THE ANTISLAVERY READING OF ARTICLE IV

THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT. Randy E. Barnett* & Evan D. Bernick.** Cambridge: Belknap Press. 2021. Pp. xx + 478. $22.95 (Paperback).

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1. ARTICLE IV AND THE DEBATE OVER THE FOURTEENTH AMENDMENT

In their sweeping book, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, Professors Randy E. Barnett and Evan D. Bernick trace the history and original meaning of the Fourteenth Amendment's first section, which provides that no state shall "abridge the privileges or immunities of citizens of the United States," nor "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."[2] The book is an essential tool for scholars of the Fourteenth Amendment for the sheer breadth of primary sources and evidence on which it relies.

It is also a useful corrective to many of the misconceptions of the modern doctrine. For example, the authors emphasize that "protection of the laws" required affirmative government action to protect private rights against interference from other private

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2. U.S. CONST. amend. XIV, § 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.").

individuals (pp. 319–50). Thus, when the Supreme Court infamously held in the *Civil Rights Cases* that the Fourteenth Amendment was not concerned with "[i]ndividual invasion of individual rights,"[3] it was dead wrong. The protection of law was at the heart of the social compact. Individuals exit the state of nature where their private rights are insecure and agree to obey the sovereign—they give allegiance—in exchange for the sovereign's remedying the defects of the state of nature. That is, the deal is that the sovereign must *protect* individuals in their private, natural rights against the interference with such rights that is endemic in the state of nature (p. 322).

The authors elsewhere advance more conventional views over which there is room for debate. For example, they make an originalist case for a version of "substantive due process," according to which judges must examine legislation for consistency with the police powers (pp. 261–62, 270–72). Legislation beyond the police powers, enacted for improper purposes, would not be "laws" within the meaning of due process "of law" (pp. 272, 276–77). I have elsewhere disagreed with this understanding of the historical materials relating to due process,[4] and I do not repeat the argument here. Whether one agrees with the authors or not, they make a compelling case for some version of the *Lochner*-era-style of substantive due process (pp. 284–85) and their book will remain a starting point for scholars wishing to engage with that doctrine.

The vast bulk of Barnett and Bernick's book is on the Privileges or Immunities Clause (pp. 41–258).[5] In a previous work, I sought, probably without much success, to dispel the modern conventional wisdom that the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights against the states through that clause.[6] As then explained, the textual

3. 109 U.S. 3, 11 (1883).

4. *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815 (2020).

5. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . .").

6. Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265 (2023) [hererinafter Wurman, *Reversing*]. As noted in that piece, that had been the gospel among American "originalists" at least since the publication of Michael Kent Curtis's book on the Fourteenth Amendment in 1986 and Akhil Amar's book over a decade later. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) [hereinafter AMAR, BILL OF RIGHTS].

argument at the root of the conventional wisdom is that "privileges" and "immunities" of "citizens of the United States" is at a minimum a reference to constitutionally enumerated rights, which a state can "abridge" as Congress can "abridg[e]" the freedom of speech or of the press.[7] The historical argument maintains that the framers of the Fourteenth Amendment understood that slavery had required the suppression of civil liberties, including among white citizens, and the solution was an amendment allowing Congress to "enforce" the Bill of Rights against the states.

The prior work demonstrated, however, that the antislavery and Republican concern, both before and after the adoption of the Fourteenth Amendment, was equality in civil rights, however defined and regulated under state law. Although fundamental rights were routinely mentioned, abolitionists and Republicans relied on state constitutions,[8] on the rights that freedom would bring under state law,[9] and on Congress's powers to insist on republican governments during readmission.[10] The congressional debates are consistent with the idea that the clause was intended to constitutionalize the Civil Rights Act of 1866, which guaranteed equality in fundamental civil rights under state law.[11] The Civil Rights Act did not require a particular substantive content to a state's law, although it presumed that all the states, as all free governments had to, secured to their respective citizens contract and property rights and other fundamental liberties.[12]

Left unaddressed in that work was the claim that antislavery constitutionalists had an unorthodox reading of Article IV's Privileges and Immunities Clause, by which that clause effectively

7. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . .").

8. Wurman, *Reversing*, *supra* note 6, at 285–87.

9. *Id.* at 287–95.

10. *Id.* at 298–302.

11. *Id.* at 304–35.

12. The Civil Rights Act declared persons born in the United States to be citizens of the United States and provided that

> such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, 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, as is enjoyed by white citizens, 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.

Ch. 31, § 1, 14 Stat. 27 (1866).

nationalized the rights of citizens. This view is prominently advanced in Barnett and Bernick's book (pp. 61–88). The clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[13] The clause was conventionally understood to require a state to treat citizens of other states on equal terms with its own citizens.[14] Barnett and Bernick argue, as others have before them, that it was refashioned by antislavery theorists into a fundamental rights guarantee (p. 61). That is, Republicans and antislavery constitutional theorists were frustrated with the denial of fundamental civil rights to free Black persons and abolitionists and therefore articulated a vision according to which the federal government would have the authority to define and protect a fundamental floor of civil rights in all the states.

The aim of this Review is to unpack and assess this claim. Some antislavery theorists did hold unorthodox views of Article IV. It seems to this reviewer, however, that the best understanding of the unorthodox view was that it would have merely extended the antidiscrimination work of the clause to discrimination among a state's own citizens. Antislavery thinkers adopted either a conventional reading of the clause, or one in which free Black persons or abolitionists were entitled to the same rights as other citizens within the same state. Much of the relevant evidence relates to the right to travel to other states and whether free Black citizens of other states, or within a state, would be entitled to similar rights as White citizens. Other evidence involves free speech and whether abolitionists from the North, or those few within the South, would be allowed to speak their minds. Although this evidence sometimes seems to suggest a fundamental-rights baseline, that interpretation of the evidence is not compelled.

I suggest that the better interpretation of the evidence is that the antislavery thinkers understood that states would continue to define and regulate rights, arguing only that states could not arbitrarily discriminate among their own citizens in doing so. This reading, although unorthodox, would not have been radical; it was built into republican ideas about citizenship and equality.[15] It would not have undermined the federalist structure of the U.S.

13. U.S. CONST. art. IV, § 2, cl. 1.
14. *See infra* Part 2.
15. Wurman, *Reversing*, *supra* note 6, at 282–84.

system. And this more modest unorthodox reading helps to make sense of an important speech from John Bingham, the principal author of the Fourteenth Amendment's first section, that is otherwise perplexing. Bingham thought an amendment "to enforce the bill of rights" was necessary to enact the civil rights bill. Bingham's speech makes perfect sense if, as he noted on several occasions, he understood Article IV to be part of the bill of rights; if Article IV required intrastate as well as interstate equality; and if the Fourteenth Amendment would allow Congress to enforce that requirement.

The remainder of this Review presents the evidence for the conventional reading of Article IV; discusses several episodes from Barnett and Bernick's book in which an unorthodox reading emerged, but which reading would have merely required equality among a state's own citizens; and evaluates John Bingham's speeches to establish that he likely believed that Article IV and, as a consequence, the Fourteenth Amendment, merely required equality under state law.

2. THE ORTHODOX VIEW

In the antebellum period, proponents and opponents of slavery debated the meaning of Article IV and of American citizenship. Barnett and Bernick do not dispute that the legal meaning of Article IV was that it merely required nondiscrimination with respect to out-of-state citizens. But, they write, the public meaning of the clause diverged from the meaning that was continuously applied by the courts (p. 215). "[T]he contemporary public meaning of [Article IV] evolved into fundamental rights reading," they write, and the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment adopted this "then-prevailing public meaning of Article IV as protecting a floor of fundamental rights" (pp. 61, 216). Michael Kent Curtis similarly argued that the Republicans had an unorthodox view of Article IV, by which it guaranteed substantive liberties.[16]

Much of the evidence, however, is consistent with the comity-only reading of Article IV. The evidence for this conventional view shall now be examined, beginning with early court cases and proceeding to the two prominent cases of *Dred Scott v. Sandford*

16. CURTIS, *supra* note 6, at 47–48.

and *Lemmon v. People*; a report of a case in the *Western Law Journal*; and abolitionist writings. The next part shall examine the emergence of a more unorthodox, intrastate equality view.

A. EARLY CASES

In *Campbell v. Morris*, a 1797 case from Maryland, the court explained that the Article IV means that the "*citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property*, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected."[17] The court elaborated that "such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to" and it "may" mean that creditors "shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor."[18] Although Barnett and Bernick argue that the italicized language describes a fundamental right, separate and above from the right described in the remainder of the paragraph (p. 64), the issue involved discrimination against nonresidents, the passage is within that context, and that was the point decided.[19] The second clause about protecting property "in the same manner as the property of the citizens of the state is protected" modifies the first clause. There is simply no reason to think this passage demonstrates a contested understanding of Article IV.[20]

17. Campbell v. Morris, 3 H. & McH. 535, 553–54 (Md. Gen. Ct. 1797) (emphasis added).

18. *Id.* at 554.

19. *Id.* at 536–38, 548–49, 554–55.

20. There is some ambiguity in *Campbell*. It appears from the same report that the judgment of the court was reversed on unrelated grounds by an appellate court in the year 1800. *Id.* at 563–76. On the privileges and immunities point, that court explained that "it never could have been the intention of the framers of our national government, to melt down the states into one common mass; to put the citizens of each in the exact same situation, and confer on them equal rights: this principle would have been wholly destructive of the state governments." *Id.* at 565. Article IV, moreover, "convey[s] no such idea." *Id.* These statements would seem strongly to support the comity-only reading of the clause. Oddly, however, the court goes on to say that "the injury, as to the effect of a law of any state, will not be whether it makes a discrimination between citizens of the several states; but whether it infringes upon any civil right, which a man as a member of civil society must enjoy." *Id.* Therefore "[i]n the present case we must inquire whether the law . . . takes from Robert Morris any of the privileges of a citizen." *Id.* at 566–66 (emphasis omitted). These statements suggest perhaps a fundamental rights reading that would greatly narrow the scope of the clause, allowing discrimination in all non-fundamental rights. But even as to the fundamental ones, there is no reason to think the judges believed the clause did anything but require non-discrimination precisely because the situations of all the states

Other early cases that have been taken for a fundamental rights reading of Article IV by scholars similarly support the equality-only view.[21] In 1811, the Virginia Supreme Court of Appeals concluded that the clause "has wisely given to a citizen of each state the privileges of a citizen of any other state."[22] The next year, Justice Yates of the High Court in New York stated that the clause "intends that the same immunities and privileges shall be extended to all the citizens equally, *for the wise purpose of preventing local jealousies* which discriminations (always deemed odious) might otherwise produce."[23] The famous Chancellor Kent declared in the same case: "[The clause] means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights."[24]

The most famous and important antebellum comity case is *Corfield v. Coryell*.[25] In elaborating on the scope of the privileges and immunities guaranteed by Article IV, Justice Bushrod Washington, riding circuit, wrote that the clause reaches privileges and immunities that are "in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." As illustrative examples, Washington included "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," "trade, agriculture, [and] professional pursuits," and "to take, hold and dispose of property,

differed.

21. *See, e.g.*, Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 6–10 (1967).

22. Murray v. McCarty, 16 Va. (2 Munf.) 393, 398 (1811).

23. Livingston v. Van Ingen, 9 Johns. 507, 561 (N.Y. 1812) (Yates, J.) (emphasis added).

24. *Id.* at 577 (Kent, C.J.). Chester Antieau wrote that these cases support the proposition that these judges "unqualifiedly accepted the fundamental rights interpretation of the clause," namely that it guaranteed all citizens "uniform basic privileges and immunities everywhere in the United States, not at all dependent on the laws of either the state of origin or destination." Antieau, *supra* note 21, at 9. That the clause applies only to fundamental rights does not answer what it does with respect to them, nor what power the respective states have to regulate them differently.

25. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825). Barnett and Bernick concede this case adopts the conventional reading (p. 63).

either real or personal," among numerous other privileges.[26] Washington observed that "the enjoyment of" these privileges and immunities "by the citizens of each state, *in every other state*, was manifestly calculated" to secure and perpetuate mutual friendship and intercourse among the states.[27] This is a conventional, comity reading of the clause. Washington concluded that access to natural resources is a public privilege unique to citizens of a state that need not be shared with citizens of other states.[28]

B. *DRED SCOTT* AND *LEMMON*

Dred Scott v. Sandford[29] also elaborated on the meaning of the term "privileges or immunities of citizens of the United States" (p. 78). In that opinion, Chief Justice Taney adopted the view of the southern governments that free Black persons were not and could never be citizens "of the United States" entitled to the benefit of Article IV. In explaining his reasoning, Taney illustrated the absurd results (in his view) that, under the clause, would follow if they were citizens. "[I]f they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws" applicable only to them; and would give such citizens of any state

> the right to enter every other State whenever they pleased . . . unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.[30]

Some scholars have interpreted this passage to adopt a comity-only reading of the clause, while others claim Taney was adopting a fundamental-rights reading; Barnett and Bernick conclude that "[i]t is hard to say" which view is correct (p. 79). Yet

26. *Corfield*, 6 F. Cas. at 551–52.
27. *Id.* at 552 (emphasis added).
28. *Id.*
29. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
30. *Id.* at 416–17.

it is relatively clear that Taney was adopting the conventional reading. Every sentence but one specifically mentions discrimination: Black citizens would be exempted from the operation of "special laws," could travel freely unless they committed some crime "for which a white man would be punished," and would have liberty to speak "upon all subjects upon which its own citizens might speak."

In only one sentence is a similar qualification lacking: Black citizens would be able to "hold public meetings upon political affairs" and "keep and carry arms wherever they went." That is a rather thin reed on which to hang a fundamental rights reading of the clause. Taney was not saying that all citizens everywhere in the United States have the exact same right to bear arms, which would have been a false and radical statement.[31] It is more natural to read Taney as saying that because all states allow public assembly and the right to bear arms, Black citizens would enjoy those same rights.

Importantly, Chief Justice Taney does not even consider the argument that free Black citizens of northern states would in fact receive the same privileges of free Black residents in the South (which is to say none), even though it was well understood that Article IV guaranteed citizens of one state the same privileges of in-state citizens of a similar description.[32] That Taney did not make this argument strongly suggests that he believed that if free Blacks were citizens, they would be entitled to equality with *white* citizens—because republican citizenship implied equal civil rights. Taney carefully noted that free Black persons in the southern states are "subjects," not citizens, for this very reason. They might

31. *See* Mark Anthony Frassetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century* 20–24 (Jan. 15, 2013) (unpublished manuscript), https://ssrn.com/abstract=2200991 [https://perma.cc/YEY9-KEN8] (listing state bans on concealed carry weapons between the Founding and the Civil War); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 58–59 (2017) (discussing the Frassetto compilation); *id.* at 59–60 (compiling various gun laws in chart form).

32. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 674–75 (1833) (Boston, Hilliard, Gray, & Co. 1833) ("The intention of this clause was to confer on [the citizens of each state], if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 61 (New York, O. Halsted 1827) ("[I]f [citizens] remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other.").

not be entitled to any rights, but free Black citizens of northern states would be. And so would free Black citizens of the southern states, if any there were. Whether rooted in Article IV or simple republican citizenship theory, one sees in Taney's opinion both a conventional reading of Article IV and an acceptance of equal citizenship within a state.

In *Lemmon v. People*, a prominent 1860 case that Republicans feared could be a follow-on to *Dred Scott*, the plaintiffs sought to assert a right to transit through free states with their slaves, notwithstanding New York state law that declared any enslaved person to be instantly free upon setting foot in the state.[33] The Lemmons made a fundamental rights argument: Article IV absolutely protected a slaveowner's "property right" in slaves anywhere in the United States.[34] Rejecting the argument, the New York Court of Appeals explained that "the meaning [of Article IV] is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess."[35]

One judge stated further in concurrence that he believed the proslavery argument to be "first occasion in the juridical history of the country that an attempt has been made to torture this provision into a guaranty of the right of a slave owner to bring his slaves into . . . a non-slaveholding State."[36] Instead, "[t]he provision was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens."[37] The court's rejection of the proslavery argument in 1860 is highly probative evidence that the meaning of Article IV had not in fact undergone a shift in meaning since the Founding.

C. *WESTERN LAW JOURNAL*

The only hint of a fundamental rights approach in any court case in this period comes from a few short paragraphs in the *Western Law Journal* from 1845, which appear to be reporting a

33. 20 N.Y. 562 (1860).
34. *Id.* at 580–81 (argument of counsel).
35. *Id.* at 608 (opinion of Denio, J.).
36. *Id.* at 626 (opinion of Wright, J.).
37. *Id.* at 626–27.

lower-court opinion by a judge of the Ohio Supreme Court from the preceding year (pp. 64–65), and even that report does not compel a fundamental rights reading of the clause. The journal comment is authored by one "Wm. H. Williams," and the first paragraph is in the author's own voice. He explains that "[the] difficult and weighty question was lately raised before a Supreme Judge of this State, as to whether the statute of Ohio, authorizing the arrest of non-residents for debt," violated Article IV.[38] The author states that "Judge Read, before whom the question was raised, sustained the law as constitutional, upon grounds which were strongly and profoundly taken."[39] The remaining six paragraphs analyze the constitutional issue and could be the author's own analysis or Judge Read's opinion.[40]

Those paragraphs declare that "if the imprisonment of the resident of another State, by our statute law, is unconstitutional, and in violation of the rights of citizenship, the same is true of the imprisonment of the resident of our own State: for the rights of both, as citizens of the United States, are precisely the same."[41] It goes on: "The question before us, then, is not whether this statute of Ohio does or does not discriminate between the residents of this and other States," but rather "whether the statute, in so discriminating, does anything to the resident of another State, which is in violation of his rights as a citizen of the United States."[42] "And thereupon rises the enquiry," the author continues, "as to what are essentially the rights of United States citizenship, and whether an exemption from imprisonment for debt is included among them."[43]

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

39. *Id.*

40. The *Western Law Journal*, in its tenth and final volume, described itself as "[a] law periodical" that "gather[s] up the important decisions in the circuit or district courts, that seldom or never reach the supreme tribunal of the State," and that "afford[s] the western lawyer an opportunity of expressing his views, freely and without expense to him, on the judicial and legislative questions that are constantly arising," and which "combines the advantages of the text book, the volume of reports, and the newspaper." 10 W.L.J. 522, 523 (1853). Two preceding sections of the second volume were explicitly reports of decisions, but the section preceding the text on the debtor law was a commentary. *Compare* Ohio ex rel. McKinney v. Douglass, 2 W.L.J. 248 (1845), *and* Clarke v. Rist, 2 W.L.J. 252 (1845), *with* Simeon Nash, *Reply to the Review of* Good v. Zercher, 2 W.L.J. 257 (1845).

41. Williams, *supra* note 38, at 266.

42. *Id.*

43. *Id.*

Supposing that the six paragraphs in the law journal accurately reflect Judge Read's lower-court opinion in a real case, it is certainly possible to interpret that opinion as advancing a fundamental rights view. But even that is not a necessary reading of the opinion. Surely Judge Read did not mean that state contract and property laws were in fact "precisely the same"; rather, he was likely suggesting that all Americans enjoy contract and property rights (as modified and regulated by their individual states) because contract and property rights are natural rights that all free governments therefore secure. Although all free governments must secure those rights in some form, not all free governments must abolish imprisonment for debt. Judge Read's opinion might have narrowed the scope of the clause to those fundamental rights common to all, but it did not necessarily alter the kind of work the clause does.[44] That is, he may have simply been suggesting that the state can discriminate, so long as the discrimination does not involve a fundamental right.

D. ABOLITIONIST THOUGHT

It has been argued that the Fourteenth Amendment is a product of abolitionist constitutionalism. It is therefore important to understand the thinking of the antislavery movement.[45] For the antislavery understanding of Article IV, a central episode is the celebrated and notorious events involving Prudence Crandall. In 1832, Crandall operated a school for girls in Connecticut and admitted a Black girl. Parents objected, and so Crandall chose to operate the school entirely as one for free Black girls, including those from other states. The Connecticut legislature then enacted the "Connecticut Black Law," requiring the permission of a town's selectmen to operate a private school for nonresidents.[46]

44. This may have been the understanding of the judges on the appeal in *Campbell v. Morris*, *supra* note 20.

45. Randy Barnett has examined the writings of numerous abolitionist thinkers in detail. *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011); *see also* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479 (part I), 1950 WIS. L. REV. 610 (part II). Barnett and Bernick discuss this subject at pp. 89–108.

46. WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 163 (1977). This paragraph is borrowed from ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 79 (2020).

Crandall's first prosecution under this statute ended in a hung jury and a second prosecution was commenced before Chief Judge Daggett of the Connecticut Supreme Court of Errors.[47] In *Crandall v. State*, the constitutionality of the Connecticut law was put in question by Crandall's counsel, as described in the report on appeal.[48]

Barnett and Bernick (p. 94) argue that Crandall's counsel, the prominent abolitionists William Ellsworth and Calvin Goodard, supported "a national entitlement of citizens" under Article IV to the "fundamental rights" "of person and to things; his acquisitions of property by contract and by inheritance."[49] They quote them as arguing that Article IV declares "a citizen of one state, to be a citizen of every state; and as such, to clothe him with the same fundamental rights, be he where he might, which he acquired by birth in a particular state."[50] This may seem like a radical, fundamental rights reading of the clause, but it is not. Ellsworth and Goodard do not deny that such fundamental rights are regulated by the various states. They are certainly not claiming that a citizen brings with him to other states "the same fundamental rights" of his own state "which he acquired by birth in a particular state." That would have authorized slaveowners to bring their slave "property" into the free states—as the proslavery argument sought do to in *Lemmon v. People*—an outcome Ellsworth and Goodard would never have brooked.

Other parts of Ellsworth and Goodard's argument make clear that they believed in a conventional reading of Article IV. They argued that "coloured persons were to be regarded as citizens of the states where they respectively belonged and were born; and that," by virtue of that Article, a statute "depriving them of the privilege of attending said school . . . *while the privilege of attending the same school for the same purpose, was allowed to coloured persons belonging to this state* . . . was repugnant to the constitution of the *United States*, and void."[51]

47. WURMAN, THE SECOND FOUNDING, *supra* note 46, at 79.

48. *Id.*; *see also* Crandall v. State, 10 Conn. 339 (1834).

49. *See also* REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT 7 (Boston, Garrison & Knapp 1834).

50. *Id.* at 8.

51. *Crandall*, 10 Conn. at 342 (emphasis added).

As for other abolitionists, Barnett's long treatment of their work demonstrates that almost all of them had conventional views of Article IV. Barnett acknowledge that, other than Joel Tiffany, the abolitionists generally "offered a conventional reading of Article IV as protecting the fundamental rights of free citizens of one state when traveling into another."[52] As for Joel Tiffany's 1849 *Treatise on the Unconstitutionality of American Slavery*,[53] which Barnett cites extensively,[54] and on which Curtis also relies,[55] that was an outlier. There is no doubt that Tiffany argued in this treatise that the Constitution contains several guarantees for personal security, personal liberty, and private property, that it has the power to "enforce" these guarantees, and that the states cannot interfere with those guarantees.[56] He argued that slavery was therefore unconstitutional everywhere (not just on federal territory) because any law providing for enslavement was a law that denied to the enslaved the various natural rights guaranteed in the Constitution.[57] Tiffany never mentioned Article IV's Privileges and Immunities Clause in the 1849 treatise.

In his 1867 treatise on constitutional law, however, he did cite the clause, and his view was conventional:

> Under the constitution of the United States, every citizen of a state is likewise a citizen of the United States; and as a national citizen, he is politically and potentially present in every part of the national domain; and he has the right to be personally present in any state or territory, *upon the same general conditions*, enjoying the same privileges and immunities *as the citizens of the state into which he seeks to come*. Now, any state regulation which interferes with his rights as a national citizen, *in manner and in effect different from what it does with its own citizens*, conflicts with his constitutional rights; whatever may be the pretense for adopting such regulations.[58]

52. Barnett, *Whence Comes Section One?*, *supra* note 45, at 225.

53. 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 (Cleveland, J. Calyer 1849).

54. Barnett, *Whence Comes Section One?*, *supra* note 45, at 221–31.

55. CURTIS, *supra* note 6, at 42–44.

56. *See*, *e.g.*, TIFFANY, *supra* note 53, at 57–58, 97, 117–18.

57. *Id.* at 117–18.

58. JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW: BEING AN INQUIRY INTO THE SOURCE AND LIMITATION OF GOVERNMENTAL AUTHORITY ACCORDING TO THE AMERICAN THEORY 194 (Albany, Weed, Parsons & Co. 1867) (emphasis added).

If every state made "exactions upon the citizens" of other states, it would be "impossible for a national citizen to leave the state in which he was born," which would "deny to the government of the nation the authority to secure to the citizen of each state the privileges and immunities of the citizens of the several states."[59] Perhaps once slavery had been abolished, Tiffany could advance a more standard interpretation of the Constitution.

Tiffany's 1867 treatise was also consistent with Thomas Cooley's famous and influential 1868 treatise on state constitutions. In that treatise, Cooley summarized Article IV: "[I]t appears to be conceded that this provision secures *in* each State to the citizens of all other States the right to remove to and carry on business therein," as well as "the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights. . . ."[60] "To this extent, at least, discriminations could not be made by State laws against" citizens of other states.[61] Surveying Cooley, *Lemmon*, and all the other cases, it would appear that the only unequivocal support for a fundamental rights reading of Article IV in the antebellum period is the proslavery arguments in *Lemmon*.[62]

3. ORTHODOX UNORTHODOXY

Article IV was also invoked in Congress during battles over the status of free Black persons. In many northern states, these free Black individuals were citizens. Article IV would thus seem to allow these Black citizens as a matter of constitutional right to travel to and reside in other states and enjoy in those states the privileges and immunities of their citizens. In a series of episodes, some states sought to prevent free Black citizens of other states from coming into their own states.

59. *Id.* at 194–95.

60. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 397 (Boston, Little, Brown, & Co. 1868) (emphasis added).

61. *Id.*

62. *See also* David R. Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1141–48 (2016) (noting that such proslavery arguments were widely rejected outside the South).

What these episodes have in common is that the participants in the debates generally adopted a conventional, comity reading of Article IV. But emergent in these debates was a more unorthodox view of the clause: that it guaranteed equality among a state's own citizens. This can be seen most clearly in the denial on the part of southern representatives that free Black persons were citizens within the meaning of the Constitution. They seem to have understood that if free Black persons were citizens, then they would be entitled to equality with White citizens. Although seemingly unorthodox, this view made perfect sense in light of the antebellum orthodoxy that republican citizenship implied equality in civil rights. This unorthodox reading of Article IV was therefore, in its own way, quite orthodox.

A. MISSOURI

One of the first significant volleys was the second Missouri controversy.[63] In the first Missouri Compromise, Congress admitted Missouri as a slave state, Maine as a free state, and prohibited slavery anywhere north of the 36° 30' parallel (excepting Missouri itself). When Missouri subsequently submitted its proposed constitution to Congress, it contained a provision requiring the state legislature to "pass such laws as may be necessary . . . to prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[64]

The committee report on the admission of Missouri was issued on November 23, 1820, and noted that the committee was aware that this provision of the Missouri constitution "has been construed to apply to such of that class *as are citizens of the United States*; and that their exclusion has been deemed repugnant to the Federal Constitution."[65] On December 6, Representative Lowndes, the head of the committee, observed that "a very large majority of the free blacks in the United States were not considered citizens in their respective States," and therefore

63. Some pieces of the below discussion appear in WURMAN, THE SECOND FOUNDING, *supra* note 46, at 73–77.

64. WIECEK, *supra* note 46, at 122–23 (quoting MO. CONST. of 1820, art. III, § 26, *in* 4 FEDERAL AND STATE CONSTITUTIONS 2154 (Francis Newton Thorpe ed., 1909)).

65. 37 ANNALS OF CONG. 108 (1820) (emphasis added).

Article IV should be understood as maintaining an exception for them.[66]

Several southerners, however, argued instead that these Black individuals were not citizens within the meaning of the Constitution at all.[67] The argument of Representative Barbour of Virginia is particularly instructive. He argued that "the opponents of Missouri" must show "that those people whom she proposes to exclude are citizens, in the sense of the Constitution of the United States."[68] He then defined what it meant to be a "citizen": "The term citizen," Barbour said, "could not with propriety be applied to any one unless under these circumstances: that he should be possessed of all at least of the civil rights . . . of every other person in the community, under like circumstances."[69]

This is Republican Equality 101: if Black persons are citizens, then they must have equal rights under like circumstances, which condition would permit restrictions on sex and age, but not color. Is there any state "in which colored men have all the civil rights of any other citizen in the community," Barbour asked; was there any state "in which they were in the full enjoyment of civil rights?"[70] Because they do not enjoy all the same civil rights as White men under like circumstances in any state, he argued, they cannot be considered citizens.[71] If they were citizens, that would mean they were entitled to equal rights within a state.

Northern representatives countered that free Black citizens of northern states were citizens of the United States within the meaning of Article IV.[72] Representative Storrs' argument on that side is particularly instructive. It is the operation of Article IV, he said, "which reduces us to a perfect equality of rights with those around us, wheresoever we may transfer ourselves in every part of the Republic."[73] It was up to the states to confer "upon all the

66. *Id.* at 513–14.

67. *Id.* at 555–57 (statement of Rep. Smyth); *id.* at 1110 (statement of Rep. Brown); *id.* at 1134 (statement of Rep. Pinckney).

68. *Id.* at 544.

69. *Id.* at 545.

70. *Id.* at 546.

71. *Id.* at 545–46, 553.

72. *Id.* at 529–31 (statement of Rep. Sergeant); *id.* at 571 (statement of Rep. Strong) ("I am constrained to believe that [free negroes and mulattoes] are citizens of the United States, and, as such, have a right peaceably to pass through, or reside in, any part of the United States."); *id.* at 596 (statement of Rep. Hemphill) (declaring them to be "citizens of the United States"); *id.* at 636 (statement of Rep. Eustis) (same).

73. *Id.* at 536.

various classes of persons within their respective State jurisdictions, such rights and privileges as to themselves shall appear most conducive to their interest."[74] But it was not up to the individual states to pick and choose which citizens of another state it would recognize as such citizens. Even under the Articles of Confederation, Storrs explained, the precursor to Article IV specifically gave the citizens of any state, as determined by that state's own naturalization laws, the benefits of comity when travelling to other states.[75]

This statement represents basic antebellum understandings of citizenship, equality, fundamental rights, and federalism. Each state decides for itself what rights and privileges to confer on its citizens. But they then must treat citizens of other states equally with respect to those rights. Article IV is what creates "a perfect equality . . . with those around us."[76] It does not create a uniform set of all civil rights across the entire United States, but rather equality in the narrower sense that the citizens of other states shall be treated as the equals of a state's own citizens with respect to the fundamental rights that the citizens of all free governments must enjoy. Storrs also added a dose of republican equality. If the "arbitrary" distinction can be made between citizens on the basis of color, then any other arbitrary distinction among citizens could be maintained.[77] That again suggests the emergent unorthodox-yet-orthodox view: citizenship required equality, and so if Black persons were citizens, whether from another state or within a state, equal treatment was expected.[78]

B. SEAMAN ACTS

The dispute over the constitutional status of free Black citizens of northern states flared up after a slave insurrection plot in South Carolina in 1821–22. Denmark Vesey was the free Black resident of Charleston at the center of the plot, and a few co-conspirators had been free sailors or slaves of shipyard owners. South Carolina therefore concluded "that free black seamen coming into Charleston on shore leave who mingled with free and

74. *Id.* at 537.
75. *Id.*
76. *Id.* at 536.
77. *Id.* at 539.
78. For the conclusion to this episode, see WIECEK, *supra* note 46, at 124.

enslaved blacks contaminated Carolina's slaves."[79] It enacted the Negro Seamen's Act of 1822, which provided for the jailing of all free Black seamen whose vessels came into Charleston until their vessels cleared, at the expense of the vessel's owner; and if the vessel's owner failed to redeem the sailor, the sailor was to be sold into slavery.[80]

When John Quincy Adams was a member of the House of Representatives in 1843, he introduced into the House a remonstrance by Boston merchants arguing that the various seamen acts violated Article IV.[81] A select committee in the House agreed that Article IV, Section 2 was violated because "some of the States of this Union recognise no distinction of color in relation to citizenship" and because "[t]heir citizens are all free; their freemen [are] all citizens."[82] In Massachusetts, free Black persons were citizens at least nine years before the Constitution's adoption. The Constitution therefore "found the colored man of Massachusetts a citizen of Massachusetts, and entitled him, as such, to all the privileges and immunities of a citizen in the several States."[83]

This is an entirely conventional reading of Article IV. Barnett and Bernick argue, however, that the antislavery forces "used a fundamental-rights reading" to challenge these laws (p. 69). Barnett, in particular, has written elsewhere that opponents of these laws "did not complain about differential treatment between in-staters and out-of-staters," but rather "protested the denial of the fundamental rights of some Northerners on account of their color."[84] They did not think the constitutional question "depended on how Southern states treated their own free blacks," and therefore Article IV "prohibit[ed] state restrictions on fundamental rights" of all citizens.[85] Akhil Amar has made the same point.[86]

79. *Id.* at 132.

80. *Id.* (citing ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 11–14 (Daniel Faust ed., 1823)).

81. COMM. ON COMMERCE, FREE COLORED SEAMEN, H.R. REP. NO. 27-80, at 7 (3d Sess. 1843) [hereinafter REP. ON FREE COLORED SEAMEN].

82. *Id.* at 2.

83. *Id.*

84. Barnett, *Whence Comes Section One?*, *supra* note 45, at 193.

85. *Id.* at 193–94; *see also id.* at 213 (noting that abolitionist Salmon Chase made this argument about Article IV "without any inquiry into how free blacks were treated in those localities").

86. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 253–54 (2005)

But as with the Missouri controversy, the southerners seemed to accept the proposition that if free Black persons were citizens, they would be entitled to equal civil rights. That is why the southerners had to deny altogether that Black residents were citizens. How they treated their own free Black residents was therefore immaterial because they were not deemed citizens. The South Carolina legislature resolved in a statement "[t]hat free negroes and persons of color are not citizens of the United States within the meaning of the Constitution, which confers upon the citizens of one State the privileges and immunities of citizens in the several States."[87] Even the minority report to the House's Report on Free Colored Seamen argued that free Black persons could not be citizens in the northern states within the meaning of the Constitution, because citizenship implied equality, and nowhere were Black persons civilly and politically equal.[88]

C. NORTHERN BLACK CODES

Scholars have pointed out that free Black citizens in the North also denounced the discriminatory laws of their own states.[89] Barnett and Bernick write that, in doing so, these individuals "specifically cited the Privileges and Immunities Clause of Article IV" (p. 87). A comity-only reading of Article IV would be insufficient to challenge discrimination internal to a particular state. If anything, however, the Colored Conventions[90] that invoked Article IV advanced the orthodoxly unorthodox, intrastate equality interpretation of the clause. The Ohio Colored Convention of 1849 quoted Article IV, Section Two, and the provision of the state bill of rights declaring "that all men are born equally free and independent, and have certain, natural, inherent, and inalienable rights, among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting

(suggesting that under a proper interpretation of Article IV, "out-of-state free blacks could claim no more than in-state free blacks").

87. South Carolina Resolution on the Mission of Samuel Hoar, (1844), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 237–38 (Herman V. Ames ed., 1906).

88. REP. ON FREE COLORED SEAMEN, *supra* note 81, at 40–41 (minority report).

89. *See, e.g.*, KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021).

90. To access the documents relating to these Conventions, see COLORED CONVENTIONS PROJECT, https://omeka.coloredconventions.org/ (last visited Aug. 11, 2025).

property, and pursuing and obtaining happiness and safety."[91] It then concluded: "therefore we claim that the colored citizens in the State of Ohio have rights equal with the rest of her citizens."[92]

The Illinois Colored Convention of 1866 specifically connected Article IV to the civil rights bill—which required equality in civil rights under state law[93]—and to the equality of rights within each state. "We require these rights at your hands, because we believe every American citizen *in each State* to be entitled to *equal rights* before the law," they claimed, and "that the Constitution of the United States contemplates as much, when it says: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'"[94] The civil rights bill, they added, was "designed to enforce this principle, and secure these 'privileges and immunities' to all alike."[95] Elsewhere the Convention demanded "the same immunities and privileges that are accorded to others."[96]

Perhaps most explicit was the Ohio Colored Convention of 1857. In exhorting against the state's "caste legislation . . . founded upon accidental or complexional differences," the Convention argued such legislation was "contrary to the drift and meaning" of the Constitution.[97] They quoted Article IV, Section Two, and noted that "[i]n spite of this clause in the United States Constitution, however, the colored sojourner who comes into our State from Massachusetts, although he is a full-grown citizen of that State, is compelled to suffer in consequence of the odious complexional discrimination found in our State Constitution."[98] The Convention concluded that such distinctions were "contrary to the philosophy of the declaration and the drift and meaning of

91. MINUTES AND ADDRESS OF THE STATE CONVENTION OF THE COLORED CITIZENS OF OHIO 22 (Oberlin, J.M. Pitch 1849), https://omeka.coloredconventions.org/items/show/247.

92. *Id.*

93. *See* Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

94. PROCEEDINGS OF THE ILLINOIS STATE CONVENTION OF COLORED MEN, ASSEMBLED AT GALESBURG, OCTOBER 16TH, 17TH, AND 18TH, 1866, at 10–11 (1866) (emphasis added).

95. *Id.* at 11.

96. *Id.* at 9.

97. PROCEEDINGS OF THE STATE CONVENTION OF THE COLORED MEN OF THE STATE OF OHIO 21 (Columbus, John Geary & Son 1857), https://omeka.coloredconventions.org/items/show/253.

98. *Id.*

the United States Constitution."[99] Interestingly, the Convention appears to have accepted the conventional, comity-only reading of the clause, but further to suggest that the clause might therefore require equality among a state's own citizens. Otherwise, a state might discriminate against *out-of-state* citizens by making invidious discriminations among its *own* citizens.

Justice Harlan gave a similar explanation in his dissent in the *Civil Rights Cases* many years later. He explained that "in virtue of section 2 of article 4 of the Constitution," the "colored citizens of other States, within the jurisdiction of [another] State, could claim . . . every privilege and immunity which that State secures to her white citizens."[100] If it were otherwise, then a state, "by discriminating class legislation against its own citizens of a particular race or color," could "withhold from citizens of other States, belonging to that proscribed race, when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship," contrary to "the constitutional guaranty . . . that the citizens of each State shall be entitled to 'all privileges and immunities of citizens of the several States.'"[101] Harlan concluded that therefore no state could discriminate "against a portion of its *own* citizens," lest the result be an impairment of the "constitutional right of citizens of other States, of whatever race, to enjoy in that State all such privileges and immunities as are there accorded to her most favored citizens."[102] This interpretation was indeed somewhat unorthodox, but it made sense of republican citizenship theory.[103]

99. *Id.*

100. *The Civil Rights Cases*, 109 U.S. 3, 47–48 (1883) (Harlan, J., dissenting).

101. *Id.* at 48 (emphasis added).

102. *Id.*

103. Other conventions did not mention Article IV specifically, but nevertheless made clear their concern was equality. *See, e.g.*, MINUTES OF THE STATE CONVENTION OF COLORED CITIZENS OF PENNSYLVANIA (Philadelphia, Merrihew & Thompson 1848), https://omeka.coloredconventions.org/items/show/241; MINUTES OF THE STATE CONVENTION OF THE COLORED CITIZENS OF OHIO (Columbus, Gale & Cleveland 1850), https://omeka.coloredconventions.org/items/show/248; PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE COLORED CITIZENS OF THE STATE OF CALIFORNIA (San Francisco, J.H. Udell & W. Randall 1856), https://omeka.coloredconventions.org/items/show/266; PROCEEDINGS OF THE CALIFORNIA STATE CONVENTION OF COLORED CITIZENS (San Francisco, 1865), https://omeka.coloredconventions.org/items/show/268.

D. FREE SPEECH

Much of the evidence supporting a fundamental rights view of Article IV derives from antebellum disputes over freedom of speech. For example, in 1844, after Congress refused to take any action on the Boston Remonstrance and the Seaman Acts, Massachusetts sent Samuel Hoar to South Carolina and Henry Hubbard to Louisiana to institute legal proceedings to challenge the acts.[104] Both men were threatened with lynching, and both had to flee the respective states.[105] Barnett and Bernick point specifically to the experience of Samuel Hoar as evidence of a fundamental rights approach to Article IV. "South Carolina denied the freedom of speech of a Massachusetts citizen," they write, "notwithstanding the fact that South Carolina equally forbade its own citizens as well as out-of-staters from engaging in antislavery speech" (p. 71). Thus "a comity-only reading of the Privileges and Immunities Clause was inadequate to explain why Hoar's treatment was unconstitutional" (p. 71).[106]

Hoar, however, was sent to prosecute suits to challenge the constitutionality of South Carolina's laws, not to publish abolitionist newspapers. The right to sue in court is a fundamental civil right that all of South Carolina's citizens possessed, even if no such citizen would dare exercise that right to challenge these laws.[107] The constitutional problem was that citizens of northern states had a right to travel to South Carolina and enjoy, in general, the privileges and immunities of citizens there. Running Hoar out of the state violated that traditional understanding of Article IV. As Charles Fairman stated, "the mistreatment that at times had

104. WIECEK, *supra* note 46, at 140. The Commerce Committee's majority report on the seamen acts included a letter from Justice William Johnson to Secretary of State John Quincy Adams, explaining that the "only mode of bringing up the subject to the Supreme Court, is by an action for damages," but that "without friends, without funds, and without time, mariners cannot resort to suits at law." REP. ON FREE COLORED SEAMEN, *supra* note 81, at 14 (quoting Letter from Judge Johnson to Mr. Adams (July 3, 1824)).

105. WIECEK, *supra* note 46, at 140.

106. For the constitutional discussions in the Thirty-Ninth Congress about Hoar's mission, see William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 582–85 (2005).

107. The British Consul challenged the law in 1823 when a British seaman was imprisoned, and the law was declared an unconstitutional regulation of commerce by Justice William Johnson, sitting as a circuit justice; "[t]his decision of the Federal Judge, however, was not acquiesced in by the State of South-Carolina [sic]," which made no change to the legislation. MR. HOAR'S MISSION: DOCUMENTS RELATIVE TO THE RECENT MISSION OF THE HON. SAMUEL HOAR, OF MASSACHUSETTS, TO SOUTH-CAROLINA, 7 S.Q. REV. 455, 462–63 (1845).

been meted out in the Southern States to visitors from out-of-state," the prime example being "South Carolina's action in excluding Samuel Hoar of Massachusetts in 1844," was "discrimination . . . forbidden by Article IV, Section 2."[108]

Additionally, if the right to "freedom of speech" is the right to speak one's mind freely, then a prohibition on abolitionist speech is discrimination. It does not limit everyone's right to speak their minds equally; it only limits the right of those who wish to express a particular point of view. On this account, the South's treatment of Hoar and other abolitionists was discriminatory, no different than modern viewpoint discrimination at the core of the First Amendment. It is by definition "unfree speech" if the state only allows its citizens to speak on state-approved topics.

That understanding also makes sense of much other discussion of freedom of speech in the period.[109] Many Members of Congress, for example, believed that the Thirteenth Amendment would restore freedom of speech.[110] The Thirteenth Amendment did not in itself create a fundamental rights guarantee; the Republicans in Congress simply believed that once a formerly enslaved person became free, he became a citizen. And citizens have the same fundamental rights to freedom of speech as other citizens in the respective states, subject to like regulations applicable to all. Others referenced freedom of speech in connection to Article IV and noted the denial of "liberty of speech and the press" to "citizens of other States."[111] They were denied the same freedom southerners enjoyed. It was not enough to say that no one could speak about abolition. The question was whether individuals could speak their minds.

In a famous speech by James Wilson on "the incompatibility of slavery with a free Government,"[112] Wilson claimed slavery required the violation of Article IV.[113] He explained:

> Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong

108. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 22 (1949).

109. *See* Wurman, *Reversing*, *supra* note 6, at 287–95.

110. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll) ("[T]he day is not far distant when this glorious privilege [of free speech] will be accorded to every citizen of the Republic.").

111. *See, e.g.*, *id.* at 1369 (statement of Rep. Clark).

112. *Id.* at 1200.

113. *Id.* at 1202.

> to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together. How have these rights essential to liberty been respected in those sections of the Union where slavery held the reins of local authority and directed the thoughts, prejudices, and passions of the people?[114]

Although some scholars have argued that Wilson must have meant that the First Amendment applied to the states through Article IV,[115] Wilson appears to have been using that amendment as an illustration of the rights that all free governments must secure. The freedom of speech was covered by Article IV; but all that meant was that a state could not discriminate with respect to this freedom. The remainder of Wilson's speech focused on discrimination, both within a state and against out-of-state citizens: "Slavery could hold its assemblages, discuss, resolve, petition, threaten, disregard its constitutional obligations, trample upon the rights of labor, do anything its despotic disposition might direct; but freedom and freemen must be deaf, dumb, and blind."[116] He continued: "Slaveholders and their supporters alone were free to think and print, to do and say what seemed to them best on both sides of [the Mason-Dixon] line. They could think, read, talk, discuss with perfect freedom in each and every State."[117] The people of the free states should therefore ensure ample protection so that a northern citizen "shall be as free to assert his opinions and enjoy all of his constitutional rights in the sunny South as he whose roof-tree is the magnolia shall to the same ends be free amid the mountains of New England and the sparkling lakes of the North and the West."[118]

Wilson's speech was consistent with the conventional antebellum understanding that all free governments must secure natural rights. To the extent the southern states failed to secure these rights it was because they discriminated against citizens of other states or against certain of their own citizens.

114. *Id.*
115. *See* AMAR, BILL OF RIGHTS, *supra* note 6, at 184; CURTIS, *supra* note 6, at 37–38.
116. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).
117. *Id.* at 1202–03.
118. *Id.* at 1203.

4. BINGHAM AND THE CIVIL RIGHTS ACT

The orthodox unorthodoxy helps to make sense of a series of important speeches by John Bingham, the principal author of the Fourteenth Amendment's first section. Although his language often sounded in fundamental rights, Bingham never denied it was up to states to define and regulate the content of rights. His view was that Article IV required that a state not arbitrarily discriminate among its own citizens. That would explain John Bingham's belief that Congress had no power to enact the civil rights bill because it had no power to enforce the bill of rights. Bingham included Article IV within the "bill of rights," and he believed that Article IV required equality in civil rights under state law.

A. OREGON

Before his important speech on the civil rights bill, Bingham spoke about his understanding of Article IV at least twice. In 1859, Congress debated a proposed constitution that would have prohibited free Black persons from emigrating to Oregon.[119] As with the admission of the Missouri, there was little question that, if free Black persons were entitled to comity rights, the proposed Oregon constitution would violate Article IV. But John Bingham, rising to oppose the proposed law, seems to have gone further. He stated that Article IV guaranteed the privileges and immunities "of citizens of the United States in the several States." Bingham then stated that he could not

> consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which . . . all good governments are instituted; and the failure to maintain which inviolate furnishes, at all times, a sufficient cause for the abrogation of such governments.[120]

Barnett and Bernick (pp. 84–85), Curtis[121] and Richard Aynes[122] argue from this and related passages that Bingham believed that Article IV created a fundamental rights baseline or

119. This section summarizes from Wurman, *Reversing*, *supra* note 6, at 295–97.

120. CONG. GLOBE, 35th Cong., 2d. Sess. 985 (1859).

121. CURTIS, *supra* note 6, at 61.

122. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 70–71 (1993).

applied the Bill of Rights against the states.[123] The reviewer has previously noted some reasons militating against this reading.[124] One is worth emphasizing here: Bingham never denied that it is was for the states to define and regulate civil rights. His demand was equality. "The *equality* of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which [the] Constitution rests," he exhorted.[125] He objected only to "the interpolation into [the Constitution] of any word of caste, such as white, or black, male or female."[126] This was consistent with conventional thinking about republican citizenship.

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Seven years after his speech on Oregon's admission, as the Union emerged victorious from the Civil War, Bingham articulated why a new constitutional amendment was necessary.[127] He began discussion of the issue by stating that Congress might "act upon the suggestion of the President, that hereafter the true intent of the Constitution, which is to secure equal and exact justice to all men, may be carried into effect."[128] Bingham then noted how everyone recalled the recent times in which "it was entirely unsafe for a citizen of Massachusetts or Ohio" who advocated against slavery "to be found anywhere in the streets of Charleston or in the streets of Richmond,"[129] because "in defiance of the Constitution its very guarantees were disregarded."[130] So far, so conventional—the problematic treatment of Samuel Hoar, as noted, can be explained under traditional principles of comity.

Bingham then argued that Article IV had been violated and another amendment, which would become the Fourteenth Amendment, was necessary.[131] Bingham again asserted that Article IV guaranteed "the privileges and immunities of citizens of the United States *in, not of,* the several states," and that "[t]his guarantee of your Constitution applies to every citizen of every

123. *Id*.
124. *See* Wurman, *Reversing*, *supra* note 6, at 295–98.
125. CONG. GLOBE, 35th Cong., 2d. Sess. at 985 (emphasis added).
126. *Id.*
127. This section summarizes from Wurman, *Reversing*, *supra* note 6, at 305–07.
128. CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866).
129. *Id.*
130. *Id.* at 158.
131. *Id.*

State of the Union; there is not a guarantee more sacred, and more vital in that great instrument."[132] He added that the guarantee "was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts [Samuel Hoar], who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens."[133]

Bingham here could easily be read to adopt the conventional, comity reading, or the same unorthodox reading of Article IV he likely advanced in 1859. Under this reading, the clause guarantees all citizens of the United States their privileges and immunities as such citizens within every state. That is consistent with the proposition that states still define and regulate the content of civil rights. The need for "equal and exact justice" does not mean that rights will be exactly the same in every state; only that a state should treat its own citizens equally, and out-of-state citizens equally with its own.

C. THE CIVIL RIGHTS ACT

The debate over the civil rights bill is particularly instructive. The bill declared all persons born in the United States (with exceptions not relevant here) to be citizens of the United States, and declared that "such citizens, of every race and color . . . shall have the same right" to "make and enforce contracts, to sue and be parties," to acquire and possess property, and to the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[134] Bingham objected to the bill because Congress, until a constitutional amendment was passed, lacked power to enact it. But, he said, "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."[135] He then noted

132. *Id.* (emphasis added).

133. *Id.*

134. Civil Rights Act, ch. 31, § 1, 14 Stat. 27 (1866). In all relevant parts the initial draft being debated was identical. It started differently, however, without a declaration of citizenship and providing instead that "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 . . . shall have the same right[s]. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

135. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

his "earnest desire to have the bill of rights in [the] Constitution enforced everywhere."[136]

How could Bingham have believed that the civil rights bill would "enforce the bill of rights," and that the proposed constitutional amendment would enforce the bill of rights by authorizing such civil rights legislation, if the civil rights bill merely required equality in civil rights under state law? The answer seems to be that Bingham previously included Article IV within his definition of the "bill of rights."[137] And, if Article IV required equality within a state, then an amendment to enforce the bill of rights would authorize the civil rights bill.

Representative Lawrence of Ohio made this "unorthodox" equality reading of Article IV explicit in connection to the civil rights bill.[138] Lawrence asked whether the nation was powerless to intervene when a state denies rights to "whole classes of native or naturalized citizens."[139] He argued that Article IV, Section 2 authorized Congress to enforce "the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State."[140] To Lawrence, and apparently to Bingham, Article IV, Section 2, and the civil rights bill both required equality in civil rights among a state's own citizens.

5. CONCLUSION

A central argument proponents of incorporation advance, and which is advanced in Barnett and Bernick's recent and sophisticated book, is that the Fourteenth Amendment's Privileges or Immunities Clause adopted the antislavery reading of Article IV's Privileges and Immunities Clause, a reading according to which that clause created a baseline of fundamental rights throughout the United States. The first proposition may be correct, but the second one is likely not. The Privileges or Immunities Clause of the Fourteenth Amendment does adopt the antislavery understanding of Article IV. But that understanding did not necessarily impose a baseline of fundamental rights. The antislavery theorists presumed that all the states guaranteed such rights, as all free governments had to. Article IV then required

136. *Id.*
137. *See* Wurman, *Reversing*, *supra* note 6, at 305–09, 320.
138. *Id.* at 317–19.
139. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866).
140. *Id.*

states not only to treat out-of-state citizens equally with the state's own citizens, but also, according to the antislavery theorists, to treat its own citizens with equality. The proslavery forces hardly disagreed with the argument. They understood that citizenship implied equality, including among a state's own citizens. That is why they worked to deny that free Black persons were citizens. This evidence tends to show that the Fourteenth Amendment was not intended by its Framers to incorporate the Bill of Rights against the states. Rather, its aim was to maintain the federalist structure of the original Constitution, but to constitutionalize the Civil Rights Act of 1866 and guarantee equality among a state's own citizens.