The Origins of the Privileges or Immunities Clause: John Bingham and the Second Draft of the Fourteenth Amendment

*by Kurt T. Lash**

The current debates over the incorporation of the Second Amendment have reignited interest in the historical understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. The Supreme Court's history-laden analysis of the Second Amendment in *District of Columbia v. Heller*[1] signaled the Court's openness to an originalist understanding of the Bill of Rights. Not surprisingly, the Court's decision to hear *McDonald v. Chicago*[2] and consider whether to extend the right recognized in *Heller* against the states triggered an avalanche of briefs (both principle and amici) that explore the history behind the Privileges or Immunities Clause and its relationship to the original Bill of Rights.

It was something of a disappointment, therefore, when the majority in *McDonald* declined the plaintiffs' invitation to rely on the Privileges or Immunities Clause and instead followed its traditional substantive due process analysis in deciding that the Second Amendment ought to be treated as a fundamental liberty. Even if a disappointment, though, the Court's avoidance of the clause was not really a surprise.

In their briefs, the petitioners had argued that the Privileges or Immunities Clause not only incorporated the Second Amendment, but also protected all fundamental natural rights—whether enumerated in the text of the Constitution or not. This was met with a rather high degree of skepticism at oral argument. When pressed by Justice Ginsburg to define the rights protected by the clause, Alan Gura declared that "it was impossible to give a full list of unenumerated rights that might be protected by the Privileges or Immunities Clause." Mr. Gura's blithe refusal to suggest even the existence of a limiting principle prompted ridicule by other members of the Court[3] and probably guaranteed the ultimate decision would not invoke Privileges or Immunities Clause, if only to avoid opening a pandora's box of unenumerated rights.

In the extended article upon which this essay is based, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, I argue that there is a more plausible, and more limited, reading of the Privileges or Immunities Clause than that pressed by the petitioners in *McDonald*. The historical evidence strongly suggests that John Bingham, the man who drafted the Privileges or Immunities Clause, understood it as protecting only those substantive rights expressly enumerated in the Constitution, in particular the first eight amendments to the Constitution. This view justifies the Supreme Court's doctrine of incorporation (including the incorporation of the Second Amendment), but rejects any reading that opens the door to a limitless list of unenumerated natural rights.

John Bingham

There are two dominant views of the man who drafted the Privileges or Immunities Clause, Ohio Representative John Bingham. Anti-incorporationist scholars tend to disparage Bingham as an inconsistent buffoon. Charles Fairman in the 1940s is an early example of this negative portrayal, but you can still find this in fairly recent work by scholars like John Harrison. The general idea is that Bingham's seemingly inconsistent and just plain quirky remarks about the Bill of Rights and the Fourteenth Amendment disqualify him as a reliable witness regarding the original meaning of the Amendment.

The pro-incorporationist view, on the other hand, treats Bingham as a kind of latter day James Madison. Starting with William Crosskey and continuing through the work of scholars like Michael Kent Curtis and Akhil Amar, this reading of Bingham downplays his inconsistent statements, or ignores them altogether and focuses on his statements regarding the need to protect the rights listed in the first eight amendments to the Constitution.

Neither portrayal gives us an accurate picture of John Bingham and his role in the development of the Fourteenth Amendment. Pro-incorporationists are correct that Bingham never waivered in his desire to require the states to respect the Bill of Rights. They are wrong, however, to ignore or downplay Bingham's inconsistencies. It is simply a fact that Bingham made radically inconsistent statements regarding the meaning of Article IV and its relationship to his proposed fourteenth amendment. Anti-incorporationists, however, are wrong to suggest these inconsistencies reveal muddleheaded thinking. Instead, I believe the evidence suggests that the debates over John Bingham's first draft of the Fourteenth Amendment caused him to change his mind about Article IV and its relationship to the Bill of Rights. His seemingly inconsistent statements were made in regard to his *second* draft. Rather than reflecting inconsistency, these later statements actually reflect Bingham's new and far more plausible understanding of how to draft an amendment that would protect constitutionally enumerated rights against state action.

Bingham's First Draft

In early February of 1866, the Joint Committee on Reconstruction adopted John Bingham's first draft of the Fourteenth Amendment:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the

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> several States equal protection in the rights of life, liberty, and property (5th Amendment).[4]

As noted in Journal of the Joint Committee (the notations are reproduced above), the wording of this first draft was taken from the Privileges and Immunities Clause of Article IV, Section 2—the so-called Comity Clause[5]—and the Fifth Amendment to the Constitution.

In a speech before the House of Representatives, Bingham explained that he used the language of Article IV because the Comity Clause, properly understood, bound the states to enforce the Bill of Rights, and had done so from the earliest days of the Constitution. It was only because states had failed to live up to this responsibility that Bingham proposed an amendment which would grant Congress the power to enforce the "privileges and immunities" of Article IV against state action—privileges and immunities which Bingham believed included the liberties listed in the Bill of Rights.[6]

This was an exceedingly odd argument. As students of the Constitution already know, the original Bill of Rights bound only the federal government, not the states. This was the famous holding of Chief Justice John Marshall in *Barron v. Baltimore* (1833). No one had ever before suggested that Article IV actually bound the states to protect the Bill of Rights. Bingham arrived at his conclusion about the language of Article IV and the Bill of Rights by way of a rather idiosyncratic rendering of the Comity Clause. According to Bingham, the Comity Clause should be read as if it contained an "ellipsis": "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (applying the ellipsis "of the United States") in the several States."[7] By adding the language of the "ellipsis," Bingham could argue that the "privileges and immunities" of Article IV were privileges and immunities of "citizens of the United States" (not merely the rights of "citizens in the several states") and these national rights included all those rights expressly listed in the people's national charter, the Constitution. Bingham went so far as to argue that Article IV *itself* was part of the Bill of Rights.[8] Finally, because his amendment authorized only the enforcement of rights expressly listed in the original Constitution, Bingham argued that his proposed amendment took nothing from the states that belonged to them under the original Constitution. As Bingham put it,

> The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent—no more."

Unfortunately for Bingham, no one else in the Thirty-Ninth Congress shared his idiosyncratic reading of Article IV. In fact, by using the language of Article IV, he opened the door to interpretations that he very much opposed. Radical Republicans had longed called for a broad reading of the Comity Clause of Article IV as a basis for federal control of all civil rights in the states. These members of the Thirty-Ninth Congress regularly cited the antebellum circuit court case *Corfield v. Coryell* and Justice Bushrod Washington's reference in that opinion to "fundamental" privileges and immunities.[9] If one followed the Radical reading of Article IV (and *Corfield),* Bingham's draft would allow the federal government complete control over all "fundamental" civil rights in the states—an unlimited catalogue of unenumerated natural rights.

Conservative Republicans, on the other hand, had a very different view of Article IV—and thus a very different view of Bingham's first draft of the Fourteenth Amendment. The conservatives viewed Article IV as doing nothing more than providing traveling citizens equal access to a limited set of state-conferred rights. As one might expect, this group strongly objected to the radicals' broad interpretation of *Corfield* and Article IV. While they were willing to require the states to equally enforce state law, they resisted efforts to nationalize the Bill of Rights. They were willing to support Bingham's proposal only because they understood his language as doing nothing more than following the traditional understanding of Article IV and simply providing an added degree of protection against discriminatory application of state law.

Bingham, of course, disagreed with both the radical and conservative readings of his proposed amendment. He opposed the radicals' call to federalize the subject of civil rights in the states. On the other hand, he also wanted to do much more than simply enforce the equality principles of the Comity Clause. Unfortunately, by using the language of Article IV, Bingham almost guaranteed that his intentions would be misconstrued. Faced with equally unacceptable readings of his text from both friend and foe, Bingham soon realized he had made a mistake and voluntarily withdrew his amendment.

Bingham's Second Draft

A month later, the Joint Committee produced a second draft of the Fourteenth Amendment, once again drafted by John Bingham. In this second draft, Bingham replaced the language of Article IV ("privileges and immunities of citizens in the several states") with language protecting "the privileges or immunities of citizens *of the United States*." This new language (which Bingham had earlier tried to add to Article IV as an "ellipsis") echoed the language commonly found in United States treaties. From the 1803 treaty which added the Louisiana Territory to the United States, to the 1866 Treaty which gave us Alaska, these documents spoke of rights, advantages and immunities *of citizens of the United States.* Influential antebellum figures such as Daniel Webster—a hero to John Bingham--described this language as referring to federal rights expressly enumerated in the Constitution.

In his speech to the House of Representatives on May 10, 1866, Bingham explained that this new draft protected "the privileges of citizens of the United States." These rights, according to Bingham, were "provided for and guarantied in your Constitution." Bingham then mentioned the federal franchise rights of Article I, as well as the Eighth Amendment's protection against cruel and unusual punishments, as rights of United States citizens that would be protected against state action by this second draft. Bingham did not use the particular term "Bill of Rights," but his use of the Eighth Amendment as an example suggests that he understood the draft as protecting rights listed in the first eight amendments.

As he had when he introduced his initial draft, Bingham continued to insist that nothing was being taken away from the states that belonged to them under the original Constitution. Instead, it was the states who had acted "contrary to the express letter of the constitution" by violating the Eighth Amendment.

There is nothing in Bingham's speech about "ellipsis" in Article IV—indeed, there is no discussion of Article IV at all. Bingham simply insists that the language in this second draft protected rights expressly listed in the Constitution, such as those found in Article I and in the Bill of Rights.

Jacob Howard

When Jacob Howard stood up to explain the second draft to the Senate, he echoed the approach of John Bingham that viewed the amendment as protecting those rights actually listed in the text of the Constitution. Instead of citing Article I liberties and the Bill of Rights, Howard cited Article IV and the Bill of Rights as examples of the "mass of privileges and immunities" of citizens of the United States.

Because Howard cited *Corfield* and Article IV as examples of the privileges and immunities protected under the Fourteenth Amendment, libertarian scholars often cite Howard's speech as evidence that the text nationalized all fundamental rights, whether or not listed in the Constitution. This is not, however, a necessary reading of his speech and, in context it seems quite unlikely to have been either Howard's intent or how Howard was understood.

To begin with, Howard's speech mirrors Bingham's—they both cite enumerated federal rights as examples of privileges or immunities. The equal protection rights of Article IV are in fact among the enumerated rights of American citizens, just as are the rights listed in the first eight amendments. Although Radical Republicans understood Article IV as referring to fundamental natural rights, neither moderate nor conservative Republicans agreed with such a broad reading—nor, in fact, had any antebellum judicial opinion. The consensus antebellum interpretation of the Comity Clause view the provision as requiring nothing more than equal treatment when it came to a certain set of state laws, and not as a provision protecting unenumerated natural rights. In fact, Howard later expressly rejected efforts to federalize the general subject of civil rights in the states. Most of all, it is clear that neither conservatives nor moderates would ever have supported the amendment had they understood Howard as embracing the radical reading of Article IV—yet no objections were raised either during or after Howard's speech. There is good reason to think, then, that Howard's inclusion of Article IV indicated nothing more than his belief that the equal protection rights of Article IV and the *substantive rights* of the first eight amendments were all part of the "mass" of "privileges or immunities of citizens of United States."

Post-Adoption Debate

However unclear Howard's views, we do not need to guess when it comes to John Bingham. One of the most famous pieces of historical evidence regarding Bingham's view of the second draft of the Fourteenth Amendment is a speech Bingham delivered a few years later in 1871. Here, Bingham declares that the second draft protected the first eight amendments, but *did not* nationalize civil rights in the states.

Bingham's 1871 speech is discounted by anti-incorporationist scholars, of course, as post-hoc wishful thinking by a muddleheaded gasbag. But there is no evidence that this is the case. Nothing in this speech contradicts Bingham's initial explanation of his second draft. In fact, Bingham's views seem rather clear even without this speech as evidence of his views. The speech is nevertheless important, however, because it expressly contradicts one of the most common claims about John Bingham—that he based the *final* draft of the Fourteenth Amendment on the Comity Clause of Article IV. Bingham's speech is almost entirely devoted to refuting that very claim.

Bingham's speech was delivered in the context of debates over the 1871 Ku Klux Klan Act, which regulated private interference with the rights of United States citizens. Radicals defended the Act on the grounds that the Fourteenth Amendment gave the federal government control over the general subject of civil rights in the states. Opponents of the Act claimed that Bingham had abandoned any effort to protect substantive rights in the states when he withdrew his initial draft of the Fourteenth Amendment. Bingham supported the Act, but he opposed the interpretations of the Privileges or Immunities Clause being put forward by the radicals *and* the conservatives. In his speech, he addresses what he viewed as both unduly broad and unduly narrow readings of the Privileges or Immunities Clause.

First, Bingham explained that the Privileges or Immunities Clause protected substantive federal rights, including those listed in the first eight amendments to the Constitution. Having refuted the conservatives, Bingham then addressed the radical claim that the Clause federalized the common law "privileges and immunities" which had received only equal protection under Article IV.

According to Bingham, "the privileges or immunities of citizens of the United States" had to be "contradistinguished" from the privileges and immunities of "citizens of a State." Where one had to consult state law to determine the laws which must be equally provided under the Comity Clause, Fourteenth Amendment "privileges or immunities" were "chiefly defined in the first eight amendments to the Constitution of the United States." Just to drive the point home, Bingham then quoted verbatim the first eight amendments to the Constitution.

Then, specifically responding to radicals who tried to use *Corfield* and Article IV in their interpretation of the second draft, Bingham declared:

> [I]s it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the Fourteenth Article, that no State shall abridge the Privileges or Immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the Fourteenth Amendment made them limitations.[10]

Bingham could not have been clearer: The rights of the privileges or immunities clause involved the substantive rights listed in

the Constitution, and not the state-law derived rights given a degree of equal protection under Article IV. All in all, the 1871 speech confirms what we already knew: Bingham had no desire to transform the vast (indeed limitless) category of common law rights granted equal protection under Article IV into a limitless category of substantive national privileges or immunities. Bingham's efforts, from the beginning, were merely to require states to protect those rights that the people themselves had placed in the text of the Constitution.

John Bingham's second draft of the Fourteenth Amendment "hath this extent—no more."

Endnotes

1 128 S. Ct. 2783 (2008).

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

3 According to Justice Scalia, Gura's approach to the Privileges or Immunities Clause was "the darling of the professoriate" and that the only reason for making the argument must be because he was "bucking for a place on some law school faculty."

4 Benjamin B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867, at 61 (1914).

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

6 Cong. Globe, 39th Cong., 1st Sess., 1088-91 (The purpose of the amendment was simply "to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today.") (John Bingham).

7 As Bingham explained in his speech of January 9, 1866:

> When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (applying the ellipsis "of the United States") in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States.

Cong. Globe, 39th Cong., 1st Sess. 158 (Jan. 9, 1866).

8 Cong. Globe, 39th Cong., 1st sess. 1033 (Feb. 13, 1866) (describing Article IV and the Fifth Amendment as "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution"); *see also* N.Y. Times, Feb. 27, 1866 (presenting a slightly different version of Bingham's speech) ("But it was equally clear that by every construction of the Constitution—its contemporaneous and continuous construction—that great provision contained in the second section of the fourth article and in a portion of the fifth amendment adopted by the first congress in 1789, that that immortal bill of rights had hitherto depended on the action of the several States.").

9 *See* Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823) (Bushrod Washington) (privileges and immunities provided equal protection under Article IV include rights which are "in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.").

10 Cong. Globe, 42d Cong. 1st Sess. app. at 84.

Originalism and the Fourteenth Amendment's Protection of Unenumerated Rights: A Response to Prof. Kurt Lash

*by Alan Gura***

When Justice Scalia derided the originalist interpretation of the Fourteenth Amendment as a "darling of the professoriate," he obviously did not have Professor Kurt Lash in mind. Setting aside the question of how the people who ratified the Fourteenth Amendment might have understood its language, Lash seizes upon the Amendment's legislative history, indeed, primarily upon "*post*-enactment history,"[1] for the proposition that the Fourteenth Amendment's Privileges or Immunities Clause does not secure against the states any rights beyond those otherwise specified in the Constitution's text.

The theory, if not its underlying methodology, might be soothing to judicial minimalists long distressed by the Constitution's textual guarantees of unenumerated rights.[2] Alas, what the people thought the Privileges or Immunities Clause meant in 1868 is not what Professor Lash today thinks Fourteenth Amendment author John Bingham thought those words meant in 1871—and indeed, even this latter theory does not withstand examination on its own terms.

The Original Meaning of "Privileges" and "Immunities"

"[A]n amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed.'"[3] As Justice Scalia wrote recently, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[4] In arguing *McDonald v. Chicago*, I was not about to "fritter away two out of nine votes by failing to address what Justice[s] Thomas and [Scalia] consider dispositive," at least in most cases: "what the text was thought to mean when the people adopted it."[5]

"At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone."[6] The theory that John Bingham believed these words referred only to rights literally enumerated is strained, at best. Even if true, the evidence overwhelmingly shows a contrary understanding among the ratifying public in 1868.

"Privileges and immunities" were secured, to some extent, by the original Constitution's instruction that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[7] Justice Bushrod Washington's circuit-riding opinion in *Corfield* v. *Coryell*[8] famously described "privileges and immunities" in this context as eluding any

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simple cataloguing of their content. The provision secured "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 . . . ."[9]

Corfield did not describe what Lash fears as "an unlimited catalogue of unenumerated natural rights."

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[10]

"[S]ome" examples of privileges and immunities "deemed fundamental" included:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . [and] the elective franchise . . . .[11]

Knowing what "privileges and immunities" meant in Article IV, Section 2, did not fully describe that provision's impact.

> Notably, Justice Washington did not indicate whether Article IV, § 2 required States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize.[12]

Bingham had endorsed the former view of Article IV, Section 2, and believed the rights which the states were bound to respect included both those constitutionally enumerated, and those as described in *Corfield*. Lash terms this "an exceedingly odd argument. . . . No one had ever before suggested that Article IV actually bound the states to protect the Bill of Rights." Not so. For example, in his *Treatise on the Unconstitutionality of Slavery*, leading abolitionist Joel Tiffany defined the privileges and immunities of American citizenship to include "all the guarantys of the Federal Constitution for personal security, personal liberty, and private property,"[13] including rights enumerated in the Bill of Rights.[14] He interpreted Article IV to mean that "[t]he states can pass no laws that shall deprive a person of the right of citizenship. Nor can they pass any law that shall in any manner conflict with that right."[15] Indeed, it was a staple of abolitionist legal thought that slave states had been violating their Article IV obligations to secure at least the fundamental rights, including those enumerated in the Bill of Rights, of traveling citizens.[16]

Perhaps most importantly, the Supreme Court acknowledged that rights enumerated in the Bill of Rights, as well as certain unenumerated rights, were among the privileges and immunities of citizenship that states would be bound to respect as adhering in visiting citizens (at least, assuming the states secured those rights to their own citizens). For precisely that reason, the Court had rejected the idea that African-Americans could be citizens:

> [I]f [blacks] were so received, and entitled to *the privileges and immunities of citizens*, it would exempt them from the operation of the special laws and from the police regulations [related to blacks]. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation. . . [and] the full liberty of speech in public and in private upon all subjects upon which [the State's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[17]

Rights of speech, assembly, and arms are, of course, enumerated in the Bill of Rights—but a right to "sojourn" and "go where [one] please[s]" is enumerated nowhere in constitutional text.

The question of whether Article IV imposed anything more than comity was, in the end, irrelevant to the Fourteenth Amendment debate. Right or wrong, the Supreme Court had long held that the states were not bound by the Bill of Rights for lack of mandatory enforcement language in the constitutional text, akin to the "No State shall" language of Article I, § 10 directing prohibitions against the states.[18] Of course, the same logic would bar federal imposition of unenumerated rights against the states *ab initio*. This alleged defect in the original Constitution is what the Fourteenth Amendment sought to correct.

Justice Thomas understated matters in offering that "it can be assumed that the public's understanding of [the Fourteenth Amendment's Privileges or Immunities Clause] was informed by its understanding of [Article IV's Privileges and Immunities Clause]."[19] The Fourteenth Amendment's ratification history is replete with invocations of *Corfield*'s "privileges and immunities" definition. After all, the people had no better reference for the meaning of terms employed by new constitutional text, than the established meaning of those very same terms in text long-ago adapted. Arguably more familiar to the American mind at the time was the *Dred Scott* decision, with its reference to enumerated and unenumerated rights alike as falling within the privileges and immunities of citizenship.

Thus, introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard explicitly defined "privileges" and "immunities" first by reciting *Corfield*'s definition of "privileges and immunities." Howard then continued:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their

> entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . . . 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 . . .[20]

Lash implicitly finds Howard's discussion of *Corfield* rights to be limited to considerations of comity, but those words simply are not there. Notably, the ratifying public in 1868 saw no such emanations from the penumbras of Howard's well-publicized words. Paraphrasing *Corfield*, and Senator Howard's widely-publicized speech, "Madison" wrote the *New York Times* that the new Amendment would secure against state interference not only enumerated rights including rights of speech and arms, but also offered:

> What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.[21]

The Fourteenth Amendment's opponents shared this broad view of the Privileges or Immunities Clause. Representative Rogers stated,

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities . . . .[22]

Ascribing the words a controversial breadth was no mere debating tactic. Years after the Amendment's ratification, one Southern sympathizer lamented that his narrow view of "privileges" and "immunities" was not widely shared:

> But I want also to invite attention to the meaning of the words "privileges and immunities" as used in this section of the amendment. It appears to be assumed in the popular mind, and too often by the law makers, that these are words of the most general and comprehensive nature, and that they embrace the whole catalogue of human rights, and that they confer the power and the obligation to enact affirmative and most dangerous laws.[23]

Not surprisingly, the popular understanding of the Privileges or Immunities Clause as securing both *Corfield* and enumerated rights was judicially acknowledged beyond the four *Slaughter-House* dissenters. Future Justice William Woods held that the Fourteenth Amendment's Privileges or Immunities "are undoubtedly those" as described in *Corfield*, and "[a]mong these we are safe in including those which in the constitution are expressly secured to the people . . . ."[24]

Considering this extremely expansive view of "privileges" and "immunities," terms already found in the Constitution and loaded with a powerful, popular meaning, it is difficult to suppose that Bingham employed these terms with the hope that they would effect a vastly different, narrower meaning. If Bingham had narrower intent, the language of the Fourteenth Amendment would contain narrower text. Or at least, the legislative history would include some evidence of a more limited intent, with Bingham and perhaps others rising to refute the popular understanding of "privileges" and "immunities" as containing what Lash asserts is "an unlimited catalogue of unenumerated natural rights."

Theories of Legislative Intent

Notwithstanding the Fourteenth Amendment text's original public meaning, Professor Lash distills from the Amendment's legislative history, and from statements offered by Bingham years following its ratification, the proposition that Bingham changed his mind regarding the scope of the Privileges or Immunities Clause. According to this theory, whereas an earlier draft would have federalized and enforced all civil rights encompassed by *Corfield*'s broad definition of "privileges and immunities," the language finally ratified secured only those rights spelled out in the Constitution's text, primarily those of the first eight amendments.

The theory's first difficulty lies in Bingham's denial that the Amendment's reformulation narrowed its scope. The Fourteenth Amendment "is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition."[25] The distinction between Bingham's two drafts was that the former might have allowed Congress, rather than the Supreme Court, to define constitutional standards.[26] In the ratified version, congressional power is remedial, not substantive. The meaning of "privileges or immunities" may now be a matter of judicial interpretation, but however interpreted, the nature of this substantive limitation is unaltered.

Lash correctly points out that in one speech, Bingham declared that the Fourteenth Amendment would enforce "the bill of rights as it stands in the Constitution today. It 'hath that extent—no more.'"[27] But as the speech continues, it becomes clear that Bingham's usage of "bill of rights" is somewhat more expansive than Lash's invocation of the term. Bingham declares that the proposed amendment "seeks the enforcement of the second section of the fourth article of the Constitution."[28] He references "the bill of rights that all shall be protected alike in life, liberty, and property," and declares that the Amendment was to right the "great wrong" of denying "equal protection *or any protection* in the rights of life, liberty, and property."[29] Bingham would add that "[t]he franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives

in Congress or Presidential electors."[30] The textual location of these rights is unclear.

In other words, even if Bingham believed the Privileges or Immunities Clause embodied only rights referred to in the constitutional text, Article IV, Section 2 is very much a part of the Constitution, and nothing indicates Bingham's rejection of *Corfield*. To the contrary, Bingham sought "any protection in the rights of life, liberty, and property," and for good measure included rights that could be inferred from the constitutional text even if not precisely delineated anywhere.

Shifting to 1871, years after ratification, Lash zeroes in on Bingham's statement that Article IV secured different rights than those contained in the Fourteenth Amendment. Bingham specifically cited the right to jury trial, freedom of the press, and "the rights of conscience and the duty of life" with respect to aiding escaped slaves, as rights the states could violate prior to the Amendment's ratification.[31] But Bingham did not deny that these rights were of the same character as those secured in Article IV. He merely acknowledged that rights could be "den[ied] to any" under a regime that imposed only comity, including a comity of absence of rights. The rights of Article IV were indeed different— in that as they were secured only as a matter of comity, they were optional.

But why excavate clues as to the Fourteenth Amendment's meaning from this 1871 comparison of the Amendment to Article IV, when that very speech contains direct statements regarding the Fourteenth Amendment's scope? After describing Section One as nothing less than a guarantee, commensurate with that of the Magna Carta, that "we will not deny to any man right or justice,"[32] Bingham declared, "Liberty, our own American constitutional liberty . . . is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[33] This is, of course, an apt description of the livelihood right recognized in *Corfield*, the livelihood right endorsed by the *Slaughter-House* dissenters two years later, and still upheld today as a matter of modern Article IV, § 2 comity.

Of course, the liberty to work in an honest calling is nowhere to be found in the antebellum Constitution's explicit text. That Bingham would invoke this crucial *Corfield* right in an 1871 debate considering enforcement of the Fourteenth Amendment, should dispel the notion that he secretly changed his mind as to the meaning of "privileges and immunities" in 1866.

The Future of Unenumerated Privileges and Immunities

As it stands today, precedent confirms that the Privileges or Immunities Clause secures at least some unenumerated rights. Although grievously wrong, *The Slaughter-House Cases* continue to hold that the Clause secures a swath of unenumerated rights of national citizenship, including the unenumerated rights to visit the U.S. Mint, or obtain the Navy's protection on the high seas. As recently as 1999, the Supreme Court observed that regardless of one's view of *Slaughter-House*, the Privileges or Immunities Clause is properly understood to secure a right of interstate travel.[34]

And indeed, even in *McDonald*, the Supreme Court tacitly acknowledged that the Fourteenth Amendment generally, if not the Privileges or Immunities Clause specifically, secures unenumerated rights. "Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866."[35] Among these are the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,"[36] none of which are specifically enumerated anywhere in the Constitution.

With neither Justice Washington, nor Representative Bingham, nor Senator Howard daring to provide a precise catalog of every freedom secured in our tradition of constitutional liberty, it would have been at least presumptuous—and doubtless, disastrous—for me to attempt such a feat in the middle of a twenty-minute argument concerning application of an *enumerated* right. Lash views this reticence as "blithe." I prefer terms such as "modest" and "realistic." As Justice Thomas observed, "The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application."[37] But my attempts to discuss the limiting principles governing application of unenumerated rights were cut-off by a certain former law professor from the University of Chicago.

McDonald has revived, not closed, the debate over the Privileges or Immunities Clause's original public meaning. The case exposed the lack of a current Supreme Court majority for endorsing the error of *Slaughter-House*, or, indeed, for embarking upon any particular new direction. The day will yet arrive when the Court gives the people the Fourteenth Amendment ratified by our ancestors. "To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer."[38]

Endnotes

1 Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part).

2 Arguably including U.S. Const. art. IV, §§ 2 and 4; U.S. Const. amend. IX; U.S. Const. amend. XIV, § 1.

3 Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (citation omitted), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

4 District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (citation omitted).

5 Justice Antonin Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871 (2008). In the absence of an originalist argument, the case would have been lost. The plurality invoked sources referencing the original meaning of the Privileges or Immunities Clause, to which it would then refer to as "the Amendment" or "§ 1." *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3033 n.9 (2010) (plurality). And Justice Thomas's pivotal fifth vote would not have been secured sua sponte. *See* Carhart v. Gonzales, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (federal abortion law upheld in absence of possible Commerce Clause challenge).

6 *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in judgment); *see also* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev.

1071 (2000) (containing exhaustive survey of American historical usage of "privileges" and "immunities").

7 U.S. Const. art. IV, § 2.

8 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

9 *Corfield*, 6 F. Cas. at 551.

10 *Id*. at 551-52.

11 *Id.* at 552.

12 McDonald v. City of Chicago, 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring in judgment). Regardless of how the clause should have operated, states could, and did, refuse to recognize rights inhering in people they declined to accept as citizens.

13 Joel Tiffany, A Treatise On The Unconstitutionality of American Slavery 97 (1849).

14 *Id.* at 99.

15 *Id.* at 96.

16 *See, e.g. The Claim Of Property In Man,* The Liberator, Sept. 21, 1838, at 149.

17 Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1857) (emphasis added).

18 Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

19 McDonald v. City of Chicago, 130 S. Ct. 3020, 3066 (Thomas, J., concurring in judgment).

20 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

21 "Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2 (second emphasis added).

22 Cong. Globe, 39th Cong., 1st Sess. 2538 (1866) (Rep. Rogers).

23 Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871) (Rep. Kerr).

24 United States v. Hall, 26 F. Cas. 79, 81 (S.D. Ala. 1871).

25 Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871).

26 City of Boerne v. Flores, 521 U.S. 507, 520-23 (1994).

27 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

28 *Id.* at 1089.

29 *Id.*

30 *Id.* at 2542.

31 Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871). It is unclear where the "rights of conscience and the duty of life" are enumerated.

32 *Id.* at 83.

33 *Id.* at 86.

34 Saenz v. Roe, 526 U.S. 489 (1999).

35 McDonald v. City of Chicago, 130 S. Ct. 3020, 3041 (citation omitted).

36 14 Stat. 27 (April 9, 1866).

37 *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in judgment).

38 *Id.*

A Response to Alan Gura's Reply

by Kurt Lash

I appreciate Mr. Gura's attempt to defend his claim during oral arguments in *McDonald v. Chicago* that "it's impossible to give a full list of all the enumerated rights that might be protected under the Privileges or Immunities Clause." Mr. Gura believed (and apparently still believes) that such an argument was necessary for his client's case. I, on the other hand, believe that all his client needed was an originalist argument supporting incorporation of the Second Amendment.[1] My reading of the Privileges or Immunities Clause does just that.[2]

But Mr. Gura believes the Clause protects much more than just enumerated rights. According to his view, Justice Washington's Article IV opinion in *Corfield v. Coryell* is the template for understanding the substantive rights of citizens of the United States. Mr. Gura's historical case for such a view is the same case made for decades by liberal (and libertarian) scholars: (1) The words "privileges" and "immunities" can be found in both the Fourteenth Amendment and in Article IV. (2) The Article IV case *Corfield,* and Article IV itself, were both repeatedly discussed during the debates over the Fourteenth Amendment. (3) This repeated reference suggests that both were used as models for the Privileges or Immunities Clause. (4) Because *Corfield* mentions numerous rights that are not expressly mentioned in the Constitution, this means that the Privileges or Immunities Clause provides substantive protection for rights not listed in the Constitution.

There are a number of critical assumptions built into Mr. Gura's argument. It requires that we assume that the *different* language of Article IV and the Privileges or Immunities Clause ("citizens of the several states" v. "citizens of the United States") does not signal that the clauses protect a different set of rights. It also requires that we assume "lots of discussion" of Article IV and *Corfield* in the Thirty-Ninth Congress indicates that there was "lots of agreement" about Article IV and *Corfield*. And, finally, it assumes that the members of the Thirty-Ninth Congress believed that *Corfield* listed national rights that would receive substantive protection under the new Privileges or Immunities Clause. If any one of these assumptions is not true, then his argument fails. None of them are true.

Taking the first, Mr. Gura's response ignores the fact that John Bingham *removed* the language of Article IV from the final draft of the Fourteenth Amendment. John Bingham's first draft used the *exact* language of the Comity Clause of Article IV, specifically its reference to the rights "of citizens in the several states." Bingham deleted this language in his second draft and instead called for the protection of the rights "*of citizens of the United States*."[3] If Article IV was supposed to be the template for understanding the Privileges or Immunities Clause, then it seems exceedingly odd to have first used and then removed the language of Article IV from the final draft. As far as I can tell, Mr. Gura has no explanation for Bingham's decision to abandon the language of Article IV. My two articles, on the other hand, explain why Bingham changed his mind. After hearing the debates over the first draft, Bingham realized that the language of Article IV would not achieve his goal of

protecting substantive rights listed in the Constitution. So he changed the language.[4]

Which leads to Mr. Gura's second assumption: Lots of references to *Corfield* and Article IV in the Thirty-Ninth Congress must mean there was lots of agreement about *Corfield* and Article IV. In fact, during the debates of the Thirty-Ninth Congress, there was spirited and express disagreement over the meaning of *Corfield* and Article IV. It was this disagreement that led Bingham to abandon his original Article IV-based draft. Radical Republicans originally held the same broad interpretation of *Corfield* and Article IV as that currently claimed by Mr. Gura. The radicals (who embraced the label, by the way) welcomed Bingham's original Article IV-based draft because they believed that it would grant the federal government control over the substantive content of civil rights in the states. Moderate and conservative Republicans, however, balked at the idea of federal control of civil rights in the states (particularly in light of the danger that Democrats would become a political majority once they were readmitted to Congress). The moderates and conservatives pointed out that the consensus antebellum understanding of *Corfield* and Article IV was that the Comity Clause provided nothing more than equal access to a limited set of state-conferred rights. Faced with overwhelming evidence of antebellum case law and commentary, the radicals in the Thirty-Ninth Congress abandoned their claims about *Corfield* and Article IV. In fact, by the end of the congressional term, radicals had *embraced* the consensus view that the Comity Clause of Article IV provided nothing more than the rights of equal protection. This understanding was the *express* basis of Radical Republican Samuel Shellabarger's use of Article IV language in his proposed civil rights bill (discussed in my full article at p. 409).

So, yes, there were lots of references to *Corfield* and Article IV during the debates. But, no, this did not signal broad agreement with the radical Republican's original (and Mr. Gura's current) reading of *Corfield* and Article IV. Just the opposite. By the end of the debates in the Thirty-Ninth Congress, even radical Republicans were using the language of Article IV fully expecting (and planning) that this language would be understood outside of Congress as providing nothing more than the rights of equal protection. Shellabarger and the radicals, of course, wanted much more (and Shellabarger says so in his speech), but they realized that this was not the public understanding of the language of the Comity Clause of Article IV (and he says so). Thus, citing repeated references to *Corfield* and Article IV is not enough; you have to read those references. When you do so, the evidence shows that, by the end of the Thirty-Ninth Congress, there was an overwhelming agreement with the equal protection reading of *Corfield* and Article IV. As far as the public at large is concerned, informed citizens would know that antebellum case law established the Comity Clause as an equal protection provision, and anyone following the debates (many of which were published) would know that the Thirty-Ninth Congress held the same view.

In fact, if Mr. Gura is right, and *Corfield* and Article IV were the templates for the Privileges or Immunities Clause, then this strongly supports an equal protection-only reading of that Clause. True, Mr. Gura is right to point out that the Comity Clause protects "unenumerated rights" including the right to travel and certain economic rights. But it was broadly agreed that these unenumerated rights received nothing more than *equal protection* under the Comity Clause. Indeed, scholars such as John Harrison and Philip Hamburger who agree with Mr. Gura that Article IV served as the template for the Privileges or Immunities Clause argue that this means that the Privileges or Immunities Clause does nothing more than provide equal protection rights.[5] I do not disagree with their reading of *Corfield* and Article IV. My argument is that the Privileges or Immunities Clause of the Fourteenth Amendment is *not* based on *Corfield* and Article IV.

But just because the Privileges or Immunities Clause is not based on Article IV, this does not mean the Clause has no impact on Article IV. Every time John Bingham described a particular right protected by the Privileges or Immunities Clause, he mentioned rights actually listed in the text of the Constitution. Bingham spoke of rights against cruel and unusual punishments (Eighth Amendment); protection of life, liberty, and property (Fifth Amendment); and rights of state representation in Congress (Article I, sections 2 & 3). Bingham believed that all rights actually listed in the Federal Constitution were the rights "of citizens of the United States." In taking this position, Bingham followed the same approach as his hero Daniel Webster who, during antebellum debates over slavery in the territories, insisted that slavery was not a right "of citizens of the United States" because it was not expressly listed in the Federal Constitution.

Article IV, of course, *is* a right expressly listed in the Constitution. And it protects a great many rights not actually enumerated in the Constitution. As Justice Washington put it, it protects everything from "the enjoyment of life and liberty" to the right "to pursue and obtain happiness." But the consensus in the Thirty-Ninth Congress was that these were not substantive rights. Instead, the Comity Clause required states to *equally* extend its protection of its residents' right "to pursue happiness" with those citizens visiting from other states. Rights listed in the first eight amendments, on the other hand, are substantive rights, such as the personal right against cruel and unusual punishments. Thus, if one reads the Privileges or Immunities Clause as protecting enumerated federal rights, then this includes protecting the *substantive* rights of the Bill of Rights and the *equal protection* rights of Article IV.

This is why John Bingham insisted that his second draft protected everything in his first draft and more. Because his first draft used the language of Article IV, his fellow moderates understood him as trying to protect nothing more than the equal protection rights of Article IV. Bingham, however, wanted to do much more; he wanted to protect all federally enumerated rights. So, he abandoned the language of Article IV in his second draft and instead invoked the full set of privileges or immunities belonging to the "citizens of the United States." This set of enumerated rights includes the equal protection rights guarded by Article IV *and* the substantive rights listed in the first eight amendments. Jacob Howard agreed: the Clause protected *both* the rights of Article IV and the first eight amendments. Unlike Mr. Gura, however, neither Howard nor any other moderate or conservative (or even, eventually, any radical Republican)

believed that the language of Article IV went beyond the rights of equal protection.

Finally, the alert reader will notice that everything I have written here is based on the pre-adoption historical record.[6] Yes, I think that John Bingham's 1871 speech strongly supports everything I've argued above. But it is not necessary; nothing I have argued above requires going beyond the debates of 1866. Mr. Gura tells us that a minority of justices in an 1873 case shared his substantive vision of *Corfield* and Article IV. Perhaps so. In 1866, however, there is no evidence that anyone other than radical Republicans shared such a view—and even they abandoned it before the year was out. Instead, a Congress controlled by moderates produced a moderate Privileges or Immunities Clause, one which protects the Bill of Rights against state abridgment but which leaves the content of unenumerated civil rights to the control of the people in the states subject only to the requirements of due process and equal protection. If the current Supreme Court is concerned about opening the door to an "unlimited" (and judicially defined) list of unenumerated rights, the concern is unfounded in terms of both text and history. We have a limited, but critically important, Privileges or Immunities Clause. It protects the Bill of Rights against state intrusion while maintaining critical aspects of federalism. We will never know if a majority of the Supreme Court would have been willing to adopt such a reading in *McDonald*, but we can hope that the day will soon come when they get the chance to take another look.[7]

Endnotes

1 In his reply to this response, Mr. Gura does not dispute this basic and fundamental criticism of his failed strategy to get the Supreme Court to rely on the Privileges or Immunities Clause.

2 In his reply to this response, Mr. Gura claims my work does not involve "originalism" in the sense that it does not create a case for the original public meaning of the Privileges or Immunities Clause. But Mr. Gura must know my work involves both the public understanding of Article IV "privileges and immunities of citizens in the several states" and evidence of the public understanding of terms like "privileges and immunities of citizens of the United States." Most of all, my work presents the consensus understanding of *Corfield* and Article IV both inside and outside the halls of Congress. That public understanding undermines Mr. Gura's argument that *Corfield* and Article IV were broadly understood as representing substantive rights. Without this piece of the puzzle, Mr. Gura's entire argument about the Privileges or Immunities Clause falls apart.

3 Both Mr. Gura and myself agree that the terms "privileges" and "immunities" were understood as being the same thing as "rights."

4 In his most recent reply, Mr. Gura appears to have abandoned his earlier claim that Bingham and a majority of the members of the Thirty-Ninth Congress intended the Privileges or Immunities Clause to embrace a substantive rights theory of Article IV despite their having *removed* the language of Article IV from the final draft. In fact, Mr. Gura has yet to offer any explanation for the decision to remove the language of Article IV from the second draft of the Fourteenth Amendment.

5 This point undercuts Mr. Gura's claims that references to *Corfield* and Article IV support his unenumerated substantive rights reading of the Privileges or Immunities Clause. Although Mr. Gura relies on congressional debates when they are helpful to his case, he never once addresses how Article IV was understood either inside or outside the halls of Congress. Doing so is fatal to his case. Every Supreme Court case handed down before and after the framing of the 14th Amendment read Article IV as providing nothing more than the rights of equal protection. The majority of the Thirty-Ninth Congress read Article IV the same way. Radicals tried to press a broader reading but then backed off, with even Shellabarger accepting the equal protection reading of Article IV as representing the consensus understanding. Thus, if Mr. Gura is right and the public understanding of the Privileges or Immunities Clause *was* based on the public understanding of Article IV, then the clause protects no substantive rights at all.

6 My two articles explore both the consensus understanding of the Thirty-Ninth Congress *and* the antebellum public understanding of phrases like "privileges and immunities of citizens in the several states" and "privileges and immunities of citizens of the United States."

7 In his reply to this response, Mr. Gura abandons his earlier reliance on the debates in the Thirty-Ninth Congress. Instead, Mr. Gura now claims that it is *I* who seek to rely on the "discredited" method of considering legislative history. Similarly, Mr. Gura abandons his earlier reliance on nineteenth century political documents. Instead, he now claims that it is *I* who rely on "dusty diplomatic codicils." Having cut off the branches he once stood upon, Mr. Gura now relies on the opinions in *Slaughterhouse* and *Cruikshank* and claims that my work can be characterized as a "fatwa." I think this argument pretty much speaks for itself. The Supreme Court was right to incorporate the Bill of Rights, including the Second Amendment. But it was also right to reject Mr. Gura's reading of the Privileges or Immunities Clause.

Reply to Professor Lash

by Alan Gura

Professor Lash's unique vision of the Fourteenth Amendment shares the same analytical methodology with the discredited collectivist vision of the Second Amendment. Both theories rely heavily on legislative history, inferring the meaning of language from context to distill conclusions that escaped mention, if not understanding, by the Framers. For Lash, as for Justice Stevens in *Heller*, the meaning of constitutional provisions depends largely on what legislators personally, secretly believed; what they must have agreed or disagreed about with each other; and various influences that, we are assured, must have prompted telling changes in legislative draftsmanship. Under this vision, the penumbra's meaning does not emanate from the text, but rather, the text's meaning emanates from the penumbra.

This is definitely original stuff, but it is not originalism. The Professor's theory is not based on "what the text was thought to mean when the people adopted it,"[1] and its conclusion, though perhaps consistent with dusty diplomatic codicils, conflicts with the way in which the Fourteenth Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning"—the way the Amendment was "understood by the voters" and "ordinary citizens."[2]

Were Professor Lash's assertions regarding the Fourteenth Amendment accepted in the framing era, or indeed, were even known at the time, why is it that *none* of the *Slaughter-House* justices, in majority or dissent, asserted this meaning? It would have been very simple for the *Slaughter-House* majority to uphold Louisiana's butchering monopoly by simply declaring that the Privileges or Immunities Clause is limited to the protection of enumerated rights. Yet instead, the majority offered its own description of the unenumerated rights secured by that provision, complete with representative examples. Indeed, *Slaughter-House* saw unanimous agreement that the

Clause secures unenumerated rights, although the Justices divided sharply as to the nature of those rights.

And if ever there were a time for Professor Lash's theory to find framing era expression, that time came, and went, in *Cruikshank*—decided within a decade of the Fourteenth Amendment's ratification—where not one Justice read *Slaughter-House* in the manner suggested by Professor Lash, or sought to distinguish *Slaughter-House* by dissenting on the grounds that the Fourteenth Amendment must protect enumerated as opposed to unenumerated rights.

In contrast to what Professor Lash espouses, the approach I urged in *McDonald* is not at all original. That the Fourteenth Amendment secures a vision of classical liberty has long been established not merely as the "darling of the professoriate," but also that of its Framers, their ratifying public, practically all contemporaneous legal commentators, various Supreme Court Justices, and, most notably, the Fourteenth Amendment's bitterest opponents. One commentator went so far as to applaud the *Slaughter-House* Court for having "dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment."[3]

That is not to say that Professor Lash's "enumerated rights only" vision of the Fourteenth Amendment is broadly unappealing today. Throughout the *McDonald* litigation, I heard loud and clear the voices of results-oriented, self-described conservatives who wish to conserve not the Framers' vision of how individuals relate to their government, but rather, the interpretive landscape of 1972—grudgingly accepting incorporation of most of the Bill of Rights, but without *Roe* and *Lawrence.* Having tasted what they claim to be the radical excesses of so-called judicial "activism," these "conservatives" naturally warm to any theory limiting courts to the enforcement of rights textually enumerated in 1791. Over 130 years after the Fourteenth Amendment's ratification, they may find in Professor Lash's theory a constitutional fatwa of sorts blessing the arrangement.

But while this result may be politically attractive to some today, it was not particularly desired in 1868, when "Privileges" and "Immunities" had a meaning derived from *Corfield*, and substantive due process was largely unknown. The Fourteenth Amendment's Framers were quite familiar with the unenumerated rights to earn a living, pursue a livelihood, make and enforce contracts, and own and convey property. The Nation was scandalized by the widespread violation of these rights throughout the unreconstructed South, prompting the adoption of the Civil Rights Act of 1866 and the Amendment that constitutionalized it. Nor were these rights new concepts in this country. The Declaration of Independence itself condemned King George for having "erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance," a refrain that echoes constantly throughout American political discourse.

Thus, however abortion, assisted suicide, gay marriage, and the rest might fare under an originalist approach to the Fourteenth Amendment, at least some manifestations of the modern regulatory state afflicting all Americans today are made possible only by *Slaughter-House*'s repudiation of the Fourteenth Amendment's text, and the tradition of classical liberty it was plainly understood to secure. *McDonald* signals the start of a long process that will yet end with a full restoration of the Fourteenth Amendment we were meant to have. Professor Lash has plainly worked hard, and dedicated his considerable talent to the creation of a unique constitutional framework. But so did the 39th Congress, and in the end, it is their blueprint for constitutional liberty to which we must adhere.

Endnotes

1 Justice Antonin Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871 (2008).

2 *District of Columbia* v. *Heller*, 554 U.S. 571, 576-77 (2008) (citations omitted).

3 Christopher Tiedeman, The Unwritten Constitution of the United States 103 (1890). For a comprehensive survey of the reaction to *Slaughter-House*, *see* Richard Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 678-86 (1994).