

# Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act

KURT T. LASH\*

*For more than a century, legal scholars have looked to the 1866 Civil Rights Act for clues regarding the original meaning of the Fourteenth Amendment. Because the 1866 version of the Act protected only citizens of the United States, most scholars believe that the Act should be used as a guide to understanding the Fourteenth Amendment's citizenship-based Privileges or Immunities Clause. A closer look at the original sources, however, reveals that the 1866 Civil Rights Act protected rights then associated with the requirements of due process. John Bingham, the man who drafted Section One of the Fourteenth Amendment, expressly described the 1866 Civil Rights Act as protecting the natural and equal right to due process in matters relating to life, liberty, and property. Believing that Congress at that time lacked the constitutional power to enforce the Due Process Clause of the Fifth Amendment, Bingham proposed a Fourteenth Amendment that expressly protected every person's right to due process and granted Congress the power to enforce the same. Following the ratification of the Fourteenth Amendment, Congress repassed the Civil Rights Act and extended the majority of its protections to "all persons." This final version of the Civil Rights Act cannot be viewed as an enforcement of the rights of citizenship. Instead, it links the Civil Rights Act to the Due Process Clause and to the rights of all persons.*

*Understanding the link between the 1866 Civil Rights Act and the 1868 Due Process Clause sheds important light on the original meaning of Section One of the Fourteenth Amendment. First, it suggests that scholars have erred in trying to use the Civil Rights Act as a guide for understanding the original meaning of the Privileges or Immunities Clause. Although citizens enjoyed the equal rights of person and property protected by the Act, such enjoyment was only because all persons held such due process-related rights. The particular Privileges or*

---

\* E. Claiborne Robins Distinguished Professor of Law, University of Richmond School of Law. © 2018, Kurt T. Lash. The author thanks Lawrence Solum, Randy Barnett, John Harrison, Jeff Pojanowski, Hank Chambers, and Kevin Walsh for their helpful comments on various drafts of the Article. I am especially grateful for the suggestions and encouraging words by participants at the London Roundtable on Constitutional Interpretation (hosted by Notre Dame Law School), the University of Richmond Law School faculty colloquium, and the University of San Diego's Center for the Study of Constitutional Originalism Works-in-Progress Conference. Finally, a special thanks to Elizabeth Farrington for her research and editorial assistance in the preparation of this Article.

*Immunities of Citizens of the United States involved a different category of rights—rights that men like John Bingham and Jacob Howard identified as those actually enumerated in the Constitution. Second, understanding the link between the Civil Rights Act and the 1868 Due Process Clause reveals an underappreciated equal rights principle within both the federal Due Process Clause and the Fourteenth Amendment’s Due Process Clause. This principle not only appropriately informs due process constraints on federal activity in places like the District of Columbia, but it also implicates broad congressional power to enforce the equal due process rights of all persons in the states regardless of citizenship.*

#### TABLE OF CONTENTS

INTRODUCTION . . . . .	1391
A QUICK WORD ABOUT METHODOLOGY . . . . .	1395
I. THE LEGAL AND IDEOLOGICAL CONTEXT OF THE THIRTY-NINTH CONGRESS . . . . .	1396
A. RADICAL, CONSERVATIVE, AND MODERATE REPUBLICANS IN THE THIRTY-NINTH CONGRESS . . . . .	1396
B. THE DUE PROCESS CRITIQUE OF SLAVERY . . . . .	1398
C. THE FREEDMEN’S BUREAU BILL . . . . .	1404
1. Debating the Freedmen’s Bureau Bill in the Senate . . . . .	1406
2. The House: Bingham’s Proposed Amendment & Debating the Freedmen’s Bill . . . . .	1410
3. Initial Vote and President Johnson’s Veto . . . . .	1412
II. THE CIVIL RIGHTS BILL . . . . .	1414
A. NARROWING THE SCOPE OF THE CIVIL RIGHTS BILL . . . . .	1416
B. PROMOTING THE CIVIL RIGHTS BILL AS AN ENFORCEMENT OF THE NATURAL RIGHTS OF DUE PROCESS . . . . .	1417
C. JOHN BINGHAM’S CALL FOR A DUE PROCESS AMENDMENT . . . . .	1428
D. FEDERALISM AND REMOVING THE LANGUAGE “CIVIL RIGHTS AND IMMUNITIES” . . . . .	1430
E. THE DUE PROCESS OBJECTIONS OF JOHN BINGHAM . . . . .	1434
F. JOHNSON’S VETO AND CONGRESSIONAL OVERRIDE . . . . .	1441

III. THE FOURTEENTH AMENDMENT . . . . .	1447
A. DISCONNECTING THE CIVIL RIGHTS ACT FROM THE PRIVILEGES OR IMMUNITIES CLAUSE . . . . .	1447
B. JOHN BINGHAM'S AMENDMENT . . . . .	1449
C. THE SPEECH OF JACOB HOWARD . . . . .	1451
D. POST-RATIFICATION REPASSAGE OF THE CIVIL RIGHTS ACT . . . . .	1454
IV. IMPLICATIONS . . . . .	1458
A. ON DUE PROCESS AND EQUAL PROTECTION . . . . .	1463
B. DUE PROCESS AND THE RIGHT TO POSSESS AND ACQUIRE PROPERTY . . . . .	1464
CONCLUSION . . . . .	1466

#### INTRODUCTION

Scholars have long looked to the 1866 Civil Rights Act for clues to the original meaning of the Fourteenth Amendment. Both legal documents were drafted and passed within weeks of each other by the same members of the Thirty-Ninth Congress and both involve the protection of individual rights against state abridgment.<sup>1</sup> Congress also repassed the Civil Rights Act following the ratification of the Fourteenth Amendment,<sup>2</sup> suggesting that Congress understood that the Amendment gave it the power to pass the Act.

What remains unclear, however, is exactly which provision in the Fourteenth Amendment provided the power to pass legislation like the 1866 Civil Rights Act. The Amendment itself is five sections long. Section One contains multiple provisions, beginning with a definition of citizenship, followed by the protection of the “privileges or immunities of *citizens* of the United States,” and ending with a declaration that *all persons* are to be protected in their rights of due process and the equal protection of the law.<sup>3</sup>

To date, most scholars assume that the framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to retroactively constitutionalize the 1866 Civil Rights Act.<sup>4</sup> Many of these same scholars believe the framers intended the 1866 Civil Rights Act to enforce the “privileges and immunities of

1. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (vetoed by President Johnson); J. Res. 48, 39th Cong. (1866) (enacted).

2. Enforcement Act of 1870, ch. 114, 16 Stat. 140.

3. U.S. CONST. amend. XIV, § 1 (emphasis added).

4. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 389–90 (2005); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 60 (2004); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 20–51 (1977); CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE*

citizens in the several states” as described by Justice Bushrod Washington in the antebellum case *Corfield v. Coryell*.<sup>5</sup> If correct, this view suggests that the Privileges or Immunities Clause nationalized a host of “fundamental” property and economic rights, as well as the right “to pursue and obtain happiness and safety.”<sup>6</sup>

A closer look at the original sources, however, suggests that the 1866 Civil Rights Act is best understood as an attempt to protect the due process rights of all persons, and not the special privileges or immunities of United States citizens. Throughout the congressional debates, members linked rights protected under the Civil Rights Act with rights traditionally associated with the Fifth Amendment’s Due Process Clause. According to James Wilson, the Bill’s sponsor in the House

---

ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 44 (2015); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 118 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1230 (1992); Randy E. Barnett, *Foreword: What’s So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325, 332–33 (2005); Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1410 (2012); James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 96–97 (2002); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1474 (1992); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 960–61 (1995); Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 228 (2003); Note, *Congress’s Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1222 (2015); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 93, 97 (1872) (Field, J., dissenting). *But see* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 123 (2011) (stating that the Civil Rights Act was “the precursor to the Amendment’s clauses on due process and equal protection”).

5. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230); see AMAR, *supra* note 4, at 391; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 174–80 (1998) [hereinafter AMAR, THE BILL OF RIGHTS]; BARNETT, *supra* note 4, at 60–68; BERGER, *supra*, note 4, at 22; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 73–74 (1986); JACOBUS TENBROEK, EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 223, 231–32 (1965); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 72 (2011); Harrison, *supra* note 4, at 1416; Robert J. Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 217–18 (2004); Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 634 (2014); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1657 n.69 (2012); Kyle Alexander Casazza, Note, *Inkblots: How the Ninth Amendment and the Privileges or Immunities Clause Protect Unenumerated Constitutional Rights*, 80 S. CAL. L. REV. 1383, 1412–15 (2007); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1934–37 (Thomas M. Cooley ed., Boston, Little, Brown, & Co. 1873).

6. According to Justice Washington:

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental[.]

*Corfield*, 6 F. Cas. at 551–52.

of Representatives, the Civil Rights Act protected the due process rights of life, liberty, and property as originally declared in the Declaration of Independence and constitutionalized by the Fifth Amendment's Due Process Clause. John Bingham, the man who framed Section One of the Fourteenth Amendment, expressly described the 1866 Civil Rights Act as an effort to enforce the Fifth Amendment's Due Process Clause. Bingham refused to support the Bill, however, due to his belief that Congress lacked the power to enforce any provision in the Bill of Rights. Rather than supporting what he viewed as an unconstitutional Act, Bingham instead proposed a constitutional amendment that both protected the due process rights of all persons and empowered Congress to protect the same. Following the ratification of the Fourteenth Amendment, Bingham joined his colleagues in repassing the Civil Rights Act—this time with an additional passage that extended the majority of its protections to all persons regardless of citizenship. This extension cannot be understood as an enforcement of the Privileges or Immunities Clause—a clause that protects only the rights of citizens. Instead, Bingham and the sponsors of the Act would have understood it as protecting the fundamental rights of all persons—rights consistently described throughout the Thirty-Ninth Congress as essential to the enjoyment of due process.

Understanding the 1866 Civil Rights Act as a due process statute requires rethinking a number of commonly held views about the history of the Fourteenth Amendment and the original understanding of Section One. Although members commonly cited *Corfield's* list of equally-protected common law rights during the debates on the Civil Rights Act, these rights would not have been transformed into substantive rights by the Privileges or Immunities Clause. Instead, such rights would have been viewed as aspects of due process under which all persons could expect equal protection. Although citizens also enjoy the rights of due process, they do so because they are persons, not because they are citizens. This explains why commentators at the time described the 1866 Civil Rights Act as protecting both the rights of citizens of the United States *and* as protecting the natural due process rights of all persons.

The historical understanding of the Due Process Clause as granting Congress power to repass (and extend) the Civil Rights Act also casts significant light on the Reconstruction-era understanding of due process. Mid-nineteenth century republican theory viewed all persons as having an equal natural right to due process. This explains why Republicans in the Thirty-Ninth Congress viewed an equal rights statute like the Civil Rights Act as enforcing the principles included in the Fifth Amendment's Due Process Clause. Thus, even without the language in the Equal Protection Clause of the Fourteenth Amendment, the Amendment's Due Process Clause guarantees all persons an equal right to a minimum set of procedural protections for persons and property. The separate language in the Equal Protection Clause could be read as either clarifying the equal protection principle inherent in Due Process or, as some scholars suggest, requiring the equal *enforcement* of laws already on the books as protecting the due process rights of whites.

Understanding the link between the 1866 Civil Rights Act and the 1868 Due Process Clause provides insight as to the original meaning of Section One of the Fourteenth Amendment. It not only reveals an underappreciated equal rights strain within the Due Process Clause, but it also suggests scholars have been looking in the wrong place for the meaning of the Privileges or Immunities Clause. Rather than protecting the natural equal rights of all *persons*, this clause appears to protect the constitutionally enumerated rights of American *citizens*, such as those enumerated in the first eight amendments. These rights were now to be applied against state officials with new federal power to secure their adequate enforcement.

Part I of this Article explores the legal and political context of the Thirty-Ninth Congress, the body responsible for passing the 1866 Civil Rights Act and the Fourteenth Amendment. Although divided into radical, moderate, and conservative camps, most Republicans shared the antebellum abolitionist view that all persons were entitled to the equal rights of due process. As Republicans began to realize the former confederate states had no intention of respecting such rights, members searched for possible sources of constitutional authority to secure equal civil rights in the South. Republicans first attempted to extend and expand the jurisdiction of the Freedmen's Bureau. In a series of debates, Republicans sought to protect the same rights that would ultimately be protected by the Civil Rights Act. The debates provide the first indication that members of the Thirty-Ninth Congress viewed these civil rights through the lens of due process.

Part II investigates the drafting and passage of the 1866 Civil Rights Act. Although the initial draft secured equal civil rights for all persons, moderate Republicans' more limited view of congressional power forced advocates to limit the Act's protections to "citizens"—a group more plausibly under Congress's protective powers. Despite the change, advocates continued to describe the Bill as protecting natural due process rights belonging to all persons. Having already proposed an amendment authorizing congressional enforcement of the Due Process Clause, John Bingham refused to support the Civil Rights Act. Bingham not only objected that Congress lacked power to enforce the rights of due process, but he also criticized Congress's failure to extend these rights to all persons. Bingham's objections to the Civil Rights Act illuminate the theory behind his chosen language for the final draft of the Fourteenth Amendment.

Part III focuses on John Bingham's proposed Section One of the Fourteenth Amendment. Having opposed the Civil Rights Act, Bingham successfully advocated passage of a constitutional amendment that bound the states to respect the rights of due process and granted Congress authority to enforce due process rights. According to Jacob Howard, the "all persons" provisions of Section One (providing due process and equal protection) ensured the invalidation of discriminatory "codes" in the South—codes that were the central target of the Civil Rights Act. Following ratification of the Fourteenth Amendment, Congress repassed the Civil Rights Act, this time extending the majority of its provisions to all persons. Described as an effort to enforce the Fourteenth Amendment, the

Civil Rights Act's extension to all persons cannot be understood as an enforcement of the Privileges or Immunities of citizens. Instead, the extension conforms with preratification accounts of the Civil Rights Act as an effort to secure the equal due process rights of all persons.

Part IV considers some of the implications of this history and some likely objections. In particular, the history suggests the need to rethink the commonly assumed link between the 1866 Civil Rights Act and the Fourteenth Amendment's Privileges or Immunities Clause. Although the equal rights of due process would have been considered one of the privileges or immunities of citizenship, this is because citizens were *persons* covered by both the Fifth and Fourteenth Amendment's Due Process Clauses. Such equal rights were not triggered by citizenship status but by the mere fact of personhood. When the Supreme Court in cases like *Bolling v. Sharpe*<sup>7</sup> identified an equality principle in the concept of due process, the Court merely echoed an idea broadly accepted by the Reconstruction Congress.

#### A QUICK WORD ABOUT METHODOLOGY

This Article explores the original meaning of the Fourteenth Amendment. This places it within the general category of contemporary originalist scholarship. Despite the varying approaches to Originalism as a method of textual interpretation, its basic parameters are clear. The method asserts that the meaning of a text is fixed at the time of its creation and that this meaning can be recovered through an investigation of common historical usage of words and legal terms. Originalists believe this meaning should have some constraining effect for contemporary judicial application of the text.<sup>8</sup> The degree to which this recovered understanding ought to bind contemporary courts depends on one's normative theory of constitutional law.

In this Article, I make no claim about normative theory. Instead, I presume that the original communicative content of the Fourteenth Amendment and related legal texts is of interest to all constitutional scholars and to any judge considering the historical roots of the Fourteenth Amendment, the Civil Rights Act of 1866, and the Reconstruction-era understanding of due process. Although this Article pays particular attention to congressional debates, this does not reflect an embrace of "framers' intent" originalism. The focus merely reflects (1) the commonly accepted idea that such debates are *relevant* to determining common understandings of legal terms and phrases, and (2) the need to address commonly held, but likely erroneous, scholarly assertions about the views and intentions of the Thirty-Ninth Congress.

---

7. 347 U.S. 497 (1954).

8. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 460 (2013).

## I. THE LEGAL AND IDEOLOGICAL CONTEXT OF THE THIRTY-NINTH CONGRESS

To understand the communicated meaning of words and phrases at the time of Reconstruction, it is necessary to first understand the Reconstruction era in historical context. When the Thirty-Ninth Congress met in late December 1865, the nation remained in shock over the April assassination of Abraham Lincoln and members of Congress were slowly getting to know Lincoln's successor, Andrew Johnson. The December celebration of a ratified Thirteenth Amendment was tempered by a growing realization in Congress that southern legislatures were attempting to entrench the inferior status of freedmen through the enactment of the infamous "Black Codes." As Congress debated the need for further legislative efforts on behalf of the freedmen, they did so surrounded by empty seats—daily reminders of the still-excluded representatives from the rebellious southern states.<sup>9</sup> Both the House and the Senate were divided into various camps, each with its own view about how to establish national freedom and how to restore a functioning Union.

### A. RADICAL, CONSERVATIVE, AND MODERATE REPUBLICANS IN THE THIRTY-NINTH CONGRESS

Historians commonly divide the Reconstruction Congress into three camps: radical, moderate, and conservative.<sup>10</sup> The terms are not meant to be pejorative—indeed, the members themselves often were proud of being associated with one or another camp.<sup>11</sup> In this Article, I continue to use these three terms both to maintain a common conversation with contemporary historians and because I agree that the labels are helpful in keeping track of influential voting blocs in the Reconstruction Congress. As we shall see, securing sufficient votes for passing legislation or constitutional amendments often required negotiation among the three camps, with the moderates often controlling legislative outcomes.

The members of the Thirty-Ninth Congress were unified in their common desire to craft a successful policy of reconstruction and readmission of the

---

9. See WILLIAM H. BARNES, *HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 17–21* (New York, Harper & Bros. 1868). For a full account of the exclusion, see David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 385–90 (2008).

10. See, e.g., PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* 4 & n.5 (1999); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 228–43 (1988) (describing and distinguishing "radical" and "moderate" Republicans). See generally HANS L. TREFOUSSE, *THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE* (1968).

11. *THE POSITION OF THE REPUBLICAN AND DEMOCRATIC PARTIES: A DIALOGUE BETWEEN A WHITE REPUBLICAN AND A COLORED CITIZEN* 1–2 (Washington, Union Republican Cong. Comm. 1868) ("Q: What is the meaning of the word Radical as applied to political parties and politicians? A: It means one who is in favor of going to the root of things; who is thoroughly in earnest; who desires that slavery should be abolished, that every disability connected therewith should be obliterated . . . Q: Is Mr. Sumner a Republican? A: He is and a Radical, so are Thad. Stevens, Senator Wilson, Judge Kelley, Gen. Butler, Speaker Colfax, Chief Justice Chase, and all other men who favor giving colored men their rights.").



southern states. They were deeply divided, however, on how to accomplish that goal. Radical Republicans favored continued exclusion of the former-confederate states.<sup>12</sup> Radicals like Charles Sumner believed that the states committed “suicide” and became no more than federal territories when they seceded from the Union, thus allowing the victorious Union to combine and reconfigure the southern “territories” at will.<sup>13</sup> At the very least, radicals insisted, proper republican governments must be constructed in the southern states prior to their readmission to the Union. Accordingly, radicals objected to including the votes of southern states in determining the ratification of the Thirteenth Amendment;<sup>14</sup> in their view, there were no southern states until Congress said so. Radicals also shared an expansive vision of federal authority to enforce common law civil rights in the states and they rejected more traditional ideas of divided national and state authority.<sup>15</sup>

At the other extreme, conservative Republicans (and most loyal Democrats) believed that the Union should be reconstructed as quickly as possible. This required the immediate readmission of the southern states following ratification of the Thirteenth Amendment. If, as President Johnson insisted, the southern states had the authority to vote for a constitutional amendment, there was no longer any valid reason to exclude them from their seats in the federal Congress.<sup>16</sup> Conservatives shared a narrow reading of national power, and they insisted that the general subject of civil rights should be left to the people in the several states—as had been the case under the original Constitution.

Moderate Republicans took, as one might expect, a middle view. They agreed with radicals that no former-rebel state should be readmitted prior to guaranteeing the rights of freedmen.<sup>17</sup> However, moderates rejected radical theories of state-suicide, and they held a far more modest view of existing congressional power to regulate civil rights in the states. Most moderates continued to believe in the

---

12. FONER, *supra* note 10, at 232.

13. *Id.*

14. See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869*, at 142 (1974). This idea carried over into the debates surrounding the Fourteenth Amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 384 (1866) (statement of Rep. Farnsworth) (“In my judgment, three fourths of the States which were not in the rebellion are sufficient. I do not see how a State which has been in the rebellion can act on the Constitution. I do not see how a State which has abolished its State government as a part of the United States, and has been acting in open hostility to the Government—I do not see how such a State can have submitted to its Legislature a proposition for ratification.”).

15. See FONER, *supra* note 10, at 230. The radicals’ broad interpretation of national power is best represented by the radical Republican view that Congress enjoyed unenumerated power to enforce civil rights in the states, with or without the addition of the Thirteenth and Fourteenth Amendments. See CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1864) (statement of Sen. Sumner).

16. See James M. Campbell & Rebecca J. Fraser, *Introduction* to *RECONSTRUCTION: PEOPLE AND PERSPECTIVES*, at xv (James M. Campbell & Rebecca J. Fraser eds., Peter C. Mancall Series ed., 2008).

17. See Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L.Q. 287, 305–07 (2015).

liberty-enhancing value of federalism, even as they sought to protect a basic set of national rights.<sup>18</sup>

#### B. THE DUE PROCESS CRITIQUE OF SLAVERY

One area of substantial overlap in the beliefs of Reconstruction Republicans was their common belief that no person should be denied life, liberty, or property without due process of law.<sup>19</sup> On this matter, Republican thinking was deeply influenced by antebellum abolitionist critiques of slavery. For decades, abolitionists had insisted that slavery was inconsistent with the Fifth Amendment's Due Process Clause.<sup>20</sup> Even if one accepted the Supreme Court's announcement in

---

18. See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 80–81 (2014); see also EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 34–35 (1990).

19. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 290 (1970); MALTZ, *supra* note 18, at 4.

20. See JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT, IN RELATION TO THAT SUBJECT* 120 (1849) (“But there are other guaranties for freedom, to be found in that instrument, which cannot be realized while slavery is permitted in the Union. Nevertheless, they stand there, as fresh and imparative as they did the day they were made. Among others, is to be found the following; in the latter clause of the 5th article of the amendments to the constitution, ‘No person shall be deprived of life, liberty, or property, without due process of law.’”); see also FONER, *supra* note 19, at 133 (“[T]he resolutions regarding slavery were fundamentally the same as they had been in 1856. Framed by John A. Kasson, the former Massachusetts Free Soiler who now lived in Iowa, the platform declared that slavery could not constitutionally exist in any territory because of the due process clause of the Fifth Amendment.”); ST. GEORGE TUCKER, *A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA* 49–51 (1796) (“Civil rights, we may remember, are reducible to three primary heads; the right of personal security; the right of personal liberty; and the right of private property. In a state of slavery the two last are wholly abolished, the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring, or holding, to his own use. Hence it will appear how perfectly irreconcilable a state of slavery is to the principles of a democracy, which form the *basis* and *foundation* of our government. For our bill of rights declares, ‘that all men are, by nature *equally free* and independent, and have certain rights of which they cannot deprive or divest their posterity—namely, the enjoyment of life and *liberty*, with the means of *acquiring* and *possessing property*.’ This is indeed no more than a recognition of the first principles of the law of nature, which teaches us this equality, and enjoins every man, whatever advantages he may possess over another, as to the various qualities or endowments of body or mind, to practice the precepts of the law of nature to those who are in these respects his *inferiors*, no less than it enjoins his *inferiors* to practise them towards *him*. . . . It would be hard to reconcile reducing the Negroes to a state of slavery to these principles, unless we first degrade them below the rank of human beings, not only politically, but also physically and morally.”); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 252–53 (1977) (“In 1837, Elizur Wright and an anonymous black abolitionist used due process arguments to condemn the federal Fugitive Slave Act of 1793. At the same time, at the annual convention of the N-EA-SS, a range of radical opinion surfaced: William Goodell claimed vaguely that slavery was ‘unlawful’; Nathaniel Colver, a Massachusetts clerical abolitionist, argued that the Constitution did not recognize any right of slaveholding; and the Reverend Orange Scott went all the way: ‘The whole system of slavery is unconstitutional, null and void, and the time is coming when the Judges of the land will pronounce it so. So far from the Constitution authorizing or permitting slavery, it was established to guard life, liberty, and property.’” (footnotes omitted)).

*Dred Scott v. Sandford* that blacks were not citizens,<sup>21</sup> no one could reasonably deny that blacks were persons.

The abolitionist reliance on the Fifth Amendment has been extensively catalogued and discussed by other scholars.<sup>22</sup> For our purposes, it is important only to note that abolitionists commonly read the federal Due Process Clause as a constitutionalized expression of the Declaration of Independence—a foundational document that declared the fundamental natural rights of *all persons*, not just American citizens. As the 1843 Liberty Party Platform Declared:

RESOLVED, That the fundamental truths of the Declaration of Independence, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government, by that amendment of the constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law.<sup>23</sup>

In 1859, abolitionist Joel Tiffany published his *Treatise on the Unconstitutionality of Slavery* which explained that, among other guarantees of freedom found in the Constitution “is to be found the following; in the latter clause of the 5th article of the amendments to the constitution, ‘No person shall be deprived of life, liberty, or property, without due process of law.’”<sup>24</sup> The former slave turned statesman Frederick Douglass likewise agreed that slavery could not be reconciled with the due process guarantees of the federal Constitution:

This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself . . . . The Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus—the great writ that put an end to slavery and slave-hunting in England—it secures to every State a republican form of government. Any one of these provisions, in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America.<sup>25</sup>

---

21. 60 U.S. (19 How.) 393, 426–27 (1857).

22. See, e.g., WIECEK, *supra* note 20, at 249–75; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011); Maltz, *supra* note 17; Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

23. 1843 Platform of the Liberty Party, Adopted in Convention, 30 August 1843, Buffalo, N.Y., <http://alexpeak.com/twr/libertyparty/1843/> [<https://perma.cc/8DAE-7QAT>].

24. TIFFANY, *supra* note 20, at 120.

25. Frederick Douglass, “*The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*” (1860), in *ANTISLAVERY POLITICAL WRITINGS, 1833–1860: A READER* 153–54 (C. Bradley Thompson ed., 2004).

Finally, the Republican Party Platform of 1860 declared:

[T]hat as our republican fathers . . . ordained that no person shall be deprived of life, liberty or property without due process of law . . . we deny the authority of the Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any Territory of the United States . . . .<sup>26</sup>

The precise content and scope of due process during the antebellum and Reconstruction period remains a matter under scholarly dispute.<sup>27</sup> Whatever disagreement may have existed at the margins, however, there was clear consensus among abolitionists and antebellum Republicans regarding its core meaning: First, *all* persons had an *equal* right to due process (not just citizens).<sup>28</sup> Second, the rights of due process prohibited, at least, deprivation of life, liberty, or property except by way of a judicially enforced set of fair procedures. For example, in striking down the Fugitive Slave Act for violating the Due Process Clause of the Fifth Amendment, Wisconsin Supreme Court Judge Abram D. Smith declared:

The constitution provides that no person shall be deprived of life, liberty or property without *due process of law*. This last phrase has a distinct technical meaning, viz: regular judicial proceedings, according to the course of the common law, or by a regular suit commenced and prosecuted according

---

26. *Platforms of 1856: Republican Platform*, in NATIONAL PARTY PLATFORMS OF THE UNITED STATES PRESIDENTIAL CANDIDATES ELECTORAL AND POPULAR VOTES 28, 28 (J.M.H. Frederick comp., 1896).

27. See, e.g., LASH, *supra* note 18; Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1675 (2012); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 588 (2009); McConnell, *supra* note 4, at 952–53; Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 496 (2013) [hereinafter Williams, *Other Desegregation Decisions*]; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428–59 (2010) [hereinafter Williams, *The One and Only*].

28. See CONG. GLOBE, 39th Cong., 1st Sess. 77 (1865) (statement of Sen. Trumbull) (“I have never doubted that, on the adoption of that amendment, it would be competent for Congress to protect every person in the United States in all the rights of person and property belonging to a free citizen”); *id.* at 158 (statement of Rep. Bingham) (“[E]very loyal citizen of this Republic has come to know, that the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons, whether citizens or strangers . . . . The President, therefore, might well say, as he does say in his message, that ‘the American system rests on the assertion of the equal right of EVERY MAN to life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all his faculties.’”); *id.* at 1090 (statement of Rep. Bingham) (“Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?”); see also CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857) (statement of Rep. Bingham) (“The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth . . . . This is equality.”).

to the forms of law.”<sup>29</sup>

Representative John Bingham (R-OH), the man who drafted the Due Process Clause of the Fourteenth Amendment, was particularly committed to the idea that all persons had an equal right to due process. In an 1862 speech advocating abolishing slavery in the District of Columbia, Bingham compared the Magna Charta’s due process for “freedmen” with the American Constitution’s due process for all “persons”:

Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word “freeman,” and adopts in its stead the more comprehensive words “no person;” thus giving its protection to all, whether born free or bond. The provision of our Constitution is, “no person shall be deprived of life, or liberty, or property without due process of law.” This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century . . . the patriots of America proclaimed the security and protection of law for *all*. The later and nobler revelation to our fathers was that all men are equal before the law. No matter upon what spot of the earth’s surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor; no matter whether wise or simple; no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law; that no person, by virtue of the American Constitution, by the majesty of American law, shall be deprived of

---

29. *In re Booth*, 3 Wis. 1, 41 (1854); see also CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1864) (statement of Sen. Sumner) (citation omitted):

This was a part of the amendments to the Constitution proposed by the First Congress, under the popular demand for a Bill of Rights. Brief as it is, it is in itself alone a whole Bill of Rights. Liberty can be lost only by “due process of law,” words borrowed from the old liberty-loving common law, illustrated by our master in law, Lord Coke. But it is best explained by the late Mr. Justice Bronson, of New York, in a judicial opinion where he says:

“The meaning of the section then seems to be, that *no member of the State shall be disenfranchised or deprived of any of his rights or privileges* unless the matter shall be adjudged against him upon trial had according to the course of common law. The words ‘due process of law’ in this place cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.”

Such is the protection which is thrown by the Constitution over every “person,” without distinction of race or color, class or condition. There can be no doubt about the universality of this protection. All, without exception, come within its scope. Its natural meaning is plain . . .

Sumner’s speech, titled *No Property in Man* was separately published in pamphlet form. See Charles Sumner, Sen. of Mass., *No Property in Man* (Apr. 8, 1864), in LOYAL PUBL’N SOC’Y, PAMPHLETS ISSUED BY THE LOYAL PUBLICATION SOCIETY, FROM FEB. 1, 1864, TO FEB. 1, 1865: NOS. 45 TO 78 (1865). As much as abolitionist Republicans may have wished to enforce the federal Due Process Clause against the states, the antebellum Supreme Court foreclosed this possibility by ruling that the Bill of Rights bound only the federal government. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833), Chief Justice John Marshall ruled that the Takings Clause of the Fifth Amendment, like the rest of the Bill of Rights, did not bind state officials.

life or liberty or property without due process of law. Unhappily, for about sixty years this provision of the Constitution, hear upon the hearthstone of the Republic, where the jurisdiction of the Government of the United States is exclusive, without State limitations and subject to no restraint other than that imposed by the letter and spirit of the Constitution, this sacred guarantee of life and liberty and property to all has been wantonly ignored and disregarded as to a large class of our natural-born citizens.<sup>30</sup>

By the time Congress debated the Thirteenth Amendment, the abolitionist linkage of the natural rights of the Declaration and the equal right to due process was well entrenched. On December 14, 1863, Representative Owen Lovejoy (R-IL) “introduced a bill to give effect to the Declaration of Independence, and also to certain provisions of the Constitution of the United States.”<sup>31</sup> As reported in the Congressional Globe:

[Lovejoy’s] bill was read. It recite[d] that all men were created equal, and were endowed by the Creator with the inalienable right to life, liberty, and the fruits of honest toil; that the Government of the United States was instituted to secure those rights; that the Constitution declares that no person shall be deprived of liberty without due process of law, and also provides—article 5, clause 2—that “this Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, and the judges in each State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding;” that it is now demonstrated by the rebellion that slavery is absolutely incompatible with the union, peace, and general welfare, for which Congress is to provide. It therefore enacts that all persons heretofore held in slavery in any of the States or Territories of the United States are declared free men, and are forever released from slavery or involuntary servitude, except as punishment for crime, on due conviction.<sup>32</sup>

As the debates went forward on the proposed Thirteenth Amendment, other members also linked the Declaration of Independence with the Due Process Clause and declared both violated by slavery. As Sen. Charles Sumner (R-MA) explained:

[N]o American need be at a loss to designate some of the distinctive elements of a republic according to the idea of American institutions. These will be found, first, in the Declaration of Independence, by which it is solemnly announced “that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” And they will be found, secondly, in that other guarantee and prohibition of the Constitution, in harmony with the Declaration of independence; “no person shall be deprived of life, liberty, or property *without due process of law*.” Such

---

30. CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (statement of Rep. Bingham).

31. CONG. GLOBE, 38th Cong., 1st Sess. 20 (1863) (statement of Rep. Lovejoy).

32. *Id.* (reporter’s account of the reading of the Bill).

are some of the essential elements of a “republican form of government,” which cannot be disowned by us without disowning the very muniments of our liberties; and it is there which the United States are bound to guaranty. But all these make slavery impossible.<sup>33</sup>

Although the final version of the Thirteenth Amendment spoke only of slavery and involuntary servitude, every proponent understood the incompatibility of slavery and the general protections of due process. Republicans embraced the abolitionist critique of slavery and the idea that slaves, as persons, were denied the due process protection of life, liberty, and property. Slavery thus conflicted with the broadly accepted idea that the rights of due process were natural rights belonging to all persons as originally announced in the Declaration of Independence. Reconstruction-era Republicans agreed that abolishing slavery would remove an impediment to the natural rights of all persons to due process in cases involving the deprivation of life, liberty, or property.

What Republicans in 1864 did not agree on, however, was whether securing these rights to the freedmen required something *more* than simply abolishing slavery. Because laws in every state protected free persons’ rights of life, liberty, and property,<sup>34</sup> it was possible that former slaves would automatically enjoy the state-secured rights of free persons without the need for additional legislation.<sup>35</sup> Some radical Republicans insisted that Congress go beyond eradicating slavery and additionally secure the “equal rights” of all freedmen. Charles Sumner, for example, criticized the final draft of the Thirteenth Amendment and urged his fellows to adopt an antislavery amendment that specifically established that “[a]ll persons are equal before the law.”<sup>36</sup> Despite Sumner’s dogged efforts, the Thirty-

33. *Id.* at 1480 (statement of Sen. Sumner).

34. For a discussion of due process in state constitutions, see generally Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *TEX. L. REV.* 7, 65–67 (2008) (“Thirty states out of thirty-seven in 1868—or an Article V, three-quarters consensus—had clauses in their state constitutions that explicitly prohibited the deprivation of life, liberty, or property without due process of law or by the law of the land.”). For examples of state constitutional provisions protecting due process rights, see, for example, GA. CONST. of 1865, art. I, § 2 (“No person shall be deprived of life, liberty, or property, except by due process of law.”); MO. CONST. of 1865, art. I, § 1 (“That we hold it to be self-evident, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness”); N.H. CONST. of 1784, art. I, § 2 (“All men have certain natural, essential, and inherent rights. [A]mong which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.”); N.Y. CONST. of 1846, art. I, § 6 (“No person shall . . . be deprived of life, liberty, or property, without due process of law”). Regardless of constitutional provisions, every state had existing laws securing the general rights of life, liberty, and property.

35. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 133 (2001) (“[M]ost Republicans, even the radicals among them, did not foresee a time when the clause would be invoked to increase federal power over the states. Instead, they assumed that the states would apply the laws of freedom equally. Republicans who assumed that the states would act responsibly may have been naïve, but their assumption was nonetheless genuine.”).

36. See CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Sumner).

Eighth Congress rejected his effort to both abolish slavery and secure equal rights. As Senator Lyman Trumbull (R-IL) explained to Sumner, although the committee had considered his proposal, the object of the amendment was “to abolish slavery and prevent its existence hereafter. The language as reported by the committee will accomplish these objects . . . .”<sup>37</sup> If the southern states accepted the amendment in good faith, freedmen would enjoy the status quo protections for free persons and nothing more would be required to secure to all persons the natural rights of due process.

Even as ratification of the Thirteenth Amendment was pending before the states, however, southern states moved to enact the infamous Black Codes. The “first and most severe” codes were enacted near the end of 1865, just as the final state ratifications triggered the adoption of the Thirteenth Amendment.<sup>38</sup> The new codes severely restricted the freedmen’s ability to buy or rent property, contract for labor, or testify in cases involving a dispute with a white employer.<sup>39</sup> The few legal process laws that remained formally available to freedmen were often unenforced or unequally enforced.<sup>40</sup>

When the members of the Thirty-Ninth Congress first assembled in December of 1865, a number of Republicans had already concluded that securing to freedmen their natural rights of due process would require additional congressional action. For these members, the difficulty became identifying a plausible source of constitutional authority to protect the rights of person and property.

#### C. THE FREEDMEN’S BUREAU BILL

The debates over the Freedmen’s Bureau Extension Bill are an underappreciated source of information about the underlying theory of the original (and ultimate) Civil Rights Act. Introduced at the same time as the Civil Rights Bill, the Freedmen’s Bill protected the same set of rights as the Act.<sup>41</sup> Proponents initially

---

37. *Id.* at 1488 (statement of Sen. Trumbull). Scholars occasionally argue that Congress did not actually reject Sumner’s proposal for an expansive equal rights amendment, and that the final language of the Thirteenth Amendment could be understood as guaranteeing everything Sumner wanted. This is unlikely. Members fully understood that Sumner wished to go beyond simply eradicating slavery. Indeed, that had been Sumner’s effort from the opening of the session. Doing so, however, would guarantee losing the support of war-supporting Democrats who were just barely on board. The Republican leadership understood this and turned aside Sumner’s more radical efforts. It was only later, after the Amendment had been ratified and it had become clear that states would *not* act in good faith, that members like Trumbull and Howard unsuccessfully pressed for a Sumner-esque reading of the Thirteenth Amendment. As Michael Vorenberg writes (in reference to this later “re-reading”): “Obviously, there was some embellishment here, for committee members in 1864 could not have envisioned all that southern state governments would do to undercut black freedom in 1865 and 1866. It was understandable, then, that a number of lawmakers in 1866 did not accept Trumbull and Howard’s story.” VORENBERG, *supra* note 35, at 55.

38. See FONER, *supra* note 10, at 199; see also ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 39 (1988).

39. See FONER, *supra* note 10, at 199–204.

40. See *id.* at 204–05.

41. See *infra* notes 43, 45 and accompanying text.



described both bills as companion efforts to enforce the natural rights of all free persons as authorized by Section Two of the Thirteenth Amendment.

On December 19, 1865, Senator Lyman Trumbull (R-IL) announced his intention to “introduce a bill to enlarge the powers of the Freedmen’s Bureau so as to secure freedom to all persons within the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with means for their vindication.”<sup>42</sup> On January 5, 1866, Trumbull introduced Senate Bills 60 and 61.<sup>43</sup> Senate Bill 60, titled a bill “to enlarge the powers of the Freedmen’s Bureau,” protected the following rights:

Whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons (including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of persons and estate) are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offense, than are prescribed for white persons committing like acts or offenses, it is to be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.<sup>44</sup>

Senate Bill 61, titled an act “to protect all persons in the United States in their civil rights, and furnish the means of their vindication,”<sup>45</sup> similarly provided:

[T]hat there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law,

---

42. CONG. GLOBE, 39th Cong., 1st Sess. 77 (1865) (statement of Sen. Trumbull).

43. CONG. GLOBE, 39th Cong., 1st Sess. 77, 129 (1866).

44. *Id.* at 209 (statement of Sen. Johnson).

45. *Id.* at 211 (statement of Sen. Trumbull).

statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>46</sup>

As originally proposed, both bills protected the same list of rights and extended these rights to all persons, not just citizens. Both bills required that the states guarantee equal rights, but neither bill established a set of absolute substantive rights. States could regulate (and deprive) the rights of liberty, property, and personal security so long as they did so in a nondiscriminatory manner with adequate access to legal process (such as when the deprivation was “as punishment for crime whereof the party shall have been duly convicted”<sup>47</sup>). Although neither bill expressly referred to the rights of due process, as the debates went forward members repeatedly linked the protections of the Bill to rights declared in the Fifth Amendment’s Due Process Clause.

### 1. Debating the Freedmen’s Bureau Bill in the Senate

When debate began in the Senate on the Freedmen’s Bill on January 18, 1866, members noted its obvious relationship to Civil Rights Bill. According to William Stewart (R-NV):

I am in favor of this bill. It goes to the utmost extent that I think we are entitled to go under the [Thirteenth] amendment. There is another bill introduced by the Senator from Illinois [Trumbull] which must go along with it, which provides civil jurisdiction for the protection of the freedman. Under this constitutional amendment we can protect the freedman and accomplish something for his real benefit.<sup>48</sup>

Opponents of the Freedmen’s Bill raised a number of objections, including that it made the war-time Freedmen’s Bureau permanent, extended its jurisdiction to include freedmen in states that had never seceded from the Union, and exercised a heretofore unheard of national power to purchase homes for local dependents.<sup>49</sup> Most of all, opponents denied that the Thirteenth Amendment authorized enforcement of the civil rights covered by either the Freedmen’s Bill or the Civil Rights Act. As Senator Thomas Hendricks (D-IN) argued:

I understand, from the remarks of the Senator who introduced this bill [Mr. TRUMBULL], when he gave notice of its introduction, that he places the power of Congress to enact this law under the amendment to the Constitution abolishing slavery.

....

It is claimed that under [that Amendment’s] second section Congress may do anything necessary, in its judgment, not only to secure the freedom of the

---

46. *Id.*

47. U.S. CONST. amend. XIII, § 1.

48. CONG. GLOBE, 39th Cong., 1st Sess. 1977 (1865) (statement of Sen. Stewart).

49. *See id.* at 315–17 (statement of Sen. Hendricks).

negro, but to secure to him all civil rights that are secured to white people. I deny that construction, and it will be a very dangerous construction to adopt . . . . What is slavery? . . . [I]t is a relation between two persons whereby the conduct of the one is placed under the will of the other . . . . The law of the State which authorized this relation is abrogated and annulled by this provision of the Federal Constitution, but no new rights are conferred upon the freedman.

Then, sir, to make a contract is a civil right which has ordinarily been regulated by the States. The form of that contract and the ceremonies that shall attend it are not to be regulated by Congress, but by the States . . . . Is the right to marry according to a man's choice a civil right? Marriage is a civil contract, and to marry according to one's choice is a civil right . . . .

. . . .

. . . [S]uppose a minister when called upon should refuse to solemnize a marriage between a colored man and a white woman because the law of the State forbade it, would he then, refusing to recognize a civil right which is enjoyed by white persons, be liable to this punishment?<sup>50</sup>

In response, Sen. Trumbull noted that the Freedmen's Bill should be viewed as a continuation of all the power Congress had exercised during the war, for war powers "do not cease with the dispersion of the rebel armies."<sup>51</sup> Trumbull's primary argument, however, was that the rights protected under both the Freedmen's Bill and the Civil Rights Bill were authorized by the adoption of the Thirteenth Amendment:

What was the object of the constitutional amendment abolishing slavery? It was not, as the Senator says, simply to take away the power of the master over the slave. Did we not mean something more than that? Did we not mean that hereafter slavery should not exist, no matter whether the servitude was claimed as due to an individual or the State? The constitutional amendment abolishes just as absolutely all provisions of State or local law which make a man a slave as it takes away the power of his former master to control him.

. . . With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.

Those laws that prevented the colored man going from home, that did not allow him to buy or sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.<sup>52</sup>

---

50. *Id.* at 318–19 (statement of Sen. Hendricks).

51. *Id.* at 320 (statement of Sen. Trumbull).

52. *Id.* at 322.

According to Trumbull, both the Freedmen's Bill and the Civil Rights Bill advanced the same policy as that advocated by President Johnson, who had recently declared that "[t]he American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness, to freedom of conscience, to the culture and exercise of all his faculties."<sup>53</sup> "The design of these bills," Trumbull assured his colleagues, "is not, as the Senator from Indiana [Mr. HENDRICKS] would have us believe, to consolidate all power in the Federal Government, or to interfere with the domestic regulations of any of the States, except so far as to carry out a constitutional provision which is the supreme law of the land."<sup>54</sup>

Trumbull's invocation of the language of the Declaration of Independence in support of a law protecting the rights of life, liberty, and property echoed the antebellum abolitionist claim that slavery denied persons their natural rights to life, liberty, and property—rights expressly declared in the Due Process Clause of the Fifth Amendment.

Trumbull's colleagues recognized the theory, but some questioned whether the Thirteenth Amendment granted Congress the power to enforce the rights of the Due Process Clause.<sup>55</sup> In fact, some argued that Trumbull's proposed legislation was unnecessary precisely because the Due Process Clause of the Fifth Amendment *already* guaranteed all persons the rights of life, liberty, and property against state abridgement. As Senator Edgar Cowan (R-PA) stated:

I have only to say that the Constitution of the United States makes provision by which the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty; and if these things are done by authority of any of the southern States, there is ample remedy now. Under the fifth amendment of the Constitution, no man can be deprived of his rights without the ordinary process of law; and if he is, he has his remedy.<sup>56</sup>

Cowan's comments are significant for two reasons. First, they indicate that Cowan understood that the purpose behind both the Freedmen's Bureau Bill and the Civil Rights Bill was to enforce rights covered by the Due Process Clause. Secondly, Cowan believed that the Fifth Amendment already provided individuals

---

53. *Id.* (quoting President Andrew Johnson's annual message to Congress).

54. *Id.* at 323. In discussing Congress's legislative efforts during the war, Trumbull claimed Congress had relied on a number of texts in the Constitution, including the War Powers, the Comity Clause, and the Republican Guarantee Clause. *See id.* at 319. Trumbull's references were not tied specifically to either the Freedmen's Bill or the Civil Rights Bill. At this point in the debates (prior to the alteration of the Civil Rights Bill), Trumbull cited only the Thirteenth Amendment as an equal source of congressional authority for passing the two bills.

55. This was John Bingham's specific objection. *See infra* note 184 and accompanying text.

56. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Cowan).

with a cause of action against state officials.<sup>57</sup> This was a minority position, but it stands as yet another example of the common understanding that the Bill sought to enforce the rights of due process.

In addition to the frequent references to the Freedmen's Bill's protection of the rights of due process, members also continually referred to the proposed Bill's protection of the rights of all freedmen, regardless of citizenship. Senator Henry Wilson (R-MA), for example, supported the Freedmen's Bill as one of a series of measures "for the security, the liberty, and the protection of *all people*."<sup>58</sup> When challenged to define what he meant by the "equality of men" secured by the Freedmen's and Civil Rights Bills, Wilson responded by describing the rights of all persons to equal protection of the law:

Why are these questions put? . . . Does he not know that we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land? Does he not know that we mean that the poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land? Does he not know that the poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor?

. . . .

. . . [W]e have accepted the sublime truths of the Declaration of Independence. We stand as the champions of human rights for *all men*, black and white, the wide world over . . . .<sup>59</sup>

Agreeing with Wilson's general description, Senator James McDougall (D-CA) explained:

The provision of the constitutional amendment, now a part of the instrument, authorizes Congress to pass any law in aid of its terms. What would be a law in aid of it? A just and proper law in aid of it would be a law declaring that no State legislation or legislation of Congress should be effective to deprive *any person*, regardless of color, of his right to life, liberty, and the pursuit and enjoyment of happiness; that every person shall be free, and that he shall be protected, if you please.

The Senator from Massachusetts [Mr. WILSON] told us a day or two ago what freedom meant; and he said it meant protection. Ay, sir, it does mean

---

57. Despite the Supreme Court's decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Fifth Amendment did not bind the states, some members of the Reconstruction Congress either were not aware of *Barron* or rejected its reasoning. See LASH, *supra* note 18, at 101.

58. CONG. GLOBE, 39th Cong., 1st Sess. 341 (1866) (statement of Sen. Wilson) (emphasis added).

59. *Id.* at 343–44 (emphasis added).

protection. Under all Governments that are free, freedom is perfect protection in life, liberty, and the enjoyment and pursuit of happiness.<sup>60</sup>

Given the obvious relationship between the Freedmen's Bill and the Civil Rights Act, opponents used the debates over the Freedmen's Bill to criticize both proposals. Thus, even before debate on the Civil Rights Act had officially begun, critics questioned whether Section Two of the Thirteenth Amendment empowered Congress to require states to equally protect the civil rights of all persons.<sup>61</sup> Despite such objections, the Senate passed the Freedmen's Bureau Bill on January 25 by a vote of 37–10.<sup>62</sup> These criticisms, however, put proponents of the Civil Rights Bill on notice that not every member shared a broad reading of the Thirteenth Amendment. These dissenters might potentially block either Bill's passage should Congress have to overcome a Presidential veto.

## 2. The House: Bingham's Proposed Amendment & Debating the Freedmen's Bill

On December 6, 1865, Representative John Bingham (R-OH) proposed an amendment that would 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, life, liberty, and property," which was then sent on to the Committee on the Judiciary for consideration.<sup>63</sup> On January 25, 1866, Bingham declared that the question "whether the Constitution shall be so amended as to give to Congress the power by statute law to enforce all its guarantees," was the most important issue that would come before Congress.<sup>64</sup>

On February 13, Bingham, on behalf of the Joint Committee on Reconstruction, referred the following proposed amendment to the House of Representatives:

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. IV, Sec. 2]; and to all persons in the several

---

60. *Id.* at 393 (statement of Sen. McDougall) (emphasis added). McDougall opposed the Freedmen's Bill on the grounds that it went beyond the rights of equal protection and provided special positive rights for the freedmen. *Id.*

61. According to Senator Willard Saulsbury (D-DE):

The authority to enact such a law is claimed under the second section of the act providing for the amendment of the Constitution. Can it be possible that any person can conceive that under that section such an extensive power as that now claimed is actually given? . . . What was the amendment? An amendment abolishing the *status* or condition of slavery, which is nothing but a *status* or condition which subjects one man to the control of another, and gives to that other the proceeds of the former's labor. Cannot that amendment be carried into effect, and the *status* of freedom established, without exercising such a power as this? I say here, as I have said before, that when that constitutional amendment was under consideration in this Chamber, there was no friend of the measure who claimed or avowed that such a power as this existed in Congress under it.

*Id.* at 363 (statement of Sen. Saulsbury) (emphasis in original).

62. *Id.* at 421 (with the following members absent: Cowan, Nesmith, and Willey).

63. *Id.* at 14 (statement of Rep. Bingham).

64. *Id.* at 432.

States equal protection in the rights of life, liberty, and property [Fifth Amendment].<sup>65</sup>

Note that the final clause in Bingham's proposed amendment guaranteed to all persons the rights of due process. This was the first draft of what would become Section One of the Fourteenth Amendment. Ultimately, Bingham would redraft the amendment and secure its adoption following Congress's passage of the Civil Rights Act.<sup>66</sup> As we shall see, members referred to Bingham's proposed amendment as the debates on the Freedmen's Bill and the Civil Rights Bill went forward.

The House began debate on the Freedmen's Bill on January 30, 1866. Like in the Senate, proponents of the Bill in the House spoke of its protection of the due process rights of life, liberty, and property, except now they linked these ideas to Rep. Bingham's proposed amendment. According to Representative Ignatius Donnelly (R-MN):

There is an amendment offered by the distinguished gentleman from Ohio [Mr. BINGHAM] which provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution.

Why should this not pass? Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty, and property to fall to the ground through lack of power to enforce them?<sup>67</sup>

As we shall see, Bingham believed an amendment was necessary to supply Congress with power to enforce the rights of due process. Proponents of the Bill, however, insisted that Congress already possessed implied authority to pass the Bill under Section Two of the Thirteenth Amendment.<sup>68</sup> Like in the Senate, however, opponents denied such an expansive reading of the abolition amendment. As Representative Samuel Marshall (D-IL) argued:

---

65. *Id.* at 813. The proposed amendment was submitted to the Senate on the same day. *See id.* at 806.

66. *See infra* note 224 and accompanying text.

67. CONG. GLOBE, 39th Cong. 1st Sess. 586 (1866) (statement of Rep. Donnelly); *see also id.* at 540 (statement of Rep. Dawson) ("The constitutional provisions guarantying the liberties of the American citizen are those contained in the fourth, fifth, and sixth articles of the amendments. They secure him in the possession of personal liberty and property, against unwarrantable search and seizure, and in the right to a trial by jury. These are the American's birthright and the pillars which support our democratic government."). Representative Donnelly's speech was separately published in pamphlet form. *See FREEDMAN'S BUREAU: SPEECH OF HON. IGNATIUS DONNELLY OF MINNESOTA: DELIVERED IN THE HOUSE OF REPRESENTATIVES, FEBRUARY 1, 1866* (Washington, D.C., McGill & Witherow 1866). Note that Donnelly understood that Bingham was trying to add an amendment that would enforce all constitutionally enumerated rights. For more on Bingham's effort to secure constitutionally enumerated rights, see LASH, *supra* note 18, at 81–96.

68. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866) (statement of Rep. Hubbard) ("I commend to his [Rep. Marshall's] careful study the spirit of the second section of that immortal amendment, and I think if he will study it with a willingness to be convinced he will see that it has given to this Congress full power in the premises.").

I know some have pretended that Congress acquires the powers asserted in this bill by virtue of the second clause of the amendment to the Constitution recently adopted

....

Congress has power to enforce what? The abolition of slavery. This is not denied. Slavery is abolished throughout the entire land. If any man asserts the right to hold another in bondage as his slave, his chattel, and refuses to let him go free, Congress can by law, under this clause, provide by appropriate legislation for the punishment of the offender and the protection from slavery of the freedman. But Congress has acquired not a particle of additional power other than this by virtue of this amendment.<sup>69</sup>

These and similar objections, however, failed to dissuade a majority of the House from voting for the Freedmen's Bureau Bill. On February 6, the House voted in favor of the Freedmen's Bill.<sup>70</sup>

### 3. Initial Vote and President Johnson's Veto

After the House and Senate concurred on the final language, the Freedmen's Bill was officially passed on February 13, 1866 and sent to President Johnson for his signature.<sup>71</sup> To the surprise of almost everyone, Johnson vetoed the Bill.<sup>72</sup> Reporting the Bill back to Congress, Johnson insisted that the Bill's protection of undefined "civil rights and immunities" exceeded Congress's war powers.<sup>73</sup>

69. *Id.* at 628 (statement of Rep. Marshall); *see also id.* at 638 (statement of Rep. Shanklin) ("They refer to the second section of the amendment to the Constitution. When the question of the ratification of the amendment to the Constitution was up in my State, those who were opposed to it opposed it upon the ground that it would be construed to give power to Congress to legislate on the subject. They told us our suspicions were unfounded, and that the second section gave no such powers to the United States; that it was only intended to carry out and secure to the negro his personal freedom, such as all the free negroes then enjoyed; that they and the friends of the amendment was as much opposed to negro equality or negro suffrage or to conferring the power on Congress to extending these privileges to the negro, as those that opposed the amendment; that the section was not susceptible of any such construction. And under that protest they induced thousands to vote for the amendment . . ."); *id.* at 649 (statement of Rep. Trimble) ("I was referred the other day by a distinguished gentleman on the opposite side that they obtained [power to pass the bill] under the provision for the general welfare of the country, and under the provision of the Constitution as recently amended, I believe known as the thirteenth article of the amendments to the Constitution of the United States. But, sir, I have looked in vain to that amendment to find a shadow of authority in it for the provisions of this bill."); *id.* at 934 (statement of Sen. Garret Davis) ("[T]he second section of the last amendment of the Constitution is mostly relied upon by the friends of this measure as conferring upon Congress the power to pass it. . . . The first section simply abolishes slavery and involuntary servitude at that time, and inhibits them, prospectively, in the United States and every place subject to their jurisdiction. It neither does nor attempts to do anything more.")

70. *Id.* at 688 (136–33, with 13 not voting).

71. *See id.* at 812.

72. *See FONER, supra* note 10, at 247.

73. In his veto message, Johnson wrote:

[T]he bill before me contains provisions which in my opinion are not warranted by the Constitution, and are not well suited to accomplish the end in view.

...



Johnson apparently did not consider the Thirteenth Amendment to be a plausible enough source of power to be worth mentioning, much less debating.

Caught off guard, proponents scrambled to assemble the necessary votes to override the President's veto.<sup>74</sup> Senator Trumbull exhorted his colleagues to "fulfill our duties as legislators by according equal and exact justice to all men,"<sup>75</sup> and he insisted that Congress had constitutional authority to pass the Bill under Section Two of the Thirteenth Amendment.<sup>76</sup> His efforts were of no avail. Although a Senate majority supported the Bill, Trumbull failed to secure the two-thirds vote necessary to override a presidential veto.<sup>77</sup> In the end, several members who had originally supported the Bill refused to support the override.<sup>78</sup>

As other historians have noted, the initial failure of the Freedmen's Bill signaled to the members of the Thirty-Ninth Congress a blunt political fact: no legislative proposal was safe unless it was supported by a broad coalition of radical, moderate, and conservative Republicans.<sup>79</sup> Unless a stronger case could be made in favor of the Civil Rights Act, the Bill faced the same fate as the Freedmen's Bureau Bill.<sup>80</sup>

---

The subjects over which this military jurisdiction is to extend in every part of the United States include protection to "all employes, agents, and officers of this bureau in the exercise of the duties imposed" upon them by the bill. In eleven States it is further to extend over all cases affecting freedmen and refugees discriminated against "by local law, custom, or prejudice." In those eleven States the bill subjects any white person who may be charged with depriving a freedman of "any civil rights or immunities belonging to white persons" to imprisonment or fine, or both, without, however, defining the "civil rights and immunities" which are thus to be secured to the freedmen by military law.

CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866). In addition to being beyond the war powers authority of Congress, Johnson also objected to making the freedmen the charges of the federal government and passing a law affecting the southern states when those states remained excluded from Congress. *Id.* at 916–17.

74. See BENEDICT, *supra* note 14, at 164–65; MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 12 (1999) (explaining that radical Republicans reacted with "frustrated outrage"); FONER, *supra* note 10, at 247; STEPHEN P. HALBROOK, *FREEDMAN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876*, at 22 (1998) ("Trumbull expressed great surprise at the veto, pointing out that the bill's purpose was to protect constitutional rights."); LASH, *supra* note 18, at 122; MCKITRICK, *supra* note 38, at 287–97.

75. CONG. GLOBE, 39th Cong., 1st Sess. 936 (1866) (statement of Sen. Trumbull).

76. See *id.* at 941–42.

77. The vote in the Senate was 30–18 in favor of the override (with two abstentions). Voting against override were Sens. Buckalew, Cowan, Davis, Dixon, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Morgan, Nesmith, Norton, Riddle, Saulsbury, Stewart, Stockton, Van Winkle, and Willey (18) (with Foot and Wright absent). See *id.* at 943. In passing the original act, only Buckalew, Davis, Guthrie, Hendricks, Johnson, McDougall, Riddle, Saulsbury, Stockton, and Wright (10) had opposed (with Cowan, Nesmith, and Willey absent). See *id.* at 421.

78. See MALTZ, *supra* note 18, at 49.

79. See *id.* at 60.

80. Later that summer, following the passage of the Fourteenth Amendment, Congress passed a different version of the Freedmen's Bureau Bill. This version narrowed the Bill's reach to citizens, removed the language of "all civil rights and immunities as belong to whites" and instead listed particular rights (the same as the Civil Rights Act), and added language limiting the enforcement power to "such rights and immunities." Congress also removed the original Bill's provisions granting land to the freedmen. See ch. 200, § 14, 14 Stat. 173, 176–77 (1866).

## II. THE CIVIL RIGHTS BILL

The Freedmen's Bureau Bill and the Civil Rights Bill were introduced on the same day and contained identical lists of rights.<sup>81</sup> Proponents initially argued that both Bills represented attempts to enforce Section Two of the Thirteenth Amendment.<sup>82</sup> Opponents rejected these arguments, insisting that neither the drafters nor the ratifiers understood the text of the Thirteenth Amendment as authorizing anything beyond congressional prohibitions relating to the formal status of chattel slavery.<sup>83</sup> After Johnson's veto of the Freedmen's Bureau Bill, it was clear that the President also had a narrow view of Section Two—something that likely surprised no one given his administration's public assurances to the ratifying states the previous fall.<sup>84</sup>

The fallback argument for the Freedmen's Bureau Bill was that it also represented a temporary exercise of Congress's war powers.<sup>85</sup> There was no such argument available in support of the Civil Rights Bill. If a majority of members were not convinced that this second bill represented an appropriate exercise of Thirteenth Amendment power, then the Bill might fail. Even if passed by a majority, the Civil Rights Bill faced a potential veto by a doubting President, in which case, proponents would have to convince a *supermajority* of their members that the Bill was an appropriate exercise of congressional power. Proponents of the Civil Rights Bill thus faced the difficult task of constructing a widely acceptable theory of congressional power, one broad enough to authorize federal protection of the natural rights of all persons.

Radical Republicans, of course, needed little convincing. Many radicals were less than committed to the idea of limited enumerated federal power in the first place.<sup>86</sup> Some claimed that the states had committed "suicide," thus triggering plenary federal control of the southern "territories."<sup>87</sup> These, however, remained

---

81. See *supra* notes 41–46 and accompanying text.

82. See *supra* note 52 and accompanying text.

83. See *supra* notes 49–50 and accompanying text.

84. Concerned that Section Two of the proposed Thirteenth Amendment would empower Congress to enforce the political and civil rights of the freedmen, the Provisional Governor of South Carolina wired President Johnson for clarification of the Amendment's scope. See EDWARD MCPHERSON, A POLITICAL MANUAL FOR 1866, at 22–23 (Washington, Phillip & Solomons 1866). He received the following reply from Secretary of State William Seward: "The objection you mention to the last clause of the constitutional amendment is regarded as querulous and unreasonable, because that clause is really restraining in its effect, instead of enlarging the powers of Congress." *Id.* at 23. Apparently hoping to make this the official construction of the Thirteenth Amendment, Florida, Alabama, and South Carolina each placed in their official ratifications a statement that any congressional legislation upon the political rights of former slaves would be contrary to the proposed amendment, just to make sure that the point was beyond dispute. See 3 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 200–10, 217–20 (1901); see also Hon. D.S. Walker, Governor Elect, Inaugural Address (Dec. 20, 1865), in THE REPORTS OF THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES 15, 18–19 (Washington, Gov't Printing Office 1866) (quoting Seward's letter and calling on the legislature to trust this assurance and ratify the Thirteenth Amendment).

85. See *supra* note 51 and accompanying text.

86. See FONER, *supra* note 10, at 231–32.

87. *Id.* at 232.

minority views. Most Republicans continued to believe that the states had never legally left the Union in the first place, and most accepted the theory of limited enumerated federal power.<sup>88</sup>

To the extent that the effort required an enumerated power, radical Republicans embraced a broad theory of congressional power to enforce Section Two of the Thirteenth Amendment.<sup>89</sup> Once again, however, their less-than-radical colleagues held far more limited interpretations of national power in general and of Section Two of the Thirteenth Amendment in particular. Moderate Republicans remained committed to constitutional federalism and the idea that, even after the adoption of the Thirteenth Amendment, the Constitution left local “civil rights” to the control of the people in the several states.<sup>90</sup> Convincing these more “federalist” members to support a federal civil rights bill required convincing them that the Bill addressed *national* civil rights. The need for such an argument became increasingly clear as the Freedmen’s Bureau debates revealed significant opposition to broad interpretations of national power.<sup>91</sup>

One approach involved characterizing the Civil Rights Bill as protecting the rights of national citizenship. If one viewed the Black Codes as violating the civil rights of American citizens, then dismantling the Codes through the Civil Rights Bill could be viewed as consistent with still-pervasive views of constitutional federalism. Constructing such an argument, however, required reconstructing the Civil Rights Bill. As originally drafted, the Bill protected the rights of every person in the United States, citizen or not. Convincingly characterizing the Civil Rights Bill as protecting the rights of national citizenship required abandoning, at least temporarily, the Bill’s original full-throated protection of the due process rights of all persons.

---

88. *See id.* at 242.

89. *See, e.g.,* Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1717 (2012) (discussing radical Republican James Ashley’s broad interpretation of Congress’s enforcement powers under the Thirteenth Amendment).

90. *See* LASH, *supra* note 18, at 80; *see also* MALTZ, *supra* note 18, at 30 (“The task [of Reconstruction] was further complicated by the Republicans firm attachment to the basic structure of American federalism.”); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 27–39 (1988) (discussing the continued commitment to principles of federalism in the Reconstruction Congress). According to Eric Foner, moderate Republicans “accepted the enhancement of national power resulting from the Civil War, but did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated.” FONER, *supra* note 10, at 242; *see also* MALTZ, *supra* note 18, at 60 (“The disposition of the Freedmen’s Bureau Bill and the apportionment amendment demonstrated that only those civil rights measures that received virtually unanimous support from mainstream Republicans could be adopted.”); NELSON, *supra*, at 114 (“Most Republican supporters of the [Fourteenth] amendment, like the Democratic opponents, feared centralized power and did not want to see state and local power substantially curtailed.”); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 67 (1974) (“[M]ost Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power.”).

91. *See supra* notes 61–62 and accompanying text.

## A. NARROWING THE SCOPE OF THE CIVIL RIGHTS BILL

On January 29, 1866 several weeks after its initial submission and following the initial round of debates on the Freedmen's Bureau Bill, proponents amended the Civil Rights Bill. First, they added a clause declaring that "all persons of African descent born in the United States are hereby declared to be citizens of the United States."<sup>92</sup> Although some radical Republicans believed abolition automatically made the freedmen citizens,<sup>93</sup> the Supreme Court's decision in *Dred Scott* indicated otherwise and the matter remained under dispute.<sup>94</sup> The sentence both rejected *Dred Scott* and purported to end the debate (it would not).<sup>95</sup> Next, having defined national citizenship, proponents also narrowed the Bill so that it protected *only* U.S. citizens.<sup>96</sup>

There was no secret about why the Bill had been altered. Proponents openly admitted that the change reflected concerns about Congress's power to protect the fundamental rights of all persons. As Chair of the Judiciary Committee and House sponsor of the Civil Rights Bill, Representative James F. Wilson (R-IA) explained:

This bill has been considered by the Committee on the Judiciary, and I have been instructed by that committee to offer several amendments to it. The first amendment is in the seventh line of the first section, to strike out the words "inhabitants of" and insert the words "citizens of the United States in;" so that that portion will read:

*There shall be no discrimination in civil rights or immunities among the citizens of the United States in any State or Territory, &c.*

This amendment is intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several States, as there seems to be some doubt concerning the power of Congress to extend this protection to such inhabitants as are not citizens.<sup>97</sup>

---

92. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull). This language was ultimately altered to read: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

93. See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 899 n.157 (1986) (citing *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151) as support for the proposition that the Thirteenth Amendment made blacks citizens when it abolished slavery).

94. Compare *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857) (denying that blacks can be citizens of the United States), with *Citizenship*, 10 U.S. Op. Att'y. Gen. 382, 412 (1862), 1862 WL 1412 (arguing that all free persons born in the United States, black or white, are citizens).

95. Congress later added the Citizenship Clause to the first sentence of the Fourteenth Amendment to "remove[] all doubt as to what persons are or are not citizens of the United States." See CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

96. See *id.* at 1115–25.

97. *Id.* at 1115 (statement of Rep. Wilson). Wilson then offered a further amendment clarifying that the equal rights referred to in the Bill were those as were "enjoyed by white citizens." *Id.* This alteration narrowing the scope of the bill to protect only citizens got the attention of future Section One framer

As Wilson's remarks indicate, the alteration in the Civil Rights Bill did not signal that the Bill's framers had changed their minds about the underlying nature of the protected rights. The Bill continued to protect the natural rights of life, liberty and property belonging to all persons. Indeed, although the scope of the Bill changed, the Bill's original title stayed virtually the same: "[A bill] to protect *all persons* in the United States in their civil rights, and to furnish the means for their vindication . . . ."<sup>98</sup> This remains the title of the Civil Rights Bill to this day.<sup>99</sup> The narrowing of the Bill to protect only citizens simply reflected that many members believed that Congress at this point had no constitutional power to protect the natural rights of anyone except, perhaps, U.S. citizens.

On the other hand, the decision to protect only "citizens" signaled a move away from the Thirteenth Amendment as the primary source of authority for the Bill. The Thirteenth Amendment established that no *person* could be held as a slave.<sup>100</sup> That proponents of the Civil Rights Bill narrowed the Bill's reach to *citizens* amounts to a concession that an insufficient number of their colleagues believed that the abolition amendment sufficiently authorized the Bill.

#### B. PROMOTING THE CIVIL RIGHTS BILL AS AN ENFORCEMENT OF THE NATURAL RIGHTS OF DUE PROCESS

The House sponsor of the Civil Rights Bill, Representative James Wilson (R-IA), spent more time discussing and answering questions about the proposed bill than any of his colleagues. In his speech introducing the Bill, Wilson left no doubt about the nature of the rights he sought to protect. The civil rights and immunities guaranteed by the Civil Rights Bill were nothing less than the natural rights of due process owed to every free person. Wilson's speech and its importance to understanding the Civil Rights Act and its relationship to the Fourteenth Amendment has been almost completely missed by Fourteenth Amendment scholars. Accordingly, it is worth an extended look.

Wilson first addressed Congress's power to add a sentence defining citizenship in a manner that embraced all freedmen born in the United States. Like most Republicans, Wilson rejected the Supreme Court's reasoning in *Dred Scott* that blacks could not be citizens of the United States. To Wilson, adding a sentence declaring all persons born in the United States to be citizens of the United States

---

John Bingham, who declared his hope that there would be "an opportunity to offer a further amendment." *Id.* (statement of Rep. Bingham). As we shall see, Bingham believed that the due process rights covered by the Civil Rights Act belonged, as a matter of natural right, to all persons. *See infra* note 181 and accompanying text.

98. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866) (statement of Rep. Wilson) (emphasis added).

99. *See* An Act to Protect All Persons in the United States in their Civil Rights and Furnish the Means of Their Vindication, ch. 31, 14 Stat. 27 (1866). A title ultimately vindicated by the final version of the Civil Rights Act passed after the ratification of the Fourteenth Amendment. *See infra* note 243 and accompanying text.

100. *See* U.S. CONST. amend XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

was “merely declaratory of what the law now is.”<sup>101</sup> If members nevertheless insisted on a showing of congressional power to bestow citizenship, Congress had the enumerated power “to establish a uniform rule of naturalization.”<sup>102</sup>

Next, Wilson turned to the Bill’s list of “civil rights” and “immunities.”<sup>103</sup> “This part of the Bill,” Wilson conceded, “will probably excite more opposition and elicit more discussion than any other.”<sup>104</sup> Wilson then explained to his more moderate colleagues what “civil rights and immunities” did *not* include:

Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities.<sup>105</sup>

Having denied that the Bill protects *all* civil and political rights, Wilson then addressed the nature of the Bill’s protected rights. Quoting treatise writer Chancellor James Kent, Wilson explained that the Bill protected the “absolute rights of individuals” to life, liberty and property:

What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—

“The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.” “Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.”<sup>106</sup>

According to Wilson, “the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic” were in fact “the natural rights of man.”<sup>107</sup>

Notice that, despite the recent narrowing of the Bill to protecting only “citizens,” Wilson describes the protected rights as the “absolute rights of individuals,” to “which any man is entitled.” In other words, the rights protected under the

101. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866) (statement of Rep. Wilson).

102. *Id.* at 1117 (citing U.S. CONST. art. I, § 8).

103. Eventually, proponents of the Act would agree to remove the words “civil rights and immunities,” leaving only the specific list of rights. For a discussion of the significance of that removal, see Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 385–88 (2011).

104. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson).

105. *Id.*

106. *Id.* (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 199 (New York, O. Halsted 1826)).

107. *Id.*

original bill had not changed, even if the group to be protected in these rights had. This distinction is critical to understanding the amended bill. Scholars sometimes attempt to describe the rights protected by the Civil Rights Bill as reflecting a theory of the rights of citizenship.<sup>108</sup> This is true only to the extent that citizens are persons and, therefore, they enjoy the same rights that belong to all persons. It is not a theory of citizenship *per se*, however, that explains the rights protected by the amended Bill. Instead, the Bill continued to reflect a theory of natural rights. That the Bill had been altered to protect only citizens reflected a political strategy to produce a broadly acceptable bill that protected at least *some* people in their natural rights.

By altering the Bill to protect the rights of federal citizens, advocates could plausibly deny they sought to upset the traditional distinction between federal and state responsibilities. Wilson explained:

Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.<sup>109</sup>

---

108. *See, e.g.*, GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 103–05 (2013); Kaczorowski, *supra* note 93; Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. CONST. L. 1269, 1285–88 (2009).

109. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson). Wilson's argument that the Bill sought to do nothing more than enforce preexisting constitutional rights had the happy (and likely calculated) effect of echoing the theories of moderate Republicans like John Bingham who had previously proposed an amendment seeking to protect the preexisting rights of American citizens. A few days earlier, Bingham had introduced an amendment declaring:

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. IV, §2], and to all persons in the several States equal protection in the rights of life, liberty, and property [Fifth Amendment].

*Id.* at 1034 (statement of Rep. Bingham). Bingham had insisted that his proposed amendment protected no new rights, but only those constitutionally enumerated privileges and immunities that states were *already* obligated to enforce according to Bingham's understanding of Article IV. As Bingham explained:

I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. 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 . . . ."

*Id.* at 1088. Wilson echoes these same assurances in his defense of the amended Civil Rights Bill.

With the Bill thus limited to American citizens, proponents could now plausibly use the citizen-based Comity Clause of Article IV<sup>110</sup> as a potential source of authority for the Civil Rights Bill. As we shall see, there were significant problems associated with this approach, but the Comity Clause nevertheless seemed useful, given the well-known list of Comity Clause rights described in *Corfield v. Coryell*.<sup>111</sup> Quoting Justice Washington's opinion, Wilson declared that the rights of American citizenship included such Comity Clause rights as:

"The right of 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; 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; to be exempt from higher taxes or impositions than are paid by the other citizens of the State."<sup>112</sup>

Although Justice Washington's opinion referred to rights similar to those protected by the Civil Rights Act, relying on *Corfield* raised a number of problems. For example, Wilson omitted the *full* list of rights provided by Justice Washington in *Corfield v. Coryell*, including the rights of suffrage.<sup>113</sup> Including this Corfieldian right, however, would have doomed the Bill.<sup>114</sup> By relying on *Corfield*, proponents had to explain why the Bill protected only some Corfieldian rights but not others.<sup>115</sup>

Proponents addressed the difficulty by denying that the Bill was an actual attempt to enforce the citizenship rights of *Corfield* and the Comity Clause. Those provisions, they explained, were cited only by way of analogy.<sup>116</sup> In fact, the Civil Rights Act was not an effort to protect the Comity Clause rights "of citizens in the several states," or those rights which attach only upon securing national citizenship. Instead, proponents explained the Civil Rights Bill protected natural rights that *preexisted* citizenship—state or federal. All citizens, of course, enjoyed such natural rights, but neither state nor federal citizenship were the *source* of such rights.

Like most radical Republicans, Wilson believed that all free persons were entitled to enjoy the natural rights of life, liberty, and property.<sup>117</sup> And, like his

---

110. See 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.").

111. See 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

112. CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (statement of Rep. Wilson) (quoting *Corfield*, 6 F. Cas. at 551–52).

113. See *Corfield*, 6 F. Cas. at 551–52.

114. At this point in 1866, trying to provide the freedmen with the right to vote was a non-starter. See FONER, *supra* note 10, at 240.

115. This was a point that opponents of the Bill jumped on. In fact, *Corfield* became such a problematic case for proponents of civil rights in the Thirty-Ninth Congress that they eventually abandoned the case as representative of Comity Clause rights. See LASH, *supra* note 18, at 162–68.

116. See CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull).

117. See *id.* at 1117–18 (statement of Rep. Wilson).



radical colleagues, Wilson also insisted that the Civil Rights Bill represented an appropriate enforcement of the Thirteenth Amendment's abolition of slavery.<sup>118</sup> After all, Wilson explained, "A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery."<sup>119</sup> Wilson conceded, however, that the rights listed in the Civil Rights Bill could be viewed as protecting more than just the freedom established by the Thirteenth Amendment.<sup>120</sup> For those colleagues who believed this was the case, Congress had *additional* authority to protect the "great fundamental [civil] rights" of every person.<sup>121</sup> These rights were the "absolute Rights of Individuals" to life, liberty, and property described by the great English jurist William Blackstone. Explained Wilson:

What are these rights? . . . Blackstone classifies them under three articles, as follows:

1. The right of personal security; which, he says,  
"Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."
2. The right of personal liberty; and this, he says,  
"Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."
3. The right of personal property; which he defines to be,  
"The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."<sup>122</sup>

Wilson then quotes a passage from Kent's Commentaries:

"The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable."<sup>123</sup>

Wilson thus presented the narrowed Civil Rights Bill as protecting the natural rights of life, liberty, and property—"the absolute rights of persons." Although the narrowed version of the Civil Rights Bill protected only citizens' rights, the rights themselves were the unalienable and natural rights of all individuals, as described in classic works like Blackstone's *Commentaries*.

---

118. *See id.* at 1118.

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES (1753)).

123. *Id.* (quoting 1 KENT, *supra* note 106, at 599).

Wilson's counterpart in the Senate, Lyman Trumbull described the rights protected by the narrowed versions of the Civil Rights Bill in the same way. Pointing to the Bill's list of rights, Trumbull explained that "[t]his section is the basis of the whole bill. The other provisions of the Bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section . . . ." <sup>124</sup> These "civil liberties," according to Trumbull, "thus defined by Blackstone:"

"Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public."

That is the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted; and in a note to Blackstone's Commentaries it is stated that—

"In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit." <sup>125</sup>

Trumbull's reference to the Declaration of Independence and the original Constitution echoes the traditional abolitionist reference to the Declaration's reference to "Life, Liberty and the pursuit of Happiness," and its embodiment in the Due Process Clause of the Fifth Amendment. To radical Republicans, the dual reference was a boilerplate description of natural rights.

Like Wilson, Trumbull also referenced Comity Clause cases like *Corfield v. Coryell*. <sup>126</sup> When challenged, however, Trumbull expressly denied that the Bill attempted to enforce the rights of the Comity Clause. Trumbull's denial was unavoidable. As antebellum case law made abundantly clear, the Comity Clause applied only in cases where out-of-state citizens had been denied rights provided to in-state citizens. <sup>127</sup> Thus, when Trumbull raised Comity Clause cases like *Corfield*, opponents immediately objected that Trumbull had misrepresented the Comity Clause and wrongly relied on that clause in support of the Civil Rights Bill. <sup>128</sup> In reply, Trumbull agreed that the Comity Clause did nothing more than

124. *Id.* at 474 (statement of Sen. Trumbull).

125. *Id.* (quoting 1 Blackstone, *supra* note 120).

126. *See id.* at 474–75.

127. *See, e.g., Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230); *Campbell v. Morris*, 3 H. & McH. 535, 542 (Md. 1797); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827); *Livingston v. Van Ingen*, 9 Johns. 507, 524 (N.Y. 1812). For a detailed discussion of these cases and the antebellum reading of the Comity Clause, see Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1258–72 (2010).

128. CONG. GLOBE, 39th Cong., 1st Sess. 597 (1866) (statement of Sen. Davis) ("All these rights and privileges are attributed by the decision of the court to the citizens of one State going into another

protect out-of-state citizens, and that the Civil Rights Bill protected an altogether different set of rights. He had referred to the Comity Clause, Trumbull explained, only to highlight the justice of providing in-state citizens their own set of fundamental rights:

[T]he Senator occupies an hour of his speech to show that certain cases which I thought proper to refer to in a few remarks, the other day, in order to ascertain what was meant by the term “citizen of the United States,” have no application to the rights of a citizen in a State. Those cases, he says, were based upon that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and they relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizens belonging to the State. I never denied that. I would have told the Senator in one moment that the cases were not introduced for any such purpose as he supposes, but they were introduced for the purpose of ascertaining, if we could, by judicial decision what was meant by the term “citizen of the United States;” and inasmuch as there had been judicial decisions upon this clause of the Constitution, in which it had been held that the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one’s self of all the laws passed for the benefit of the citizen to enable him to enforce his rights; inasmuch as this was the definition given to the term as applied in that part of the Constitution, I reasoned from that, that when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship. That was the object for which those cases were introduced. The Senator seemed to suppose, and argued to show what no one would controvert, that they were not cases deciding upon the rights of the citizen in the State in which he resided.<sup>129</sup>

According to Trumbull, the Civil Rights Bill protected only *certain* fundamental rights that were discussed in *Corfield*: not those belonging as a particular matter to U.S. citizens, or to citizens in the several states, but only those rights involving “certain great fundamental rights, such as the right to life, to liberty, and to avail one’s self of all the laws passed for the benefit of the citizen to enable him to enforce his rights.”<sup>130</sup> These were the natural rights of due process—a point Trumbull emphasized in the following exchange:

Mr. MCDUGALL. I beg leave to ask the Senator how he interprets the term “civil rights” in the bill.

---

State . . . . The opinions relied on by the honorable Senator do not establish any other proposition.”); *see also id.* at 1268–70 (statement of Rep. Kerr) (opposing the Bill and denying it can be grounded on the Comity Clause, given the limited antebellum understanding of the Comity Clause).

129. *Id.* at 600 (statement of Sen. Trumbull).

130. *Id.*

Mr. TRUMBULL. The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, *fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.*<sup>131</sup>

According to Trumbull's argument, the fundamental rights of life, liberty, and property are announced in the Declaration of Independence and codified in the Fifth Amendment's Due Process Clause (part of the "Constitution as it now exists"). *Corfield* helps clarify the precise nature of some of these rights—rights which belong to all citizens and which Congress has power to enforce. As a radical Republican, Trumbull embraced the theory that Congress had power to enforce all of the rights contained in the Constitution, including those declared by the Fifth Amendment. Although Trumbull does not (at this point) specifically tie the rights of life, liberty, and property to the Due Process Clause, his listeners would have understood his reference to rights contained in "the Constitution as it now exists." It would not have been understood as a reference to the Thirteenth Amendment because expanding congressional authority beyond Section Two was the point of amending the scope of the original bill. Once again, here is the House sponsor of the Civil Rights Bill, James Wilson:

What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the right to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

....

*Now, I want to know whether these rights [in the Civil Rights Bill] are any greater than the rights which are included in the general term "life, liberty, and property."*<sup>132</sup>

Others were just as explicit in describing the Bill as an attempt to enforce the Due Process Clause. Consider, for example, the following excerpts from a speech on the Civil Rights Act by Representative M. Russell Thayer (R-PA):

Would it not be an extraordinary circumstance if the framers of the Constitution had made a Constitution which was powerless to protect the

---

131. *Id.* at 476 (emphasis added).

132. *Id.* at 1294–95 (statement of Rep. Wilson) (emphasis added).

citizens of the United States in their fundamental civil rights, their rights of life, liberty, and property? And yet to that position are these gentlemen driven who deny the existence of any power which authorizes Congress to pass this bill.

If I am asked from whence the power is derived to pass this bill, I reply that I derive it, in the first place, from the second section of the late amendment to the Constitution. I say further, that so far as regards the power to declare the freedmen citizens is concerned, it may be clearly derived (if it be not inherent in the very frame of every Government) from that clause of the Constitution which gives the express power to Congress to pass laws for naturalization. And I might say, also, that in my judgment sufficient power is found, by implication at least, *in that clause of the Constitution which guaranties to all the citizens of the United States their right to life, liberty, and property.*

There are sources of power enough from which this power can be deduced. In my judgment no man can find any difficulty in seeking constitutional grounds upon which to place his justification for supporting this bill. . . .

. . . .

. . . If, then, the freedmen are now citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens.

They are entitled to the benefit of *that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property*, and no just reason exists why they should not enjoy the protection of that guarantee of the Constitution.

. . . [The recently enacted black codes] demonstrate [] the necessity for enforcing the guarantees of liberty and of American citizenship conferred by the Constitution.

. . . .

. . . [This bill] contains no power which is not necessary to protect and defend the great rights of American citizenship.

. . . .

I approve of the proposition of the gentleman from Ohio, [Mr. BINGHAM,] in which he offers to put this protection substantially into the Constitution of the United States, though, according to my best judgment, it is not necessary to do so, and I have little hope that the proposition he submits will ever be carried into effect. Still I will, in order to make things doubly secure, vote for the proposition of the gentleman from Ohio. I will also vote for this bill . . . .

. . . .

While engaged in this great work of restoration, it concerns our honor that we forget not those who are unable to help themselves; who, whatever may have been the misery and wretchedness of their former condition, were on our side in the great struggle which has closed, and whose rights we cannot disregard or neglect without violating the most sacred obligations of duty and of honor . . . . To us they hold out to-day their supplicating hands, asking for protection for themselves and their posterity. We cannot disregard this appeal, and stand acquitted before the country and the world of basely abandoning to a miserable fate those who have a right to demand the protection of your flag and the immunities guaranteed to every freeman by your Constitution.<sup>133</sup>

Representative Thayer said *nothing* about the Comity Clause in his entire speech supporting the Civil Rights Bill. Instead, Thayer pointed to the naturalization clause as granting power to make freedmen citizens, and then pointed to the *Due Process Clause* as declaring the rights covered by the Bill—rights enjoyed not only by citizens, but also by “every freeman.”

In addition to finding power in the Thirteenth Amendment to enforce the rights of due process, Thayer’s remarks show that he also believed Congress had inherent power to enforce the constitutional rights of American citizens, including those protected by the Due Process Clause of the Fifth Amendment. Thus, even though Thayer supported Bingham’s proposed Amendment, he did not believe that such an amendment was necessary.

The idea that Congress had inherent power to enforce enumerated constitutional rights was held by a number of radical Republicans in the Thirty-Ninth Congress, including James Wilson. As Wilson put it, “the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect.”<sup>134</sup> In support of this theory of implied power, Wilson cited antebellum cases such as *Prigg v. Pennsylvania*, in which the Supreme Court ruled that Congress had the inherent power to enforce the rights of slave owners under the Fugitive Slave Clause of Article IV.<sup>135</sup>

Not all Republicans in the Thirty-Ninth Congress shared Thayer’s broad reading of the Thirteenth Amendment or his views about implied power to enforce enumerated rights. The result was an ongoing debate the about congressional enforcement of the Due Process Clause. Consider, for example, the colloquy between Representative Charles A. Eldridge (D-WI) and Representative Thayer regarding Thayer’s claim that the Civil Rights Bill was a constitutionally authorized enforcement of the Due Process Clause:

Mr. ELDRIDGE. . . .

. . . .

133. *Id.* at 1152–54 (statement of Rep. Thayer) (emphasis added).

134. *Id.* at 1119 (statement of Rep. Wilson).

135. *See id.* at 1294 (quoting *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)).

But gentlemen claim that there is warrant and authority in the second section of the recent amendment to the Constitution for this measure. I believe that is the only authority upon which the eloquent gentleman from Pennsylvania [Mr. THAYER] rested his claim of the right to pass this bill.

Mr. THAYER. The gentleman will recollect that I also founded a portion of my argument in favor of the constitutionality of this bill upon the guarantee which is contained in the Constitution, of life, liberty and property to citizens of the United States, and I argued that if this measure was necessary to enforce that guarantee it was a power necessarily contained by implication in the Constitution.

Mr. ELDRIDGE. Then the gentleman differs in all his claims with his friend, the able gentleman from Ohio [Mr. BINGHAM,] who introduced the resolution proposing the amendment of the Constitution for the purpose of meeting the constitutional objections to the passage of this bill. He admitted, or seemed to admit, when that resolution was under consideration, that there is by the Constitution as it now stands no warrant for the Federal Government to go into a State for the purpose of protecting the citizen in his rights of life, liberty, and property. I shall not undertake to argue that question. It is enough for my purpose that the majority of this House have urged the necessity of the passage of that resolution to amend the Constitution in order to enable them to attain the purpose sought by this bill.<sup>136</sup>

Thayer dodged the issue of Congress's Thirteenth Amendment power by citing congressional power to enforce the Fifth Amendment's Due Process Clause. Eldridge countered by noting the position of moderate Republicans, like John Bingham, who believed it would take a constitutional amendment to enforce the Due Process Clause.<sup>137</sup> Both men thus understood the Bill as attempting to enforce the rights of due process; they simply disagreed on whether Congress had power to do so.

Other members agreed that the Bill sought to enforce due process rights, but they insisted that the Bill was unnecessary because such rights were *already* protected. According to Representative Anthony Thornton (D-IL):

The gentleman from Pennsylvania [Mr. THAYER] insists that the power exists by virtue of the fifth amendment, which provides that no man shall be deprived of life, liberty and property without due process of law. Is this bill necessary to prevent the deprivation of life, liberty, and property? If laws are enacted in the southern States of the character alleged, their constitutionality can be tested in the courts of the United States and there declared to be void because in violation of the supreme law.<sup>138</sup>

---

136. *Id.* at 1155 (statements of Reps. Eldridge & Thayer).

137. *See infra* note 173 and accompanying text.

138. CONG. GLOBE, 39th Cong. 1st Sess. 1156–57 (1866) (statement of Rep. Thornton).

As we have already seen, similar claims were made against the necessity of the Freedmen's Bureau.<sup>139</sup> Although the Supreme Court had ruled in *Barron v. Baltimore* that the Bill of Rights did not bind the states,<sup>140</sup> some members either had not read the opinion or simply believed otherwise.<sup>141</sup> Accordingly, members like Thornton agreed that the Bill protected the rights of due process but believed that such protection already existed.

In sum, there was widespread understanding by both proponents and critics that the Civil Rights Bill sought to protect the natural rights of due process as declared in the Fifth Amendment. The issue was whether such protection was necessary and whether Congress had the power to enforce such rights. As we shall see, Bingham agreed that Congress needed to enforce the rights of due process against state abridgement, but he insisted that it would take a constitutional amendment to make that possible.

#### C. JOHN BINGHAM'S CALL FOR A DUE PROCESS AMENDMENT

Representative John Bingham (R-OH) authored Section One of the Fourteenth Amendment, including the Due Process Clause. An abolitionist Republican,<sup>142</sup> Bingham fully supported the idea that Congress was duty bound to respond to the Black Codes and to protect the fundamental due process rights of the freedmen and all United States citizens. Unlike his colleague James Wilson—who pursued the avenue of legislation—Bingham focused on securing an amendment to the Constitution.

On December 6, 1865, long before the introduction of the Civil Rights Bill, Bingham introduced the following 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, life, liberty, and property.”<sup>143</sup>

On February 26, 1866, on behalf of the Joint Committee on Reconstruction, Bingham introduced a proposed amendment to the Constitution declaring:

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, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>144</sup>

In his remarks to the House introducing the Resolution, Bingham stressed that “[e]very word of the proposed amendment is to-day in the Constitution of our

---

139. See *supra* note 55–57 and accompanying text.

140. 32 U.S. (7 Pet.) 243 (1833).

141. See AMAR, *supra* note 4, at 1203–12 (discussing the “Barron contrarians”).

142. For a recent biography of John Bingham and his abolitionist Republican roots, see generally GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* (2013).

143. CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865).

144. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).



country, save the words conferring the express grant of power upon the Congress of the United States.”<sup>145</sup> He added,

The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the First Congress in 1789, and made part of the Constitution of the country.<sup>146</sup>

Notice that Bingham understands, and expects his colleagues to understand, the language securing the “equal protection in the rights of life, liberty, and property” as a reference to rights declared by the Due Process Clause of the Fifth Amendment. Bingham believed that the Supremacy Clause already imposed an obligation on the states “to obey these great provisions of the Constitution, in their letter and spirit.”<sup>147</sup> Unfortunately, despite their oaths to uphold the Constitution and “this immortal bill of rights,” state officials had acted “in utter disregard of that official oath which the Constitution required” and had “violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.”<sup>148</sup> To date, Congress could do nothing about these violations because it had no enumerated power “to enforce obedience to these requirements of the Constitution.”<sup>149</sup>

As reflected in his initial announcement and his first draft of the Fourteenth Amendment, Bingham believed that all persons had an equal right to the due process protections of life, liberty, and property. His proposed amendment thus gave Congress the power to enforce both the Comity Clause rights of *citizens* and the due process rights of *all persons*. Bingham also believed that, despite the addition of the Thirteenth Amendment, Congress remained powerless to enforce the rights of due process against state abridgement. The failure of the original Constitution to grant Congress power to enforce the Bill of Rights was, to Bingham, “the want of the Republic.”<sup>150</sup> His proposed Amendment supplied that power.

Despite Bingham’s desire to increase the protected rights of freedmen, he opposed the narrowed version of the Civil Rights Bill. In a speech explaining his reasons for opposing the Bill, Bingham not only expressly embraced the due process reading of the Civil Rights Bill, but also explained why enforcing due process rights required a constitutional amendment.

I will discuss Bingham’s speech momentarily. First, and by way of introduction, this Article considers how proponents of the narrowed version of the Civil Rights Bill responded to concerns about language referencing the general subject of “civil rights.” Far from an ancillary issue, the complaints—and the outcome—

---

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

open a window on the critical role played by moderate and conservative Republicans in controlling the substantive outcome of debates in the Thirty-Ninth Congress. This also helps explain why Congress embraced legislation protecting procedural due process rights but avoided nationalizing the general substance of civil rights in the states.

D. FEDERALISM AND REMOVING THE LANGUAGE “CIVIL RIGHTS AND IMMUNITIES”

On March 8, 1866 Bingham proposed striking the language “[a]nd there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery” from the Civil Rights Bill.<sup>151</sup> He would speak about his reasons for proposing the change the following day. In the meantime, other congressmen rose in support of Bingham’s proposal to remove the term “civil rights” from the Bill. For instance, Representative Columbus Delano (R-OH) stated:

[I]n my opinion the bill would be very much improved and relieved from many of its serious difficulties and objectionable features if it were amended in accordance with the proposition suggested by my colleague, [Mr. BINGHAM.] I think that, with this amendment, I could myself now, without any further light on the subject, vote for it. But we must discuss it as it is . . . .<sup>152</sup>

According to Delano, “as it [was],” the Bill had serious problems. To begin with, Delano had doubts about its constitutionality:

I shall vote for it, if possible. If I can be brought to believe that there is a reasonable probability of its constitutionality, so that I can justify my conscience in turning over the question of the power of Congress to pass this bill to the courts, I shall sustain it; but without some further light upon the question than I now have, I do feel that there are such difficulties in the way as call for a careful examination of the provisions of this bill . . . .<sup>153</sup>

However, even if Congress could claim such power, Delano objected to the provision conferring “full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens,” which he argued conferred on freedmen the right to be jurors.<sup>154</sup>

Delano next asked the Bill’s House sponsor James Wilson where the Constitution granted Congress power to determine “who shall be competent to give evidence in the State courts?”<sup>155</sup> He continued,

151. CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).

152. CONG. GLOBE, 39th Cong., 1st Sess. app. at 156 (1866) (statement of Rep. Delano).

153. *Id.*

154. *Id.* Wilson responded that this was not the case, but Delano remained dubious. *See id.* at 157.

155. *Id.* (statement of Rep. Delano).

[W]here is the authority in the fundamental law of this land for this Congress to declare who shall be witnesses in a State court? Is it in the old Constitution? And if so, in what clause? Or is it in the amendment to the Constitution abolishing slavery? I desire to hear from the gentleman upon that point.<sup>156</sup>

Wilson's response hinted at the extended argument he would later make based on the Fifth Amendment's Due Process Clause:

I place the power of Congress to secure to these citizens the right to testify in the courts upon the same basis exactly that I place the power of Congress to provide protection for the fundamental rights of the citizen commonly called civil rights, so that if the presence of a citizen in the witness-box of a court is necessary to protect his personal liberty, his personal security, his right to property, he shall not be deprived of that protection by a State law declaring that his mouth shall be sealed and that he shall not be a witness in that court. That is one of the protective remedies which must run with these great civil rights belonging to every citizen. And I will say to the gentleman that when I come to close the discussion on this bill I shall enlarge somewhat on this point if the temper of the House at the time shall disclose a disposition to hear further discussion.<sup>157</sup>

Protecting the jury right, in other words, was necessary and proper to securing the rights of life, liberty, and property.

Delano found Wilson's reference to a citizen's right to "personal liberty," "personal security," "property" too vague and pressed Wilson "to name the clause of the Constitution in which he finds the power."<sup>158</sup> In response, Wilson explained that such power could be found in both the Thirteenth Amendment and Congress's implied power to enforce the rights of the federal Constitution:

If the gentleman [Mr. DELANO] had read my remarks at the opening of this debate he would have seen very distinctly the provision of the Constitution upon which I base this bill so far as it relates to persons who are liable to be reduced to a condition of slavery, and that is the amendment to the Constitution abolishing slavery and conferring an express delegation of power upon Congress.

*But I placed it upon a broader ground, and it was this: that these people, being entitled to certain rights as citizens of the United States, were entitled to protection in those rights, and that the power thus to protect them is necessarily implied from the entire body of the Constitution, which was made for the protection of these rights, and upon the duty of the Government to enforce and protect all those rights. I based the power of Congress to select the means in*

---

156. *Id.*

157. *Id.* (statement of Rep. Wilson).

158. *Id.* (statement of Rep. Delano).

accordance with the doctrines laid down in the case of *McCulloch, vs. The State of Maryland*.<sup>159</sup>

Delano was not impressed with the idea of implied congressional power. “The duties of this Congress,” Delano replied, “rest upon its constitutional powers, and those powers are to be derived from the Constitution if found at all.”<sup>160</sup> In response, Wilson pointed to the Due Process Clause of the Fifth Amendment, inquiring of Delano:

[D]oes the gentleman from Ohio [Mr. DELANO] believe that persons as citizens of the United States are entitled to any rights? If they are entitled to any rights, are the great fundamental civil rights of life, liberty, and property involved among them?

And if they are entitled, as citizens of the United States, to those rights, are they entitled to protection of those rights from the hands of the Government? And should a State enact laws and attempt to enforce them which will deprive the citizens of the United States of those rights, may we not intervene to protect them in spite of those laws of the State?<sup>161</sup>

Here, Wilson finally revealed his basis for believing Congress had authority to pass the Civil Rights Bill. The Bill, according to Wilson, was an exercise of Congress’s implied power to adopt any necessary and proper means of enforcing the citizen’s right not to be deprived of life, liberty, or property without due process of law. Now fully understanding Wilson’s argument, Delano’s response was a veritable seminar on the moderate Republican theory of national authority in the aftermath of the Civil War:

I believe that the citizens of the States are entitled to many rights. I believe that those rights are to be guaranteed and sustained and enforced by the laws of the States under the constitutions of the States, and by the Congress of the United States when there is power given by the Constitution of the United States to enforce those rights.

But I do not believe that the rights of the States are utterly overwhelmed and dethroned. I know that for years we have been swinging the pendulum of public opinion toward the doctrine of State rights until it threatened the subversion of the Federal Government. And I stand here in my place to-day to say that one of the most serious apprehensions I have, in the extreme of public opinion fluctuating from one point to another, is that we may fall into an error about as great and dangerous as that which has caused us these long years of bloody war.

---

159. CONG. GLOBE, 39th Cong., 1st Sess. app. at 157 (1866) (statement of Rep. Wilson) (emphasis added).

160. *Id.* (statement of Rep. Delano).

161. *Id.* (statement of Rep. Wilson).

....

I suppose there are certain rights of citizenship that are exclusively within the control of the States, under the constitutions of the States. . . .

. . . [W]hat I say here to-day, that the powers of Congress are specific powers, and that beyond those specific powers Congress cannot go without violating the Constitution.<sup>162</sup>

At this point, Delano's time had expired, and it was Representative John Bingham's turn to speak.<sup>163</sup> Bingham, however, wished for Delano to continue. "I will yield to my colleague, [Mr. DELANO,]" Bingham stated, "and trust to the indulgence of the House for an opportunity to be heard upon this subject."<sup>164</sup> Delano proceeded to expressly deny that Congress had either express power under the Thirteenth Amendment or implied power under the Fifth Amendment to enforce the rights of life, liberty, and property:

In my opinion, if we adopt the principle of this bill we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. . . .

....

Now, sir, I proceed to inquire whether the constitutional amendment abolishing slavery confers on Congress the power to enact a measure of this character. That amendment provides—[Amendment quoted] . . . .

Now, what is this provision of the Constitution? It is the abolition of slavery and involuntary servitude. It is authority by Congress to pass proper legislation for the enforcement of that principle. Now, sir, can it be claimed by fair reasoning that the right to testify is necessarily incident to freedom?<sup>165</sup>

Wilson then intervened, seeking again to turn the conversation from the Thirteenth Amendment to the Due Process Clause:

The gentleman will pardon me for an interruption. Suppose that the only person witnessing a state of facts necessary to be given in court for the protection of life, liberty, and property should be a black man, has the State the right to say that that man, the only person living who has a knowledge of the facts to protect a citizen, should have no right to testify?<sup>166</sup>

---

162. *Id.* (statement of Rep. Delano).

163. *Id.*

164. *Id.* at 158 (statement of Rep. Bingham).

165. *Id.* (statement of Rep. Delano).

166. CONG. GLOBE, 39th Cong., 1st Sess. app. at 158 (1866) (statement of Rep. Wilson).

Delano shot back, “Does the gentleman believe the Constitution of the United States is so framed as to say this power may be exercised?”<sup>167</sup> He continued:

We proclaimed freedom to this race, and reserved to ourselves the power to enforce it, but we did not reserve to ourselves the power to enter the States and regulate the domestic relations of life, liberty, and property.

....

I must say, therefore, that I do not see how we can sustain the principles of this bill. I said in the outset that I wanted to see the provisions of this bill adopted or enforced upon the South, and it was with this thought before me that I introduced, at an early day of the session, an amendment to the Constitution requiring each State to provide for the security of life, liberty, and property, and the rightful pursuit of happiness, and giving to Congress power to enforce these rights where the States withheld them . . . .

I am still of opinion that if this subject is developed and investigated as it should be, that if we do anything upon this subject at all, we had better do it by taking up the amendment to the Constitution offered by my colleague, [Mr. BINGHAM,] now postponed till April, modifying it in the form I have suggested, and making it the fundamental law, and then proceeding to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land.<sup>168</sup>

Wilson insisted that the Civil Rights Bill protected the rights guaranteed by the Fifth Amendment’s Due Process Clause. Delano agreed, but denied that Congress had any power to enforce those rights. In his view, the better approach was to pass the Amendment as proposed by John Bingham, expressly authorizing congressional enforcement of the due process rights of life, liberty, and property.

Delano’s accusation that the Bill was unconstitutional because Congress lacked the power to protect these rights would be used—unsuccessfully—by his political opponents later that summer.<sup>169</sup> By that point, however, the country would be considering precisely the kind of amendment Delano recommended.

#### E. THE DUE PROCESS OBJECTIONS OF JOHN BINGHAM

On March 9, 1866 John Bingham spoke at length about his objections to the proposed Civil Rights Bill.<sup>170</sup> Bingham began by suggesting that, whatever the Bill’s final form, Congress should add a clause providing for “a final appeal of all

167. *Id.* (statement of Rep. Delano)

168. *Id.* at 158–59.

169. Gen. George W. Morgan, speech at Coshocton, Ohio (Aug. 21, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY: THE MOST REMARKABLE SPEECHES ON BOTH SIDES 15, 16 (Cincinnati, Cincinnati Commercial 1866).

170. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham). Congress did so; *see also id.* at 1367 (statement of Rep. Wilson).

questions of law arising under it to the Supreme Court of the United States.”<sup>171</sup> Bingham then assured his colleagues that he supported the general policy of extending the rights of the national Constitution:

I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic. I know if it had been enforced in good faith in every State of the Union the calamities and conflicts and crimes and sacrifices of the past five years would have been impossible.<sup>172</sup>

Like Trumbull, Wilson, Thayer, and Delano, Bingham understood the proposed Civil Rights Bill as an attempt to enforce the natural due process rights of life, liberty, and property. However, in his view, this attempt was beyond congressional authority:

[I]n view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. Who can doubt this conclusion who considers the words of the Constitution: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people?” The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised . . . .

. . . I am with [Mr. WILSON] in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country.<sup>173</sup>

Bingham had no difficulty with the Bill’s citizenship provision, which he said was “simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen.”<sup>174</sup> His objection concerned Congress’s attempt to “declare by congressional enactment as to citizens of the United States within the States that there shall be no discrimination among them of civil rights[.]”<sup>175</sup> According

---

171. *Id.*

172. *Id.* at 1291 (statement of Rep. Bingham).

173. *Id.*

174. *Id.*

175. *Id.*

to Bingham, this provision went well beyond the protection of enumerated national rights and infringed upon subjects left to the people in the several states:

What are civil rights? . . . I respectfully submit to that gentleman [Mr. WILSON], that by all authority the term “civil rights” as used in this bill does include and embrace every right that pertains to the citizen as such.

Why, sir, the very origin of the term “civil” ought to satisfy gentlemen on this point, that it has relation to the rights and all the rights of the citizen . . . . A distinction is taken, I know very well, in modern times, between civil and political rights. I submit with all respect that the term “political rights” is only a limitation of the term “civil rights,” and by general acceptance signifies that class of civil rights which are more directly exercised by the citizen in connection with the government of his country. If this be so, are not political rights all embraced in the term “civil rights,” and must it not of necessity be so interpreted? . . .

If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights.<sup>176</sup>

To Bingham, an undefined reference to “civil rights” rendered the Bill improperly overbroad—as a general category, civil rights included not only political rights, but all manner of local laws. Like most of his moderate colleagues, Bingham believed Congress had neither the power nor the responsibility to remove all racial distinctions then existing in the states. In fact, following this speech, sponsors of the Bill accepted Bingham’s proposal and removed the proposal’s reference to “civil rights or immunities.”<sup>177</sup>

Another of Bingham’s complaints concerned the Bill’s specific list of rights to be protected from racial discrimination—which he assured his colleagues, “with all [his] heart” should be law in every state.<sup>178</sup> But, the “remedy,” he insisted, was to be achieved “not by an arbitrary assumption of power, but by amending the Constitution of the United States.”<sup>179</sup> That, of course, was the intent of Bingham’s proposed amendment.<sup>180</sup> Absent such an amendment, demanding the

---

176. *Id.*

177. *See id.* at 1366.

178. *Id.* at 1291.

179. *Id.*

180. Apparently, the draft of the Bill Bingham had before him had not yet been altered to protect only citizens, but still contained the original protection for “inhabitants.” Sponsors in both the House and Senate had already agreed to limit the Bill to citizens, and Bingham spoke on the assumption that the Bill would in fact be limited to citizens. *See id.* at 1292.



equal protection of rights remained beyond the constitutional powers of Congress.

But even if Congress was empowered to pass such a bill one final problem remained. Proponents of the Bill had altered its original scope so that instead of protecting the equal due process rights of all persons, the statute protected only the due process rights of “citizens.” This, to Bingham, was unjust. The rights of due process were natural rights owed to every person, not just citizens. Bingham’s understanding of the rights of due process is illuminated in his explanation below:

If this is to be the language of the bill, by enacting it are we not committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates? Do we not thereby declare the States may discriminate in the administration of justice for the protection of life against the stranger irrespective of race or color?

*Sir, that is forbidden by the Constitution of your country.* The great men who made that instrument, when they undertook to make provision, by limitations upon the power of this Government, for the security of the universal rights of man, abolished the narrow and limited phrase of the old Magna Charta of five hundred years ago, which gave the protection of the laws only to “free men” and inserted in its stead the more comprehensive words, “no person;” thereby obeying that higher law given by a voice out of heaven: “Ye shall have the same law for the stranger as for one of your own country.” Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination.

This bill sir, with all respect I submit, departs from that great law. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience? With all respect to every gentleman who may be a supporter of it, I ask, can it be sanctioned? Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says “no person,” not “no citizen,” “shall be deprived of life, liberty, or property,” without due process of law.<sup>181</sup>

In short, narrowing the Bill to protect only *citizens’* rights of due process was not only unjust, it contravened the language of the Due Process Clause itself. Such rights ought to be *equally* enforced for *all* persons.

Bingham conceded that he had supported the Freedmen’s Bureau Bill which, he noted, “enumerate[d] the same rights . . . and privileges that are enumerated in the first section of this bill.”<sup>182</sup> But the Freedmen’s Bill, Bingham reminded his

---

181. *Id.* (emphasis added).

182. *Id.*

colleagues, was a war measure that's protections "shall cease and determine upon the restoration of those insurrectionary States to their constitutional relations with the United States, and the establishment therein of the courts."<sup>183</sup> Regulating state due process protection during peacetime, on the other hand, exceeded Congress's authority:

[W]hen peace is restored; when the courts of justice are opened; when her white-robed ministers take the golden scales into their hands, justice is to be administered under the Constitution, according to the Constitution, and within the limitation of the Constitution.

What is that limitation, sir? Simply this, that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution . . . . "[C]entralized government, decentralized administration." That, sir, coupled with your declared purpose of equal justice, is the secret of your strength and power.

. . . .

Sir, I have always so learned our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.

Now, what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws. I humbly bow before the majesty of justice, as I bow before the majesty of that God whose attribute it is, and therefore declare there should be no such inequality or discrimination even in the penalties for crime; but what power have you to correct it? That is the question.<sup>184</sup>

In sum, Bingham expressly viewed the Civil Rights Bill as an effort to enforce the rights of due process as declared in the Fifth Amendment to the Constitution. He agreed that states ought to respect such rights and that Congress should have the power to force recalcitrant states to do so. The Constitution, however, including Section Two of the Thirteenth Amendment, did not give Congress any such authority. Bingham's proposed due process amendment was meant to remedy

---

183. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham).

184. *Id.* at 1292–93.

this. But even if Congress held such power, the Bill's current draft also assumed federal power to enforce "civil rights and immunities" in the states. This violated the Constitution's balance between state and federal authority, a balance Bingham insisted remained a critical aspect of American liberty even in the aftermath of the Civil War.

To the consternation of the Bill's supporters, Bingham's speech was "extensively published."<sup>185</sup> If moderates like Bingham and Delano were willing to challenge Congress's authority to protect due process rights, this could dangerously undermine House support for the Bill. Bingham's arguments would have to be answered.

Later that same day, the House sponsor of the Bill, James Wilson, delivered his reply. The thrust of his argument was simple: Congress had power to pass the Civil Rights Act because Congress had implied power to enforce the Due Process Clause of the Fifth Amendment. According to Wilson:

The gentleman from Ohio [Mr. BINGHAM] tells us in the protection of these rights the citizen must depend upon the "honest purpose of the several States," and that the General Government cannot interpose its strong right arm to defend the citizen in the enjoyment of life, liberty, and in possession of property. In other words, if the States of this Union, in their "honest purpose," like the honesty of purpose manifested by the southern States in times past, should deprive the citizen, without due process of law, of life, liberty, and property, the General Government, which can draw the citizen by the strong bond of allegiance to the battle-field, has no power to intervene and set aside a State law, and give the citizen protection under the laws of Congress in the courts of the United States; that at the mercy of the States lie all the rights of the citizen of the United States; . . . that revolted South Carolina may put under lock and key the great fundamental rights belonging to the citizen, and we must be dumb; that our legislative power cannot be exercised; that our courts must be closed to the appeal of our citizens . . . .

. . . .

He says that we cannot interpose in this way for the protection of rights. Can we not? What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

---

185. *See id.* at 1837 (statement of Rep. Lawrence).

And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights. In the case of *Prigg vs. The Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case . . . .

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them in entitled to a remedy. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.

The citizen is entitled to the right of life, liberty, and property. Now, if a State intervenes and deprives him, without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions? . . .

. . . .

Now, I want to know whether these rights [enumerated in the bill] are any greater than the rights which are included in the general term “life, liberty, and property.” And yet the gentleman admits by his instructions, and asks this House to indorse his admission, that the General Government may secure to citizens of the United States in every State the possession of these enumerated rights. I take the gentleman’s own instructions, and his argument in favor of them, and I apply them as arguments in support of the report of the Judiciary Committee.<sup>186</sup>

Wilson agreed with Bingham that the Civil Rights Bill constituted an effort to enforce the rights of life, liberty, and property as declared by the Fifth Amendment’s Due Process Clause. He also accepted Bingham’s argument that the unenumerated rights of state citizenship were reserved to the control of the people in the states. Wilson insisted, however, that every right announced in the Bill of Rights fell within either the scope of the federal Due Process Clause or was necessary to protect the rights of due process. Indeed, Wilson believed that referencing the “civil rights” of federal citizenship was no different than referencing the Fifth Amendment rights of due process. The Civil Rights Bill, he explained, constituted an effort to enforce the enumerated due process rights of national citizenship, not the unenumerated civil rights of state citizenship.

Like most radical Republicans, Wilson insisted Congress had implied power to enforce the federal Due Process Clause against the states. In *Prigg v. Pennsylvania*, the Supreme Court found implied congressional power to enforce the Fugitive Slave Clause.<sup>187</sup> If Congress had implied power to enforce the

---

186. *Id.* at 1294–95 (statement of Rep. Wilson).

187. 41 U.S. (16 Pet.) 539, 569 (1842).

enumerated rights of slave owners, then it had no less power to enforce the enumerated rights of former slaves.

Wilson's insistence that the Bill protected nothing more than the due process rights of life, liberty, and property was plausible only in regard to its enumerated rights of person and property. The general terms "civil rights and immunities" were not so easily cabined. Because other members echoed Bingham's concerns about this language,<sup>188</sup> the Bill's proponents ultimately agreed to delete the disputed terms. As Wilson explained,

Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section.<sup>189</sup>

Having removed the language that arguably extended the Bill beyond the rights of due process, the House now had sufficient votes to pass the due process based Civil Rights Bill.<sup>190</sup> They did so, however, without John Bingham support.<sup>191</sup> For Bingham, the effort would have to wait until after ratification of a constitutional amendment empowering Congress to enforce the rights of due process.

More broadly, the above debates demonstrate that both critics and supporters of the Civil Rights Bill—including its sponsors—understood the effort involved enforcing the equal natural rights of individuals not to be deprived of life, liberty, or property without due process of law.

#### F. JOHNSON'S VETO AND CONGRESSIONAL OVERRIDE

As he had done with the Freedmen's Bureau Bill, President Johnson vetoed the Civil Rights Bill. Among his various grounds for rejecting the Bill, Johnson insisted that it was inappropriate to so quickly grant freedmen the rights of

188. See CONG. GLOBE, 39th Cong., 1st Sess. 1295–96 (1866) (statement of Rep. Latham).

189. *Id.* at 1367 (statement of Rep. Wilson).

190. Representative Samuel Shellabarger (R-OH) supported the Bill only because it had been altered to protect only citizens—thus vindicating the strategy of narrowing the Bill—and because Congress was not asserting any power to regulate the *substance* of the listed rights—requiring only that whatever their substance under state law, these rights would be equally extended to all citizens regardless of race. See *id.* at 1293 (statement of Rep. Shellabarger). According to Shellabarger:

[I]f this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and the people. But, sir, except so far as it confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

*Id.*

191. See *id.* at 1367 (reporting Bingham as a "nay" vote).

citizenship—rights that arguably included suffrage. Even if such action were appropriate, Congress had no constitutional power to enforce the Bill’s listed rights.<sup>192</sup>

The Bill then returned to Congress for a possible override. Having been unable to override Johnson’s last veto, the Senate took no chances. On March 26, 1866, the Senate voted to “retroactively” exclude New Jersey Democrat John Stockton. Days later, the Senate successfully voted to override Johnson’s veto—by a single vote.<sup>193</sup>

In his speech responding to Johnson’s veto, Senator Trumbull denied that the rights of American citizenship necessarily included the rights of suffrage. Franchise rights were political rights, and not the kind of civil rights covered by the Bill.<sup>194</sup> In describing the rights that *were* protected by the Bill, Trumbull moved back and forth between the natural rights of all persons and rights incident to the status of citizenship:

But, sir, what rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union . . . . These rights belonging to the citizen, and known as natural rights, are defined by Blackstone in his definition of civil liberty to be:

“No other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient to the general advantage of the public. In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be *equal to all*, or as much so as the nature of things will admit.”

“The equality of rights is the basis of a commonwealth” is said in a note to Kent, and Kent himself, in speaking of these rights, says:

“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country to be natural, inherent, and inalienable.”

What are they? “The right of personal security, the right of personal liberty, and the right to acquire and enjoy property;” and these are declared to be inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be.<sup>195</sup>

---

192. *See id.* at 1679–81.

193. *See id.* at 1809; *see also* MCKITRICK, *supra* note 38, at 323.

194. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull).

195. *Id.*

Trumbull thus echoed his counterpart in the House, James Wilson, by arguing that the Bill was limited to protecting the rights of national citizenship and claiming that these rights were simply the natural rights of life, liberty, and property. Trumbull also stressed the inherent principle of equality, whereby the rights of due process “should be *equal to all*.” As other scholars have noted, antebellum due process theory commonly included an equality principle which demanded that laws preventing the arbitrary deprivation of life, liberty, and property should be equally extended to all persons “as much as the nature of things will admit.”<sup>196</sup> This equality principle appeared as early as the writing of William Blackstone, and was embraced by antebellum abolitionists and key members of the Thirty-Ninth Congress, including Trumbull, Wilson, Bingham, and others.<sup>197</sup>

On the other hand, there is a conceptual opaqueness in Trumbull’s argument. In determining the nature of the Bill’s protected rights, Trumbull begins by citing the classic definition of the natural rights of all persons. Trumbull then slides into describing these rights of all persons as the “rights [] belonging to every citizen of the United States, as such.” The only way to make sense of this statement is to understand that citizens, as persons, enjoy all the natural rights of every other person (and more). However, limiting the Bill’s protections of natural rights to citizens—however awkward (and, to Bingham, unjust)—allowed defenders of the Bill to claim authority under “citizenship” provisions like the Comity Clause of Article IV.<sup>198</sup> It also allowed Trumbull to invoke the government’s implied power to protect its citizens.<sup>199</sup>

As for President Johnson’s claim that Congress lacked the power to enforce the rights of personal security, liberty, and property, Trumbull was contemptuous:

Whatever may have been the opinion of the President at one time as to “good faith requiring the security of the freedmen in their liberty and their property” it is now manifest from the character of his objections to this bill that he will approve no measure that will accomplish the object.<sup>200</sup>

Trumbull’s speech was a mixed bag of natural and national rights, coupled with an expansive view of Congress’s power to enforce the Thirteenth

---

196. See, e.g., Chapman & McConnell, *supra* note 27; McConnell, *supra* note 4, at 1036–37; Williams, *The One and Only*, *supra* note 27. As Ryan Williams points out, the caveat “as much so as the nature of things will admit” indicates an acceptance of common law distinctions in the protections of life, liberty, and property, including rules regarding the acquisition and possession of property by females and aliens. See Williams, *Other Desegregation Decisions*, *supra* note 27, at 530.

197. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (“Civil liberty, or the liberty which a person enjoys in society, is thus defined by Blackstone: ‘Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public. . . . In this definition of civil liberty it ought to be understood . . . that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.’”).

198. See *id.*

199. *Id.*

200. *Id.* at 1761.

Amendment. However persuasive these ideas were to a majority, the Senate achieved the supermajority necessary to override Johnson's veto only on account of having previously removed the likely opposing vote of New Jersey Democrat John Stockton.<sup>201</sup>

The House, on the other hand, took the more traditional route of allowing all their members to discuss the matter, if only briefly.<sup>202</sup> Following Wilson's announcement that only limited time would be allowed for debate,<sup>203</sup> Representative William Lawrence (R-OH) rose in support of overriding Johnson's veto. In a speech that takes up several pages in the *Congressional Globe*,<sup>204</sup> Lawrence detailed his reasons for supporting congressional enforcement of the rights of due process.

After asserting Congress's power to bestow the rights of national citizenship,<sup>205</sup> Lawrence explained the nature of the rights protected by the Civil Rights Bill. Following what had become a well-trod path by supporters of the Bill, Lawrence focused on the natural rights of all persons as originally described in the foundational documents of the Country and the Due Process Clause of the Fifth Amendment:

Legislative powers exist in our system to protect, not destroy, the inalienable rights of men. . . .

The Continental Congress of 1774, composed of delegates from twelve colonies, in their Declaration of Rights, among other things, declared:

"That the inhabitants of the English colonies of North America, by the immutable laws of nature, the principle of the English constitution, and the several charters or compacts, have the following rights:

"*Resolved*, That they are entitled to life, liberty, and property, and that they have never ceded to any sovereign Power whatever a right to dispose of either without their consent."

The Declaration of Independence affirms—

"That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among men."

The Constitution was established, as its preamble declares, to—

---

201. Despite those supporting the veto, such as Senator Garrett Davis (D-KY), see *CONG. GLOBE*, 39th Cong., 1st Sess. app. at 181–85 (1866), the final vote was 33–15, the requisite two-thirds majority for a veto override. *Id.* at 1809.

202. *CONG. GLOBE*, 39th Cong., 1st Sess. 1828 (1866) (statement of Rep. Wilson) ("It is not my intention . . . to allow any discussion . . . The bill has already been very thoroughly discussed.").

203. *Id.*

204. *Id.* at 1832–37 (statement of Rep. Lawrence).

205. *Id.* at 1832.



“Promote the general welfare and secure the blessings of liberty.”

All the law-writers agree that every citizen has certain “absolute rights,” which include—

“The right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and inalienable.” . . .

The bill of rights to the national Constitution declares that:

“No person” . . . “shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.”

. . . .

Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and unalienable rights: either by prohibitory laws, or by a failure to protect any one of them.<sup>206</sup>

Lawrence then explored the conditions in the South and the existence of both “prohibitory laws” and failures to enforce fundamental rights of life, liberty, and property.<sup>207</sup>

Lawrence’s basic argument, as quoted above, was that all persons enjoy the fundamental due process rights of life, liberty, and property. These rights also include whatever is necessary to allow the enjoyment of such rights. The Fifth Amendment’s Due Process Clause expressly declares that citizens of the United States enjoy these rights;<sup>208</sup> rights that Congress may enforce in cases in which states have either passed laws violating the due process rights of citizens, or states have failed to enforce laws protective of due process rights. Both problems existed in the southern states under the Black Codes.

Lawrence ended his speech by addressing what he claimed was John Bingham’s essential objection to the Bill, the reference to “civil rights and immunities” and the implication that Congress had authority over the content of civil rights in the states:

---

206. *Id.* at 1832–33 (citations omitted).

207. *See id.* at 1833–35.

208. U.S. CONST. amend. V.

The speech of my distinguished colleague [Mr. BINGHAM, March 9] has been extensively published in a mode to mislead the public judgment.

The great weight of his argument was leveled against a single provision of the bill as it originally came from the Senate. In his speech he used this language:

“It [the bill] provides that—

“There shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States, on account of race, color, or previous condition of slavery.”

....

Now, sir, he placed upon this provision of the bill an interpretation different from the committee who reported it. But for the purpose of obviating his objection this clause was stricken out and forms no part of the bill as it finally passed.<sup>209</sup>

John Bingham’s objections to the Civil Rights Bill, of course, went well beyond that particular phrase. Bingham’s central constitutional argument was that Congress lacked the implied power to enforce the Due Process Clause. As much as members like Lawrence might enjoy turning the once-hated *Prigg* doctrine against the South, Bingham was having none of it. In his speech, referenced above by Representative Lawrence, Bingham insisted that enforcing provisions of the Bill of Rights such as the Due Process Clause against the states required a constitutional amendment. Bingham therefore refused to support the Civil Rights Bill, even after its proponents removed the “civil rights and immunities” language, and he refused to support the congressional override.<sup>210</sup> Eventually, Bingham *would* support a later version of the Bill, but only after the adoption of an amendment protecting the due process rights of all persons and only after key provisions of the bill were extended to all persons.<sup>211</sup>

In light of the above evidence, it appears that the due process reading of the Civil Rights Act was broadly accepted in the Thirty-Ninth Congress. Congressmen Trumbull, Wilson, Thayer, Delano, Cowan, Bingham, and Lawrence—key sponsors and key objectors in both the Senate and the House—all described the Civil Rights Bill as seeking to enforce the natural due process rights of life, liberty, and property. Not only was this characterization never denied but it was also explained, in great detail, by several congressmen. The only remaining question was whether Congress had the constitutional power to enforce the Due Process Clause. Part III, below, explores Bingham’s effort to supply just such power.

---

209. CONG. GLOBE 39th Cong., 1st Sess. 1837 (1866).

210. *Id.* at 1861 (House votes to override Johnson’s veto 122–41, with Bingham reported as “not voting”).

211. See, *infra* note 251 and accompanying text.

### III. THE FOURTEENTH AMENDMENT

As the chronology of events in the Thirty-Ninth Congress illustrates, the Civil Rights Act and the Fourteenth Amendment proceeded along separate tracks. Bingham took the lead in what became Section One of the Fourteenth Amendment, and Wilson took the lead on the Civil Rights Act. The former was a constitutional effort, the latter a legislative one. The Amendment and the Act were premised on entirely different principles of constitutional authority. Whereas Wilson insisted that the Act merely enforced already existing constitutional provisions, Bingham insisted that the Act required a constitutional amendment.

Despite their disagreement about the Constitution, both agreed about the nature of the rights Congress sought to protect in the Civil Rights Act. The Act was not an attempt to regulate the entire subject of civil rights in the states. Language that might be misconstrued to that effect was removed. Nor was this an effort to enforce rights bestowed upon individuals only at the moment they became citizens (either of a state or of the United States). Instead, all agreed that the rights protected by the Civil Rights Act were the natural rights of all persons—a recognition which caused Bingham to object to the Act's exclusion of non-citizens from its protection.

Throughout the debates, Bingham insisted that an amendment, which he had already proposed, provided both the constitutional authority and the proper scope of constitutional protection. After an initial round of debate and modification, Bingham produced a draft with two provisions that ultimately became part of the Fourteenth Amendment: “nor shall any State deprive *any person* of life, liberty, or property, without due process of law” and “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>212</sup>

Like the Civil Rights Act, Bingham's proposed amendment sought to protect the rights of due process. However, unlike the Civil Rights Act, Bingham's amendment guaranteed the rights of due process to all persons. Thus, Bingham's amendment restored the original vision of the Civil Rights Act.

#### A. DISCONNECTING THE CIVIL RIGHTS ACT FROM THE PRIVILEGES OR IMMUNITIES CLAUSE

As noted in the opening of this Article, many scholars commonly assume that the members of the Thirty-Ninth Congress intentionally drafted the Fourteenth Amendment in a manner that constitutionalized the 1866 Civil Rights Act.<sup>213</sup> Although this assumption seems intuitively correct, it faces several historical problems. To begin with, members of the Joint Committee, which approved and submitted Bingham's draft, expressly *denied* that it had been drafted to constitutionalize the Civil Rights Act (more on this in a moment).<sup>214</sup> Bingham himself

---

212. U.S. CONST. amend. XIV, §§ 1, 5 (emphasis added).

213. See sources cited *supra* note 4.

214. See CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Fessenden).

never once mentioned the Civil Rights Act in his speeches supporting his drafts of the Fourteenth Amendment, nor did his counterparts in the Senate.<sup>215</sup> We also know that, simply as a matter of chronology, Bingham's efforts to pass an amendment began *prior* to the debates on the Civil Rights Act and that they proceeded along an entirely different legislative track. Further, both the Civil Rights Act and the Amendment were significantly amended prior to final passage, each for different reasons and in response to different concerns.<sup>216</sup> Finally, and most problematically for those seeking to equate the Act and the Amendment, the man who drafted Section One of the Fourteenth Amendment refused to support the 1866 Civil Rights Act. All of this suggests that we should be careful before assuming that the drafters intended the Amendment to constitutionalize the Act.

This does not mean, however, that the Fourteenth Amendment has no relationship to the 1866 Civil Rights Act. Indeed, the evidence strongly suggests that the Amendment and the Act are linked in important ways. What we must avoid is the assumption that the framers of the Fourteenth Amendment intended to constitutionalize one particular version of the Civil Rights Act. This is not only false—Bingham had no such intent—but it also misleadingly focuses our attention on the temporary narrowed version of the Civil Rights Act passed in April 1866.

If one starts with the assumption that the framers sought to enforce the version of the Act that protected *citizens*, one inevitably looks to provisions in the Fourteenth Amendment that *also* protect citizens. The result might lead to something like the following chain of reasoning:

- (1) The Fourteenth Amendment constitutionalized the 1866 version of the Civil Rights Act;
- (2) The 1866 version of the Civil Rights Act protected only citizens;
- (3) The only provision in the Fourteenth Amendment that protects only citizens is the Privileges or Immunities Clause;
- (4) Therefore, the Privileges or Immunities Clause must be the provision that constitutionalizes the 1866 Civil Rights Act.

Such or similar logic has mistakenly informed almost all legal historical scholarship on the relationship between the 1866 Civil Rights Act and the Fourteenth Amendment.<sup>217</sup>

Once we understand the due process roots of the *original* Civil Rights Act, this breaks the commonly assumed link between the Act and the Privileges or Immunities Clause. We now know that key members, including the House sponsor (Representative Wilson) described the Civil Rights Act as an effort to enforce the natural rights of due process; rights which are properly held by all persons,

---

215. See, e.g., *id.* at 1291–92 (statement of Rep. Bingham); *id.* at 2765 (statement of Sen. Howard).

216. See *id.* at 1115–25 (tracking the amendments to the Civil Rights Bill).

217. See *supra* notes 4–6 and accompanying text.

not just citizens. We also know that the man who drafted the Fourteenth Amendment (Representative Bingham) had no intention of constitutionalizing the April 1866 version of the Civil Rights Act. Instead, Bingham drafted an amendment that would authorize something like the original version of the Civil Rights Act, one that protected the natural due process rights of all persons.

#### B. JOHN BINGHAM'S AMENDMENT

Two months prior to the passage of the Civil Rights Act, John Bingham drafted the initial version of Section One of the Fourteenth Amendment. As submitted to Congress, the proposal read:

“The Congress shall have power to make all laws which shall be necessary and proper to secure the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).”<sup>218</sup>

Bingham believed this language would require the states to protect both the national rights of citizenship enumerated in the Bill of Rights, and the natural rights of all persons declared by the Due Process Clause of the Fifth Amendment. As Bingham explained to the House on February 26, “it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution.”<sup>219</sup>

On February 28, 1866, Bingham delivered a second speech that fleshed out his ideas in more detail. Only days earlier, Congress had failed to override President Johnson’s federalism-based veto of the Freedmen’s Bureau Bill.<sup>220</sup> Fully aware of the need to maintain moderate (and moderately conservative) support, Bingham assured his colleagues that the Amendment did not “take away from any State any right that belongs to it.”<sup>221</sup> Its purpose 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. It ‘hath that extent—no more.’”<sup>222</sup> Bingham continued:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say,

---

218. BENJ. B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865—1867*, at 61 (1914).

219. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).

220. President Johnson vetoed the Bill on February 19. See MCKITRICK, *supra* note 38, at 287–88. The next day, the Senate failed to override the veto by two votes, 30–18. See CONG. GLOBE, 39th Cong., 1st Sess. 943 (1866).

221. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham).

222. *Id.*

“We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed.” That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed?<sup>223</sup>

Following the debates on the Civil Rights Act, Bingham redrafted his proposed Amendment.<sup>224</sup> This second draft went far beyond Bingham’s earlier proposal and combined a number of proposed amendments which had been proposed by different members at various points during the Thirty-Ninth Congress.<sup>225</sup> Bingham’s contribution became the Section One of the five-sectioned amendment.<sup>226</sup> For now, we are concerned only with Sections One and Five:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.<sup>227</sup>

In his speech presenting the new draft to the House, Bingham explained that, despite the new language, his goals remained the same: Congress must be empowered to protect the enumerated rights of citizens and the natural rights of all persons. According to Bingham:

The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. 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

---

223. *Id.* at 1089.

224. For a detailed discussion of John Bingham’s first and second drafts of Section One of the Fourteenth Amendment, see generally LASH, *supra* note 18, at 85–175.

225. See NELSON, *supra* note 90, at 48–58 (describing the various proposals and their combination into a single amendment).

226. See KENDRICK, *supra* note 218, at 87. The Joint Committee on Reconstruction, of which Bingham was a member, prepared and submitted the amendment to the House and Senate. Although we have no record of the Joint Committee’s discussion, we do have a record of the votes and of which member submitted which draft. From these notes, we know that John Bingham authored Section One.

227. U.S. CONST. amend. XIV, §§ 1, 5.

by congressional enactment which hitherto they have not had the power to do, and have never even attempted 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.<sup>228</sup>

In this passage, Bingham continues his longstanding practice of distinguishing the natural rights of all persons from the rights of citizens of the United States. The rights of equal protection are “the inborn rights of every person,” whereas “citizens of the Republic” enjoy an additional set of national privileges or immunities. These privileges or immunities were not unlimited; they did not, for example, include a national right of suffrage.<sup>229</sup> In fact, according to Bingham, the Amendment took “from no State any right that ever pertained to it,” but simply granted Congress the previously missing power to enforce those national and natural rights that states ought to have respected from the beginning.<sup>230</sup> As Bingham explained:

That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.<sup>231</sup>

Here is Bingham’s answer to the Civil Rights Act. With this amendment, Congress would have power to enforce the rights of national citizenship (the Bill of Rights) and the natural due process rights of all persons, even the stranger.

#### C. THE SPEECH OF JACOB HOWARD

As a matter of chance, it fell to Jacob Howard to introduce Bingham’s provision to the Senate.<sup>232</sup> Howard’s speech has been the subject of exhaustive scholarly commentary for clues his words might yield for the meaning of the Privileges or Immunities Clause. For now, I want to address only those aspects of Howard’s speech that relate to Congress’s power to oppose the Black Codes through legislation like the Civil Rights Act.

Howard began by defining the “privileges and immunities of citizens of the several States” to be protected under what was at that point the opening clause of the Amendment.<sup>233</sup> Here, Howard pointed to rights specifically enumerated in the federal Constitution, including the Comity Clause of Article IV and the first eight

---

228. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) (emphasis added).

229. *See id.*

230. *Id.*

231. *Id.* at 2543.

232. *See id.* at 2764–65 (statement of Sen. Howard) (explaining that William Fessenden had been originally chosen to introduce the amendment to the Senate but that he had fallen ill at the last moment).

233. *See id.* at 2765. The citizenship clause would be added later. *See id.* at 2890–97.

provisions in the Bill of Rights.<sup>234</sup> Scholars vigorously disagree about the meaning of Howard's reference to the Comity Clause and to cases like *Corfield v. Coryell*. One view is that it was nothing more than a recognition that Article IV equality rights were among the enumerated rights of citizens (along with the substantive rights of the Bill of Rights). Another view is that an undefined category of local civil rights previously given equal protection under the Comity Clause would now be transformed into unenumerated substantive national rights.<sup>235</sup> Given that Bingham and the moderates had just successfully forced the removal of the general term "civil rights" from the Civil Rights Act to avoid even *suggesting* federal power over the substance of civil rights in the states, it seems unlikely that Bingham would have proposed (or the moderates accepted) the latter. Absent evidence to the contrary, Howard presumably shared the same understanding of the Comity Clause as most everyone else in the Thirty-Ninth Congress: a provision providing out-of-state visitors equal access to a limited set of state-secured rights.<sup>236</sup> These equal protection rights were as much the "privileges or immunities of citizens of the United States" as were the substantive absolute rights of the First Amendment.

But it is not necessary to engage at length this particular debate involving the Privileges or Immunities Clause. The effort to inflate the significance of Howard's reference to the Comity Clause has been driven by the assumption that Bingham drafted the Fourteenth Amendment's Privileges or Immunities Clause to constitutionalize the Civil Rights Act—an Act many scholars also assume represented an effort to enforce the citizenship rights of the Comity Clause. We now know that Bingham did *not* read the Civil Rights Act in this manner. Neither, it appears, did Jacob Howard.

Howard said nothing about the Civil Rights Act in his description of the Privileges or Immunities Clause. Instead, Howard referenced the Black Codes—the target of the Civil Rights Act—in his discussion of the proposed Due Process and Equal Protection Clauses:

---

234. After quoting the Comity Clause case, *Corfield v. Coryell*, and the first eight amendments, *id.* at 2765, Howard concluded:

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

*Id.*

235. See AMAR, THE BILL OF RIGHTS, *supra* note 5, at 185–87; LASH, *supra* note 18, at 155–60; Barnett, *supra* note 22, at 175; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 24–25 (2008); Hamburger, *supra* note 4, at 79–81.

236. See LASH, *supra* note 18, at 162–68.



The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a *code* not applicable to another.<sup>237</sup>

The “code” Howard refers to, of course, is the Black Codes. To Howard, it was the last two clauses of Section One, and not the Privileges or Immunities Clause, that abolished the Black Codes. This statement suggests that, to Howard at least, the power to enact anti-Black Code legislation like the Civil Rights Act is found somewhere in the “last two clauses” of Section One (the Due Process and Equal Protection Clauses) in combination with the powers granted by Section Five.<sup>238</sup>

Howard did not say *which* of the last two clauses empowered Congress to eradicate the Black Codes. However, we know from the Civil Rights debates that members commonly viewed the Due Process Clause as carrying its own “equality” principle. We also know that John Bingham believed that enforcing the Due Process Clause involved eradicating racially discriminatory Codes at least to the extent that they deprived persons of their natural due process rights of life, liberty, and property.<sup>239</sup>

On the other hand, even if Bingham believed that enforcement of the Due Process Clause authorized Congress to prohibit certain forms of racial discrimination, he and the Committee may have believed it was safest to expressly declare this implicit principle of equal due process. It also is possible, as scholars have recently argued,<sup>240</sup> that the Equal Protection Clause had an altogether separate task: where due process required laws that secured all persons in their equal rights of due process, the Equal *Protection* Clause (in combination with Section Five) empowered Congress to ensure those rights were actually, and equally, enforced. For now, it is enough to recognize that Howard appears to have shared Bingham’s view that abolishing the Black Codes involved enforcing the natural rights of “all persons,” and not the special rights of “citizens of the United States.”

---

237. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (emphasis added).

238. Howard’s statement seems to contradict claims that the framers of the Fourteenth Amendment viewed the Privileges or Immunities Clause as authorizing anti-Black Code legislation like the Civil Rights Act. This has led some scholars to embrace creative readings of Howard’s statement. Christopher Green, for example, argues that Howard did not mean to link power to prohibit the Black Codes with the “last two clauses” of Section One. Green asserts that the word “this” in the above Howard quote actually refers to Section One as a whole and not to the “last two clauses” of Section One. See GREEN, *supra* note 4, at 50; Green, *supra* note 235, at 28–29. Green’s reading is, at best, counterintuitive. It also conflicts with everything we know about how members viewed the rights of the Civil Rights Act. In short, the most natural reading of Howard’s speech preserves the structure of the paragraph, coincides with the views of the Amendment’s drafter—and Howard’s colleague on the Joint Committee—John Bingham, and fits with how supporters and critics viewed the Civil Rights Act.

239. See *supra* note 181 and accompanying text.

240. See Green, *supra* note 235, at 28–29.

## D. POST-RATIFICATION REPASSAGE OF THE CIVIL RIGHTS ACT

The 1870 reenactment of the 1866 Civil Rights Act has gone mostly unnoticed and completely unanalyzed in Fourteenth Amendment historical scholarship. This omission is surprising because of the important role legal historians assign to the Civil Rights Act in determining the original meaning of the Fourteenth Amendment. Passed only two years after the adoption of the Fourteenth Amendment, many of the same members of Congress were involved in the passage of the original Civil Rights Act, the Fourteenth Amendment, and the reenacted Civil Rights Act.<sup>241</sup>

Of course, as is true for all postratification evidence, the further removed from the time of ratification, the less the evidence sheds light on original understanding. That reason alone may justify legal historians' disregard of the reenacted Civil Rights Act. On the other hand, if during the reenactment debates, members made statements calling into question the due process understanding of the original Act, then this would at least be *some* evidence of a contrary understanding. In this case, however, the evidence strongly supports an original due process understanding of the Civil Rights Act.

Recall that the original version of the Act declared the following:

[T]he *inhabitants* of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, *shall have the same right* to make and enforce 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>242</sup>

Because a number of members doubted that Congress had power under the Thirteenth Amendment to guarantee all persons their due process rights, proponents narrowed the Bill so that it protected only "citizens." John Bingham opposed the amended bill on the dual grounds that it would take a constitutional amendment to protect the rights of life, liberty, and property, and that *all persons* deserved such protection, not just citizens.

---

241. Fifteen senators voted in all three final passage votes. See CONG. GLOBE, 39th Cong., 1st Sess. 1854 (1866) (Civil Rights Act on April 9, 1866); *id.* at 3042 (Fourteenth Amendment on June 8, 1866); CONG. GLOBE, 41st Cong., 2d Sess. 3809 (1870). Among them were Senators Anthony, Chandler, Harris, Morrill, Pomeroy, Trumbull, and Williams. Similarly, twenty-eight representatives voted in the final votes of these bills in House, most notably Representatives Davis, Griswold, Jenckes, Lawrence, and Pomeroy. See CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866) (Civil Rights Act on April 9, 1866); *id.* at 3149 (Fourteenth Amendment on June 13, 1866); CONG. GLOBE, 41st Cong., 2d Sess. 3884 (1870) (repassage of the Civil Rights Act on May 27, 1870). Representatives Bingham was involved in all three bills, of course, but voted against the Civil Rights Act of 1866. See *supra* note 191.

242. CONG. GLOBE, 39th Cong., 1st Sess. 363 (1866) (emphasis added).

Following the ratification of the Fourteenth and Fifteenth Amendments, Congress revisited the issue. Buried within the provisions of an 1870 bill “to enforce the fifteenth amendment” (the “Enforcement Act”) were the following two provisions:

Sec. 15. *And be it further enacted, That all persons* within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all law and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding . . . .

. . . .

SEC. 17. *And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reenacted; and said act, except the first and second sections thereof, is hereby referred to and made a part of this act; and section fifteen and section sixteen hereof shall be enforced according to the provisions of said act.*<sup>243</sup>

With the exception of the right to buy and sell American real estate,<sup>244</sup> Section Fifteen extended all of the rights of the 1866 Civil Rights Act to “all persons.” Section Seventeen formally reenacted the citizenship-based 1866 Act and incorporated into the Enforcement Act the same enforcement provisions of the Civil Rights Act.

As the debates over the Enforcement Act went forward, members described the “all persons” section as an effort to enforce the Fourteenth Amendment and its guarantee to all persons the rights of life, liberty, and property—rights protected by the original version of the Civil Rights Act. For example, in response to Senator Eugene Casserly’s (D-CA) criticism of the Bill’s enforcement provisions,

---

243. CONG. GLOBE, 41st Cong., 2d Sess. 3562 (1870) (emphasis added).

244. The issue of noncitizen real estate rights came up during the original debates. *See* CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866) (statement of Sen. Trumbull) (acknowledging that Congress could not force states to grant real estate rights to noncitizens, but that Congress could make people citizens and then require states to grant those citizens real estate rights). I will discuss this issue in a final section of this Article. Although all persons (including noncitizens) enjoyed the equal natural due process right to acquire and possess property, *see infra* note 278, the “equality” aspect was subject to the caveat “as much as the nature of things will admit.” *See supra* note 196; *see also* Williams, *The One and Only*, *supra* note 27, at 460–77 (noting that Reconstruction-era conceptions of due process incorporated common law distinctions). Common law conceptions of due process property rights accepted distinctions between citizens and noncitizens, with noncitizens usually allowed to acquire but not “hold” real property. This meant that real property was possessed “subject to office” (government intervention). This distinction between the property rights of aliens and citizens likely influenced the decision to remove real estate rights from the “all persons” section of the 1870 version of the Civil Rights Act. *See infra* notes 275–78 and accompanying text.

Senator John Pool (R-NC) pointed out that these provisions “are copied from the civil rights bill.”<sup>245</sup> To this, Senator Allen Thurman (D-OH) responded:

There is not one word in the civil rights bill on the subject of the right to vote. There is not one provision in it intended to secure or protect anybody in the right to vote. The right to vote is wholly outside of that bill . . . .

. . . .

It deals simply with rights of life, liberty, person, property. It does not touch political rights at all, has nothing in the world to do with the elective franchise.<sup>246</sup>

Objections to the Enforcement Act tended to focus on whether the Fifteenth Amendment empowered Congress to prohibit private interference with the right to vote.<sup>247</sup> Unlike the original debates over the Civil Rights Act, no one argued this time that Congress lacked the constitutional power to reenact the Civil Rights Act and extend its protections to “all persons.”<sup>248</sup> Also, where proponents of the original version of the Civil Rights Act had initially characterized the Act as an enforcement of the Thirteenth Amendment,<sup>249</sup> both Republicans and Democrats in 1870 uniformly described the civil rights provisions as an effort to enforce the *Fourteenth* Amendment. Finally, although John Bingham had previously opposed what he viewed as an unauthorized attempt to enforce the rights of due process, this time, Bingham helped lead the effort to pass the Act and extend its provisions to all persons.

On May 27, 1870, John Bingham introduced the Enforcement Act to the House with the above-quoted sections reenacting and extending the rights of the original Civil Rights Act. Bingham noted that, in addition to enforcing the right to vote, “the Senate amendment contained various provisions for the enforcement

245. CONG. GLOBE, 41st Cong., 2d Sess. app. at 470 (1870) (statement of Sen. Pool).

246. *Id.* (statement of Sen. Thurman). Senator Casserly responded by denying the constitutionality of the 1866 Civil Rights Act:

I am discussing this bill as a bill to enforce the fifteenth amendment. The civil rights bill had another object. Yet I am surprised to hear that there are such provisions in that act. I do not think anybody has ever thought of enforcing them, or ever supposed them to be valid or constitutional. . . .

. . . .

. . . [I]s it a proper thing to repeat that error now?

*Id.*

247. *See, e.g., id.* at 473 (colloquy between Sens. Carpenter and Casserly).

248. At most, members suggested that extending these rights to all persons was a complicated subject requiring more discussion. *See, e.g., id.* at 475 (statement of Sen. Casserly) (“I shall not say a word in reply to the speech of the Senator from Nevada [Mr. STEWART] on the Chinese question in California, made by him after I arose, when I yielded to him to say a word in reply to the Senator from Oregon, [Mr. WILLIAMS.] That is a question of considerable dimensions, which, as even he seems to be conscious, is by no means an easy one to deal with. I trust that the Senate will at this time confine itself to the subject which it has before it—the consideration of the bills to enforce the fifteenth amendment.”).

249. *See supra* note 52 and accompanying text.

of certain sections of the fourteenth article of the amendments to the Constitution.”<sup>250</sup>

Notice how Bingham phrased his introduction. The additional provisions were not efforts to enforce the Thirteenth Amendment (a theory he originally rejected and which no one now proposed), nor did Bingham describe the effort as simply “reenacting” the Civil Rights Act (a bill he originally opposed as unconstitutional). Instead, Bingham presented the Bill as if this were a new and unprecedented effort to enforce the Fourteenth Amendment. In fact, the 1870 version of the 1866 Civil Rights Act *was* the first congressional effort to enforce the Fourteenth Amendment.

Although some Democrats opposed the Bill, they also recognized that the civil rights provisions were an attempt to enforce the Fourteenth Amendment.<sup>251</sup> Although some members argued that the Bill in its entirety violated rights reserved to the states under the Ninth and Tenth Amendments,<sup>252</sup> no one claimed that the civil rights provisions exceeded Congress’s power under Section Five of the Fourteenth Amendment.

The lack of such an objection is all the more significant in light of the Enforcement Act’s extension of most of the Civil Rights Act to *all persons*. Neither the Citizenship Clause nor the Privileges or Immunities Clause authorizes a guarantee of equal rights to *noncitizens*. These were the rights of life, liberty, and property—the natural rights of all persons originally protected by the Fifth Amendment’s Due Process Clause, and now guaranteed against state abridgement by the Fourteenth Amendment’s Due Process Clause. It was the failure of the original Civil Rights Act to extend these natural rights to all persons that triggered the objections of John Bingham. It is altogether fitting, therefore, that Bingham introduced to the House the first national effort to protect the due process rights of all persons against state abridgement—rights that entered the Constitution by the hand of Bingham himself.

---

250. CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (statement of Rep. Bingham).

251. *See id.* at 3873 (statement of Rep. Kerr) (“The gentleman from Ohio [Mr. BINGHAM] says that this bill is intended for the purpose of executing the fourteenth and fifteenth articles of amendment to the Constitution of the United States. Yet one section only has any logical relation to the fourteenth article of amendment, that is the fourteenth section; and one section alone has direct and logical reference to the enforcement of the fifteenth article of amendment; and that is all.”); *id.* at 3874 (statement of Rep. Beck) (“The bill which left us was simply a bill to enforce the fifteenth amendment, and we had a right to suppose the gentleman from Ohio [Mr. BINGHAM] would insist on maintaining it in that form; instead of that it is abandoned, and he urges us to pass this bill of abominations hatched and concocted in the conference committee-room, in part, at least, which pretends to reenact the infamous civil rights bill, and enforce the fourteenth amendment as well as the fifteenth amendment. We are required to swallow it all at one dose.”).

252. *See id.* app. at 354 (statement of Sen. Hamilton) (citing the Ninth and Tenth Amendments together as establishing the principle of enumerated federal power and protecting the reserved sovereignty of the states); *id.* at 431 (statement of Rep. Swan) (same).

## IV. IMPLICATIONS

As I mentioned in the Introduction, the 1866 Civil Rights Act plays a significant role in scholarship relating to the meaning of both the Thirteenth and Fourteenth Amendments. Thirteenth Amendment scholars, for example, often insist that the Civil Rights Act of 1866 represents an enforcement of the Thirteenth Amendment.<sup>253</sup> Fourteenth Amendment scholars, on the other hand, often use the Act as a guide to understanding the meaning of the Fourteenth Amendment's Privileges or Immunities Clause.<sup>254</sup> The history presented in this Article problematizes both of these claims.

To begin with, advocates of the original version of the Civil Rights Act initially tried to argue that the Act represented an appropriate enforcement of the Thirteenth Amendment. Because "true freedom" for any person required the protection of their natural rights of life, liberty, and property, they argued, the Civil Rights Act was an appropriate effort to enforce the freedom guaranteed by the Thirteenth Amendment. Although their fellow members understood that the effort involved protecting the natural rights of due process, many of them doubted Congress's power to enforce such rights under the Thirteenth Amendment. The failure to convince a sufficient number of their colleagues prompted an alteration in the Act's original language which abandoned the idea of protecting all free persons and instead protected only free citizens. This alteration opened the door to a variety of additional sources of potential congressional authority, from the state-citizen rights of Article IV's Comity Clause to the federal rights of American citizens under the Due Process Clause of the Fifth Amendment.

The alteration of the Act signaled the advocates' realization that a majority of members would not accept the original version of the Civil Rights Act that was authorized solely by the Thirteenth Amendment. No doubt, some members *did* have a sufficiently broad view of the abolition amendment, but because too many other members did not, proponents decided not to go forward with the original bill. Once altered to protect only citizens, James Wilson exhorted his colleagues to accept the Bill not as an enforcement of the Thirteenth Amendment, but as an enforcement of the Fifth Amendment's Due Process Clause—a right of American citizens. The uncoupling of the Civil Rights Act from the Thirteenth Amendment is especially evident during the repassage debates of 1870. Not a single member mentioned the Thirteenth Amendment. Instead, everyone viewed the issue as one involving the enforcement of the Fourteenth Amendment. In short,

---

253. Even without postadoption evidence, there is good reason to doubt this claim. As the first half of this Article points out, advocates of the Civil Rights Act began by relying on the Thirteenth Amendment, but later added a variety of additional possible sources of authority, including the Fifth Amendment, the Republican Guarantee Clause, the Privileges and Immunities Clause, and the Naturalization Clause. It is unlikely that, at the time of the Act's original passage, any single source of authority represented *the* authority for the Civil Rights Act. Following the adoption of the Fourteenth Amendment, when reenacting the Act Congress cited no source of authority *except* for the Fourteenth Amendment.

254. See *supra* notes 4–6 and accompanying text.

the historical evidence tilts heavily against a Thirteenth Amendment reading of the reenacted Civil Rights Act.

The evidence strongly supports, on the other hand, a due process reading of the Civil Rights Act. Many key members of Congress described the 1866 version of the Civil Rights Act as an effort to enforce the natural rights of due process, and this seems to be *prima facie* evidence of a common due process reading of the Act. Indeed, with both sponsors and critics accepting this reading, it is difficult to see how an argument can be made *against* a due process reading of the Act. Although scholars often point to the many instances in which members associated the rights of the Comity Clause with the Civil Rights Act, they have missed the full context of those references. For example, when men like Trumbull discussed the Comity Clause and cases like *Corfield v. Coryell*, they were careful to *deny* that the Act was an effort to enforce the Comity Clause. The reference was meant only to illustrate how some of the rights of *Corfield* ought to be considered among the natural rights of American citizens. Outside of Congress, both judges and political commentators agreed that the Act was *not* an effort to enforce the rights of the Comity Clause. The reason was clear to members of Congress (and was repeatedly discussed): the Comity Clause provided visiting citizens equal access to a limited set of rights that states might (but might not) grant their own citizens. It had nothing to do with those rights states *must* grant their own citizens (the subject of the Civil Rights Act).

Additionally, scholars often describe the Privileges or Immunities Clause as somehow authorizing legislation like the Civil Rights Act.<sup>255</sup> The evidence presented in this Article suggests otherwise. Whereas the Privileges or Immunities Clause protects only citizens, the original and final versions of the Civil Rights Act protect all persons. Although the Civil Rights Act was temporarily narrowed, the debates overwhelmingly reflect a consistent understanding that the protected rights were the natural rights of all persons. The temporary focus on citizens reflected a perceived lack of constitutional authority, not a belief that these rights belonged only to citizens. Wilson, Bingham, Thayer, and others could not have been clearer on this issue: the Act protected the rights covered by the Fifth Amendment's Due Process Clause which, by their nature, belonged to all persons.

This suggests that the Due Process Clause of the Fourteenth Amendment carried a meaning that both critics and supporters would have recognized as authorizing legislation like the Civil Rights Act. That the framer of Section One, John Bingham, expressly held a due process understanding of the Civil Rights Act simply adds additional (and important) authority.

Securing one's life, liberty, and property required a minimum set of basic legal process rights; rights that remained insecure unless a person had the right to make and enforce contracts, sue, and be sued. All persons—not just citizens—had an equal right to such security. Bingham therefore objected to the 1866 Act's

---

255. See *supra* note 4.

failure to protect noncitizens. He insisted, however, that protecting such rights required a constitutional amendment. Everyone in Congress, and everyone following the debates from outside, would have understood Bingham's proposed "Due Process Amendment" as authorizing legislation like the Civil Rights Act. Bingham certainly did, which is why Bingham opposed the Civil Rights Act prior to the passage of the Fourteenth Amendment but supported the enactment of an extended version—one protecting all persons—after the ratification of the Fourteenth Amendment.

Although we have limited evidence of the public's understanding of the precise relationship between the Civil Rights Act and the Fourteenth Amendment, the evidence we have nevertheless supports a due process reading of the Act. For example, even if one discounts evidence of the framers' intent, we know that John Bingham embraced the language of the Due Process Clause because he believed that this language, in conjunction with Section Five, authorized legislation like the Civil Rights Act. We know that many of his colleagues also associated the listed rights of the Civil Rights Act with the natural due process rights of all persons. Finally, we know that after the ratification of the Fourteenth Amendment, members of Congress continued to associate the majority of rights listed in the Civil Rights Act with the Fourteenth Amendment's protection of the rights of "all persons." Even if not dispositive, all of this is evidence of a widely-shared understanding of a relationship between the Civil Rights Act and the Fourteenth Amendment's Due Process Clause.

We also know that the debates in Congress were well published in newspapers throughout the country, and that members of the public were following those debates.<sup>256</sup> Public critics of the Civil Rights Act understood it was an effort to enforce the rights of the Fifth Amendment's Due Process Clause, and they published essays critical of the effort in national newspapers. Bingham's criticism of the Act as an unconstitutional effort to enforce the Due Process Clause was not only independently published and distributed, but his arguments were expressly relied upon by politicians in their public explanations of their vote.<sup>257</sup> Anyone following the debates over the Civil Rights Act, and Bingham's role in it, would understand that Bingham's proposed "Due Process Clause" amendment sought to authorize legislation like the Civil Rights Act. In short, there is sufficient evidence to think that the due process reading of the Civil Rights Act, and the Civil

---

256. In 1866, Congressional debates were a significant source of newspaper content. This includes not only the national papers like the Herald Tribune, but also much smaller regional papers which reprinted content from their larger siblings. Both white and African American constituencies closely followed developments in the Reconstruction Congress. This was especially true in 1866 as the country looked forward to a congressional election that would determine the direction of Reconstruction policy. See LASH, *supra* note 18, at 177–79.

257. See *Letter from Mr. H. J. Raymond*, EVENING POST, Apr. 21, 1866, at 3 ("Some weeks ago Mr. Bingham, of Ohio, proposed an amendment to the Constitution intended to confer upon Congress the right to enact precisely such a law as this. He held, and the great body of those who have now voted for this bill then held with him, that without such an amendment Congress had no authority whatever to pass such a law.").



Rights Act reading of the Due Process Clause, informed at least some members of the public's understanding of the Act and the Amendment.

That said, one must acknowledge the frustratingly vague and varied discussions of the Civil Rights Act and the Fourteenth Amendment which took place during the political debates of 1866. Sometimes the Act and the Amendment were described as protecting the equal rights of citizens, without any analysis as to why this was true or which clause accomplished the protection. It is, of course, literally true that the Civil Rights Act by its terms protects the equal rights of citizens. It is also true that the Fourteenth Amendment would have been understood as authorizing the Civil Rights Act. But there are a variety of ways members of the public might have believed the text accomplished this result. Some might have believed the Citizenship Clauses accomplished this result by themselves, or perhaps by way of the Privileges or Immunities Clause, or (as I believe most likely) by way of the Due Process and Equal Protection Clauses. In the end, the political debates *by themselves* do not provide enough specific analysis of the Act and the Amendment to allow for a conclusion one way or another.

On the other hand, nothing in the public political debates of 1866 is inconsistent with a due process reading of the Civil Rights Act and a Civil Rights Act reading of the Due Process Clause. Under such a reading, the Due Process Clause *would* have guaranteed the equal right of citizens to protections like those found in the Civil Rights Act. It would have been equally true that a Bingham-like reading of the Privileges or Immunities Clause *also* would have guaranteed the equal rights of citizens to protections like those found in the Civil Rights Act. The Fifth Amendment, as one of the enumerated protections in the Bill of Rights, fell within Bingham's understanding of the Privileges or Immunities of citizens of the United States.<sup>258</sup> It was because such rights should *also* be extended to noncitizens as well that Bingham added a separate clause declaring the due process rights of all persons.

We know that one of John Bingham's central goals was passing an amendment that would allow federal enforcement of the Bill of Rights against state abridgement. The failure of the original Constitution to allow such enforcement was, in his view, the "want of the Republic."<sup>259</sup> Bingham accomplished this goal by way of the second sentence of Section One, which declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>260</sup>

To Bingham, the privileges or immunities of citizens of the United States included the rights listed in the Bill of Rights.<sup>261</sup> As Jacob Howard explained, this

---

258. For fuller elaboration on this point in addition to the evidence cited in this Article, see LASH, *supra* note 18, at 246–52 (discussing Bingham's view that "privileges or immunities of citizens of the United States" included the enumerated rights in the Bill of Rights).

259. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).

260. U.S. CONST. amend. XIV, § 1.

261. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham) ("I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any

provision obligated the states to protect the rights enumerated in the federal Constitution, including all of the rights listed in the first eight amendments.<sup>262</sup> Public commentary during ratification and immediately following ratification also linked the privileges or immunities of citizens of the United States with enumerated rights such as those listed in the first eight amendments.<sup>263</sup>

If this was in fact the original understanding of the Privileges or Immunities Clause, then this means that the rights of the 1866 Civil Rights Act were secured in two different ways. First, the rights of the Fifth Amendment, including the Due Process Clause, were secured for U.S. citizens by way of the Privileges or Immunities Clause. All of the enumerated rights of U.S. citizens would have counted as privileges or immunities protected against state action. Although non-citizens might not enjoy all the constitutionally enumerated privileges or immunities of American citizenship, the separate Due Process Clause ensured that they too would enjoy at least the natural right to being secure in life, liberty, and property.

The 1866 Civil Rights Act protected rights belonging to both American citizens and “all persons,” which explains why commentary both inside and outside of Congress sometimes associated the Civil Rights Act with the rights of citizens and sometimes with the rights of all persons. Both references reflected nonconflicting understandings of the basic rights of due process and, ultimately, the meaning of the Fourteenth Amendment.<sup>264</sup>

On the other hand, members commonly referred to the Fifth Amendment due process rights of *citizens*, which reminds us that the privileges or immunities of citizens of the United States included those rights that were enumerated in the federal Constitution. Elsewhere, I have explored evidence suggesting that the Privileges or Immunities Clause referred exclusively to enumerated constitutional rights—including, but not limited to, those rights enumerated in the Bill of Rights.<sup>265</sup> A common objection to this reading is that it failed to account for the

right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. 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.’”)

262. *Id.* at 2765 (statement of Sen. Howard) (“Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution . . .”).

263. See generally LASH, *supra* note 18, at 197–234.

264. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866) (statement of Rep. Raymond) (“The principle of the first [section], which secures an equality of rights among all the citizens of the United States, has had a somewhat curious history. It was first embodied in [the Bingham amendment tabled in February] . . . Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. . . . I have at all times declared myself heartily in favor of the main object which that bill was intended to secure. I was in favor of securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction . . .”).

265. See generally LASH, *supra* note 18.

1866 Civil Rights Act—an act many historians believed was authorized after the fact by the adoption of the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>266</sup> If, however, it was the Due Process Clause that authorized legislation like the Civil Rights Act, this removes an objection to reading the Privileges or Immunities Clause as protecting only those rights actually enumerated in the federal Constitution.

#### A. ON DUE PROCESS AND EQUAL PROTECTION

One complicating factor is the relationship between the rights of the Civil Rights Act and the Equal Protection Clause. As explained earlier, Bingham and many of his colleagues understood Due Process as containing a principle of *equal* due process—one seemingly sufficient to authorize passage of legislation like the Civil Rights Act. The public, however, may well have viewed the Equal Protection Clause as providing specific textual authorization for equal due process rights legislation like the 1870 version of the Civil Rights Act.<sup>267</sup> If so, this view cuts against both a Thirteenth Amendment and a “Privileges or Immunities” reading of the Civil Rights Act. On the other hand, this possibility complicates our ability to specify how the public understood the Fourteenth Amendment’s Due Process Clause.

Although this is a possible public understanding of the Equal Protection Clause, there is no evidence that it was the common understanding. To begin, there is too much evidence in the historical record indicating the Due Process Clause was understood as including an equality principle to believe that the Equal Protection Clause *extinguished* this common understanding of due process. More likely, the Equal Protection Clause would have been understood as supportive of this traditional understanding of due process. For example, it is possible that the Equal Protection Clause expressly communicated a broadly accepted *implied* aspect of due process.<sup>268</sup> If so, then the Equal Protection Clause adds nothing other than clarity to the rest of the Fourteenth Amendment. A second possibility involves reading the Equal Protection Clause as demanding the equal protection of those “equal laws” already demanded by the Due Process Clause.<sup>269</sup> If this represents the common understanding, then the Due Process Clause may have communicated a body of equal due process rights, and the Equal Protection Clause communicated a duty to equally enforce such rights.<sup>270</sup>

---

266. See *supra* note 4.

267. There is some evidence they did. See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (describing the Fourteenth Amendment’s protection of equal rights for all men as echoing the Civil Rights Act).

268. See, e.g., Tussman & tenBroek, *supra* note 22.

269. See Green, *supra* note 235, at 74; see generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011) (considering the historical evidence of a theory of “state neglect” as a trigger for congressional enforcement power).

270. Failure of the southern states to equally enforce laws in cases involving freedmen was a serious and recognized problem in the Reconstruction Congress. See FONER, *supra* note 10, at 199 (discussing the rise of the post-civil war Black Codes in the South).

Whatever the precise relationship of the Due Process Clause and the Equal Protection Clause, the historical evidence seems to confirm the Supreme Court's recognition of an equality principle as an inherent aspect of due process.<sup>271</sup> John Bingham understood both the Fifth and Fourteenth Amendment's Due Process Clause as declaring due process rights equally enjoyed by all persons. The Fourteenth Amendment did not introduce an equality principle to due process; the right was already understood as containing an equality principle. The Supreme Court in *Bolling v. Sharpe* simply echoed the Reconstruction-era understanding of due process, under either the Fifth or Fourteenth Amendment.<sup>272</sup>

#### B. DUE PROCESS AND THE RIGHT TO POSSESS AND ACQUIRE PROPERTY

A potential objection to the due process reading of the 1866 Civil Rights Act involves the Act's requirement that states grant citizens the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens."<sup>273</sup> This protection was not extended to noncitizens in the 1870 extension of the Civil Rights Act. This might indicate that at least *this* section of the 1866 Civil Rights Act cannot be viewed as protecting a natural right of all persons.<sup>274</sup> As explained below, I do not think this is the best understanding of either the 1866 or 1870 version of the Act. The common law understanding of due process property rights explains why acts distinguishing the real property rights of citizens and noncitizens fall comfortably within the Reconstruction-era understanding of the rights of due process.

According to the antebellum Republican conception of due process, both aliens and citizens held the natural due process rights of life, liberty, *and* property.<sup>275</sup> This includes natural rights associated with acquiring and possessing real property. This is an idea that can be traced back to the Lockean labor theory of property, whereby all persons have the natural right to acquire property and be protected against arbitrary deprivation.<sup>276</sup> In theory, the natural right to acquire

271. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

272. Whether *Bolling* represents a proper application of the original or Reconstruction understanding of Due Process is a more difficult question, and one beyond the scope of this Article.

273. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

274. Christopher Green has made a version of this argument. See GREEN, *supra* note 4, at 44 ("the Civil Rights Act covers land-ownership rights traditionally denied, with little or no controversy, to aliens").

275. See WILLIAM B. GLIDDEN, CONGRESS AND THE FOURTEENTH AMENDMENT: ENFORCING LIBERTY AND EQUALITY IN THE STATES 51 (2013) ("The evidence indicates that the Republicans understood that aliens lawfully residing in the country and entitled to enjoy the same civil rights as citizens. . . . Bingham objected at the time that enacting a federal civil rights statute that even by implication tolerated local government discriminations against aliens would constitute a violation of the fifth amendment, which says that 'no person' shall be deprived of life, liberty, or property without due process of law. Distinguishing 'in the laws in respect to life, liberty, and property between the citizen and stranger . . . is forbidden by the Constitution.'"); Calabresi & Agudo, *supra* note 34, at 52 ("[M]any state constitutions specifically protected as a matter of state positive law the 'natural and inalienable rights' of the people, among which was often the right 'to defend' life and liberty and 'to protect' property.'").

276. See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 275–76 (1988) ("[T]he need to protect rights of possession was seen to follow from the rights of acquisition.

real property existed regardless of citizenship, as in the case of a newly arrived settler who tills otherwise unoccupied and unclaimed land.<sup>277</sup> Early American jurisprudence embraced this idea, with antebellum descriptions of due process rights consistently including the natural right of *all persons* to “acquire and possess property.”<sup>278</sup> This included some of the earliest constitutional theorists (and abolitionists).<sup>279</sup>

Although, under common law, aliens were restricted in the manner in which they could acquire real property, even aliens enjoyed the presumed right to acquire real property “until office found”—a legally sanctioned action by the government to reclaim title to the land.<sup>280</sup> This cloud over the title disappeared at the time of naturalization. As Justice Joseph Story wrote in *Fairfax’s Devisee v. Hunter’s Lessee*,

It is clear by the common law, that an alien can take lands by purchase, though not by descent, or, in other words he cannot take by the act of law, but he may by the act of the party . . . . [I]n the language of the ancient law, the alien has the capacity to *take*, but not to *hold*, lands, and they may be seized into the hands of the sovereign.<sup>281</sup>

As of 1868, the concept of due process of law incorporated the same distinctions embraced by the common law.<sup>282</sup> This meant that both citizens and aliens enjoyed the natural right to “acquire and possess” real and personal property, subject to the distinctions acknowledged at common law. This explains why the 1866 Civil Rights Act demanded citizens be granted the equal right to “hold” real property,<sup>283</sup> but the 1870 extension demanded only that all persons enjoy the general natural rights of “*person and property*.”<sup>284</sup> It also explains why Bingham would oppose the “citizen only” 1866 version but support the 1870 version,

---

‘The personal right to acquire property, which is a natural right,’ Madison stated late in life, ‘gives to property, when acquired, a right to protection, as a social right.’” (quoting 9 THE WRITINGS OF JAMES MADISON 361 (G. Hunt ed., 1904)); Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J. L. & LIBERTY 1, 2 (2010) [hereinafter McConnell, *Natural Rights*] (“According to Locke, natural rights are the rights human beings have in the state of nature, before the creation of civil or political society. ‘[E]very man,’ Locke wrote, ‘has a property in his own person,’ along with the products of his labor and that which he mixes with his labor.” (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1689))).

277. See McConnell, *Natural Rights*, *supra* note 276.

278. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

279. See *supra* note 20 and accompanying text.

280. See, e.g., *Terrace v. Thompson*, 263 U.S. 197, 217 (1923); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*372; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*54; see generally Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 163 (1999).

281. 11 U.S. (7 Cranch) 603, 619–20 (1813); see also *Thompson*, 263 U.S. at 217 n.3.

282. See Williams, *The One and Only*, *supra* note 27.

283. Ch. 31, 14 Stat. 27, 27 (1866).

284. Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (emphasis added).

which omitted the right to hold real property but otherwise guaranteed “all persons . . . the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, . . . and to full and equal benefit of all law and proceedings for the security of person and property as is enjoyed by white citizens.”

In short, statutes enforcing the rights of both citizens and aliens to acquire and possess property fall within the general power to enforce the rights of due process, even if those statutes distinguish the manner in which citizens and aliens “hold” real property.

#### CONCLUSION

Legal historians have rightly looked to the 1866 Civil Rights Act for clues to the original meaning of the Fourteenth Amendment. Unfortunately, scholars have tended to focus on the temporary version of the Act passed in April of 1866. By doing so, they have missed important clues regarding the nature of the rights Congress originally sought to protect—and ultimately did protect—in the final version passed in 1870.

The 1866 Civil Rights Act began as an effort to secure to all persons the due process rights of life, liberty, and property. This initial effort was postponed due to a perceived lack of constitutional power to enforce the Fifth Amendment’s Due Process Clause. To cobble together a sufficient number of votes, proponents trimmed the initial Act to protect only United States citizens. Those members who denied that Congress had the power to protect the civil rights of all persons in the states were more willing to sign on to a federal law protecting the rights of federal citizens. Following the adoption of the Fourteenth Amendment, with its Due Process Clause and its Section Five enforcement powers, Congress now had express authority to protect all persons in their natural right to security in person and property. This new grant of power allowed John Bingham to support the reenactment of the 1866 Civil Rights Act, this time with language reflecting Bingham’s demand that Congress protect the basic due process rights of all persons, not just citizens.

Understanding the 1866 Civil Rights Act as precursor to the Due Process Clause, and not the Privileges or Immunities Clause, has significant implications for scholarship on the original meaning of the Fourteenth Amendment. To date, scholars have almost universally assumed that the Civil Rights Act was an early attempt to enforce the special privileges or immunities of citizens of the United States. This assumption, in turn, has led numerous scholars to suppose that specific provisions granting equal protection to citizens under the Act, such as the provision securing the right of citizens “to make and enforce contracts,”<sup>285</sup> were raised to the status of substantive (if constitutionally unenumerated) rights. The historical record shows that this reading of the Privileges or Immunities Clause is both unduly narrow and unduly broad. It is unduly narrow in that the rights of the

---

285. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

1866 Civil Rights Act were understood as belonging to all persons, and not just citizens of the United States. It is unduly broad in that it wrongly transforms an effort to ensure proper procedural protections for deprivations of life, liberty, and property (for example, through the judicial enforcement of contracts) into an unenumerated and unbounded set of substantive civil rights. However much radical Republicans might have supported such an effort, it is clear that a majority of Congress did not. These members insisted that proponents remove any language from the Civil Rights Act that could *conceivably* be read as federalizing the substantive content of local civil rights.

Rather than representing an effort to constitutionalize the Civil Rights Act and, perhaps, transform the nature of rights granted equal protection under the Comity Clause, it appears that the Privileges or Immunities Clause played a completely different role. The man who drafted the Privileges or Immunities Clause, John Bingham, described it as an effort to enforce *enumerated constitutional rights* such as those declared in the first eight amendments to the Constitution. Evidence supporting a due process reading of the 1866 Civil Rights Act and a civil rights reading of the Due Process Clause seems to confirm John Bingham's understanding of his own work.

Scholars remain divided about Bingham's understanding of the Privileges or Immunities Clause and whether the text referred to constitutionally enumerated rights. Much of this division, however, has been driven by the assumption that Bingham must have understood the Privileges or Immunities Clause as enforcing the 1866 Civil Rights Act. This Article disrupts that assumption and clears the way for a new understanding of the Privileges or Immunities Clause—one that distinguishes its protections from those afforded by the Civil Rights Act. One possibility is that the privileges or immunities of citizens of the United States involve a set of constitutionally enumerated rights—such as those listed in the Bill of Rights—which had theretofore been ignored by the southern states and which had lacked the guardianship of federal enforcement power. This was Bingham's understanding of his handiwork and there is significant evidence that this represents the public's understanding as well.

Regardless, the next generation of Fourteenth Amendment scholarship must revise much of what prior scholars have assumed about the 1866 Civil Rights Act and its relationship to the Fourteenth Amendment. The Act represents the first congressional effort to enforce the rights of the Fourteenth Amendment. As such, it stands as one of our master keys to understanding the original meaning of this critical guardian of constitutional liberty. Getting the statute correct is an essential first move toward understanding the special privileges of American citizens and the fundamental rights of all persons.