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THE INTENT OF THE FRAMER: JOHN BINGHAM'S FOURTEENTH AMENDMENT

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It is not often that a single individual is responsible for constitutional provisions as important as Sections 1 and 5 of the Fourteenth Amendment. My project in this Essay is not to engage in a study of original intent, or original public meaning, or however we wish now to characterize the originalist project, but to engage in a quest for John Bingham's Amendment, for understanding the Amendment as he understood it. Whether this gives us an authoritative reading of the Amendment for the purposes of constitutional interpretation and adjudication is a separate issue. I treat Bingham as an author and the text of Sections 1 and 5 as one would treat a text in political philosophy or constitutional theory by any author.

It is not often that a single individual is responsible for constitutional provisions as important as Sections 1 and 5 of the Fourteenth Amendment. By "responsible" I mean that John Bingham, Republican congressman from Ohio, was the author of the text of these Sections (with the exception of the opening definition of citizenship). He was not, of course, solely responsible for the Amendment as it became part of the Constitution, in that he shared responsibility with at least the two houses of Congress and the state ratifiers. But his unique role in supplying the text of the Amendment leads me to my project in this Essay: not to engage in a study of original intent, or original public meaning, or however we wish now to characterize the originalist project, but to engage in a quest for *Bingham's* Amendment, for understanding the Amendment as he understood it. Whether this gives us an authoritative reading of the Amendment for the purposes of constitutional interpretation and adjudication is a separate issue, one that I will, at most, only touch on here. I wish to treat Bingham as an author and the text of Sections 1 and 5 as one would treat a text in political philosophy or constitutional theory by any author. Obviously, the Amendment understood as he

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understood it should have some bearing on the official or legal meaning of the Amendment, but, as I said, that is a somewhat separate question.

In treating Bingham as an author or even as a poet, whose poem was the text of Sections 1 and 5, I do not mean to treat him as a complete solitaire. He developed his text in colloquy with colleagues in the House and on the Joint Committee on Reconstruction, but I am thinking of these other participants as equivalent to, say, Ezra Pound in "The Waste Land" of T.S. Eliot, sounding boards and perhaps advisors on the rhyme scheme.

I have a partly personal reason for my project in this Essay. Many years ago, I submitted to a law review an article on the Amendment, which drew substantially on Bingham. Alas, the article was rejected with the student editor's comment that everyone knows Bingham was an incoherent thinker and a bloviating speaker and thus almost completely unreliable as a constitutionalist. That view no longer holds in the literature. Most recent studies of the Amendment's origins rely heavily on Bingham and treat him with respect. But they consider him as part of their quest for the original public meaning of the Amendment and therefore do not centrally aim to bring out *his* understanding of his handiwork. My focus is thus different from most of the recent and past literature and my argument is different as well. I differ in my emphases, most notably, in attending to Bingham's early antebellum constitutional thinking. Among other things, this focus leads me to diminish the role of the Privileges or Immunities Clause in Bingham's thinking. While other recent scholars give pride of place to that Clause, I emphasize far more his concern with what became the Equal Protection and Due Process Clauses.

My different emphases are related to one of my chief concerns—to explain a puzzling claim made by Bingham during the debates on the Amendment. Very early in the Thirty-Ninth Congress Bingham forecast for the House of Representatives an amendment then under consideration by the Joint Committee on Reconstruction, of which he was a member. That committee, he told the House,

> has under consideration [a] general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guarantied to him from the beginning, but which guarantee has unhappily been disregarded by more than one State of this

> Union, defiantly disregarded, simply because of a want of power in Congress to enforce that guarantee.[1]

Bingham refers here to an early version of what became the Fourteenth Amendment, which differed from the adopted version in one particularly striking way: it directly provided Congress with the power to protect rights rather than forbade States from abridging rights or arbitrarily depriving citizens of the objects of their rights.[2]

Somewhat later in the debates, speaking of a draft amendment still cast as an empowerment of Congress but substantively even closer to the amendment as ultimately adopted, Bingham made the same point in somewhat different language:

> I ask the attention of the House to the . . . consideration that the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.[3]

Finally, in the debate on Sections 1 and 5 in the form taken by the adopted amendment (sans the opening definition of citizenship) he again stated:

> There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do . . . that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[4]

The amendment enacts provisions to prevent the States from abridging rights, but the rights themselves have been present in the Constitution before the amendment:

> [T]his Amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the

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1 CONG. GLOBE, 39th Cong., 1st Sess. 422–35 (1866) (statement of Rep. Bingham), *as reprinted in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 55, 57 (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 2].

2 LASH, Vol. 2, *supra* note 1, at 7.

3 CONG. GLOBE, 39th Cong., 1st Sess. 1033–35 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 99, 100.

4 CONG. GLOBE, 39th Cong., 1st Sess., 2530–45 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 170, 178.

> Republic, although many of them have assumed and exercised the power, and that without remedy.[5]

Let us call this the theory of preexisting (personal) rights and (state) obligations. This is puzzling because the Amendment does indeed seem to add previously nonexistent rights protections and state obligations to the Constitution. I argue below that the key to understanding this theory of preexisting rights and obligations, and thus to Bingham's theory of the Amendment, lies in his pre-Civil War constitutional pronouncements.

I thus spend much of my space on the antebellum Bingham and by most standards scant the actual debates on the Amendment in the Thirty-Ninth Congress. But I try to show briefly at the end how the materials gleaned from his earlier pronouncements supply a key to Sections 1 and 5 of the Amendment as he understood them.

I. POLITICAL PHILOSOPHY

Bingham was no constitutional virgin when he came to draft the Fourteenth Amendment. He had entered Congress in 1855 and was immediately swept up in constitutional and even philosophical debates raised by the controversies over slavery in the territories. Recent studies of the Fourteenth Amendment begin with surveys of "The Early Origins of Privileges or Immunities,"[6] or "On Antebellum Privileges and Immunities."[7] This being a study of Bingham's constitutional thought, I begin with Bingham himself. There is actually very little to no evidence that he knew of, or paid attention to, the prehistory of privileges and immunities that recent scholars so much concern themselves with.[8] Bingham's earliest expressions that appear relevant to the Fourteenth Amendment occur rather in the context of congressional debates over slavery in the territories. At issue was not legislation in the ordinary sense but matters revolving on the admittance of Kansas and Oregon to the Union, a distinction important for grasping Bingham's constitutional arguments. In the case of Kansas, Bingham sided with his fellow Republicans and opposed the Lecompton Constitution;[9] in the case of Oregon, the

5 *Id.*

6 RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 41–60 (2021).

7 KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 9–66 (2014).

8 Though consider *id.* at 72, 277.

9 CONG. GLOBE, 35th Cong., 1st Sess. 399 (1858) (statement of Rep. Bingham).

Republican Party split and his side lost in opposing the admittance of Oregon.[10]

Although Bingham happily engaged in nitty-gritty constitutional exposition, he regularly rooted it in normative political philosophy. He understood the basics of political philosophy very similarly to the way in which the American Founders and his fellow Republicans did: in terms of the natural rights and social compact theory of government as developed preeminently by John Locke. As Bingham said in 1857,

> [t]he Constitution is based upon the EQUALITY of the human race . . . . A State formed under the Constitution, and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. . . . [T]he rights of human nature belong to each member of the State, and cannot be forfeited but by crime.[11]

In his speech on Oregon, he repeated that thought almost verbatim and added to it the affirmation of "natural rights [as] those rights common to all men . . . to protect which, not to confer, all good governments are instituted."[12] Clearly he is referring to the same philosophy of government that found expression in the Declaration of Independence: men are created equal in the sense that no human being has a natural or divine right to rule another, but insecurity of rights without rule is so severe that the equal individuals recognize that a body with coercive power, government, is necessary to cure the rights insecurity of life without government.[13]

The task of government follows for Bingham from this account of its origins: "to establish justice, to promote the general welfare, and to secure to each and every person . . . the absolute enjoyment of the rights of human nature, which are as imperishable as the human soul, and as universal as the human race."[14] From the original equality of all and the task of securing rights follows the standard that Bingham constantly evokes: "the equal protection of each."[15] The context makes clear that he means by this the equal protection of the natural rights of each by law. This more expansive version of his central

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10 *Statehood Survives Congressional Morass*, OREGON.GOV, https://sos.oregon.gov/archives/exhibits/constitution/Pages/after-state.aspx [https://perma.cc/VU4D-55S5].

11 LASH, *supra* note 7, at 83 n.66 (quoting CONG. GLOBE, 34th Cong., 3d Sess. 139–40 (1857) (statement of Rep. Bingham)).

12 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) *as reprinted in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 152, 156 (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 1].

13 *See* MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM 216–26 (2002).

14 CONG. GLOBE, 34th Cong., 3d Sess. 136 (1857) (statement of Rep. Bingham).

15 *Id.* at 140.

thought was on display at the very opening of the Thirty-Ninth Congress, the Congress that proposed the Fourteenth Amendment. That Congress opened on December 4, 1865, and on December 6 Bingham "introduced a joint resolution to amend the Constitution of the United States so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights [of] life, liberty, and property."[16]

On the day before that Thaddeus Stevens had proposed a different constitutional amendment: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race [or] color."[17] Stevens's draft amendment has clearly a nondiscrimination thrust that makes it particularly well targeted to the black codes that had recently popped up all through the South and had definitely discriminated on the basis of race and color. Bingham's amendment differs substantially. It is not a formal requirement of universally equal laws for whites and blacks alike but has a substantive focus on protection of the particular set of natural rights. Equality is the standard, but only for the protection of those specified rights. In this sense it is more limited than Stevens's proposal. Bingham's draft could apparently permit discrimination, even on the basis of race, with respect to other matters. His draft calls for equal protection of the specified rights, and it does not single out race and color as specifically impermissible bases for unequal treatment. In this respect it is broader than Stevens's proposal. A final difference concerns the protected class in each draft. Stevens's concern is with citizens; Bingham's is with all persons. That difference results from Bingham's focus on protection of natural rights, which, as we have seen, he believed inhered in every human being and was the basis for government. We might notice also that neither draft mentions privileges or immunities. In line with his theoretical pronouncements, Bingham is preeminently concerned with natural rights.[18]

Bingham appeared to believe that it was the glory of America that its constitutions embodied these cardinal truths of political philosophy. American federalism complicated matters substantially because the different levels of government potentially stood in different relationships to the natural rights and their securing. To sort

16 CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 22, 22.

17 CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 22, 22.

18 The difference between Bingham's and Stevens's proposals goes a long way toward discrediting the interpretation of the Amendment in ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020).

this out properly was indeed one of the primary tasks of his amendment.

II. CITIZENSHIP AND SUFFRAGE

Before the war Bingham was not considering an amendment, but faced instead the pressing issue of congressional power over slavery in the territories as raised by the Kansas-Nebraska Act and the *Dred Scott* case. He considered the Kansas-Nebraska Act unconstitutional as violative of the Fifth Amendment's Due Process Clause, which prohibited deprivation of liberty without due process of law.[19] The Kansas-Nebraska Act instituted Stephen Douglas's popular sovereignty policy for establishing or forbidding slavery in the territories, which in effect, as Bingham saw it, illegitimately put Congress's authority behind any local decision for slavery. Likewise, because of the Due Process Clause, he disagreed strongly with the *Dred Scott* decision denying Congress the power to prohibit slavery in the territories.[20] Bingham's most extended and "most significant speech of the antebellum era" occurred in 1859 in the debate on Oregon statehood.[21] He opposed it for two reasons: first, the proposed Oregon Constitution extended the right of suffrage for federal offices to aliens; and second, it contained an exclusionary provision forbidding free blacks from entering the state or using its legal apparatus. His positions on these two issues are highly pertinent to the Fourteenth Amendment. Akhil Amar highlights the importance of Bingham's contribution to the debate on Oregon when he avers that Bingham's "views . . . track almost perfectly the natural meaning of the words Bingham drafted in 1866 as section I of the Fourteenth Amendment."[22] Perhaps an overstatement, but the debate over alien suffrage did prompt Bingham's development of the distinction between United States citizenship and state citizenship, a distinction that finds a crucial place in the Amendment. Moreover, the debate over Oregon's exclusionary provisions supplied the occasion for his development of his ellipsis theory of Article IV, Section 2 and his identification of the content of the privileges and immunities of U.S. citizenship, another central feature of the Amendment.

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19 GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 44–45 (2013).

20 CONG. GLOBE, 34th Cong., 3d Sess. app. 138 (1857); CONG. GLOBE, 36th Cong., 1st Sess. 1837 (1860).

21 MAGLIOCCA, *supra* note 19, at 62–65; CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 152–56.

22 AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 182 (1998).

The U.S. Constitution provides that "the Electors" for members of the House of Representatives, "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[23] Oregon's proposed state Constitution provided that those qualified to vote in Oregon would include persons not born in the United States, who have resided in the United States one year at least, one half year at least in Oregon, and have "declared [an] intention to become a citizen of the United States."[24] It would seem that this provision satisfies the terms of Article I, Section 2 and is therefore legitimate and constitutional. Bingham disagreed. Although the constitutional text expressly says no such thing, he concluded that the States are not free to grant suffrage rights for elections to federal office to individuals who are not U.S. citizens.

This was an unexpected and minority conclusion, as is clear from the fact that there was strong and relatively settled precedent for establishing this rule of suffrage in the state constitutions of Michigan (1835), Wisconsin (1848), Indiana (1851), and Minnesota (1858), to which Oregon was added in 1859.[25] Although the vote on Oregon admission was close in the House, 114 to 103, most of the opposition came from Republicans on the black exclusion issue.[26]

Despite having few followers and apparently having the text against him, Bingham had a serious constitutional case. The Constitution in 1859 contained no explicit definition of U.S. citizenship but it did provide that "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States."[27] According to Bingham, "The people here referred to are the same community, or body-politic, called, in the [P]reamble . . . 'the people of the United States.'"[28] They are "the citizens of the United States, and no other people whatever."[29] These terms "people of the United States" and "'people of the several States,' as used in the Constitution of the United States, have invariably received this judicial construction in all our courts, State and

23 U.S. CONST. art. 1, § 2, cl. 1.

24 OR. CONST. of 1857, art. II, § 2.

25 MICH. CONST. of 1835, art. II, § 1; WIS. CONST. of 1848, art. III, § 1; IND. CONST. of 1851, art. II, § 2; MINN. CONST. of 1858, art. VII, § 1; *Constitution of Oregon*, OR. STATE ARCHIVES, https://sos.oregon.gov/blue-book/Pages/state-constitution.aspx [https://perma.cc/CCH3-AY3D].

26 *Crafting the Oregon Constitution: After the Convention*, OR. STATE ARCHIVES, https://sos.oregon.gov/archives/exhibits/constitution/Pages/after-state.aspx [https://perma.cc/7AD8-KT38].

27 U.S. CONST. art. 1, § 2, cl. 1.

28 CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859) (statement of Rep. Bingham) (quoting U.S. CONST. pmbl.).

29 *Id.*

national."[30] In order to support this claim he even cites Chief Justice Taney in the otherwise despised *Dred Scott* case.[31]

These "citizens of the United States," otherwise known as "the people of the several States" or "people of the United States," are to select members of the House and cannot be aliens because the Constitution grants Congress the power "[t]o establish an uniform Rule of Naturalization . . . throughout the United States."[32] The government of the Union can make citizens of the United States; the government of the individual states cannot. Otherwise there would not be "an uniform Rule of Naturalization." Bingham's interpretation of "people of the several States" as equivalent to "people of the United States" or "citizens of the United States" makes sense if we recognize that he is taking the phrase "people of the several States" to mean the people of the states taken together as a whole, equivalent to "the people [i.e., citizens of] of the United States." This entity is to be contrasted to the people of each state taken separately. He must have been struck by the language of Article I, Section 2, which could have stated more simply, "the House of Representatives shall be composed of members chosen . . . by the people of the states," which Bingham would take as referring to the citizens of the states. A difference between the two formulations comes into view if we consider the situation Chief Justice Taney posited in his *Dred Scott* decision. According to Taney, not every citizen of a state is ipso facto a citizen of the United States.[33] The states retain a right never delegated to the general government to make their own citizens, but the right to make aliens into U.S. citizens belongs to Congress.[34] The phrase "people of the states" would imply that all state citizens or even residents were to be among the pool of potential electors of the House of Representatives. But the phrase "people of the several States" designates only those state citizens who are also citizens of the United States, for they possess the shared quality of either being natural born citizens of their state and of the United States or naturalized under congressional law. That is what makes them "people of the several States" rather than just people of each state. They would be people or citizens of other states were they to reside therein. Individuals who are merely citizens of an individual state, that is, a foreign-born person considered a citizen by his home state, but not naturalized by congressional law, would not be a "citizen of the several States." A perhaps simpler way to trace Bingham's thinking is to say that he takes

30 *Id.* (quoting U.S. CONST. art. I).
31 *Id.*; Dred Scott v. Sandford, 60 U.S 393 (1856).
32 U.S. CONST. art. 1, § 8, cl. 4.
33 *Dred Scott*, 60 U.S. at 406.
34 *See id.* at 405.

the "people of the United States" of the Preamble to be obviously referring to the whole population and therefore equivalent to "people of the several States" by a simple substitution of "several States" for "United States." And in these interpretations he is backed up, or so he claims, by steady judicial practice. Admittedly, this is not a self-evident reading of Article I, Section 2.

However, it is a plausible reading, and it makes the best sense of the various provisions and Republican presumptions regarding natural citizenship in the Constitution, that is to say, birthright citizenship in the United States and the state of residence, and of the broader theory of the Constitution that the two sets of governments in the federal system have identifiably different constituent sovereignties.

One implication of Bingham's interpretation is that the states are limited to selecting among these citizens of the United States in their setting of qualifications to vote for Congress. The states may omit some members of that class, those beneath a certain age or of a certain sex, or even by race, but they may not include any persons not of that class.[35]

III. EXCLUSION AND ARTICLE IV, SECTION 2

Bingham took seriously Oregon's unconstitutional effort to endow aliens with the vote, but his argument regarding that seems most centrally to have served to set the premise he used to make his constitutional argument against the exclusion of black citizens. This provision was "still more objectionable" than the alien suffrage provision.[36] The Oregon Constitution mandated that "[n]o free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein."[37] Given Bingham's theoretical grounding in the natural rights philosophy of government, this provision struck him as a travesty. "I say," he said, "that a State which, in its fundamental law, denies to any person, or to a large class of persons, a hearing in her courts of justice, ought to be treated as an outlaw, unworthy of a place in the sisterhood of the Republic."[38]

Bingham straightforwardly denies "that any State may exclude a law abiding citizen of the United States from coming within its Territory . . . or acquiring . . . property therein, or from the enjoyment

35 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 154.

36 *Id.*

37 OR. CONST. art. XVIII, § 4 (amended 2002).

38 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 155.

therein of the 'privileges and immunities' of a citizen of the United States."[39] In support of this latter claim he cites Article IV, Section 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[40]

Those persons who are to be excluded, however, are "citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States."[41] That is to say, says Bingham, the exclusion provisions are "an infraction of that wise and essential provision of the national Constitution,"[42] Article IV, Section 2. But is that clearly so? As he is reading it, Article IV, Section 2 establishes a right inhering in those natural born U.S. citizens to the privileges and immunities of U.S. citizens, which include the right to enter Oregon and to "a hearing in her courts of justice."[43] It must be noted that in his restatements of the language of Article IV, Section 2 he regularly expands the phrase in the article "all privileges and immunities of citizens" by adding to it "of the United States."[44] He explains this practice by referring to "an ellipsis in the language employed in the Constitution."[45] He posits such an ellipsis because the clause's "meaning is self-evident that it is 'the privileges and immunities of citizens of the United States in the several States' that it guaranties."[46] Generations of scholars have failed to find Bingham's ellipsis reading as self-evident as he claims it to be, but he infers from it a distinction with grave consequences for his later crafting of the Amendment. Article IV, Section 2 protects "[n]ot . . . the rights and immunities of the several States; not . . . those constitutional rights and immunities which result exclusively from State authority or State legislation; but . . . 'all privileges and immunities' of citizens of the United States in the several States."[47] I believe this can be well stated in terms of two separate sets of privileges and immunities: those inhering in states and those inhering in U.S. citizenship, only the latter of which are relevant to Article IV, Section 2.

Two questions press against Bingham's reading, however. Granting that the claim to self-evidence is hyperbolic, how does he come to import "of the United States" into the constitutional text and

39 *Id.* at 154.
40 *Id.* (citing U.S. CONST. art. 4, § 2, cl. 1).
41 *Id.* at 155.
42 *Id.*
43 *Id.*
44 *Id.* at 154–55.
45 *Id.* at 154.
46 *Id.*
47 *Id.*

thus to limit the scope of Article IV, Section 2 to privileges and immunities of U.S. citizenship? The second question is this: What are the privileges and immunities of U.S. citizenship and how are they to be distinguished from those of state citizenship?

His textual interpolation has, it seems, two bases in Bingham's mind. First, in restating Article IV, Section 2 he has the closing phrase in all caps, "IN THE SEVERAL STATES," so as to give it special emphasis.[48] That emphasis derives significance from his use in the earlier part of his Oregon speech of the phrase "people of the several States" as equivalent to "people of the United States" and of both as equivalent to "citizens of the United States." He is taking "citizens in the several States" to refer to the people of the states taken together and thus as citizens of the United States, as he had done earlier. Those persons who are citizens in the several states would be the very same persons who are "the people [or citizens] of the several States" in that, except for residence, they would be citizens "in the several States."

That reading might have seemed preferable to him, not only because it resonated so well with his interpretation of the Article I, Section 2 suffrage provision, but because of difficulties with the more standard readings of Article IV, Section 2, according to which this provision was taken to be a comity clause, that is, a clause aimed at establishing comity among the states of the union.[49] It was generally taken to mean that citizens of one state, when present in another state would be treated as citizens of that state would be and not excluded from whatever fundamental special privileges and immunities the state's citizens, but not aliens, possessed.[50]

Bingham's reading works a major transformation from that standard interpretation of the clause. It now protects not the rights of citizens of one state when visiting another state but a wholly different class of rights—privileges and immunities of citizens of the United States, whatever these might be.

The leading judicial interpretation of Article IV, Section 2 at the time of the Oregon speech was the 1823 circuit court case *Corfield v. Coryell*.[51] It is a good vehicle for exposing the difficulties of the comity reading of the Article IV, Section 2. Justice Bushrod Washington was attempting to determine if New Jersey's limitation on taking of oysters to its own citizens was in violation of Article IV, Section 2.[52] Read literally as a comity provision, it would seem so, for citizens of other states would appear to have the same right to oysters in New Jersey as

48 *Id.* at 155 (quoting U.S. CONST. art. IV, § 2).

49 LASH, *supra* note 7, at 45–46.

50 *Id.* at 46–47.

51 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,320).

52 *Id.* at 551–52.

New Jersey citizens. However, Justice Washington could not accept the view that

> under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state [e.g., rivers], the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.[53]

Washington pronounced a much more limited coverage for the clause: "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."[54] This, of course, is not what Article IV, Section 2 says, but it has a common sense ring to it, echoed in Bingham's exclusion from the clause of "rights and immunities which result exclusively from State authority or State legislation."[55] That is, the literal comity reading seems greatly overinclusive, opening the system to, among other things, pervasive moocher abuse.

Moreover, and even more clearly on Bingham's mind, was a privilege that Washington affirmed as covered: "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."[56] On a strict comity reading, this would seem to mean that the "elective franchise" should be available to out of state citizens on the same terms, whatever they may be, as it is for state citizens. Bingham, however, distinguishes political rights from the sort of privileges and immunities covered in Article IV, Section 2. His alternate ellipsis reading is meant to avoid these and related issues that derive from the comity interpretation.

But affirming that Article IV, Section 2 covers the privileges and immunities of U.S. citizenship leaves him with the question: What are these privileges and immunities? How does one determine them? At the least we may conclude that they are not the list of privileges and immunities in Justice Washington's *Corfield* opinion, for these are identified as "privileges and immunities . . . which have, at all times,

53 *Corfield*, *as reprinted in* LASH, Vol. 1, *supra* note 12, at 92, 94.

54 *Id.*

55 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 154.

56 *Corfield*, *as reprinted in* LASH, Vol. 1, *supra* note 12, at 92, 94.

been enjoyed by the citizens of the several states [of the] Union."[57] These seem to be the very set of rights Bingham expressly excludes.

The core passage is this:

> I maintain that the persons thus excluded from the state by this section of the Oregon constitution, are . . . citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law.[58]

By closing its courts to free black citizens, Oregon is denying them this legal protection in their rights of life, liberty, and property. These rights are the rights identified in the Due Process Clause of the Fifth Amendment. Article IV supplies the link, then, to the Fifth Amendment and the rights it protects.

Two points are especially noteworthy in Bingham's appeal to the Due Process Clause. First, he is clearly considering the Fifth Amendment to be among the privileges and immunities of U.S. citizenship to which state citizens are entitled under Article IV, Section 2. The most plausible explanation for that is that the Bill of Rights protections are among the privileges and immunities of U.S. citizens. That coheres with what Bingham, and others, said of the Fourteenth Amendment's Privileges or Immunities Clause during the later debates over the Amendment and with the text itself.[59] Like Taney earlier and Justice Miller later in the Slaughter-House Cases,[60] Bingham clearly accepts the thesis that there are two different sets of privileges and immunities adhering to the two different kinds of citizenship Americans possess. But how to identify the privileges and immunities of the two sorts of citizenship? The most evident answer would be to look to the constitutive documents and legislation of the relevant political entities, in the case of privileges and immunities of U.S. citizenship to the U.S. Constitution. Rights affirmed or granted to citizens by virtue of the U.S. Constitution are the citizenship rights of U.S. citizens. The Bill of Rights is one such source of rights affirmations in the U.S. Constitution, and Bingham is clearly taking these as rights of U.S. citizens made applicable in a certain way to the states by Article IV, Section 2.

Bingham often singles out for mention the Due Process Clause, misleading some scholars to believe that it is somehow special and that

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57 *Id.*

58 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 155.

59 *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Sen. Howard), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 185, 185–91.

60 Slaughter-House Cases, 83 U.S. 36, 55 (1873).

he does not mean to include the other rights protected by the Bill of Rights or other relevant provisions of the Constitution as among the privileges and immunities of U.S. citizens.[61] But he clearly does understand Bill of Rights protections as among those privileges and immunities. In the course of his argument, he identifies other rights to which U.S. citizens are entitled in the states by Article IV, Section 2: the right of a fair trial, right of a jury trial, the right "to argue and to utter, according to conscience."[62] These are rights sampled from the Bill of Rights. Therefore, there is no reason to suppose that First Amendment rights and, through the Fifth Amendment, natural rights are the only ones included among the privileges and immunities of United States citizenship. There are others besides Bill of Rights provisions. Take the rights at stake in the then-recently decided *Dred Scott* case: Did Scott have a right to bring suit against Sandford under diversity jurisdiction?[63] Taney said no free black could do so,[64] but Bingham would undoubtedly say yes. As citizens of the United States, free blacks would qualify to bring suit in federal court if they satisfy the diversity requirement. Indeed, the Constitution implies many rights of that sort inhering in United States citizens by virtue of their U.S. citizenship.

Article IV, Section 2 protects the rights of U.S. citizenship, which includes the natural rights due to all persons via the Fifth Amendment. Perhaps strangely, U.S. citizens are entitled to protection of their natural rights, rights possessed by all persons, as Bingham emphasizes, but persons who are not U.S. citizens are not entitled to these same natural rights protections under Article IV, Section 2.

Scholars are indeed correct to see that the Due Process Clause is somehow special but not in the way they believe it to be. The Due Process Clause is the provision in the Bill of Rights that explicitly mentions the natural rights of life, liberty, and property that Bingham and most others at the time see to be the main business of government to protect.[65] He infers from the Amendment's prohibition of depriving persons of these rights an obligation, of a sort to be discussed later, inhering in the states not only not to deprive persons of them without due process of law but to provide protection for them as well. Failure to protect them is a deprivation of them. When a state provides protection for these rights it is not granting them; they already exist for each and every person by nature and constitutional affirmation.

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61 BARNETT & BERNICK, *supra* note 6, at 134.

62 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 156.

63 Dred Scott v. Sandford, 60 U.S. 393, 402–03 (1856).

64 *Id.* at 406.

65 U.S. CONST. amend. V.

So, in failing to protect, the state is depriving or countenancing the deprivation of them. The combination of Article IV, Section 2 and the Fifth Amendment is the vehicle whereby the Constitution is committed to the central task of governance, according to Bingham, the security of natural rights.

Article IV, Section 2, then, cast protection around two sorts of rights: those which derive from the Constitution itself, such as the first eight amendments, and natural rights incorporated via the Fifth Amendment. This implies that there would be at least some overlap with the rights listed in *Corfield*, for many of these are properly seen as modes of effectuating protection for the natural rights of persons. Recall that Bingham had excluded from Article IV, Section 2 coverage "rights and immunities which result *exclusively* from State authority or State legislation."[66] Any rights protected by states that are in service of the natural rights are thus not exclusively derived from state authority, but jointly from that authority, and the Fifth Amendment (and nature). Bingham seems most concerned with the fact that Article IV, Section 2 brings the Fifth Amendment and thus natural rights within the ambit of the constitutional provisions applying to the states. That is to say, his concerns with privileges and immunities are in the first instance concerns with natural rights protections.

IV. PREEXISTING (PERSONAL) RIGHTS, (STATE) OBLIGATIONS, AND THE TASK OF THE FOURTEENTH AMENDMENT

Bingham's antebellum constitutional pronouncements allow us to understand his theory of preexisting personal rights. These rights are, it must be emphasized, rights against the states. They derive from Article IV, Section 2 and include rights derived both from the Constitution, such as the personal rights secured in the Bill of Rights, and natural rights as carried into Article IV, Section 2 by the Fifth Amendment. This is admittedly not in all ways orthodox constitutional law, but it echoes many of the themes of antislavery constitutionalism.[67]

But what of the other part of Bingham's theory, that the states never had any right to abridge or deny these preexisting rights, but that they regularly "have assumed . . . [that] power, and that without remedy?"[68] The lack of a right in the states to abridge or deny these rights can be restated as a preexisting obligation, for, as he says, "No

66 CONG. GLOBE, 35th Cong., 2d Sess. 981–85 (1859) (statement of Rep. Bingham) (emphasis added), *as reprinted in* LASH, Vol. 1, *supra* note 12, at 152, 154.

67 *See generally* JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865 (2013).

68 CONG. GLOBE, 39th Cong., 1st Sess. 2530–45 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 170, 178.

State ever had the right . . . to deny to any freeman the equal protection of the laws."[69] That is, the states were obliged not only to refrain from denying or abridging but also to actually supply equal protection of the laws, which, we have already seen, meant for Bingham equal protection of natural rights. We may thus collect the states' lack of power to deny and positive duty to supply protection to rights under the rubric of obligation—an obligation "to secure these Rights," as the Declaration of Independence puts it.[70] Bingham's thinking here closely matches the natural rights/social contract general theory according to which governments acquire upon their formation an obligation to provide rights protections and not themselves to threaten rights. This theory was developed with a unitary system of government in mind, but under American federalism there were two sets of governments, which complicated matters substantially. Which government, state or federal, was responsible for protecting which rights? Were both sets of governments responsible for securing natural rights? Constitutional rights? Bingham's answer was that with the Fifth Amendment and Article IV, Section 2 both sets of government had some sort of obligation to both sets of rights. But these obligations were asymmetric and ineffectual, as he indicates when he pronounces violation of these obligations to be "without remedy."[71] He means there is in place no legal or constitutional means to prevent or remediate these violations. Although he speaks most often of congressional powers of prevention and remediation, he also means no judicial remedy either.

The issue of enforcement implicates Bingham's complex and elusive theory of obligation. He conceives of three levels or types of obligation relevant to the Fifth Amendment rights of primary concern to him. First, there is a natural law obligation; second, a moral-constitutional obligation; and third, a full scale constitutionally enforceable legal obligation.

The rights identified in the Fifth Amendment are natural rights. As such, entirely independently of any constitutional text, they impose natural law obligations upon all human beings, including state officers and by extension their states, not to deprive rights holders of the objects of their rights unless authorized by the natural law. This is a moral obligation but has no standing in positive law. There certainly is no constitutional right or obligation involved. It is not a very precise obligation even in the moral sense. The obligation of a state entity toward a nonmember not within the jurisdiction of the state is a

69 *Id.*

70 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

71 CONG. GLOBE, 39th Cong., 1st Sess. 2530–45 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 170, 178.

truncated obligation, an obligation toward only one-half of the due process pair of obligations. The state has an obligation toward nonmembers not to deprive them of their rights by, for example, fighting unjust wars against them, but it does not have an obligation to provide legal protection for their rights. This obligation derives from the social contract and not entirely from nature. So the first level of obligation is merely moral and partial relative to what Bingham's Fifth Amendment provides.

The natural rights along with the other rights were, however, incorporated in a constitutional provision that is directly binding on the federal government but not on the states. Article IV, Section 2 brings these rights within the ambit of the states. These rights are among the privileges and immunities of U.S. citizens and state officials take an oath to support the Constitution as in Article VI.[72] That oath brings with it what I am calling a moral-constitutional obligation not to deprive U.S. citizens of their national citizen rights. It is a moral obligation deriving from the Constitution but there exists no means of constitutional enforcement. Neither courts nor Congress have any enforcement powers. Such enforcement as there is vis-à-vis the states depends solely on the good faith of the oath takers. It was evident to Bingham that good-faith enforcement was not successful.

The status of both the natural rights and the other national rights of U.S. citizens was quite different relative to the federal government. It and its officers were under a full-scale obligation to protect and respect those rights. These obligations were imposed by oath but more directly by express constitutional command and more effectively by genuine enforcement mechanisms. There is, then, a basic asymmetry in the system of rights and obligations in American federalism. U.S. citizens possess rights, both natural and positive, that are fully protected and enforced against the federal government but, even though truly constitutional rights, these are left merely to the tender consciences of the states. It should be added that the federal government has a very truncated obligation to supply protection of the laws—not in general but at most only in areas of the enumerated powers.

My account of Bingham's three-tiered system of obligation may leave the reader puzzled about Bingham's aims in attacking the black exclusion provisions of the proposed Oregon Constitution. According to his own theory of obligation, Congress had no power to enforce the moral duty Oregon had to recognize these natural and, via Article IV, Section 2, constitutional rights. But here he was, apparently attempting to enforce these duties on Oregon. The explanation for

72 U.S. CONST. art. VI.

this action by Bingham is that he was not actually attempting to congressionally enforce the rights and duties at stake here but was seeking congressional disapproval of the Oregon Constitution under Congress's power to admit new states and as part of that to pass on the adequacy of the new state's proposed constitution. Oregon's Constitution on its face violated the spirit of the U.S. Constitution and rejected outright the moral-constitutional duties imposed on it by Article IV, Section 2.

Bingham's antebellum Constitution affirmed many rights that had no legal remedy, an anomalous situation for a legal system. With slavery, the cause of that incompleteness, destroyed, Bingham sought to complete though not to revolutionize the Constitution. That was the aim of the Amendment he wrote. As he frequently said during his advocacy for the Amendment, he meant not to add new rights but to render enforceable the rights and duties imperfectly present already in the Constitution.[73] And that is exactly what he did in the two major drafts of the Amendment he prepared. The Amendment was to protect the natural rights of persons both through the Privileges and Immunities Clause's inclusion of the Fifth Amendment's natural rights within it, and the more direct protection of those rights through the Due Process and Equal Protection Clauses. The Amendment contained what might seem redundant protection for natural rights. Part of that redundancy, so far as it existed, was for emphasis because of the capital importance of natural rights in Bingham's conception of the proper business of government. But technically there was no redundancy because of the odd gap the Privileges and Immunities Clause contained. It will be recalled that that Clause protected the natural rights limits identified in the Fifth Amendment for citizens of the United States even though those rights belonged not merely to citizens but to all persons. His Amendment's Due Process and Equal Protection Clauses fill that gap for they are addressed to all persons.

These two Clauses also provide a fuller explication of Bingham's reading according to which the Due Process Clause's prohibition of a deprivation of rights is taken to include a positive duty to supply protection to those rights. States are to protect the rights to life, liberty, and property by not depriving persons of them except by due process of law. We might call that a negative obligation. But states are also under a positive obligation to supply legal protection to those rights. In one version of the Amendment the text provided for "full protection in the enjoyment of life, liberty and property,"[74] rather than

73 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, 380 (2011).

74 J. JOINT COMM. 56–58 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 66, 67.

"equal protection." Bingham generally preferred the modifier "equal" to "full." One reason, no doubt, is that "full protection" does not supply an operational standard by which to judge its fulfillment. It is always possible to provide more protection than any given level of protection. So "full protection" would be unworkable as an actual standard of enforceability.[75]

A more important reason for Bingham's preference for "equal" is his aim to complete but not revolutionize the Constitution. Contrary to the fears of many during the debates on the Amendment, Bingham did not intend to have the federal government replace the states in providing day-to-day protection for rights. He greatly valued the federal system and its division of authority between the two levels of American government.[76] But he also did not think the states should be free to violate rights of persons and of U.S. citizens. He sought what is best called a corrective federalism. The federal government is to have power—both judicial and legislative—to correct the states when they stray but not to replace them with some sort of plenary power over rights. The "equal protection" standard was well suited to this conception of constitutional corrective federalism, for it set a standard by which states' errancy could be easily identified and corrected: the state is to supply to all persons' rights protection equivalent to the rights protection it provides to the most favored element in the society.

The commitment to corrective federalism also accounts for another crucial feature of the Amendment: originally Bingham provided that

> [t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[77]

(It should be noted how this draft amendment echoed almost exactly Bingham's antebellum thinking about privileges and immunities and the various citizenships. Note especially his deliberate usage of "citizens of each State" and "citizens in the several States.") This version of the Amendment met with two somewhat opposite objections. For one, it would authorize action by Congress to effectuate its end. This congressional action was to remedy the absence of constitutional enforcement mechanisms for the moral-

75 *But see* CONG. GLOBE, 42d Cong., 1st Sess. app. 81–86 (1871) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 620, 628.

76 *Id.* at 626–27.

77 CONG. GLOBE, 39th Cong., 1st Sess. 1033–35 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 99, 99.

constitutional rights of the original Constitution. The response, however, was that it would be better to put the requirement of equal protection directly into the Constitution by way of prohibiting the states from denying it in order to guard against congressional inaction or perverse congressional action. On the other side, there was a fear that the text would allow Congress to take on too much—not correcting the states, but replacing them, not completing but revolutionizing the Constitution. In the face of these criticisms Bingham redrafted the text of the Amendment into the "no State shall" form with which it entered the Constitution.[78] This change was relatively easy for him to make for he did not ever wish to see Congress exercising the kind of power some feared the earlier version would make possible.[79] The change in form was less radical than it might seem, however, for the congressional empowerment was maintained as Section IV of the Amendment, and as Bingham understood it was not limited to correcting state action but also state inaction in failing to supply equal protection.[80]

In the Amendment's final form, the Due Process and the Equal Protection Clauses are to supply protection of basic natural rights against state violations of the same. A good example of what Bingham had in mind for such protection was the Civil Rights Act of 1866.[81] Although it has sometimes been wrongly said that Bingham drafted his amendment in order to incorporate and legitimate the Civil Rights Act, this was highly unlikely because Bingham introduced his draft amendment before the Civil Rights Act was introduced and the two documents contain entirely different language.[82] Nonetheless, Bingham saw the Civil Rights Act as the kind of corrective legislation Congress would be empowered to pass once the Fourteenth Amendment was accepted into the Constitution. The chief operative part of the Act was this:

> [C]itizens, of every race and color . . . shall have the same right in every State and Territory in the United States, to make and enforce

78 CONG. GLOBE, 42d Cong., 1st Sess. app. 81–86 (1871) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 620, 625; Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENT. 123, 134–44 (1986).

79 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1083, 1087–95 (1866) (statement of Rep. Hotchkiss), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 108, 117–118.

80 *See generally* Zuckert, *supra* note 78.

81 Civil Rights Act of 1866, ch. 114, 16 Stat. 140, *as reprinted in* LASH, Vol. 2, *supra* note 1, at 605, 605–06.

82 *Id.*; *see also* 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, 1393 (2018); Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 PUBLIUS 69, 78 (1992).

> contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens[83]

and "shall be subject to like punishment, pains, penalties . . . and none other."[84] That is to say, these are "positive laws that secure natural rights" of life, liberty, and the acquisition and maintenance of property.[85]

When the Civil Rights Act was first introduced Bingham opposed it, largely because he believed Congress lacked the power to protect these rights without a new empowerment such as his amendment was to supply.[86] But he did not object to the list of rights in the bill.[87] When the Civil Rights Act was repassed after the adoption of the Fourteenth Amendment he voted for it.[88] The law provides protection for rights of person and property by setting a standard that states must meet in their legislation and execution of law, and that standard is equality between whites and blacks. Other sections of the law put teeth into it by setting penalties for state officials who fail to abide by the terms of the Act.[89]

The other main clause of the Fourteenth Amendment, providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," completes the set of new rights protections provided by the Amendment.[90] As we have seen from Bingham's earliest constitutional arguments, this clause covers all those rights that accrue to citizens of the United States as citizens of the United States and not as citizens of the states. These include, as Bingham often said, the rights affirmed in the Bill of Rights, and all other rights expressly affirmed, such as the habeas corpus right, or implied by the text and structure of the Constitution, such as the right to sue in federal court.[91]

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83 Slaughterhouse Cases, 83 U.S. 38 (1873) (Field J., dissenting) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 630, 641.

84 Force Act of 1870, ch. 114, 16 Stat. 140 (including repassage of the Civil Rights Act of 1866), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 605, 606.

85 BARNETT & BERNICK, *supra* note 6, at 49 (quoting Eric Claeys's analysis of William Blackstone).

86 CONG. GLOBE, 39th Cong., 1st Sess. 1290–96 (1866) (statement of Rep. Bingham), *as reprinted in* LASH, Vol. 2, *supra* note 1, at 135, 135.

87 *Id.*

88 *See* Lash, *supra* note 82, at 1454–57.

89 Force Act of 1870, ch. 114, 16 Stat. 140, *as reprinted in* LASH, Vol. 2, *supra* note 1, at 605, 606.

90 U.S. CONST. amend. XIV, § 1.

91 Much ink and scholarly energy have been expended trying to interpret the Fourteenth Amendment, an expenditure to which I have just contributed. There is,

Although the Fourteenth Amendment was not the last amendment, it is special in that it completes the logical structure of the incomplete original Constitution by providing a completed symmetrical system of rights protections for both natural and positive constitutional rights in relation to both national and state governments. In this sense it perfects the Constitution.

however, a more straightforward way to understand Bingham's handiwork: to read his text as a text should be read. This approach has played a remarkably small role in the various attempts to parse the Amendment. By reading the text properly I mean reading it not as a series of nuggets—phrases and clauses with largely independent meanings—but reading it structurally, that is, taking note of the way the text proceeds by way of five sets of contrasting concepts, which set off and clarify each other. I have presented such a reading in a collection of essays edited by Alan Levine, Thomas Merrill, and James Stoner. Michael P. Zuckert, *Completing the Constitution*, *in* THE POLITICAL THOUGHT OF THE CIVIL WAR 293, 308–315 (Alan Levine, Thomas W. Merrill & James R. Stoner, Jr. eds., 2018); *see also* Zuckert, *supra* note 82 (providing a related analysis).