALLY ENUMERATED RIGHTS CANNOT BE SHORTENED

A second very simple argument can be presented quickly but deserves the attention of those who care chiefly about our precise constitutional text. The "which shall abridge" language of the Privileges or Immunities Clause is in tension with the enumerated-rights-only position because the set of rights set out in the Constitution is not susceptible to abridgement by state action.⁶⁰ "No State shall make or enforce any law which shall *abridge* the privileges or immunities of citizens of the United States."⁶¹ If "abridge" means simply "shorten," which 1868 dictionaries suggest it

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1281 (1992); *see also* AMAR, *supra* note 6.

⁵⁷ *See, e.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 3–4 (1960).

⁵⁸ *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977).

⁵⁹ *See, e.g.*, Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1127–30 (1995).

⁶⁰ U.S. CONST. amend. XIV, § 1, cl. 2.

⁶¹ *Id.* (emphasis added). Lash several times slightly misquotes this language in a way that makes it more similar to the First Amendment; he replaces "which shall abridge" with

did,⁶² then the “privileges or immunities of citizens of the United States” set must be something states can, in principle, shorten. But a state cannot shorten the Bill of Rights itself (or the set including other federally enumerated rights). The word “abridge” in the Privileges or Immunities Clause requires a direct causal chain between the threatened state action and the protected class of rights.⁶³ By their nature, federally enumerated rights cannot stand in such a causal chain.

III. PARALLELS WITH ARTICLE IV, SECTION 2, CLAUSE 1

A third cluster of arguments concerns not the enumerated-rights thesis itself, but Lash’s particular argument for it, which relies heavily on a sharp contrast between the language of the Comity Clause⁶⁴ and the Privileges or Immunities Clause.⁶⁵ Lash does not consider a possible way to parse the grammar of the Comity Clause that puts it on a much closer parallel with the Privileges or Immunities Clause and does not deal adequately with two very important pieces of evidence—from John Bingham in January 1867⁶⁶ and Jacob Howard in February 1869⁶⁷—that link the underlying privileges of the two provisions.

A. The Ambiguity of “[I]n”

Lash distinguishes too sharply between “privileges or immunities of citizens of the United States”⁶⁸ and the Comity Clause’s “privileges and immunities of citizens in the several States,”⁶⁹ a phrase Lash uses many times in isolation.⁷⁰ He comments, “Although both clauses speak of ‘privileges’ and ‘immunities,’ they use very different language when referring to the groups whose rights are being protected: ‘citizens

“abridging.” See, e.g., LASH, *supra* note 1, at vii, 1, 3 n.6. His initial quotation of the Fourteenth Amendment also changes the Due Process Clause’s verb into “denying” and brings it inside the scope of the “make or enforce any law” language of the Privileges or Immunities Clause. *Id.* at vii.

⁶² See, e.g., WILLIAM G. WEBSTER & WILLIAM A. WHEELER, A COMMON-SCHOOL DICTIONARY OF THE ENGLISH LANGUAGE: EXPLANATORY, PRONOUNCING, AND SYNONYMS 22 (Phila., J. B. Lippincott & Co. 1868).

⁶³ I make similar arguments in my book against defining the “privileges or immunities of citizens of the United States” in terms of natural rights, which exist necessarily, or in terms of rights in the past, which are beyond the causal influence of state action today. See GREEN, *supra* note 14, at 84–86, 107–08, 112, 115.

⁶⁴ U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); see also LASH, *supra* note 1, at ix.

⁶⁵ LASH, *supra* note 1, at 20–26, 280–83.

⁶⁶ CONG. GLOBE, 39th Cong., 2d Sess. 449–50 (1867).

⁶⁷ CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

⁶⁸ U.S. CONST. amend. XIV, § 1, cl. 2.

⁶⁹ U.S. CONST. art. IV, § 1, cl. 2 (emphasis added).

⁷⁰ See, e.g., LASH, *supra* note 1, at 20–26, 280–83.

in the several states' versus 'citizens of the United States.'"⁷¹ It is not perfectly clear, however, that "Citizens in the several States" from the Comity Clause defines the set of protected rights, or protected citizens, because it is not clear that "in the several States" modifies "Citizens" at all.⁷² Lash's use of the isolated phrase "citizens in the several states" makes a controversial grammatical choice about how to read Article IV. If "in the several states" can refer adverbially to the *manner in which privileges are to be enjoyed by visitors*, rather than adjectivally to the set of privileges, then the use of the isolated phrase "citizens in the several states," or "privileges and immunities of citizens in the several states," is improper.

Recall the text of the Comity Clause: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁷³ Reading "in the several States" adverbially—that is, as modifying "shall be entitled," rather than adjectivally as modifying "Privileges and Immunities" or "Citizens"—makes the Comity Clause a general guarantee of the "Privileges and Immunities of Citizens," a formulation of which Fourteenth Amendment Privileges or Immunities Clause is a specification. "[I]n the several States" says, on this reading, where the citizens of each State are to have their entitlement, not where citizens or privileges are located.

Both the Comity Clause and the Fourteenth Amendment concern the privileges and immunities of citizens.⁷⁴ The Fourteenth Amendment is more specific—the privileges and immunities of citizens of the United States—but if we assign "in the several States" to "shall be entitled," the set of privileges covered by the Fourteenth Amendment language, and that of the Comity Clause, can be made consistent.

The way to make the sets of covered privileges in the Comity Clause and the Fourteenth Amendment identical would be to construe the general phrase "Privileges and Immunities of Citizens" in the Comity Clause to have an implicit restriction like "of the United States." Indeed, as Lash notes, many Republicans (and others) made exactly this interpolation as they interpreted the Comity Clause; it was called the "ellipsis theory" of the Comity Clause.⁷⁵

Thus, while Lash is right that the Fourteenth Amendment text is more analogous to treaty provisions using "of citizens of the United States" to restrict the rights at issue explicitly than the Fourteenth Amendment text is to the bare text of the Comity Clause,⁷⁶ more than the bare text of the Comity Clause was in view at the time the Fourteenth Amendment was adopted. The Comity Clause construed with the ellipsis theory and an adverbial rather than adjectival "in the several States" replicates the restrictive "of citizens of the United States," which Lash rightly sees as central to the meaning expressed by the Privileges or Immunities Clause.⁷⁷

⁷¹ *Id.* at 280–81.

⁷² U.S. CONST. art. IV, § 2, cl. 1.

⁷³ *Id.*

⁷⁴ *Id.*; see also U.S. CONST. amend. XIV, § 1, cl. 2.

⁷⁵ LASH, *supra* note 1, at 102–08; see also *infra* Part III.B.1.

⁷⁶ *Id.* at 20–26.

⁷⁷ *Id.* at 102–08.

B. Evidence From Bingham and Howard Linking Article IV with the Privileges or Immunities Clause

Moreover, two very strong pieces of evidence link the Comity Clause with the Fourteenth Amendment's Privileges or Immunities Clause, one which Lash explains inadequately in his book and another which Lash neglects entirely.

1. Bingham in January 1867

Lash's explanation of John Bingham's January 1867 reiteration of the "ellipsis theory" of the Comity Clause,⁷⁸ applying the phrase "Privileges and Immunities of citizens of the United States" to rates of taxation, falls short.⁷⁹ Discussing the admission of Nebraska, Bingham explained why congressional restrictions on new states were generally inappropriate, despite some contrary precedents.⁸⁰ These precedents, Bingham explained, merely enforced the Comity Clause:

It is urged also that States have been admitted upon the condition that non-resident citizens of the United States should be subject to no other or higher rate of tax than resident citizens or be denied the immunities or privileges of citizens therein. But this is simply a carrying out of that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens" [of the United States] (supplying the ellipsis) "in the several States."⁸¹

Lash (after admirably setting out this quotation in full) says that Bingham's use of the ellipsis theory simply indicated that respecting interstate comity would make citizens of different states also citizens of the United States.⁸² But the importance is much greater: during the key ratification moment of the Fourteenth Amendment—the month in which most of the North would ratify⁸³—Bingham used the phrase "privileges and immunities of citizens of the United States" to refer to rights clearly outside the Bill of Rights (or elsewhere in the Constitution).⁸⁴ Bingham cannot in this context be using the phrase "privileges and immunities of citizens of the United States" to refer to the Comity Clause rights themselves because that would make the provision into a fractal. The Comity Clause requires comity *with respect to the*

⁷⁸ See CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867).

⁷⁹ LASH, *supra* note 1, at 167 n.399.

⁸⁰ CONG. GLOBE, 39th Cong., 2d Sess. 449–50 (1867).

⁸¹ *Id.* at 450.

⁸² LASH, *supra* note 1, at 167 n.399 (alteration in original).

⁸³ See Green, *supra* note 10, at 11 n.13.

⁸⁴ CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867).

privileges of citizens of the United States, not merely comity *as* a privilege of citizens of the United States. Rather, on Bingham's reading, state law which subjected its citizens to certain rates of taxation, and thus privileged them against any higher rates, had to apply to citizens of other states as well under the Comity Clause.⁸⁵ These underlying tax rates, and not merely the comity requirement, were encompassed within the phrase "privileges and immunities of citizens of the United States" for Bingham.⁸⁶ To reiterate: the rate of taxation prevalent in a state was, for Bingham, a privilege of citizens of the United States to which other visiting citizens of the United States were entitled. Plainly, "privileges and immunities of citizens of the United States" did not mean, for Bingham in 1867, "privileges enumerated in the federal constitution."

2. Howard in February 1869

Lash's book also fails to consider Jacob Howard's 1869 explanation for the lack of voting rights under the Fourteenth Amendment's Privileges or Immunities Clause in terms of the lack of voting rights under the Comity Clause.⁸⁷ Howard explained:

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under the second section of the fourth article of the old Constitution. That section declares that—

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

There it was plainly written down. Now, sir, it seems to me, that unless the Senator from Vermont and the Senator from Massachusetts can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States, they must give up the argument; and I assert here with confidence that no such construction was ever given to the second section of the fourth article of the Constitution.⁸⁸

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

⁸⁸ *Id.* (quoting U.S. CONST. art. IV, § 2, cl. 1). Howard misquotes "in" as "of."

This gives powerful evidence in support of reading Howard's quotation of *Corfield v. Coryell* in 1866 as indicating he thought that *Corfield* rights previously protected only against interstate discrimination, but now protected more generally for all citizens of the United States, even those staying home.⁸⁹ While Howard's introduction is familiar, it is worth setting it out again. Howard first gives a long description of the Comity Clause, tentatively recalling the Supreme Court's evasion of a full interpretation in *Conner v. Elliot*⁹⁰ in 1855, but then quoting at length Justice Bushrod Washington's famous 1825 circuit court opinion in *Corfield* in which Justice Washington described Article IV's protection (in the context of comity) of "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 . . ."⁹¹ Justice Washington gave a long list of rights that he thought satisfied that criterion.⁹² Just after the *Corfield* quotation, Howard explained:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution . . .⁹³

He then paraphrased most of the Bill of Rights.⁹⁴

The key here is Howard's "to these should be added." The usual way of reading Howard at this point is that he intended to deploy the *Corfield* standard out of its context of mere comity and use it as the standard for nationalized rights of citizens of the United States—even citizens who stay home.⁹⁵ The rights in the Bill of

⁸⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866); see also *infra* note 99 and accompanying text.

⁹⁰ 59 U.S. 591 (1855) ("We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution.").

⁹¹ *Id.* at 551.

⁹² *Id.* at 551–52.

⁹³ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

⁹⁴ *Id.*

⁹⁵ See, e.g., EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, 108–09 (1990); Earl M. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 526–27 (1985). But cf. *Slaughterhouse Cases*, 83 U.S. 36, 41–42 (1873) (Field, J., dissenting) ("If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States. . . . Now, what the clause in question does for the protection of citizens of one

Rights, however, *also* satisfied this criterion, not just the rights listed by Justice Washington.⁹⁶

On Lash's reading, Howard is doing no such thing.⁹⁷ Rather than using the *Corfield* criterion and saying that rights in the Bill of Rights should be "added" to Justice Washington's list as an additional application, Lash takes Howard to be doing the opposite—the general criterion is instead "textually enumerated rights," a category under which both the comity rights of Article IV and the rights in the Bill of Rights fall.⁹⁸ Even on its own terms, it is hard for me to read Howard's 1866 speech to be using *Corfield* merely as an instance of the broader, basic category "textually enumerated rights," rather than as setting out, itself, the basic definitional category for the Privileges or Immunities Clause. Whatever ambiguity Lash may find in 1866, however, Howard made his non-enumerated-rights-only attitude toward the Comity Clause–Fourteenth Amendment relationship crystal clear in 1869.⁹⁹

Lash has argued that Howard's 1869 comments merely reflect, like his 1866 introduction, the idea that comity is (because of its inclusion in Article IV) one enumerated right among many.¹⁰⁰ This interpretation does not fit the argumentative context. Howard is not saying that the comity rights of Article IV are *part* of those included in the Fourteenth Amendment; Howard is saying that because voting rights are *not* included in Article IV, they are thus not included in the Fourteenth Amendment.

For what it is worth, in his other work on a variety of issues during the Civil War and Reconstruction, such as Fourteenth Amendment legitimacy and presidential power, Howard gives every impression of being a candid speaker and clear

State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever.").

⁹⁶ The reading here is that later given in 1871 in *United States v. Hall*, as described below. See 26 F. Cas. 79 (S.D. Ala. 1871); see also *infra* notes 57–59 and accompanying text. Howard's handwritten notes for his introduction, kept at the Duke University Rubenstein Rare Book and Manuscript Library, suggest this reading as well. See Notes of Jacob Howard on the Fourteenth Amendment's Privileges or Immunities Clause (1866), <http://www.tifis.org/sources/Howard.pdf> [<http://perma.cc/V6HA-X2YK>]. The reference to the Bill of Rights is apparently a later addition to the draft—pages "2a" and "2b" in Howard's handwritten page numbers. Initially, the discussion of the Privileges or Immunities Clause discussed only *Corfield*, which would be very odd if it were only an illustration of one enumerated right among many, rather than the basic defining criterion for the whole Privileges or Immunities Clause. See *id.*

⁹⁷ LASH, *supra* note 1, at 158–59.

⁹⁸ *Id.*

⁹⁹ See CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869).

¹⁰⁰ See Kurt Lash, *More Than Equality, Less Than Federalizing the Common Law: A Response to Christopher Green*, THE ORIGINALISM BLOG (Nov. 24, 2014), <http://www.originalismblog.typepad.com/the-originalism-blog/2014/11/more-than-equality-less-than-federalizing-the-common-law-a-response-to-christopher-green-kurt-lash.html> [<http://perma.cc/T22C-5VB3>].

thinker.¹⁰¹ He certainly explains himself more adequately than Bingham generally does, for instance. The Fourteenth Amendment itself was sometimes known as the “Howard Amendment.”¹⁰² Lash himself relies heavily on Howard’s 1866 introduction.¹⁰³ Howard’s 1869 Comity Clause–based construction of the Privileges or Immunities Clause, on an occasion where no ulterior motive suggests itself, is thus extremely important.

Bingham and Howard both give us good reason to anchor our interpretation of the Fourteenth Amendment’s Privileges or Immunities Clause in Article IV in *some* way. There are, however, many different ways this might be done. Philip Hamburger gives the narrowest possibility: seeing the Fourteenth Amendment itself as merely a tweak on interstate comity.¹⁰⁴ This would, of course, not have done much for the freedmen. Two other possibilities are: (1) to take the equality-for-visitors comity idea and transform it into equality for everyone, even citizens of the United States who stay home; or (2) to take the rights covered by the Comity Clause and protect them absolutely for all citizens of the United States, whether or not fellow citizens receive those rights. As we will see, a great deal of evidence favors the broader-sort-of-equality transformation of Article IV; a reasonable amount of evidence also suggests that the Privileges or Immunities Clause also protects basic rights. My book explains why I take the basic-rights aspect of the Privileges or Immunities Clause to be the expression of an equality requirement—equality among citizens of the United States even if they live in different states—but for the purposes of evaluating the enumerated-rights-only interpretation, the equality evidence is more important.¹⁰⁵

IV. EQUALITY

This Article’s first three criticisms of Lash’s version of the enumerated-rights-only thesis—the 1791 and 1868 gulf, the problem with “abridge,” and the closer relationship between Article IV and the Fourteenth Amendment than Lash acknowledges—have stayed largely above the fray of significant historical dredging. However, the most persuasive reasons to reject the enumerated-rights-only reading depend on seeing just how weighty contrary interpretations are, a task which will require more dirt

¹⁰¹ For Howard’s views of the rights forfeited by the rebellion, see CONG. GLOBE, 40th Cong., 3d Sess. 987 (1869); CONG. GLOBE, 40th Cong., 2d Sess. 2863–64 (1868); CONG. GLOBE, 39th Cong., 2d Sess. 1365 (1867); CONG. GLOBE, 39th Cong., 2d Sess. 186 (1866); CONG. GLOBE, 38th Cong., 2d Sess. 554, 578 (1865). For discussion, see Green, *supra* note 10, at 34–35. For Howard’s views on the Recess Appointments Clause, see S. REP. NO. 37-80 (1863). For discussion, see Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1543 n.173 (2005).

¹⁰² See LASH, *supra* note 1, at 227.

¹⁰³ See *id.* at 155–56.

¹⁰⁴ Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 61–74 (2011).

¹⁰⁵ See generally GREEN, *supra* note 14.

under our fingernails. This section will consider equality among similarly situated citizens of the United States, both as an interpretation of the Privileges or Immunities Clause itself and as an interpretation of non–Article IV precursors, which Lash rightly sees as strongly parallel to the Fourteenth Amendment.

This Part considers two sorts of evidence which, on Lash’s principles, he should take particularly seriously: evidence from the treaty provisions like the Louisiana Cession of 1803 and evidence from the 1866 public debate. Part VI will discuss subsequent-interpretation equality evidence preceding the Civil Rights Act of 1875, of which there is an enormous amount. But first let’s talk about treaties and 1866.

A. Treaties

One of the very important contributions from Kurt Lash’s scholarship on the Privileges or Immunities Clause has been his focus on provisions like the 1803 promise to Napoleon to supply the “rights, advantages, and immunities of citizens of the United States” to those in the Louisiana Territory.¹⁰⁶ Restrictive interpretations of this language, limiting it to rights set out in the federal Constitution, were made by Daniel Webster and his allies in rebutting the Southern-Democratic argument that it encompassed Missourians’s right to legalize slavery.¹⁰⁷

I agree with Lash that the terms “privileges” and “immunities” were themselves not sharply distinguished from each other, or from terms like “rights” or “advantages,” in the context of the Privileges or Immunities Clause. The restrictive phrase “of citizens of the United States” was critical in the Fourteenth Amendment, and treaties which use the same restrictive phrase were therefore a more precise textual background for the Privileges or Immunities Clause than was Article IV. As explained above, however, Article IV, as glossed, used the same restrictive language as the Fourteenth Amendment.¹⁰⁸

There was a great deal of evidence, however, which Lash does not confront, that the 1803 promise of the rights of citizens of the United States was understood as a promise of the rights of *other similarly situated* citizens of the United States.¹⁰⁹ It was a promise that the new citizens of the Louisiana Territory would not become second-class citizens. This interpretation fits the context of Reconstruction perfectly: it was chiefly a promise that new citizens—the freedmen—would not become second-class citizens.

Jefferson’s correspondence with his Attorney General Levy Lincoln during the summer of 1803—secret at the time, but published after Jefferson’s death in

¹⁰⁶ See, e.g., LASH, *supra* note 1, at 49–50, 61–62, 142 (quoting Louisiana Purchase Treaty, *supra* note 25, at 202).

¹⁰⁷ *Id.* at 56–57 (citing DANIEL WEBSTER, A MEMORIAL TO THE CONGRESS OF THE UNITED STATES: ON THE SUBJECT OF RESTRAINING THE INCREASE OF SLAVERY IN NEW STATES TO BE ADMITTED INTO THE UNION 15 (Bos., Sewell Phelps 1819)).

¹⁰⁸ See *infra* Part III.

¹⁰⁹ See *infra* notes 114–21 and accompanying text.

1826—gives powerful support to this interpretation.¹¹⁰ The treaty with France was signed on April 30, 1803, and the Senate had not yet ratified it.¹¹¹ Jefferson worried that the acquisition of territory required a constitutional amendment and thought about the language which would have accomplished such acquisition in the way that the deal with France contemplated.¹¹² Jefferson proposed this language: “Louisiana, as ceded by France to the United States, is made a part of the United States; its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States, in analogous situations.”¹¹³

This was obviously Jefferson’s understanding of the status of the inhabitants of Louisiana. Jefferson proposed it as a way to give proper constitutional support, in case of widespread congressional scruples, to the promises already made to (white) Louisianans; it was not a proposal to go beyond the existing treaty.

The negotiating history of the rights-advantages-and-immunities provision likewise reflects a focus on equal citizenship. Then-Secretary of State James Madison wrote on March 2, 1803, to Robert Livingston and James Monroe, who were negotiating the treaty:

To incorporate the inhabitants of the hereby ceded territory with the citizens of the United States on an equal footing, being a provision, which cannot now be made, it is to be expected, from the character and policy of the United States, that such incorporation will take place without unnecessary delay. In the meantime they shall be secure in their persons and property, and in the free enjoyment of their religion.¹¹⁴

Looking at this alongside the cession agreed to the next month, it is plain that “incorporat[ion] . . . with the citizens of the United States on an equal footing” was

¹¹⁰ See Letter from President Thomas Jefferson to Attorney Gen. Levy Lincoln, (Aug. 30, 1803), in 4 THOMAS JEFFERSON, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS 1–2 (Thomas Jefferson Randolph ed., London, Henry Colburn & Richard Bentley 1829) [hereinafter Letter from Thomas Jefferson].

¹¹¹ See generally Louisiana Purchase Treaty, *supra* note 25, at 200. Article III reads, “The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.” *Id.* at 202.

¹¹² See Letter from Thomas Jefferson, *supra* note 110, at 1–2.

¹¹³ *Id.*

¹¹⁴ Letter from Sec’y of State James Madison to Robert R. Livingston and James Monroe (Mar. 2, 1803), in 7 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 19 (Gaillard Hunt ed., 1908).

the language which became the promise of (eventual) “rights, advantages and immunities of citizens of the United States.”¹¹⁵ Both were placed alongside temporary promises of security for property and religion until full rights of citizenship were possible.

Louisiana cases interpreting the cession applied it to the right to be a lawyer¹¹⁶ and statutory rights relating to alienage disabilities.¹¹⁷ Both contradict Webster’s constitutional-rights-only construction.

Webster’s argument was one of those made in defense of congressional power to impose restrictions on new states. However, there were others who construed the cession as a guarantee of equality with other citizens of the United States but defended restrictions as even-handed.¹¹⁸ They also argued both that the promise was limited to those in Louisiana in 1803 or to areas inhabited in 1803, and that Congress could override treaties.¹¹⁹

For instance, this is Senator James Burrill’s 1820 defense of restrictions on Missouri:

The true meaning of the clause must be, that the inhabitants shall be put on the same footing as other citizens of the United States, to their political rights, and to the same extent as if native-born, and the provision extends only to those who were inhabitants, and is the common provision when territory is ceded either after a conquest, or otherwise; and cannot refer to persons already citizens of the United States who buy land and remove thither; such require no aid from the treaty.¹²⁰

Chief Justice John Marshall’s opinion for the Court in *Mayor of New Orleans v. De Armas*¹²¹ in 1835, shortly before Marshall’s death,¹²² interpreted the Louisiana cession promise to be fulfilled when Louisiana residents exercised self-government through, inter alia, their court systems: “The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.”¹²³ The “advantages of American citizens” were not, for Marshall, limited to the advantages set out textually in the Constitution, but were the advantages enjoyed in common with citizens of the United States elsewhere in the Union.

¹¹⁵ Louisiana Purchase Treaty, *supra* note 25, at 202.

¹¹⁶ See *Desbois’ Case*, 2 Mart. (o.s.) 185 (La. 1812).

¹¹⁷ See *United States v. Lavery*, 26 F. Cas. 875, 875–76 (D. La. 1812).

¹¹⁸ See, e.g., 35 ANNALS OF CONG. 213 (1820).

¹¹⁹ See, e.g., *id.* at 215.

¹²⁰ *Id.*

¹²¹ 34 U.S. 224, 233–37 (1835).

¹²² DAVID HACKETT FISCHER, *LIBERTY AND FREEDOM: A VISUAL HISTORY OF AMERICA’S FOUNDING IDEAS* 59 (2005) (noting that the Liberty Bell cracked on July 8, 1835, ringing Marshall’s death).

¹²³ *De Armas*, 34 U.S. at 235.

The Treaty of Guadalupe Hidalgo's similar provision¹²⁴ was said in 1849 to put "the Mexicans upon an equality with the citizens of the United States according to the principles of the Constitution."¹²⁵ The Louisiana,¹²⁶ Florida,¹²⁷ and Mexico¹²⁸ provisions, all of which affected many Catholics,¹²⁹ were invoked against anti-Catholic discrimination in 1855.¹³⁰

President Franklin Pierce's December 1856 message to Congress described the Louisiana Cession as "a right to pass into the condition of States on a footing of perfect equality with the original States."¹³¹ Justice Benjamin Curtis's 1857 dissent in *Dred Scott v. Sandford*¹³² echoed Marshall's construction of the rights of American citizens in *Mayor of New Orleans v. De Armas*.¹³³ Moreover, Justice John Catron's concurrence argued against the Missouri Compromise on the basis of the Louisiana Cession;¹³⁴ in response, Benjamin Curtis and John McLean's dissents relied on the arguments that the cession was limited to those in Louisiana in 1803 and that Congress could override a treaty but without making Webster's arguments.¹³⁵ It is true that Catron relied chiefly on the interim provisions regarding the preservation of property until statehood, but slave-owners' rights to participate equally in constitution-making in Kansas and Nebraska, even before statehood, were taken by President Pierce and his fellow-travelers as covered by the "rights, advantages and immunities of citizens of the United States" language.¹³⁶ There was no sharp line between the maintenance-of-liberty-property-and-religion phase of territorial life under the cession and the rights-advantages-and-immunities phase. Webster's argument, if it were current, would have been *à propos*, but McLean and Curtis did not make it.

Finally on the treaty issue, one 1866 observer noted, shortly after its proposal, the Privileges or Immunities Clause's (and the Civil Rights Act of 1866's) similarity

¹²⁴ Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico art. 9, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (commonly referred to as the "Treaty of Guadalupe Hidalgo") [hereinafter Treaty of Guadalupe Hidalgo].

¹²⁵ *Congressional Proceedings*, GREEN MOUNTAIN FREEMAN (Montpelier, Vt.), Feb. 15, 1849, at 2.

¹²⁶ Louisiana Purchase Treaty, *supra* note 25, art. 3.

¹²⁷ See Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty art. 6, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

¹²⁸ Treaty of Guadalupe Hidalgo, *supra* note 124, art. 9.

¹²⁹ See JAMES S. OLSON & HEATHER OLSON BEAL, *THE ETHNIC DIMENSION IN AMERICAN HISTORY* 14 (4th ed. 2010) (discussing migration during and following the passages of these treaties).

¹³⁰ *Speech of John M. Bright, Esq.*, NASHVILLE UNION & AM., Nov. 7, 1855, at 2.

¹³¹ CONG. GLOBE, 34th Cong., 3d Sess. app. 2 (1856).

¹³² 60 U.S. 393, 564–633 (1856) (Curtis, J., dissenting).

¹³³ 34 U.S. 224, 224–25 (1835).

¹³⁴ See *Dred Scott*, 60 U.S. at 524–25 (Catron, J., concurring).

¹³⁵ *Id.* at 631–32 (Curtis, J., dissenting); *id.* at 557 (McLean, J., dissenting).

¹³⁶ Louisiana Purchase Treaty, *supra* note 25, art. 3; see also CONG. GLOBE, 34th Cong., 3d Sess. app. 1–3 (1856).

to the analogous Florida provision, which gave some Creoles in the Mobile area American citizenship—and continued equal citizenship—in 1819.¹³⁷ John Forsyth of the *Mobile Advertiser* wrote:

These people although of African and mixed blood, were citizens under the Spanish government, on an equal footing, in all respects, with other citizens. The treaty of 1819, by which this portion of Alabama (with Florida) was ceded to the United States, expressly guaranteed to them a continuance of the privilege of citizenship. They have actually been citizens of Alabama and Florida for nearly half a century.¹³⁸

B. 1866 Public Discussion of the Privileges or Immunities Clause

Turning to 1866 public discussion of the Privileges or Immunities Clause, a great deal of it described the Clause in terms of equality—not just interstate comity, but freedom from the Black Codes for freedmen remaining in their home states.

One of the sources which Lash himself cites repeatedly, the *Cincinnati Commercial's* collection, *Speeches of the Campaign of 1866*,¹³⁹ includes many examples in which the Privileges or Immunities Clause was described in terms of equality: Lyman Trumbull did so on August 2,¹⁴⁰ Robert Schenck on August 18,¹⁴¹ James Garfield on August 22,¹⁴² Benjamin Butler on August 25,¹⁴³ Columbus Delano on August 28,¹⁴⁴ Lyman Trumbull again on August 31,¹⁴⁵ William Dickson on September 1,¹⁴⁶ Thaddeus

¹³⁷ John Forsyth, *The Civil Rights Bill*, WKLY. N.-CAROLINA STANDARD, May 9, 1866, at 1 (discussing Treaty of Amity Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 127, art. 6).

¹³⁸ *Id.*

¹³⁹ CINCINNATI COMMERCIAL, *SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES OF OHIO, INDIANA, AND KENTUCKY* (1866), <http://www.ohiomemory.org/cdm/ref/collection/p15005coll2/id/3> [<http://perma.cc/8L4B-SL8H>].

¹⁴⁰ Senator Lyman Trumbull, *Speech of Senator Lyman Trumbull in Chicago* (Aug. 2, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 6.

¹⁴¹ Major General Robert Schenck, *Speech of Major Gen. Robert C. Schenck at Dayton Ohio* (Aug. 18, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 12–13.

¹⁴² Representative James Garfield, *Speech of the Hon. J. A. Garfield, of Ohio* (Aug. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 18.

¹⁴³ General Benjamin Butler, *Speech of General Butler* (Aug. 25, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 20.

¹⁴⁴ Representative Columbus Delano, *Speech of Hon. Columbus Delano at Coshocton, Ohio* (Aug. 28, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 23.

¹⁴⁵ Senator Lyman Trumbull, *Speech of Senator Lyman Trumbull Delivered at Evanston, Illinois, August 31* (Aug. 31, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 49.

¹⁴⁶ Representative William Dickson, *Speech of Hon. Wm. M. Dickson, at Yellow Springs, O., Sept. 1* (Sept. 1, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 26.

Stevens on September 4,¹⁴⁷ Robert Ingersol on September 10,¹⁴⁸ Benjamin Wade on September 11,¹⁴⁹ Nathaniel Banks on September 27,¹⁵⁰ Benjamin Butler again on October 2,¹⁵¹ Clement Vallandigham on October 4,¹⁵² William Dennison on October 6,¹⁵³ and Zachariah Chandler on October 22.¹⁵⁴ I stress that these are all descriptions of the *Privileges or Immunities Clause*, not merely Section One as a whole, in terms of equality. They are also not descriptions of the Privileges or Immunities Clause in terms of comity, but equal treatment of citizens in their home states. The *Cincinnati Commercial's* collection can serve as an excellent time machine for those wishing to get a first-hand feel for the public discussions during 1866. Truth be told, I had not encountered it before reading Lash's book, but carefully reading the collection greatly bolstered my confidence in an equality-based reading of the Privileges or Immunities Clause.

Lash quotes several of these descriptions, particularly Benjamin Butler's insistence that "every citizen of the United States should have equal rights with every other citizen of the United States, in every State."¹⁵⁵ Lash notes that "a promise of 'equal rights' was a common theme."¹⁵⁶ Indeed it was.

Another excellent collection of evidence, though it is limited to Southern sources, appears in James E. Bond's *No Easy Walk to Freedom*.¹⁵⁷ Though Bond's own analysis does not focus on the Privileges or Immunities Clause, he allows the original sources to speak for themselves at length. Several of them explain the Privileges or Immunities Clause quite extensively in terms of equality: the *Southern Herald* for

¹⁴⁷ Representative Thaddeus Stevens, Speech of Hon. Thaddeus Stevens Delivered at Bedford, Penn. (Sept. 4, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 27.

¹⁴⁸ Colonel Robert Ingersol, Speech of Col. Robt. G. Ingersol at Indianapolis (Sept. 10, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 29.

¹⁴⁹ Senator Benjamin Wade, Speech of Hon. Benjamin F. Wade at Ottawa, Putnam Co., Ohio (Sept. 11, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 31.

¹⁵⁰ General Nathaniel Banks, Speech of General Banks (Sept. 27, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 46.

¹⁵¹ General Benjamin Butler, Speech of Gen'l Ben. Butler, at Toledo, Ohio, October 2 (Oct. 2, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 41.

¹⁵² Representative Clement Vallandigham, Speech of C. L. Vallandigham (Oct. 4, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 42.

¹⁵³ Governor William Dennison, Governor Dennison's Speech (Oct. 6, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 44.

¹⁵⁴ Senator Zachariah Chandler, Speech of Hon. Zachariah Chandler, United States Senator from Michigan, Delivered at Mount Clemens, Macombe Co., Mich. (Oct. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 56.

¹⁵⁵ LASH, *supra* note 1, at 194–95 n.74 (quoting General Benjamin Butler, Campaign Speech in Toledo, Ohio (Oct. 3, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 41).

¹⁵⁶ *Id.* at 195.

¹⁵⁷ JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997).

August 25, 1866,¹⁵⁸ the Texas House Committee on Federal Relations report of October 13, 1866,¹⁵⁹ the *Arkansas Daily Gazette* for November 13, 1866,¹⁶⁰ a petition of the Colored Citizens of South Carolina from February 20, 1867,¹⁶¹ and the *Nashville Republican Banner* for July 6, 1867.¹⁶² One of Bond's earlier articles regarding some Northern sources similarly quotes the *Danville Plaindealer* for May 10, 1866.¹⁶³

A third resource is Edward McPherson's 1868 collection of newspaper clippings, *Proposed Fourteenth Amendment to the Constitution of the United States*, housed at the Library of Congress.¹⁶⁴ It is not easy to tell where and when exactly all of these clippings came from, but many of them describe the Privileges or Immunities Clause in terms of equality: an article titled *The Proposed Constitutional Amendment: The Radical Platform as It Is*,¹⁶⁵ another titled *The Proposed Constitutional Amendment: Why No Southern State Can Ratify It*,¹⁶⁶ and another titled *The 14th Amendment in Kentucky*,¹⁶⁷ as well as articles excerpted from the *Newbern Times* of North Carolina,¹⁶⁸ the *Daily News*,¹⁶⁹ and the *Republican*.¹⁷⁰

Finally, my own very quick tour of digitized newspaper sources, such as the Library of Congress's excellent Chronicling America database,¹⁷¹ turns up interpretations of the Privileges or Immunities Clause in terms of equality in the *Ashtabula Weekly Telegraph* for May 12, 1866,¹⁷² and the *Charleston Daily News* for July 28, 1870.¹⁷³ I am sure that a full canvass would produce many others.

How does viewing the Privileges or Immunities Clause as a guarantee of equality fit with the enumerated-rights-only view? Lash explains his reaction to such evidence:

A number of Republicans expressly tied Section One of the Fourteenth Amendment to the Civil Rights Act of 1866, a reference

¹⁵⁸ *Id.* at 37 & n.31, 48.

¹⁵⁹ *Id.* at 216 & n.31, 226.

¹⁶⁰ *Id.* at 192 & n.12, 206.

¹⁶¹ *Id.* at 129 & n.65, 140.

¹⁶² *Id.* at 24, 30 n.69.

¹⁶³ James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 454–55, 455 n.134 (1985) (quoting DANVILLE PLAINDEALER (Ill.), May 10, 1866, at 2).

¹⁶⁴ Edward McPherson, *Proposed Fourteenth Amendment to the Constitution of the United States* (1868) (unpublished scrapbook) (on file with the Library of Congress).

¹⁶⁵ *Id.* at 24.

¹⁶⁶ *Id.* at 29.

¹⁶⁷ *Id.* at 84.

¹⁶⁸ *Id.* at 27–28.

¹⁶⁹ *Id.* at 82.

¹⁷⁰ *Id.* at 82–83.

¹⁷¹ See *Chronicling America: Historic American Newspapers*, LIBRARY OF CONGRESS, <http://chroniclingamerica.loc.gov/>.

¹⁷² *Reconstruction*, ASHTABULA WKLY. TEL. (Ohio), May 12, 1866, at 2.

¹⁷³ *Remarks of Senator Sawyer*, CHARLESTON DAILY NEWS (S.C.), July 28, 1870, at 1; see also BOND, *supra* note 157, at 20.

rendered ambiguous in light of President Johnson's objection that, by conferring the status of citizenship on freedmen, the Act had not only granted certain equal rights, but had also necessarily conferred *all* the substantive rights of citizens of the United States. The same was true of speeches that described the Clause as guaranteeing equal rights of citizens in the states, since both nationalizing the Bill of Rights and enforcing the Comity Clause would have had that effect.¹⁷⁴

I find these comments opaque. Why exactly would nationalizing the Bill of Rights guarantee equal rights for all citizens? The sort of equality at stake in the Civil Rights Act of 1866 was clear: it was equality with respect to rights, like the right to contract, which were both (a) outside the Bill of Rights, and (b) to be enjoyed even by citizens staying home, unconcerned with comity. Lash's explanation here is mysterious. Lash's later summary—"there is nothing in the historical record that contradicts Jacob Howard's description of the Privileges or Immunities Clause as protecting constitutionally enumerated rights"¹⁷⁵—conflicts with the evidence he presents himself earlier in the chapter, at least if this sentence means to refer to Lash's reading of Howard as contending that the Privileges or Immunities Clause covers *only* rights enumerated elsewhere. Perhaps Lash means only that there is no evidence that specifically said that an enumerated right was *excluded*. I will concede that, but Lash himself produces a great deal of evidence that the Privileges or Immunities Clause goes beyond rights enumerated in the Constitution.

Finally, when Lash assesses other views of the Privileges or Immunities Clause in his conclusion,¹⁷⁶ he does not devote any argumentative space to the rebuttal of an equal-citizenship view. At this key point, he lumps John Harrison's equal-citizenship and Philip Hamburger's comity readings without answering Harrison's much stronger view.¹⁷⁷ Lash's arguments against Hamburger are, to my mind, quite compelling, but he makes no arguments specifically against Harrison. His trichotomy between comity, enumerated-rights-only, and common-law-federalization positions is too impoverished because it neglects an interpretation of the Privileges or Immunities Clause in terms of equality for citizens in their home states.

C. *The Civil Rights Act of 1866*

To his credit, Lash quotes at length Speaker of the House of Representatives Schuyler Colfax's August 7, 1866, explanation of the Privileges or Immunities Clause:

¹⁷⁴ LASH, *supra* note 1, at 194.

¹⁷⁵ *Id.* at 221.

¹⁷⁶ *Id.* at 301–03.

¹⁷⁷ See *id.* at 280 n.2 (citing Hamburger, *supra* note 104, and John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992)).

We passed a Bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease, and sell property, and be subject to like punishments. That is the last law on the subject.¹⁷⁸

Colfax's examples of the rights of citizens of the United States were, of course, not rights enumerated in the Bill of Rights or elsewhere in the Constitution. As Lash notes, the *Cincinnati Commercial* collection contained "many similar examples."¹⁷⁹ Lyman Trumbull argued the same way on August 2,¹⁸⁰ and Zachariah Chandler on October 22,¹⁸¹ Thaddeus Stevens noted his agreement with Colfax on September 4.¹⁸² Bond quotes a similar statement from the *Old North State* of October 6.¹⁸³ McPherson quotes the *American and Gazette* on September 28¹⁸⁴ and the *Baltimore Gazette* on February 5, 1867.¹⁸⁵ Similar statements also were made by General John A. Logan in the Butler County, Pennsylvania, *American Citizen* of September 5, 1866,¹⁸⁶ and in a South Carolina Republican platform reported by the *Charleston Daily News* for July 28, 1870.¹⁸⁷

Prior to the actual framing of the Fourteenth Amendment, the discussion of the Civil Rights Act itself was conducted in terms of the privileges of citizens of the United States. The two sponsors, the chairmen of the House and Senate Judiciary Committees—James Falconer Wilson and Lyman Trumbull—were very explicit. Wilson said on March 9, 1866, "[T]his bill refers to those rights which belong to men as citizens of the United States and none other . . ."¹⁸⁸ At the time, the Civil Rights Act of 1866 draft included references to "civil rights and immunities," but also named several non-constitutionally enumerated rights explicitly.¹⁸⁹

¹⁷⁸ *Id.* at 196 n.76 (quoting Speaker Schuyler Colfax, Speech in Indianapolis, Ind. (Aug. 7, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 14).

¹⁷⁹ *Id.*

¹⁸⁰ Senator Lyman Trumbull, Senator Trumbull in Chicago (Aug. 2, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 6.

¹⁸¹ Senator Zachariah Chandler, Speech of Hon. Zachariah Chandler, United States Senator from Michigan, Delivered at Mount Clemens, Macombe Co., Mich. (Oct. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 56.

¹⁸² Representative Thaddeus Stevens, Speech of Hon. Thaddeus Stevens Delivered at Bedford, Penn. (Sept. 4, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 27.

¹⁸³ BOND, *supra* note 161, at 57, 70 n.44.

¹⁸⁴ McPherson, *supra* note 164, at 23.

¹⁸⁵ *Id.* at 64–65.

¹⁸⁶ *Great Speech of General Logan: At Chicago, Tuesday Evening, Aug. 14, AM. CITIZEN*, Sept. 5, 1866, at 1.

¹⁸⁷ *Remarks of Senator Sawyer*, *supra* note 173, at 1.

¹⁸⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

¹⁸⁹ See 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, 391–95 (2011).

Trumbull's statement relating the privileges of citizens of the United States to the Civil Rights Act came in the context of Andrew Johnson's veto.¹⁹⁰ In addition to his important new focus on the Louisiana Cession evidence, Lash has been a pioneer in highlighting the role of that veto in focusing attention on the "privileges and immunities of citizens of the United States" concept.¹⁹¹ Napoleon and Andrew Johnson were thus co-authors of the Privileges or Immunities Clause with John Bingham. Johnson complained about the freedmen on March 27, "Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?"¹⁹²

Republicans answered with an emphatic yes, and the Privileges or Immunities Clause—which Bingham proposed to the Joint Committee on Reconstruction on April 21¹⁹³—was of course their chief vehicle for doing so. But so was the Civil Rights Act of 1866. Lyman Trumbull's April 4 response to Johnson equated the privileges of citizens of the United States with the sorts of rights in Civil Rights Act of 1866:

[W]hat rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, *such as the rights enumerated in this bill*, and they belong to them in all the States of the Union. The right of American citizenship means something.¹⁹⁴

Wilson and Trumbull were not alone in their characterizations of the Civil Rights Act in terms of the privileges and immunities of citizens of the United States. Bond quotes the *Raleigh Sentinel's* April 12, 1866, characterization of the Civil Rights Act as containing "[o]nly those privileges and immunities peculiar to United States citizenship and necessary to civil freedom."¹⁹⁵

What does Lash make of this evidence? Lash quotes the statement from Wilson,¹⁹⁶ but, a few pages later, he sees this argument as problematic because rights like the right to contract, give evidence, and own land, were not actually privileges of citizens of the United States: "This was not a theory without problems. Whether Congress had power to confer the rights of national citizenship on persons in the states was not at all clear. Nor was it clear that the rights listed in the Act actually *were* rights of national citizenship."¹⁹⁷ The "nor was it clear" is a huge understatement on

¹⁹⁰ See LASH, *supra* note 1, at 137–40.

¹⁹¹ See, e.g., *id.* at 137–44.

¹⁹² CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

¹⁹³ BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, 82, 87 (1914).

¹⁹⁴ *Id.* at 1757 (emphasis added) (discussing Civil Rights Act, 14 Stat. 27 (1866)).

¹⁹⁵ BOND, *supra* note 161, at 54, 66 n.10.

¹⁹⁶ LASH, *supra* note 1, at 131 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866)).

¹⁹⁷ *Id.* at 136.

Lash's understanding of the rights of citizens of the United States: Wilson's view that the rights in the Civil Rights Act of 1866 were rights of citizens of the United States clearly contradicts the enumerated-rights-only view of the rights of citizens of the United States. That poses a much bigger problem for the enumerated-rights-only view, however, than for Wilson.

Lash insists, however, on claiming Wilson and Trumbull as allies: "In seeking to secure the needed votes, proponents like Trumbull and Wilson narrowed their definition of the rights of American citizenship to rights expressly enumerated in the Bill of Rights."¹⁹⁸ Reviewing these two speeches, this interpretation does not seem right at all. They didn't narrow the Civil Rights Act itself to enumerated rights—it still covered the right to contract, testify, own land, and so on.¹⁹⁹ Lash reads Trumbull as invoking on this page "the Fifth Amendment as a textual hook for the Act," and Wilson as making a "similar move."²⁰⁰ However, Trumbull does not mention the Fifth Amendment explicitly in his response to Johnson's veto. Wilson, for his part, mentions the Fifth Amendment, but the context seems too far-removed from his reference to the privileges of citizens of the United States to make it fit with an enumerated-rights-only view of the privileges of citizens of the United States. Readers, however, can mull Wilson and Trumbull's speeches for themselves.

These explanations of the Civil Rights Act of 1866 used the language of the privileges of citizens of the United States, rather than the equal protection of the laws. Lash notes my protection-based view of the Equal Protection Clause, leaving its merits open.²⁰¹ This is important because, on my view, the "protection of the laws," to which the Equal Protection Clause is limited, cannot cover all of the rights in the Civil Rights Act; it clearly did not encompass the right to own land, uncontroversially denied to aliens. Unless Lash adopts a contrary view of the Equal Protection Clause, he must not only disagree with Colfax, Trumbull, Stevens, Wilson, and many others who explicitly explained the Civil Rights Act in terms of the rights of citizens of the United States, but also do without Civil Rights Act of 1866 constitution-alization at all. It is, of course, quite enough for one book to focus on the Privileges or Immunities Clause, but, if Lash is presupposing a contrary view of the Equal Protection Clause, he is doing so without adequate explanation or defense.

V. 1866

The Civil Rights Act of 1866 was, of course, a central player in the public discussion of the Privileges or Immunities Clause, and it could not be sustained on an enumerated-rights-only interpretation. Two other aspects of the 1866 debate spell other trouble for the view: (a) Republican explanations of the lack of voting rights that overlook the argument which would be obvious under the enumerated-rights-only

¹⁹⁸ *Id.* at 142–43.

¹⁹⁹ *See* Civil Rights Act, 14 Stat. 27 (1866).

²⁰⁰ LASH, *supra* note 1, at 141 n.306.

²⁰¹ *Id.* at 171 n.402, 260 n.111.

view, and (b) Republican failure to invoke the enumerated-rights-only view to rebut Democratic charges of indeterminacy.

A. The Lack of Voting Rights

The Democrats' most common objection to the Privileges or Immunities Clause was that it would confer voting rights; Republicans insisted repeatedly that women and children were citizens yet not voters, and thus that "privileges or immunities of citizens of the United States" did not include voting rights.²⁰²

A trip in the *Cincinnati Commercial*, Bond, and McPherson time machines will make this very clear. Among *Cincinnati Commercial* evidence, the Democratic voting-rights charge was made by Thomas Hendricks on August 8,²⁰³ by a "Dr. Snow" on August 25,²⁰⁴ and by Thomas Bartley on September 29.²⁰⁵ Bond quotes the charge by the *Wilmington Daily Dispatch* on May 16,²⁰⁶ by the *Montgomery Daily Mail* on June 15,²⁰⁷ by the *Clarke County Journal* on June 28,²⁰⁸ by the *Montgomery Daily Mail* on September 27,²⁰⁹ by the *Selma Daily Messenger* on September 29,²¹⁰ by the *Raleigh Sentinel* on September 29,²¹¹ by the *People's Press* on October 11,²¹² by the *Arkansas Daily Gazette* on October 23,²¹³ by the Florida House Committee on Federal Relations on November 23,²¹⁴ by the *Fayetteville News* on February 12, 1867,²¹⁵ and by the *Vicksburg Daily Herald* on July 24, 1868.²¹⁶ McPherson includes clippings making the charge titled *The Proposed Constitutional Amendment: The Radical Platform as It Is*,²¹⁷ two separate articles

²⁰² See, e.g., *id.* at 26.

²⁰³ Senator Thomas Hendricks, Speech of Hon. Thos. A. Hendricks, U.S. Senator from Indiana, Delivered at Indianapolis (Aug. 8, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 9.

²⁰⁴ Doctor Snow, Speech of the Hon. John Hannah, Late United States District Attorney for Indiana, Delivered at Indianapolis, Saturday Evening, August 25 (Aug. 25, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 22.

²⁰⁵ Judge Thomas Bartley, Speech of Hon. T.W. Bartley, in Reply to Hon. John Sherman (Sept. 29, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 143, at 48.

²⁰⁶ BOND, *supra* note 161, at 56, 69 n.34.

²⁰⁷ *Id.* at 104, 115 n.26.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 56, 69 n.34.

²¹² *Id.* at 37, 49 n.35.

²¹³ *Id.* at 192, 206 n.14.

²¹⁴ *Id.* at 174, 185 n.40.

²¹⁵ *Id.* at 56, 69 n.34.

²¹⁶ *Id.* at 49 n.34.

²¹⁷ McPherson, *supra* note 164, at 24.

titled *The Constitutional Amendment*,²¹⁸ and another titled *The 14th Amendment in Kentucky*,²¹⁹ as well as the *Daily News* in separate pieces on July 31, 1868,²²⁰ and August 22, 1868.²²¹

The Republican rebuttal generally invoked the fact that women and children could not vote yet were citizens of the United States. Voting was thus not a privilege of citizens of the United States. The *Cincinnati Commercial* reported such arguments by Oliver Morton on July 27,²²² Schuyler Colfax on August 7,²²³ John Hannah on August 25,²²⁴ John P.C. Shanks on August 25,²²⁵ Columbus Delano on August 28,²²⁶ Thomas Ewing on September 17,²²⁷ Thaddeus Stevens on September 4,²²⁸ Robert Ingersol on September 10,²²⁹ Oliver Morton on September 22,²³⁰ Henry Noyes on September 29,²³¹ Robert Schenck on October 3,²³² and Zachariah Chandler on October 22.²³³ Bond references such an argument by William W. Holden on September 20.²³⁴ McPherson quotes such arguments by the *American and Gazette* on

²¹⁸ *Id.* at 45, 81.

²¹⁹ *Id.* at 84.

²²⁰ *Id.* at 77.

²²¹ *Id.* at 82.

²²² Governor Oliver Morton, Gov. Morton's Speech at New Albany, Ind. (July 27, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 3.

²²³ Speaker Schuyler Colfax, Speech of Hon. Schuyler Colfax, at Indianapolis, August 7 (Aug. 7, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 14.

²²⁴ John Hannah, Speech of Hon. John Hannah, Late United States District Attorney for Indiana, Delivered at Indianapolis (Aug. 25, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 21.

²²⁵ General John P.C. Shanks, Sharp Speech from Gen. Shanks (Aug. 25, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 22.

²²⁶ Representative Columbus Delano, Speech of Hon. Columbus Delano at Coshocton, Ohio (Aug. 28, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 23.

²²⁷ Major General Thomas Ewing, Speech of Maj. Gen. Thos. Ewing, Jr., at the Cleveland Soldiers and Sailors' Convention (Sept. 17, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 25.

²²⁸ Representative Thaddeus Stevens, Speech of Hon. Thaddeus Stevens Delivered at Bedford, Penn. (Sept. 4, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 27.

²²⁹ Colonel Robert Ingersol, Speech of Col. Robt. G. Ingersol at Indianapolis (Sept. 10, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 29.

²³⁰ Governor Oliver Morton, Speech of Governor Morton, at Anderson, Madison County, Indiana (Sept. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 35.

²³¹ Colonel Henry Noyes, Speeches of Col. Noyes and Judge Hoadly (Sept. 29, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 48.

²³² General Robert Schenck, General Schenck and Senator Wade at Mozart Hall (Oct. 3, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 47.

²³³ Senator Zachariah Chandler, Speech of Hon. Zachariah Chandler, United States Senator from Michigan, Delivered at Mount Clemens, Macombe Co., Mich. (Oct. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 56.

²³⁴ BOND, *supra* note 161, at 57–58, 70 (citation omitted); *see also* WKLY. STANDARD (Raleigh, N.C.), Sept. 26, 1866.

September 28,²³⁵ by the *New Orleans Picayune* on October 24,²³⁶ and an article from the *Philadelphia American* entitled “Reconstruction: The Amendment Alone.”²³⁷ The *Tri-Weekly Standard* argued likewise on May 3.²³⁸

This debate—which consumed the largest share of the public discussions of the Privileges or Immunities Clause—makes no sense under the enumerated-rights-only reading. Under that reading, Republicans should instead have simply noted the absence of voting rights in the Bill of Rights or elsewhere in the Constitution. The enumerated-rights-only view of the Privileges or Immunities Clause was never offered during 1866 as an explanation why the Privileges or Immunities Clause did not apply to voting.

B. The Simplicity of the Enumerated-Rights-Only Reading

The very simplicity and clarity of the enumerated-rights-only reading also contradicts the Republican response to the second-most-common Democratic objection to the Privileges or Immunities Clause in 1866: that it was indefinite. Bond quotes the *Cleveland Banner* of July 14,²³⁹ the *Southern Herald* of October 10,²⁴⁰ and the North Carolina Joint Select Committee of December 12²⁴¹ making this argument. McPherson includes clippings from a letter to the *Evening Post* of September 17,²⁴² a letter by W.E. Sharkey of September 17,²⁴³ a Report of the Texas legislature by Ashbel Smith, the chairman of its Committee on Federal Relations,²⁴⁴ and an article titled *The Amendment in Arkansas*.²⁴⁵ Reverdy Johnson’s objection to the Privileges or Immunities Clause just before proposal of the Fourteenth Amendment—“I do not understand what will be the effect of that”—struck the same theme.²⁴⁶

Republicans did not deny that the Privileges or Immunities Clause had fuzzy edges, though the most explicit endorsements of vague boundaries came later, rather than in the 1866 campaign itself. Jacob Howard noted in his May 1866 introduction that the privileges covered by the Comity Clause “are not and cannot be fully defined in their entire extent and precise nature,”²⁴⁷ though of course Lash interprets Howard as sharply distinguishing Comity Clause privileges from their Fourteenth

²³⁵ McPherson, *supra* note 164, at 23.

²³⁶ *Id.* at 31.

²³⁷ *Id.* at 41.

²³⁸ *Raleigh, N.C.*, TRI-WKLY. STANDARD, May 3, 1866, at 2.

²³⁹ BOND, *supra* note 161, at 23, 30 nn.61–62.

²⁴⁰ *Id.* at 37, 49 n.36.

²⁴¹ *Id.* at 59, 70 (citation omitted).

²⁴² McPherson, *supra* note 164, at 4.

²⁴³ *Id.* at 22–23.

²⁴⁴ *Id.* at 41.

²⁴⁵ *Id.* at 57.

²⁴⁶ CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

²⁴⁷ *Id.* at 2765.

Amendment counterparts.²⁴⁸ George Boutwell noted years later that the “euphony and indefiniteness of meaning” of the Privileges or Immunities Clause “were a charm to” Bingham when he proposed it.²⁴⁹ John Pool noted in 1871, “The full scope of the rights incident to citizenship may not be easy to define.”²⁵⁰ John Sherman noted in 1872, “There may be sometimes great dispute and doubt as to what is the right, immunity, or privilege conferred upon a citizen of the United States.”²⁵¹ George Edmunds noted in 1875, in the last speech before the Senate’s passage of the Civil Rights Act of 1875,²⁵² that “it may be that you cannot make a precise definition,” though “what belongs to a man in his character as a citizen has been long in a great many respects well understood.”²⁵³

The enumerated-rights-only interpretation contradicts these concessions of Privileges-or-Immunities-Clause fuzziness because it provides a perfectly clear, sharp criterion for the clause. The enumerated-rights-only view was never offered during 1866 as an explanation why the Fourteenth Amendment had precise boundaries. As Aristotle noted, it is the mark of an educated man not to seek an explanation more precise than a subject matter will bear.²⁵⁴

C. Lash’s 1866 Evidence

Before leaving 1866, very brief comments are in order on three other pieces of evidence from 1866 on which Lash relies heavily.

First, Lash is right that freedoms of speech and assembly were widely taken as paradigmatic privileges of citizens of the United States in 1866, and here too his work unearths too-long ignored evidence.²⁵⁵ However, this data point can be an instance of many different categories: natural rights, rights expressed in the Constitution, rights prevalent among U.S. citizens historically, or (my view) rights prevalent among United States citizens today. We must not, like Euthyphro, mistake examples for definitions.²⁵⁶

²⁴⁸ See LASH, *supra* note 1, at 278.

²⁴⁹ GEORGE S. BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41–42 (1902).

²⁵⁰ CONG. GLOBE, 42d Cong., 1st Sess. 607 (1871).

²⁵¹ CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872).

²⁵² Civil Rights Act, 18 Stat. 335 (1875).

²⁵³ CONG. REC. 1870 (1875).

²⁵⁴ ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 3–4 (F. H. Peters trans., 5th ed. 1893) (“We must be content if we can attain to so much precision in our statement as the subject before us admits of . . . [W]e must be content if we can indicate the truth roughly and in outline . . . [I]t is the mark of an educated man to require, in each kind of inquiry, just so much exactness as the subject admits of: it is equally absurd to accept probable reasoning from a mathematician, and to demand scientific proof from an orator.”).

²⁵⁵ See LASH, *supra* note 1, at 181.

²⁵⁶ See 2 THE DIALOGUES OF PLATO: TRANSLATED INTO ENGLISH WITH ANALYSES AND INTRODUCTIONS 80 (B. Jowett trans., 3d ed. 1892) (“Remember that I did not ask you to give

Second, Lash relies on Bingham's statement that his Fourteenth Amendment *precursor* did not go beyond enforcement of "the Bill of Rights," but concedes that Bingham used "Bill of Rights" idiosyncratically broadly (i.e., as including the comity clause rights of Article IV) at the time.²⁵⁷ Lash's concluding reiteration of Bingham's February 1866 evidence, without mentioning this complexity,²⁵⁸ is likely to mislead.

Third, Lash reconstructs the political universe of 1866 in a far-too-Procrustean fashion. He claims that his trichotomy of views about the Privileges or Immunities Clause—comity, enumerated-rights-only, and federalizing the common law—matched the political divisions between conservatives, moderates, and radicals in 1866:

Radical Republicans argued in favor of a broader conception of national citizenship, one that would give the federal government control over the entire subject of common law civil rights. On the opposite side of the spectrum, Conservative Republicans wanted to enforce the equal protection norms of the Comity Clause—and *nothing* else. The broad middle, however, rejected both Radical and Conservative theories and stuck with an idea that everyone could understand and that most people embraced: States should respect those rights announced in the federal Charter—all of them, from the equal rights of the Comity Clause to the substantive rights of the first eight amendments. My book presents no more than the tip of the iceberg of historical evidence supporting this reading.²⁵⁹

However, the division between moderates and radicals is itself quite tricky to draw—the two groups did not, say, caucus separately—and is best seen as a matter of degree. Political scientists like Allan Bogue have put a great deal of quantitative work into it; for what it's worth, Bogue lists Howard as the eleventh-most radical Senator in 1866 out of fifty, and John Sherman, who saw the common law very clearly as the critical source for privileges of citizens of the United States, as the thirty-second.²⁶⁰ This hardly fits calling Howard a moderate and Sherman a radical.

The gauziness of "moderate" is matched by the gauziness of "federalism." Lash argues, "Howard, like other Moderate Republicans, believed in Federalism. He

me two or three examples of piety, but to explain the general idea which makes all pious things to be pious. . . . Tell me what is the nature of this idea, and then I shall have a standard to which I may look, and by which I may measure actions, whether yours or those of any one else, and then I shall be able to say that such and such an action is pious, such another impious.").

²⁵⁷ See LASH, *supra* note 1, at 94.

²⁵⁸ *Id.* at 301–03.

²⁵⁹ Lash, *supra* note 103.

²⁶⁰ See ALLAN G. BOGUE, *THE EARNEST MEN: REPUBLICANS OF THE CIVIL WAR SENATE* 104–05 (1981).

would never have supported an amendment that transformed the unenumerated subjects of local common law into congressionally controlled absolute national rights.”²⁶¹ The Fourteenth Amendment did not, of course, abandon federalism wholesale. But the precise extent of its retail abandonment cannot, I think, be usefully discussed in the coarse-grained way Lash argues. Were moderates so attached to federalism that they could not possibly see equality in constitutionally unenumerated civil rights as a privilege of all citizens of the United States? The proof is in the pudding: Republicans passed the Civil Rights Act of 1866 and consistently described it in terms of the privileges of citizens of the United States. If Republican “moderates” genuinely held sway in 1866, their passage of the Civil Rights Act in that context tells us all we need to know about the willingness of Republican moderates to view home-state freedom of contract as one of the privileges of citizens of the United States. Further, if moderates were attempting to remove the idea of “civil rights”—i.e., the rights of citizens—from the Civil Rights Act of 1866, they did not do a very good job because they left it in the bill’s title: “An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”²⁶² Lyman Trumbull also didn’t get the memo, describing the bill in terms of the privileges of citizens of the United States, and in terms of civil rights, just before its passage.²⁶³ Neither did Schuyler Colfax, describing the Privileges or Immunities Clause quite explicitly in terms of the constitutionally unenumerated rights of the Civil Rights Act of 1866.²⁶⁴

It is also worth noting that in certain ways, Lash’s view of the Privileges or Immunities Clause would be a far greater intrusion on federalism than would my own. Lash would insist that federal judges make policy for all fifty states regarding free speech, gun rights, church and state, and so on, based only on their understanding of the text of the Bill of Rights (more precisely, what those 1788- and 1791-enacted texts expressed in 1868). But my view would only allow rights, whether in the Bill of Rights or in the common law, to be enforced if a state itself either gave such a right to similarly situated fellow citizens, or if a consensus of states granted such a right in particular circumstances. As the second Justice Harlan advocated, this view would allow different standards to govern basic rights for the States and the federal government.²⁶⁵ States might then lose the ability to be outliers, like Connecticut in banning the use of contraceptives,²⁶⁶ but they would gain flexibility in areas of

²⁶¹ Lash, *supra* note 100.

²⁶² Civil Rights Act, 14 Stat. 27 (1866).

²⁶³ Senator Lyman Trumbull, Speech of Senator Trumbull Delivered at Evanston, Illinois, August 31 (Aug. 31, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 49.

²⁶⁴ Speaker Schuyler Colfax, Speech of Hon. Schuyler Colfax, at Indianapolis, August 7 (Aug. 7, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866*, *supra* note 139, at 14.

²⁶⁵ See *Poe v. Ullman*, 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting).

²⁶⁶ See *id.*

substantial disagreement, even in areas where the federal government would be bound by the 1791 meaning of the Bill of Rights. Harlan, of course, would hardly think that Lash's approach was properly respectful of federalism. That doesn't mean by itself that an enumerated-rights-only view—more to the point here, an *all*-enumerated-rights view—could not have been adopted during Reconstruction, but we must be wary of thinking that all sensible folk, or even all “moderate Republicans,” whoever that might seem to include, always get identical readings on their “federalism-o-meters.” Harlan's *Griswold v. Connecticut* concurrence²⁶⁷ and *Poe v. Ullman* dissent²⁶⁸ make for a greater intrusion on states than Black's *Griswold* dissent,²⁶⁹ to be sure, but Harlan's concurrences and dissents in *Roth v. United States*,²⁷⁰ *Mapp v. Ohio*,²⁷¹ *Gideon v. Wainwright*,²⁷² *Malloy v. Hogan*,²⁷³ *Pointer v. Texas*,²⁷⁴ *Washington v. Texas*,²⁷⁵ *Duncan v. Louisiana*,²⁷⁶ *Benton v. Maryland*,²⁷⁷ and *Williams v. Florida*²⁷⁸ arguably make up for it, in comparison to Black's *Adamson v. California* dissent.²⁷⁹

VI. SUBSEQUENT INTERPRETATIONS

Finally, a few comments on subsequent-interpretation evidence.

A. Is Subsequent-Interpretation Evidence Worth Canvassing?

Lash has disparaged such evidence in general, calling it “questionable help”²⁸⁰ and “historically perilous.”²⁸¹ What really matters, Lash and I agree, is what a reasonable person participating in the actual act of adopting the Fourteenth Amendment

²⁶⁷ 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring).

²⁶⁸ 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting).

²⁶⁹ 381 U.S. at 512–20 (Black, J., dissenting).

²⁷⁰ 354 U.S. 476, 503–07 (1957) (Harlan, J., dissenting).

²⁷¹ 367 U.S. 643, 678–82 (1961) (Harlan, J., dissenting).

²⁷² 372 U.S. 335, 349–52 (1963) (Harlan, J., concurring).

²⁷³ 378 U.S. 1, 21–27 (1964) (Harlan, J., dissenting).

²⁷⁴ 380 U.S. 400, 408–09 (1965) (Harlan, J., concurring).

²⁷⁵ 388 U.S. 14, 23–25 (1967) (Harlan, J., concurring).

²⁷⁶ 391 U.S. 145, 173–82 (1968) (Harlan, J., dissenting).

²⁷⁷ 395 U.S. 784, 808–09 (1969) (Harlan, J., dissenting).

²⁷⁸ 399 U.S. 78, 128–34 (1970) (Harlan, J., concurring).

²⁷⁹ 332 U.S. 46, 120–23 (1947) (Black, J., dissenting).

²⁸⁰ LASH, *supra* note 1, at 230.

²⁸¹ See Kurt Lash, *Why Slaughterhouse Was Right: The Textual Limits of the Privileges or Immunities Clause*, WASH. POST: THE VOLOKH CONSPIRACY (May 9, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/09/kurt-lash-guest-blogging-why-slaughterhouse-was-right-the-textual-limits-of-the-privileges-or-immunities-clause/> [http://perma.cc/T8ZB-SGQN].

would have understood it to express. I agree with Lash that the 1866 evidence is thus considerably more important than later evidence. Given the quantity and clarity of subsequent-interpretation evidence, however—particularly the thoroughness of its textual reasoning—I find it extremely valuable as well. We should apply a discount rate so that the further we get from 1866, the less valuable evidence becomes. This decay may be quite rapid; I would be happy to concede that, pound for pound, equally well-reasoned and equally numerous evidence from the period of 1872 to 1875 would be worth only, say, five percent of the value of evidence from 1866. However, because subsequent-interpretation evidence is much more abundant and much better textually reasoned, its relevance approaches the approximate order of magnitude of the 1866 evidence. As I explained above, Lash’s book actually led me to find a much greater store of equality-based evidence from 1866 than I had known earlier; given the obvious priority of pre-enactment evidence, perhaps the pre-Civil Rights Act of 1875 evidence is not as important as this 1866 cache. But it is close.

Lash’s book itself presents some subsequent-interpretation evidence in support of the enumerated-rights-only interpretation. This evidence ranges from John Bingham’s incorporation-focused March 1871 speech²⁸² and the Ohio Supreme Court’s 1871 decision in *Ohio ex rel. Garnes v. McCann*,²⁸³ as well as a creative reading of the *Slaughter-House Cases*,²⁸⁴ and several other pieces of subsequent-interpretation evidence, such as Bingham’s very confusing and difficult-to-harmonize January 1871 report against women voting²⁸⁵ and the failed Blaine Amendment of August 1876.²⁸⁶ Evidence like the March 1871 speech, Lash notes, bolsters the idea that Bingham had a consistent view about nationalizing the Bill of Rights from 1866 to 1871—it “illustrates the continuity in his thinking from 1866 to 1871.”²⁸⁷ I agree that consistency over time is important, but it is important both for Bingham and for other interpreters as well. Above, I discussed Jacob Howard’s 1869 discussion of voting rights under the Fourteenth Amendment, arguing that it helpfully clarifies his speech from 1866.²⁸⁸ It is striking that in Lash’s chapter on subsequent-interpretation evidence, he notes that “in the end we are left with Jacob Howard’s public explanation of the Clause as protecting the constitutionally enumerated rights of citizens of the United States as the most likely original meaning of the text,”²⁸⁹ but without commenting on subsequent-interpretation evidence from Howard himself.

²⁸² See CONG. GLOBE, 42d Cong., 1st Sess. app. 81–84 (1871).

²⁸³ 21 Ohio St. 198 (1871).

²⁸⁴ 83 U.S. 36 (1872).

²⁸⁵ See CONG. GLOBE, 41st Cong., 3d Sess. app. 838 (1871).

²⁸⁶ See 4 CONG. REC. 5185–90 (1876).

²⁸⁷ LASH, *supra* note 1, at 252.

²⁸⁸ See *supra* Part III.B.2.

²⁸⁹ LASH, *supra* note 1, at 232.

Of course, neither John Bingham, nor Jacob Howard, nor Schuyler Colfax were the authors, constitutionally speaking, of the Fourteenth Amendment. The actual author was a *collection* of people in Congress and ratifying conventions who acted collectively only through the text of the Amendment itself.²⁹⁰ To the extent that a Reconstructor attached idiosyncratic meanings to that text, he was on a frolic of his own, not acting on behalf of the actual constitutional author. In assessing the weight appropriate for explanations of meaning and assessments of constitutional application, it therefore seems reasonable to use the factors pertinent to *Skidmore v. Swift & Co.*²⁹¹ deference: “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²⁹² Consistency between 1866 and 1871 (or 1869 or 1872 or 1875), as well as the relative cogency and thoroughness of textual reasoning, are interpretively quite important.

If nothing else, the large number of equality-based explanations of the Privileges or Immunities Clause prior to the Civil Rights Act of 1875 can bolster equality-based explanations of the clause given in 1866. The situation might be different if equality interpretations were completely unknown in 1866 and popped into existence full-blown from the brow of Charles Sumner in January 1872. But they did not.

B. Subsequent-Interpretation Equality Evidence

I devote a substantial appendix in my book²⁹³ to a collection of the many bits of evidence explaining the Privileges-or-Immunities-Clause basis for the Civil Rights Act of 1875. The serious stream of such evidence began in January 1872, when Charles Sumner began attempting to attach a civil rights provision to Fourteenth Amendment, Section Three amnesty legislation.²⁹⁴ Republicans explained over and over and over that, under the Privileges or Immunities Clause, all similarly situated U.S. citizens must receive the same privileges: common-carrier, schooling, and jury rights were rights of citizens of the United States that states could not grant in a racially discriminatory manner.

Here, I will simply list the Republicans offering such interpretations most clearly with a citation to a representative speech for each:

²⁹⁰ Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641, 1660–61 (2009) (describing the notion of constitutional author speaking in assembled conventions, but only through the text).

²⁹¹ 323 U.S. 134, 140 (1944).

²⁹² *Id.*

²⁹³ GREEN, *supra* note 14, at 164–202.

²⁹⁴ See CONG. GLOBE, 42d Cong., 2d Sess. 381–83 (1872).

- Framing Senators George Boutwell,²⁹⁵ John Conness,²⁹⁶ George Edmunds,²⁹⁷ Timothy Howe,²⁹⁸ James Nye,²⁹⁹ John Sherman,³⁰⁰ William Sprague,³⁰¹ Charles Sumner,³⁰² and Henry Wilson;³⁰³
- Nonframing Senators James Alcorn,³⁰⁴ Matthew Carpenter,³⁰⁵ Cornelius Cole,³⁰⁶ Henry Corbett,³⁰⁷ Frederick Frelinghuysen,³⁰⁸ James Harlan,³⁰⁹ Henry Pease,³¹⁰ John Pool,³¹¹ Daniel Pratt,³¹² Thomas Robertson,³¹³ Frederick Sawyer,³¹⁴ and John Scott;³¹⁵
- Framing Representatives Thomas D. Eliot,³¹⁶ James Garfield,³¹⁷ William Lawrence,³¹⁸ and Samuel Shellabarger;³¹⁹ and
- Nonframing Representatives Julius Burrows,³²⁰ Benjamin Butler,³²¹ Richard Cain,³²² Chester Darrall,³²³ Robert Elliott,³²⁴ E.R. Hoar,³²⁵ Stephen Kellogg,³²⁶ David Mellish,³²⁷ James Monroe,³²⁸ William

²⁹⁵ *E.g.*, 2 CONG. REC. 4116 (1874).

²⁹⁶ *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2891–92 (1866).

²⁹⁷ *E.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 895–900 (1872).

²⁹⁸ *E.g.*, *id.* at 3259.

²⁹⁹ *E.g.*, *id.* at 495.

³⁰⁰ *E.g.*, *id.* at 843.

³⁰¹ *E.g.*, *id.* at 898–99.

³⁰² *E.g.*, *id.* at 381–83.

³⁰³ *E.g.*, *id.* at 920–21.

³⁰⁴ *E.g.*, 2 CONG. REC. app. 302–05 (1874).

³⁰⁵ *E.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 762 (1872).

³⁰⁶ *E.g.*, *id.* at 872.

³⁰⁷ *E.g.*, *id.*

³⁰⁸ *E.g.*, *id.* at 435–37.

³⁰⁹ *E.g.*, *id.* at 877–78.

³¹⁰ *E.g.*, 2 CONG. REC. 4153–54 (1874).

³¹¹ *E.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 100–07 (1871).

³¹² *E.g.*, 2 CONG. REC. 4081–83 (1874).

³¹³ *E.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 918–19 (1872).

³¹⁴ *E.g.*, *id.* at 273.

³¹⁵ *E.g.*, *id.* at 529–30.

³¹⁶ *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

³¹⁷ *E.g.*, 3 CONG. REC. 1004 (1875).

³¹⁸ *E.g.*, 2 CONG. REC. 341 (1874).

³¹⁹ *E.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 67–71 (1871).

³²⁰ *E.g.*, 3 CONG. REC. 999–1000 (1875).

³²¹ *E.g.*, 2 CONG. REC. 340–41 (1874).

³²² *E.g.*, *id.* at 565–67.

³²³ *E.g.*, *id.* app. 477–80.

³²⁴ *E.g.*, 2 CONG. REC. 407–10 (1874).

³²⁵ *E.g.*, 3 CONG. REC. 979 (1875).

³²⁶ *E.g.*, *id.* at 997.

³²⁷ *E.g.*, 2 CONG. REC. 567 (1874).

³²⁸ *E.g.*, 3 CONG. REC. 997–98 (1875).

Phillips,³²⁹ William Purman,³³⁰ Joseph Rainey,³³¹ Alonzo Ransier,³³²
James Rapier,³³³ Ellis H. Roberts,³³⁴ William Stowell,³³⁵ Lyman
Tremain,³³⁶ Josiah Walls,³³⁷ and Alexander White.³³⁸

C. The Enumerated-Rights-Only Reading and the Civil Rights Act of 1875

Because common-carrier and schooling rights are outside the Bill of Rights, the enumerated-rights-only reading undermines the dominant argument for Republican proposals for the desegregation of schools and common carriers in (drafts of) the Civil Rights Act of 1875. Indeed, Democrat Allen Thurman adopted the enumerated-rights-only view on February 6, 1872, for precisely this purpose.³³⁹ We can date Thurman's adoption of the enumerated-rights-only view with some precision—and significantly undermine his credibility—because on January 23, exactly two weeks before, Thurman stated that the Privileges or Immunities Clause applied to the textually unenumerated right to testify.³⁴⁰ Democrats like James Beck,³⁴¹ Eppa Hunton,³⁴² Roger Mills,³⁴³ Milton Southard,³⁴⁴ and Thomas Norwood³⁴⁵ echoed Thurman's enumerated-rights-only interpretation of the Privileges or Immunities Clause for the same anti-Civil-Rights-Act-of-1875 purpose.

In turning away a constitutional challenge to segregated schools—the same constitutional claim underlying versions of the Civil Rights Act of 1875 covering education—the Ohio Supreme Court (of which Thurman had years earlier been the chief justice) also followed Thurman's interpretation, though with some hesitation, in May 1872 in *Garnes*.³⁴⁶ The date is important: Lash lists the case as decided in 1871, matching the December 1871 term of court, but newspaper accounts from May 8, 1872, refer to the case as decided the previous day.³⁴⁷ The causal arrow runs from Thurman to *Garnes*, not the other way.

³²⁹ *E.g., id.* at 1003.

³³⁰ *E.g.,* 2 CONG. REC. 422–25 (1874).

³³¹ *E.g., id.* at 343–44.

³³² *E.g., id.* at 382–85.

³³³ *E.g.,* 3 CONG. REC. 1001 (1875).

³³⁴ *E.g., id.* at 980–81.

³³⁵ *E.g.,* 2 CONG. REC. 425–27 (1874).

³³⁶ *E.g., id.* at 416.

³³⁷ *E.g., id.* at 416–17.

³³⁸ *E.g.,* 3 CONG. REC. app. 19–21 (1875).

³³⁹ *See* CONG. GLOBE, 42d Cong., 2d Sess. app. 25–26 (1872).

³⁴⁰ *See* CONG. GLOBE, 42d Cong., 2d Sess. 525–26 (1872).

³⁴¹ *E.g.,* 2 CONG. REC. 342–43 (1873).

³⁴² *E.g.,* 3 CONG. REC. app. 117–20 (1875).

³⁴³ *E.g.,* 2 CONG. REC. 383–85 (1874).

³⁴⁴ *E.g., id.* app. 1–3 (1874).

³⁴⁵ *E.g., id.* app. 233–44 (1874).

³⁴⁶ *Ohio ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209–10 (1872).

³⁴⁷ *See, e.g., Against Mixed Schools in Ohio*, EVENING STAR (D.C.), May 8, 1872, at 1.

Lash quotes *Garnes* quite prominently, making it “Exhibit A” of early judicial decisions.³⁴⁸ It is worth stressing, however, that *Garnes* did not quite adopt the enumerated-rights-only reading but only noted “strong reasons for believing” such an interpretation.³⁴⁹ As a fallback position, the court adopted a separate-but-equal theory to rebut the hypothetical Privileges or Immunities Clause grant of “equality of rights to the citizens of a State, as one of the privileges of citizens of the United States;”³⁵⁰ *Garnes* took an equal-citizenship requirement as the chief competitor to the enumerated-rights-only reading.

Other things being equal, one would of course think that the Republican Party’s interpretations of the Privileges or Immunities Clause in attacking school segregation would be worth far more than the Democratic Party’s interpretations defending it. Democratic opposition to the Civil Rights Act of 1875 and to school integration stood in “apostolic succession” to their opposition to the Fourteenth Amendment itself.³⁵¹ A case like *Garnes*, cited favorably in *Plessy v. Ferguson*,³⁵² is a better candidate for the anti-canon than the canon. While Lash immediately follows up his acknowledgment of *Garnes*’s separate-but-equal holding with a citation to Michael McConnell’s piece on the originalist foundations of *Brown v. Board of Education*,³⁵³ the Thurman/*Garnes* enumerated-rights-only position was designed precisely to undermine those foundations.

D. *United States v. Hall*

In addition to the failure to canvass congressional subsequent-interpretation evidence fully, Lash is selective in early court cases. He quotes *Garnes* prominently,³⁵⁴ for instance, but omits future-Justice William B. Woods’s discussion of the incorporation issue a year earlier in *United States v. Hall* in May 1871.³⁵⁵ Woods agreed with total incorporation but clearly rejected the nothing-but-incorporation

³⁴⁸ LASH, *supra* note 1, at 232. Lash also highlights *Garnes* prominently in two of his summaries of the book for the Volokh Conspiracy. See Kurt Lash, *Defining American Privileges and Immunities*, WASH. POST: THE VOLOKH CONSPIRACY (May 5, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/05/defining-american-privileges-and-immunities/> [http://perma.cc/NH7B-GC8M]; Kurt Lash, *Does the Fourteenth Amendment Protect Unenumerated Rights?*, WASH. POST: THE VOLOKH CONSPIRACY (May 8, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/08/kurt-lash-guest-blogging-does-the-fourteenth-amendment-protect-unenumerated-rights/> [http://perma.cc/2GHG-Y8E6].

³⁴⁹ *Garnes*, 21 Ohio St. at 209–10.

³⁵⁰ *Id.* at 210.

³⁵¹ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

³⁵² 163 U.S. 537, 545 (1896). *Plessy* cites the case as *State v. McCann*; as the plaintiff, *Garnes*, was a relator. See *Garnes*, 21 Ohio St. at 198.

³⁵³ LASH, *supra* note 1, at 232 n.3 (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)).

³⁵⁴ See, e.g., *id.* at 232.

³⁵⁵ 26 F. Cas. 79 (S.D. Ala. 1871).

aspect of the enumerated-rights-only reading.³⁵⁶ Woods saw the *Corfield* standard adapted from the Comity Clause as definitional, but its application encompassed all of the rights in the Bill of Rights:

What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, 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 *Corfield v. Coryell* [Case No. 3,230]. Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.³⁵⁷

E. Bingham in March 1871

Finally, I note a key bit of waffling from John Bingham's March 1871 speech.³⁵⁸ He says that the privileges of citizens of the United States were "chiefly defined" in the Bill of Rights, which he then read, and were distinct from the Comity Clause privileges.³⁵⁹ Lash never considers possible meanings for "chiefly." The freedom of speech was a *paradigmatic* privilege of citizens of the United States, to be sure, and the rest of the rights in the Bill of Rights were all rights of great prestige in the Anglo-American tradition of civil liberty; that was how they got into the Bill in the first place. But were they privileges of citizens of the United States in virtue of their placement in the Constitution as such, or, as *Hall*, quoted just above, suggests, in virtue of their antecedent place in the tradition? Bingham's "chiefly" leaves the matter imperfectly clear.

Further, at the very end of Bingham's speech, Bingham refers to "the liberty . . . to work in an honest calling and contribute by your toil . . . to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil."³⁶⁰ The comment comes only a few sentences after a clear reference to the Privileges or Immunities Clause. Because references to the Declaration of Independence, the Preamble, and Milton's *Areopagitica* come between, though,³⁶¹ the extent to which Bingham may have thought that Republican free-labor principles were directly incorporated into the Privileges or Immunities Clause is unclear.

³⁵⁶ See *id.* at 81.

³⁵⁷ *Id.* at 81 (citing *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823)).

³⁵⁸ See CONG. GLOBE, 42d Cong., 1st Sess. app. 81–84 (1871).

³⁵⁹ *Id.* at 84.

³⁶⁰ *Id.* at 86.

³⁶¹ See *id.*

It is also noteworthy that Bingham's March 1871 speech was never cited by enumerated-rights-only Democrats opposing the Civil Rights Act of 1875, though they were happy to cite his January 1871 Judiciary Committee report against women's voting.³⁶² Bingham himself voted four times in May 1872 in favor of procedural motions to allow precursors of the Civil Rights Act of 1875 to be considered in the House,³⁶³ but the House itself did not debate the issues until 1874, after Bingham had left Congress to become ambassador to Japan.³⁶⁴ It is possible that Thurman and his ilk were afraid of the "chiefly," or afraid Bingham might contradict them, or both.

CONCLUSION

Despite all of these critical comments, I want to express my great appreciation again to Kurt Lash for his dogged persistence in researching the Privileges or Immunities Clause. I have not devoted much space in this Article to my many areas of agreement. In several large chunks of his book, such as his explanation of terms like "privileges" and "immunities," his careful history of comity-clause interpretations, and his refutation of comity-only interpretations of the Fourteenth Amendment, his arguments are quite compelling indeed. His work on treaties promising the rights of citizens of the United States to those in newly acquired territory and on Andrew Johnson's use of the concept of the privileges and immunities of citizens of the United States in his Civil Rights Act of 1866 veto has completely transformed my own understanding of the context of the Privileges or Immunities Clause, though working through this material has brought me back to an equal-citizenship-focused reading of the Clause. Lash's amazing energy in unearthing important, hitherto-neglected material makes him the perfect choice for the University of Chicago's Reconstruction sequel to the Founder's Constitution, which has done such an excellent job of making materials in our constitutional history available to a wider scholarly and public audience. He would, I think, be the first to encourage others to look carefully into the evidence he has uncovered and to consider the merits of competing accounts of it. In conversation, he has compared himself to the discoverer of vast new territory of which he can only explore a small part, and that metaphor seems exactly right. I offer my own take, here and in my own book, on the material, but it should be obvious that energetic controversy over the Privileges or Immunities Clause will not be over anytime soon. More explorers are obviously needed. By all means, read his book and explore this territory yourself!

³⁶² See, e.g., 2 CONG. REC. app. 242 (1874).

³⁶³ See CONG. GLOBE, 42d Cong., 2d Sess. 1118, 1956, 2270, 3932 (1872).

³⁶⁴ See 2 CONG. REC. 4175–76 (1874); GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 167 (2013).