Notre Dame Law Review

Volume 95 | Issue 2 Article 3

12-2019

The Difference Narrows: A Reply to Kurt Lash

Randy E. Barnett
Georgetown University Law Center

Evan D. Bernick

THE DIFFERENCE NARROWS: A REPLY TO KURT LASH

Randy E. Barnett & Evan D. Bernick***

We thank the *Notre Dame Law Review* for allowing us to respond to Kurt Lash's reply to our critique of his interpretation of the Privileges or Immunities Clause. We could forgive readers for having difficulty adjudicating this dispute. When Lash argues, evidence always comes pouring forth, and the sheer volume can overwhelm the senses. We sometimes have a hard time following his arguments, and we are experts in the field. We can only imagine how it seems to those who are otherwise unfamiliar with this terrain.

So, in this reply—with a few exceptions—we will avoid piling up any new evidence and will instead offer succinct counterpoints to his points. Above all, we wish to stress the narrowness of our disagreement—narrowness that is easily obscured by the presentation of one source after another. As we did in our original article, we start with our points of agreement—which Lash repeatedly characterizes as "concessions."[1]

I. Where We Agree

A. The Accuracy of Our Summary of Lash's Thesis

We are pleased that, for all his many disagreements with our position, Lash does not dispute the accuracy of our twenty-two-page summary of his thesis. Summarizing his approach was no mean feat. It required weeks of poring over his various articles and blog posts, along with his book. To the end of getting his views right, we shared an early draft of our paper with him to offer him a chance to correct us. He did not offer any corrections then and does not take issue with our account of his views now. So, readers can

* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution.

** Law Clerk to the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

1 *See, e.g.*, Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 Notre Dame L. Rev. 591, 598 (2019).

read our opening summary with confidence it accurately reflects all the twists and turns of Lash's arguments—including their evolution over time.

It was during this inquiry that we discovered that Lash has on several occasions fundamentally changed his positions on key issues. In our critique, we focused on one issue in particular: how Section 1 of the Fourteenth Amendment constitutionalized the fundamental rights identified in the Civil Rights Act of 1866. Lash has at one time or another claimed that each of the four working parts of Section 1 constitutionalized the 1866 Act.[2] His present position is that the Act was constitutionalized by the Due Process of Law Clause (or perhaps a combination of the Due Process of Law Clause and Equal Protection of the Laws Clause).[3]

In our critique, we did not fault Lash for changing his views. To the contrary, we have changed our views over time on some important issues;[4] we commend Lash for continually seeking to get things right; and we applaud him for having the intellectual humility to acknowledge what he now believes to have been interpretive errors (even where we think he was closer to the mark the first time).

If there is anything to fault in Lash's presentation of his revised views, it was in his omission to inform readers that those views were in fact revised and to explain his reasons for those revisions. At a minimum, it would have made it much easier for us to understand his actual claims. Instead, each new view is presented as though it is consistent with all that went before. We are happy to have dispelled some of the resultant confusion.

We might also fault Lash for his failure to correct his previous dismissal of the suggestion made by one of us that the Due Process of Law Clause is not merely a "procedural" guarantee but constrains the content or "substance" of legislation. In reply to a piece by Lash in which he caustically criticized a book by journalist Damon Root,[5] Evan Bernick wrote:

> The notion that the Due Process of Law Clause protected natural rights became a thesis that was asserted in the platforms of anti-slavery parties throughout the antebellum period. Due process of law clauses in state constitutions had been interpreted to provide natural law protections for property rights before the Civil War and the Supreme Court had interpreted states' law of the land provisions to protect substantive rights. . . .

---

2 *See* Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 505 (2019).

3 Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1459 (2018).

4 *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4–5 (2018) ("[S]ome New Originalists—including one of us—insisted that the usage of the terms 'originalist' and 'originalism' is properly confined to the activity of interpretation. . . . We now believe that construction not only can but *must* be originalist."); *id.* at 5 ("The postulate that constitutional construction is inherently nonoriginalist is mistaken and has led to unnecessary division among originalists.").

5 *See* Kurt T. Lash, *Equality and the Civil Rights Act of 1866: A Final Response to Damon Root*, LAW & LIBERTY (July 21, 2015), https://www.lawliberty.org/2015/07/21/equality-and-the-civil-rights-act-of-1866-a-final-response-to-damon-root/.

> . . . .
>
> Thus, there is reason to believe that, *contra* Lash, both the Privileges or Immunities and the Due Process of Law Clauses are properly understood to protect unenumerated rights.[6]

To this, Lash responded:

> But what about the Due Process Clause? Even if libertarians are wrong about the Privileges or Immunities Clause, perhaps the Supreme Court was right to develop the doctrine of substantive due process. This is the proposition of Evan Bernick, whose recent essay at the Huffington Post also takes issue with my review of Root's book.
>
> My review did not address the Due Process Clause because not even Damon Root had the courage to try and resuscitate this broadly mocked doctrine. That Mr. Bernick now tries to do so provides a telling illustration of the failure of libertarian constitutionalism.
>
> . . . .
>
> Perhaps now, in the face of overwhelming evidence that the Privileges or Immunities Clause does not say what they want it to say, libertarians will embrace their inner Emily Litella, say "never mind," and quietly return to Substantive Due Process.[7]

This was way back in 2015, when Lash was still confident in his opinion that it was the Equal Protection of the Laws Clause that protected the unenumerated economic liberties of the Civil Rights Act of 1866.[8] He offered this opinion just a year after publishing his book, in which he contended that it was the Citizenship Clause that protected economic liberties.[9]

We have since presented our theory of the Due Process of Law at length.[10] In our *William and Mary Law Review* article, we do *not* embrace the modern "substantive due process" doctrine that privileges certain rights identified by judges as "fundamental"—who then apply heightened scrutiny—while leaving all other liberties protected by "conceivable-basis review."[11] But

---

6 Evan Bernick, *Yes, the Fourteenth Amendment Protects Unenumerated Rights: A Response to Kurt Lash*, HUFFPOST (July 13, 2015), https://www.huffpost.com/entry/yes-the-fourteenth-amendm_b_7787926.

7 Kurt T. Lash, *Root Digs a Deeper Hole: The Equal Protection of Economic Privileges and Immunities*, LAW & LIBERTY (July 15, 2015), https://www.lawliberty.org/2015/07/15/root-digs-a-deeper-hole-the-equal-protection-of-economic-privileges-and-immunities/.

8 *See id.* (arguing that "Bingham refused to support the Civil Rights Act because: 1) he believed Congress needed an amendment granting them power to pass such an act, and 2) he believed that *all persons* should enjoy the equal protection of the law, not just citizens" and stating that "Bingham's final draft of the Fourteenth Amendment fixed both problems by including an equal protection clause that protected all persons").

9 *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 171 (2014) (identifying Citizenship Clause as "the text that constitutionalized the Civil Rights Act of 1866").

10 *See* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

11 *See id.* at 1647–56.

we do claim that the Clause protects unenumerated rights, such as those specified in the Civil Rights Act of 1866. We are pleased to see that Lash now joins us in doing so—albeit in a manner he has yet to specify.

B. The Due Process of Law Clause Protects the Natural Rights of Persons

Kurt Lash and we now agree that the Due Process of Law Clause protects the unenumerated natural rights of all people. Having presented our theory of why and how the Clause does so, we now await Lash's presentation of his own theory. In our piece, we maintained that due process of law requires a judicial assessment of whether a person who stands in jeopardy of his or her life, liberty, or property is actually guilty of violating the statute—so-called "procedural due process."[12] It also requires a judicial assessment of the "substance" of a statute to determine whether the statute was within the power of the legislature to enact.[13]

The Due Process *of Law* Clauses forbid the deprivation of a person's life, liberty, or property except through a valid "law." This proposition ought to be less controversial than it is. Consider what takes place when acts of Congress are found not to be necessary to carry into effect any proper enumerated power, or when statutes violate an enumerated right, such as the freedom of speech. In such cases, the "due process of law" requires a judicial forum in which such challenges can be heard and prohibits such acts—for we cannot call them laws[14]—from being used to deprive people of life, liberty, or property. Likewise, legislation that is not directed at an end that is properly within the reserved police power of states is an arbitrary *act* and not truly a *law* that can be used to deprive people—including noncitizens—of life, liberty, or property.[15]

In our article, we proposed that, to be valid, state laws actually be shown to be rationally related to a purpose that is properly within the "legislative" or police power of states. And we present a theory of the police power that is based on protecting the rights of individual members of the general public. This may sound like ordinary "rational basis review," and it is how rationality review was traditionally conceived.[16] However, it is not the *conceivable* basis review that courts have sometimes employed since the 1955 case of *Williamson v. Lee Optical*.[17]

---

12 *See id.* at 1660–61.

13 *Id.* at 1630 (emphasis omitted).

14 *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." (emphasis omitted)).

15 Barnett & Bernick, *supra* note 10, at 1655.

16 *Id.* at 1650–54.

17 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might* be thought that the particular legislative measure was a rational way to correct it.") (emphasis added)).

With this approach to the due process of law, the gap between the protection afforded by the Fourteenth Amendment to "citizens" by the Privileges or Immunities Clause, and that afforded to all "persons" by the Due Process of Law Clause narrows. We do not expect Kurt Lash to agree with our approach to implementing the Due Process of Law Clause. We anticipate he will limit the scope of judicial review to determining whether a state law is discriminatory—which we understand to be necessary but insufficient to assess whether a state law is unconstitutionally arbitrary. But hope springs eternal, and our newfound agreement about the Due Process of Law Clause is significant for at least two reasons.

First, even if Lash disagrees with us regarding *how* the Due Process of Law Clause protects natural rights to life, liberty, and property, as we expect, his view that it *does* protect natural rights reduces the significance of our disagreement about the Privileges or Immunities Clause. At issue with the Privileges or Immunities Clause is any additional rights that citizens alone are constitutionally entitled to enjoy. (With respect to both clauses, we think civil rights—that is, the legally protected natural rights—are to be protected absolutely.)

Second, our debate would then shift to the original meaning of the text—"the letter"—of the Due Process of Law Clauses in the Fifth and Fourteenth Amendments and how they best should be implemented consistent with their original "spirit" or function. This would be an entirely separate debate from the one in which we are engaged here. In sum, the fact that Lash now maintains that *unenumerated* natural rights are protected by the "enumerated" Due Process of Law Clause reduces our disagreement with respect to natural rights to one over *how*, not *whether*, these rights are protected by the Clause.

Further, because the Due Process of Law Clause is, first and foremost, a right to a judicial forum, some judicial protection of the privileges and immunities specified in *Corfield*[18] and in the Civil Rights Act is warranted by the original meaning of the Due Process of Law Clause. A legislative act that deprived citizens of any of the privileges and immunities of citizenship would not be a "law" and thus could not be used to deprive anyone of life, liberty, or property without violating the Due Process of Law Clause.

With respect to that debate over the scope of protection afforded by "the due process of law," every source Lash quotes in his reply to us in support of his view that the Due Process of Law Clause was thought to protect the rights identified in the Civil Rights Act of 1866 also supports our reading of this Clause. And any such judicial inquiry—even if limited to whether a statute unjustly discriminates—would require an examination of the *substance* of the statute, not merely the procedures by which the statute was enacted. On this, there is a growing originalist consensus that we described in our Article.[19]

18 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

19 *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677–79 (2012); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth*

So, after initially asserting that the rights contained in the Civil Rights Act of 1866 were protected by the Privileges or Immunities Clause, then by the Citizenship Clause, and then by the Equal Protection of the Laws Clause, Lash's settlement, at least for now and at least in part, on the Due Process of Law Clause is significant and welcome.[20]

C. The Fourteenth Amendment Protects the Fundamental Rights Enumerated in the First Eight Amendments

Another area of agreement is a very big deal: we share with Lash the view that the Fourteenth Amendment protects the rights enumerated in the first eight amendments to the Constitution, which along with the Ninth and Tenth Amendments are today referred to as "the Bill of Rights." We routinely come across people—typically political conservatives—who deny what is called the "incorporation doctrine." We are pleased to stand shoulder to shoulder with the formidable Kurt Lash in affirming that these rights are indeed protected from state infringement by the Fourteenth Amendment.

And we also stand with Lash in affirming that enumerated rights are properly protected as "privileges or immunities of citizens of the United States,"[21] and not as "incorporated" against the states through the Due Process of Law Clause of the Fourteenth Amendment. All that remains at issue is the constitutional status of unenumerated rights, say the right of family members to live together,[22] the right to raise one's own children,[23] the right to associate with others,[24] or the right to marry[25]—none of which are specifically enumerated anywhere in the Constitution.

D. Possible Agreement on "Enumerated Rights"

Another area of possible agreement will come as a surprise to readers. We might actually agree with Lash's thesis that the Privileges or Immunities Clause is limited to "enumerated rights"—as he sometimes uses the term. We say "possible agreement" because Lash and we may not be using the phrase "enumerated rights" in the same way.

Amendment, 58 EMORY L.J. 585, 595–96 (2009); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 505–06 (2010).

20 *See* Lash, *supra* note 1, at 655 ("As for legislation like the Civil Rights Act, which prohibited racially discriminatory 'codes,' such legislation would be authorized by the Due Process *and Equal Protection Clauses* in combination with Section 5." (emphasis added)); *id.* at 658 ("As far as the Civil Rights Act was concerned, they would know that the Joint Committee believed that *the Equal Protection and* Due Process Clauses prohibited racially discriminatory 'codes' and that Section 5 of the Amendment authorized federal legislation prohibiting such codes." (emphasis added)).

21 U.S. CONST. amend. XIV, § 1.

22 *See* Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (plurality opinion).

23 *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion).

24 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

25 *See Meyer*, 262 U.S. at 399.

Lash's use of the phrase "enumerated rights" continually shifts throughout his writings and within his reply. Sometimes he uses the phrase to describe textually specified rights, such as the right of "freedom of speech."[26] We continue to disagree that only such rights are protected by the Fourteenth Amendment. At other times, however, he uses "enumerated rights" far more broadly to refer to the protection of rights that is "authorized" by something in the text.[27] We can agree that the Fourteenth Amendment secures rights, the protection of which is authorized by the text, even if those rights do not appear in the text in itemized form.

We have already seen an example of this in Lash's insistence that the *enumerated* right to due process of law (either alone or in combination with the Equal Protection of the Laws Clause) authorizes the protection of what we would describe as *unenumerated* natural rights that are specified in the Civil Rights Act of 1866 but that are *not* in the text of the Constitution itself. As just explained, we agree that the Due Process of Law Clause authorizes such protection (while we may disagree about how and perhaps also why). But this is not the only place where Lash claims that apparently unenumerated rights are in fact enumerated because there is some textual hook upon which they can be hung.

Lash also suggests that the courts might be authorized by the Guarantee Clause to protect a right to vote in some circumstances, a right that he includes in the set of "enumerated rights" protected by the Privileges or Immunities Clause.[28] The Guarantee Clause reads: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[29]

This does not much look like an individual right, privilege, or immunity to us. Nevertheless, Lash claims that John Bingham "believed there were *enumerated texts* like the Republican Guarantee Clause that, on certain occasions, gave rise to congressional *authority* to regulate voting in the states."[30] He continues: "[T]he enumerated-rights understanding of . . . [t]hese rights [of citizenship] include not only those in the 1791 amendments but *all* enumerated rights, including those enumerated in the Republican Guarantee Clause and *the provisions enumerating the processes* of congressional representation."[31] And he maintains this notwithstanding that the right to vote itself is *not* enumerated.

We can play this language game, too. If there is an enumerated right to vote because of the Guarantee Clause's provision for "Republican . . . Government," there are also enumerated rights to marry, have children, live together with members of one's own family, etc., because all of these rights

26 *E.g.*, Lash, *supra* note 1, at 659.

27 *Id.* at 649.

28 *See id.* ("Bingham believed that there *were* enumerated rights that, in certain circumstances, authorized federal enforcement of the right to vote.").

29 U.S. CONST. art. IV, § 4.

30 Lash, *supra* note 1, at 650 (emphasis omitted and emphases added).

31 *Id.* (emphases added).

are "privileges or immunities of citizens of the United States." Put another way, if the courts and Congress are authorized to protect the right to vote by the "enumerated text" of the Guarantee Clause, so too may they be authorized to protect the rights to marry, have children, live together with members of one's own family, etc., by the "enumerated text" of the Privileges or Immunities Clause.

Assuming Lash is right about the Guarantee Clause, in both cases, the constitutional text denotes a concept that was associated at the time of ratification with a variety of referents that are not textually specified. Lash would presumably deny that the rights we have listed are among the "privileges or immunities of citizens of the United States," but he could hardly deny that, if indeed they were, they would be just as "enumerated" as the right to vote he derives from the Guarantee Clause.

For our part, we are agnostic, if not skeptical, that the Guarantee Clause protects an individual right of the sort that is protected as a privilege or immunity of citizenship. But we offer this as an example of how Lash includes textual *authorization* of the protection of a right not expressed in the text as part of his "enumerated-rights" thesis.

He makes this move a lot—especially when discussing how proponents of the Civil Rights Act of 1866 claimed they were "authorized" to enact the statute by the right enumerated in the Due Process of Law Clause of the Fifth Amendment.[32] At the same time, he disparages claims that the Privileges or Immunities Clause protects "unenumerated" rights like the right to contract—even though the latter is listed in the 1866 Act.[33] In passages such as these, Lash appears to be saying that his "enumerated-rights" thesis includes the protections of rights that are *not* specified in the text of the Constitution, when such protection is authorized by the text.

At one point he writes "[t]o be 'secured by the Constitution' is to be *enumerated* in the Constitution."[34] *When expanded in this way*, we can accept his "enumerated-rights" thesis. We too look to the text for authorization for the protection of unenumerated rights. We contend that the mass of privileges or immunities of citizens of the United States identified by Jacob Howard are "secured by the" text of the Privileges or Immunities Clause from state abridgment.

---

32 *Id.* at 638 ("Representative M. Russell Thayer of Pennsylvania, for example, insisted that the Due Process Clause all by itself authorized legislation like the Civil Rights Act . . . ."); *id.* at 644 ("It is possible, for example, that members believed that the Due Process Clause authorized the 1866 Act's protections of *citizens'* property rights, but also believed that *noncitizens did not have the same due process rights* when it came to the purchase and conveyance of real property."); *id.* at 655 ("As for legislation like the Civil Rights Act, which prohibited racially discriminatory 'codes,' such legislation would be authorized by the Due Process and Equal Protection Clauses in combination with Section 5.").

33 *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; Lash, *supra* note 1, at 592.

34 Lash, *supra* note 1, at 656 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard)).

Having identified this area of possible agreement, we must again confess our uncertainty.[35] Lash is not at all consistent on what he means by "enumeration." This happens to be a term that appears in the text of the Constitution itself: "The *enumeration* in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[36] The standard reading is that this is a reference to the rights that are textually specified in the foregoing eight amendments and elsewhere in the Constitution, for example, in Article I, Sections 9[37] and 10,[38] or in Article III, Section 2.[39] It does not ordinarily include any and every provision of the text, such as provisions governing congressional representation.

Lash is, of course, entitled to adopt any meaning of the phrase "enumerated rights" he pleases. But if he is going to use the phrase in a nonstandard manner, it is incumbent upon him to define his usage carefully and then employ it consistently. Otherwise readers—in which we include ourselves—will be confused.

There is a potential problem of false advertising. People are likely to read Lash's "enumerated-rights" thesis to be claiming that only enumerated *rights*—that is rights that are textually specified—may be "privileges or immunities of citizens of the United States." And yet, in responding to our critique of *this* thesis, he shifts to the protection of rights which may somehow be "authorized" by something "enumerated" somewhere in the text. We doubt that most readers will notice the shift. If they walk away persuaded by the avalanche of evidence he presents, it is most likely they will (wrongly) believe he has proven the first not the second claim.

To be fair, it is possible that it is Lash's sources and not Lash himself who are confused by this. But we doubt this. We suspect that Lash starts with a thesis that only "enumerated rights" are privileges or immunities of U.S. citizenship. Then, when pressed to explain his sources, he sees "enumerated rights" whenever a "provision" of the text is being invoked by his sources for authorization.

Our exchange with Lash will not end our scholarly debate over the original meaning of the Privileges or Immunities Clause. Lash is nothing if not indefatigable. He will have ample opportunities in the future to clarify what it is exactly he is claiming and we encourage him to do so.

---

35 We hope that this is a merely verbal dispute rather than a substantive disagreement—that Lash and we can agree about the meaning of the phrase "enumerated rights" even if we disagree about its extension (whether particular rights are in fact enumerated). *See generally* David J. Chalmers, *Verbal Disputes*, 120 PHIL. REV. 515 (2011).

36 U.S. CONST. amend. IX (emphasis added).

37 U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed.").

38 U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

39 *See* U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . .").

II. Where We Still Disagree

Of course, there is one remaining area where we still disagree with Kurt Lash: we think the evidence shows that citizens of the United States have "privileges or immunities" beyond those enumerated in what we today call the Bill of Rights, or elsewhere in the text. We believe that the express text of the Privileges or Immunities Clause—"No State shall make or enforce any law which shall abridge . . . ."—together with the text of Section 5 of the Fourteenth Amendment authorizes Congress and the judiciary to protect unenumerated "privileges or immunities of citizens of the United States." We are unpersuaded by his rebuttal. We cannot reiterate all the evidence we presented. About the evidence he attempts to rebut we will simply say the following.

A. Republicans' Understanding of Article IV

We claimed in our critique that antislavery Republicans developed an absolute-rights understanding of the Privileges and Immunities Clause of Article IV, Section 2 over the course of the antebellum period. Lash responds that "[t]here is no evidence, however, that any such transformation occurred at any point during the antebellum period. In fact, antislavery Republicans were deeply committed to the idea that the Comity Clause provided nothing more than equal access to a limited set of state-secured rights."[40]

Lash is wrong. While the weight of judicial authority supported the comity-only reading of Article IV, Section 2, we cite some judicial authority to support the Republicans' differing understanding. Lash takes issue with our reading of three of these cases but fails to mention the 1844 decision of Ohio Judge Nathaniel Reed, who held that the Privileges and Immunities Clause was designed "not to secure to the non-resident the same rights and indulgence with the resident in every State, but simply to secure to the citizen of the United States, whether a State resident or not, the full enjoyment of all the rights of citizenship, in every State throughout the Union."[41] Judge Reed then employs the "ellipsis" reading of the Clause years before it was asserted by his fellow Ohioan John Bingham.[42] Without some affirmative evidence, we decline to attribute Bingham's use of this argument to his having gotten it from his fellow Ohioan, though it would be a reasonable hypothesis.

In his reply, Lash stresses that antislavery constitutionalist Joel Tiffany cited only enumerated rights as privileges or immunities of citizens that are protected by Article IV in his 1849 book, *A Treatise on the Unconstitutionality of*

40 Lash, *supra* note 1, at 598.

41 Wm. H. Williams, *The Arrest of Non-Residents for Debt.—Constitutionality of the Law.*, 2 W.L.J. 265, 267 (1845).

42 *See id.* at 266 ("That 'the citizens (of the United States) of each State,' or belonging to each State, 'shall be entitled to all the privileges and immunities of citizens (of the United States) in the several States.'").

American Slavery.[43] Indeed, Tiffany's interpretation does sound a lot like Lash's interpretation of the Privileges or Immunities Clause. But Tiffany attributes this meaning *to Article IV, Section 2*, which Lash claims was unrelated to the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.[44] In the quoted passage, Tiffany *rejects* the comity-only reading of Article IV, Section 2 that had prevailed in the courts, as Lash correctly reports.[45] Evidently the absolute-rights understanding of what Lash insists upon calling the "Comity Clause" was *not* idiosyncratic after all.

Such sentiments continued to build among antislavery constitutionalists and affected the constitutional stance of the antislavery Republican Party. In our critique, we quote John Bingham's friend and mentor,[46] Joshua Giddings's proposed resolution at the National Republican Convention in May of 1860:

> That we deeply sympathize with those men who have been driven, some from their native states and others from the states of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic party responsible for this gross violation of *that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.*[47]

This was not merely the opinion of one "radical" Republican. At its convention, the party *unanimously* adopted Giddings's resolution,[48] which "formally endorsed an absolute-rights reading of the Clause, and one that would protect citizens *even in their own state.*"[49] Lash doesn't address this resolution, which contradicts his strident claim that "[i]t was essential to [antislavery Republicans'] constitutional theory that Article IV, Section 2 be understood as providing *nothing other than* the relative rights of sojourning citizens."[50] By 1860, at least, this claim is clearly wrong.

In his reply, Lash notes Republican Giles Hotchkiss's response to Bingham's proposal to protect Article IV privileges and immunities: "Hotchkiss did not oppose enforcing the rights of Article IV, rights that Hotchkiss described as 'provid[ing] that no State shall discriminate *between its citizens*

43 Lash, *supra* note 1, at 607–08.

44 *Id.* at 596 (claiming that "antebellum historical evidence reveals the existence of an altogether different category of rights, privileges, and immunities [from those protected by Article IV]—those belonging to 'citizens of the United States'").

45 *Id.* at 607–08.

46 Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment 42 (2013) (describing how Giddings took Bingham "under his wing" and "was his closest professional confidant").

47 Proceedings of the First Three Republican National Conventions 165 (Minneapolis, Charles W. Johnson 1893) (emphasis added).

48 John Hutchins, *Reminiscences of the Thirty-Sixth and Thirty-Seventh Congresses: XII*, 12 Mag. W. Hist. 63, 69 (1890).

49 David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 Notre Dame L. Rev. 1117, 1153 (2016).

50 Lash, *supra* note 1, at 596.

and give one class of citizens greater rights than it confers upon another.'"[51] Lash employs this quote to stress Hotchkiss's nondiscrimination reading of Article IV. He apparently missed the fact that, by reading Article IV as barring discrimination "between its citizens," Hotchkiss is rejecting the comity-only reading of Article IV that Lash insists was so essential to antislavery Republicans.

B. Jacob Howard's 1866 Speech

Lash moves heaven and earth to explain away the conventional scholarly interpretation of Jacob Howard's speech. He goes so far as to draw attention to the fact that Howard was a substitute sponsor of the Amendment who did not support it in committee, even though Lash provides no evidence of Howard's unreliability. Few, if any, speeches related to the Privileges or Immunities Clause have received more academic attention, and Lash's reading is idiosyncratic. At this point we can do little more that to ask readers to reread Howard's speech to see if it sounds like he is referring to two sets of rights: one set of rights that are to be protected absolutely; and another set that are to be protected from discrimination *only* when sojourning within another state.

At times in his writings, Lash intimates that the *Corfield* rights listed by Howard are to be generally protected against discrimination.[52] But that is not his current thesis. His current thesis is that these rights are only to be protected against discrimination *when sojourning in another state.* Readers can judge for themselves whether this is the information conveyed by Howard's words. True, we are part of a different linguistic community and our linguistic intuitions may differ from those of Howard's contemporaries, but Lash does not identify any contemporary who understood Howard as Lash does.

We pointed out that the notes for Howard's speech suggest that he was not originally going to mention enumerated rights at all, but added them on auxiliary sheets 2a and 2b.[53] Assuming page 3 was originally meant to be read following page 2, Howard was referring to *Corfield* rights alone when he wrote: "By the first clause, each state is prohibited from restricting these fundamental civil rights of citizens, whatever may be their nature or extent."[54] There is nothing here about "when sojourning in other states," or that limits protection to discrimination. Nor is there anything like that in his speech as delivered.

It bears emphasizing that Howard refers to *Corfield* rights as the "fundamental civil right*s* [plural] of citizens." Lash's reading treats Howard's

51 *Id.* at 635 (emphasis added) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss)).

52 This is the stance he now seems to attribute to the Due Process of Law Clause's protection of natural rights.

53 *See, e.g.*, *id.* at 657 n.337 (referring to the "equal protection rights of Article IV").

54 *See* Notes of Jacob Howard on the Fourteenth Amendment's Privileges or Immunities Clause (1866) [hereinafter Notes of Jacob Howard], http://www.tifis.org/sources/Howard.pdf [http://perma.cc/V6HA-X2YK].

speech as identifying a *single* civil right of U.S. citizens: the right to be free from discrimination when sojourning in another state. This point is likely to be lost in all the verbiage, but we cannot stress it too much. "Civil rights" is not the same as "civil right."

In a footnote, Lash responds: "If . . . Howard originally considered naming only the equal protection rights of Article IV as 'privileges or immunities,' then this might reflect Howard's personal preference for such a limited clause (as reflected in his votes in the Joint Committee)."[55] Notice Lash's use of the phrase "the equal protection rights." Those are Lash's words, not Howard's, who says nothing of the kind.

Nor does Howard's explanation track the nondiscrimination language he favored in committee. In committee, Howard proposed the following: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[56] While this proposal only protected these rights against discrimination, not absolutely, it would have protected all these "civil rights" of citizens from discrimination *by their own states.* (And in his notes for his speech he identifies *Corfield* rights as "these fundamental civil rights.")[57]

This isn't Lash's thesis, and it isn't the meaning he attributes to Howard's speech. Again, Lash claims that Howard is referring only to a single civil right of *sojourners* to be free of discrimination when traveling in another state; Howard is not referring to the right of all citizens to be protected against discrimination by their own states.

In our view, Howard's words carry a broader meaning. They did not convey only the "equal protection of rights" within a state; nor did they convey only the right of sojourners to be free from discrimination with respect to these rights when traveling in another state. Instead, they conveyed the meaning Howard's notes shows he intended to convey: "[E]ach state is prohibited from restricting these fundamental civil rights of citizens, whatever may be their nature or extent."[58]

Lash's only other responses are denial ("Nothing about these handwritten notes, however, supports a fundamental-rights reading")[59] and rank speculation ("they seem to indicate that Howard received some last-minute pressure, perhaps from his committee colleague John Bingham, to say something about protecting the Bill of Rights—Bingham's major purpose for the Clause").[60] Lash's denial is unjustified. Howard's notes clearly support the conventional interpretation of Howard's speech as affirming the existence of one mass of fundamental privileges or immunities of citizens drawn from two textual sources in the Constitution: Article IV and the first eight amend-

55 Lash, *supra* note 1, at 657 n.337.

56 BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83 (1914).

57 Howard, *supra* note 54, at 3.

58 *Id.*

59 Lash, *supra* note 1, at 657 n.337.

60 *Id.*

ments. It is conceivable that Howard was misunderstood by his audience, but in view of the consistency between his notes and the natural reading of his words, and the lack of any evidence that the public understood him as Lash does, we do not think it is plausible.

It is worth noting as well that Howard does not endorse Lash's current view that the Privileges or Immunities Clause protects any and all enumerated rights that are found *outside the first eight amendments*. There is no mention, for instance, of any qualified right to vote derived from the Guarantee Clause. And neither does Lash's favorite source in Lash's favorite speech.

C. John Bingham's 1871 Speech

In his reply, Lash goes to great lengths to disparage postratification evidence. "All postratification evidence is necessarily weak as a source of original understanding."[61] And this: "All postratification 'evidence' is problematic as a source of original ratifier understanding . . . ."[62] In our Article, we too qualified the probative value of such evidence: "We do not offer here a theory of the discount rate that should be used in assessing the credibility of postratification evidence."[63]

But Lash then takes us to task. "Barnett and Bernick spend much time discussing postratification evidence—a telling choice that reveals the paucity of preratification evidence supporting their theory."[64] This is unfair. Our choice to discuss postratification evidence is a result of the subject of our critique spending much time discussing postratification evidence. As we wrote:

> We are surprised in two respects by the postratification evidence curated by Lash. First, we are surprised that Lash interprets this evidence as being generally consistent with his ERO theory. Second, we are surprised that Lash neglects a wealth of other evidence from the same timeframe, which suggests that the ERO understanding did not take hold.[65]

It is for this reason we present some of the evidence Lash omits and question his interpretation of the evidence that he presents.

For a guy who now criticizes harshly the use of postratification evidence, Lash spends an inordinate amount of time on John Bingham's 1871 speech in which Bingham does indeed deny that the privileges or immunities of U.S. citizens includes *Corfield* rights. And he does so again in his reply. As before, Lash flatly asserts that Bingham's speech "is an unambiguous defense of the enumerated-rights reading of the Privileges or Immunities Clause and a refutation of the fundamental-rights theory of the Clause."[66]

---

61 *Id.* at 593.

62 *Id.* at 643.

63 Barnett & Bernick, *supra* note 2, at 584.

64 Lash, *supra* note 1, at 670.

65 Barnett & Bernick, *supra* note 2, at 575.

66 Lash, *supra* note 1, at 671.

We think it is correct to say that Bingham is *rejecting* the proposition that *Corfield* rights are protected absolutely. "Refuting" connotes successful disproof, and we don't think Bingham was successful. But Lash is wrong to interpret Bingham as defending "*the* enumerated-rights theory" of the Clause—at least if Lash is referring to his own "enumerated-rights reading" of the Clause.

Lash, of course, insists that the Privileges or Immunities of citizens of the United States includes all and every enumerated personal right—invoking, as we have seen, even "enumerated provisions" like the Guarantee Clause that make no reference to personal rights. But that is not what Bingham said in 1871. As did Howard in his 1866 speech introducing Section 1 to the Senate,[67] Bingham limits the set of enumerated rights he says are protected to those in the first eight amendments.

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the *first eight amendments* to the Constitution of the United States. Those eight amendments are as follows: [quotes the first eight amendments.][68]

In our critique we allow that "chiefly defined" suggests that "first eight amendments" isn't exhaustive.[69] But if Bingham does not specify exactly what other privileges or immunities there might be, he certainly does not articulate Lash's current theory that they include any and every enumerated right or provision found elsewhere in the text. So, while Bingham's speech does not support our (and Howard's) reading of the Clause, it doesn't support Lash's either.

Finally, Lash acknowledges that "[Samuel] Shellabarger had tried to argue that privileges and immunities protected by the Fourteenth Amendment were the same as the 'fundamental' rights listed by Justice Washington in *Corfield v. Coryell*, only now transformed into rights applicable against one's own state."[70] This means that Shellabarger adopted our view, and the view of Jacob Howard, of the scope of the Privileges or Immunities Clause and rejected Lash's position in 2019 and whatever was Bingham's view in 1871. That is a serious mark against Lash's claim to have established an original public meaning to the contrary.

---

67 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) ("Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . .").

68 CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham) (emphasis added); *see also id.* ("Jefferson well said of *the first eight* articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights." (emphasis added)).

69 Barnett & Bernick, *supra* note 2, at 576.

70 Lash, *supra* note 1, at 674.

D. Omitted Postratification Evidence

While he begins his reply to us with Bingham's 1871 speech, Lash again neglects Howard's 1869 speech in which Howard reiterates the explanation he gave in 1866:

> 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."[71]

Once again, Howard makes no reference to protecting the rights of citizens sojourning in another state. Nor does he limit himself to discrimination by states or what Lash calls "equal protection rights." Instead Howard says the Clause "secure[s] absolutely" the rights that had been associated with Article IV, Section 2. Moreover, in this summary, Howard omits any reference to the enumerated rights in the first eight amendments, as he did in his original notes for his 1866 speech before adding pages 2a and 2b.[72]

Howard's 1869 summary is entirely consistent with his 1866 speech. It's true that in his 1869 speech he equates the set of privileges or immunities protected by the Fourteenth Amendment with the set of rights protected by Article IV, Section 2, and not the first eight amendments. But in his 1866 speech he identifies the "privileges or immunities of citizens of the United States" as including both *Corfield* rights and the personal guarantees specified in the first eight amendments.

Howard's 1869 speech is therefore consistent with the antislavery Republican position that these sets of rights together comprised the "privileges and immunities" to which Article IV, Section 2 refers. In sum: the set of "privileges or immunities" in the Fourteenth Amendment is the same as the set of "privileges and immunities" in Article IV, Section 2 (the 1869 speech)—and *this* set consists of *Corfield* rights plus those in the first eight amendments (the 1866 speech).

As this is a postratification summary, we do not place great stock in any of this. But Howard's speech flies in the face of Lash's theory and undermines Lash's reading of Howard's 1866 speech. And, for what it is worth, Howard's 1869 speech is also closer in time to ratification than Bingham's 1871 speech and consistent with what Howard said about the Privileges or Immunities Clause throughout the time period canvassed by Lash and ourselves.

In contrast, as we have detailed, Bingham's 1871 speech was unusual. It is "the only speech presented by Lash in which one of the framers of the

71 CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Howard) (emphases added).

72 *See* Howard, *supra* note 54.

Fourteenth Amendment clearly denies that *Corfield* rights are among the privileges and immunities of national citizenship."[73] It is also inconsistent with Bingham's response to Victoria Woodhull's petition in support of women's suffrage—issued just two months previous.[74] In that response, Bingham plainly stated that the set of rights protected by Article IV, Section 2 is identical to the set of rights protected by the Privileges or Immunities Clause.[75] Howard's 1869 speech suffers from no such subsequent problems.

And while in his previous scholarship Lash canvasses materials from the 1870s, he still neglects how heavily Republicans relied on the Privileges and Immunities Clause in justifying the bill that became the Civil Rights Act of 1875.[76] In this bill, Congress protected against racial discrimination in public accommodations, common carriers, and places of public amusement. Only after the Supreme Court's ruling in the *Slaughter-House Cases*[77] did many Republicans shift to the Equal Protection of the Laws Clause as a constitutional hook for this particular legislation.[78] True, the Civil Rights Act of 1875 was about discrimination, not the absolute protection of these civil rights. But Republicans clearly did not hold Lash's Enumerated Rights Only reading of the Privileges or Immunities Clause.[79]

---

73 Barnett & Bernick, *supra* note 2, at 576 (emphasis omitted).

74 S. Misc. Doc. No. 41-16 (1870).

75 Barnett & Bernick, *supra* note 2, at 526, 577.

76 Michael McConnell has summarized Republicans' initial reliance upon, and understanding of, the Privileges or Immunities Clause thus:

> To the supporters of the civil rights bills during the Reconstruction period, . . . [t]he Fourteenth Amendment (first by virtue of the Privileges or Immunities Clause, later shifting to the Equal Protection Clause) meant that legally enforceable civil rights are the same for all citizens (or, after the shift to Equal Protection, all persons), without distinction on the basis of race, color, or previous condition of servitude.

Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 993 (1995).

77 83 U.S. (16 Wall.) 36 (1873).

78 McConnell, *supra* note 76, at 1002 ("Republican supporters of the civil rights bill turned to the Equal Protection Clause as a solution to the *Slaughter-House* problem because that Clause was not limited to rights of federal citizenship.").

79 We cannot resist a response to Lash's charge that we have "fail[ed] to understand" Frederick Douglass's views of the Fourteenth Amendment. Lash, *supra* note 1, at 668. Lash appears to think that we are unaware that Douglass opposed the Fourteenth Amendment and championed the ratification of the Fifteenth Amendment because he did not believe that the Fourteenth Amendment conferred the right to vote. *Id.* at 668–69. Not so. We are just unpersuaded by Lash's effort to enlist Douglass as a champion of his enumerated-rights-only theory.

We pointed out in our critique that in an *Atlantic* essay highlighted by Lash, Douglass included (unenumerated) voting rights among the privileges and immunities protected by Article IV. Barnett & Bernick, *supra* note 2, at 574 & n.426–27. We argued that Douglass's denial that there was "any difference between a citizen of a State and a citizen of the United States" implied that he believed voting rights were among the privileges and immunities of U.S. citizens. *Id.* (quoting Frederick Douglass, *Reconstruction*, Atlantic Monthly, Dec. 1866, at 761, 765). We contended that Douglass opposed the Fourteenth Amend-

Finally, in insisting on his interpretation of the original public meaning of the Privileges or Immunities Clause, Lash never really engages the arguments of the four dissenting Justices in *Slaughter-House*. These Justices insisted that the privileges or immunities of citizens of the United States included the (unenumerated) right to pursue a lawful occupation.[80] Though a minority of four, their reading of the historical record negates any suggestion that "libertarians" are today making things up.

Readers today are entitled to evaluate the originalist reasoning—such as it is—of Justice Miller's majority opinion alongside that of the dissenters and reach their own conclusions. This is what we do when evaluating Justice Harlan's solo dissent in *Plessy v. Ferguson*.[81] And there is a widespread consensus among constitutional scholars of all political stripes—not merely among "libertarians"—that the dissenters had the better of the originalist argument.[82] Lash is the outlier here, along with a couple others we mention in our critique.

E. Nonstandard Uses of "the Bill of Rights"

Lash apparently wishes to dispute the modern scholarship by Pauline Maier, Gerard Magliocca, and Michael Douma showing that the use of the phrase "the bill of rights" to refer to the first ten amendments did not become standard until the twentieth century.[83] Readers can decide for themselves whether Lash has the better of this dispute. This is a relatively minor point we offered to show that, when mid-eighteenth-century speakers

---

ment because he believed Section 1's promise of citizenship was contradicted by Section 2's implicit denial of voting rights. *Id.* Lash does not rebut any of these claims.

Any doubt that Douglass believed that the privileges and immunities of citizenship encompassed unenumerated rights ought to be dispelled by Douglass's criticism of the Supreme Court's decision in the *Civil Rights Cases* to hold unconstitutional key provisions of the Civil Rights Act of 1875. These provisions guaranteed people nondiscriminatory access to inns, public conveyances on land or water, theaters, and other places of public amusement. Douglass charged the Court with "admit[ting] that a State shall not abridge the privileges or immunities of citizens of the United States, but commit[ting] the seeming absurdity of allowing the people of a State to do what it prohibits the State itself from doing." Frederick Douglass, Speech at the Mass-Meeting Held at Lincoln Hall: The Civil Rights Case (Oct. 22, 1883), *in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER 392, 400 (Philip S. Foner ed., 1955).

80 Slaughter-House Cases, 83 U.S. (16 Wall.) at 109 (Fields, J., dissenting).

81 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

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

83 *See* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 6 (2018); Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 593, 609–611 (2017) (finding that "Bill of Rights" became defined as the first ten amendments by the late 1920s and early 1930s); Pauline Maier, *The Strange History of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 497, 506–511 (2017) (finding that the "Bill of Rights" did not emerge as an icon until the 1930s).

used the phrase, "the bill of rights," twenty-first-century scholars cannot be certain exactly what they meant by it without more context. Claims by Bingham and others that the Privileges or Immunities Clause would apply "the bill of rights" to the states must be handled with care. In addition, it is useful to rebut charges made by Raoul Berger, Charles Fairman, and other scholars of the Fourteenth Amendment that Bingham was confused and not particularly bright because he said that Article IV, Section 2 was part of "the bill of rights."[84]

Back then, no one necessarily meant what we mean today when speaking of "the Bill of Rights." For example, when explaining his proposal to give Congress the power to enforce "all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property,"[85] Bingham noted that "[e]very word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States."[86] After quoting both Article IV, Section 2, and the Fifth Amendment, he referred to them as "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution."[87]

Lash asserts that Bingham's use here of the term "bill of rights" to refer to Article IV, Section 2 and the Fifth Amendment might have been idiosyncratic.

> Whether Bingham originally held an idiosyncratic view of the federal Bill of Rights and later changed his mind, or whether he originally spoke only rhetorically in an effort to emphasize the role Article IV played in obligating the states to respect the federal Bill of Rights, makes no difference to the enumerated-rights reading of the Privileges or Immunities Clause.[88]

In other words, Lash doesn't know which it is and is just guessing.

Lash is also wrong on the merits. It makes a big difference whether Bingham and others understood "the bill of rights" to encompass only a pair of enumerated rights, all enumerated rights in the first eight amendments, or all enumerated rights, full stop. Only one of those understandings is consistent with Lash's distinctive thesis.

In his reply, Lash again quotes Bingham as saying his proposal "is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it

---

84 *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 182 (2d ed. 1997) (describing Bingham as a "careless, inaccurate, stump speaker" who made "confused, contradictory utterances"); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 26, 31 (1949) (describing Bingham as "befuddled," "careless").

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

86 *Id.* (statement of Rep. Bingham).

87 *Id.*

88 Lash, *supra* note 1, at 630.

stands in the Constitution to-day. It 'hath that extent—no more.'"[89] Lash then says that "Bingham's reference to the federal Bill of Rights would have been understood as a reference to rights enumerated in the 1791 amendments."[90] But if the meaning of a word (or phrase) is its use in language[91] and "the bill of rights" was not conventionally used to denote the first eight amendments, then we do not know this to be true. And, as Lash grudgingly acknowledges, Bingham himself used the term "bill of rights" to refer to Article IV, which was enacted in 1789.

If Maier, Magliocca, and Douma are correct that there was no standard usage, then Bingham's use was not idiosyncratic. In our article we reprised what Magliocca says a "bill of rights" generally meant: a declaration of rights, usually found at the head of a constitution. Why does this matter?

We raised this issue in our critique because, in his scholarship, Lash repeatedly uses quotes with the term "the bill of rights" to suggest to his modern readers these speakers were all referring to the first eight or ten amendments as we would today, when in fact they were referring to a variety of sets of rights—including the "privileges and immunities" protected by Article IV, Section 2. We also granted that this was an understandable mistake both for him and his readers to make before the revisionist scholarship existed. It is far less understandable for Lash to continue to insist upon it now.

CONCLUSION

For all the focus on the trees it is important not to lose sight of the forest. This is a debate about what other protections citizens enjoy as citizens under the Privileges or Immunities Clause over and apart from what they enjoy as persons under the Due Process of Law Clause and the Equal Protection of the Laws Clause. In particular, it is a debate over whether the Fourteenth Amendment protects the fundamental rights identified in *Corfield v. Coryell* and the Civil Rights Act of 1866, both absolutely and against discrimination.

Lash now concedes these rights are protected by the Fourteenth Amendment. The debate is over how. Lash contends that these rights are only protected from discrimination by the Due Process of Law Clause and Equal Protection of the Laws Clause. States may deprive their citizens of these fundamental rights provided they deprive all their citizens equally. We contend that these are protected by the Privileges or Immunities Clause in the same manner as the rights enumerated in first eight amendments.

But in either case, all these rights are "enumerated" in Lash's (sometimes) sense of the word insofar as their protection is expressly authorized by

89 *Id.* (quoting Cong. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham)).

90 *Id.*

91 *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43, at 25 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell Publishing, rev. 4th ed. 2009) (1953).

the original meaning of the text of the Constitution—properly interpreted. Recall, Lash insists Article IV, Section 2 is itself an enumerated right of sojourning citizens, and with respect to sojourners the "privileges and immunities" to which it referred are protected by the Privileges or Immunities Clause of the Fourteenth Amendment. So do we.

The disagreement is now over the scope of its protection. On Lash's understanding of "enumerated rights," the "privileges and immunities" to which Article IV refers are protected by the Fourteenth Amendment only from discrimination when American citizens are sojourning in other states. We think the Fourteenth Amendment also protects American citizens from discrimination by their own states, as well as from when their states abridge the rights of all their citizens equally. But *the set of rights being protected*—which includes the personal guarantees of the first eight amendments as well—*is the same* on both accounts.

Our article was intended as a critique of Kurt Lash's theory of the Privileges or Immunities Clause. Notwithstanding his lengthy rebuttal, we believe that Lash has still not proven his case. Serious questions, concerns, and problems with Lash's theory remain unresolved. In future work, we will advance additional evidence on behalf of our reading of the Privileges or Immunities Clause.

Our account will be deeply informed by the "republican" conception of citizenship—a conception affirmed by the Citizenship Clause that precedes it. And we will show how the meaning and operation of the Privileges or Immunities Clause fits together with the original meaning of the Due Process of Law and Equal Protection of the Laws Clauses. Finally, we will identify a practical method for judges to identify the privileges or immunities of American citizenship that is grounded in our history and our traditions.

But this is merely a promissory note. Before we could deliver on this promise we needed to explain exactly why, not only scholars, but public officials and ordinary citizens need a better theory of the Privileges or Immunities Clause than the one provided by Kurt Lash.