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Honors Thesis

WHAT ARE OUR UNENUMERATED RIGHTS AS AMERICANS? AN
ANALYSIS OF THE NINTH AMENDMENT AND THE FOURTEENTH
AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE USING ORIGINAL
INTENT ORIGINALM

by
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Submitted to Brigham Young University in partial fulfillment
of graduation requirements for University Honors

Political Science Department
Brigham Young University
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ABSTRACT

WHAT ARE OUR UNENUMERATED RIGHTS AS AMERICANS? AN ANALYSIS OF THE NINTH AMENDMENT AND THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE USING ORIGINAL INTENT ORIGINALISM

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Bachelor of Arts

This research aims to determine what the author believes is the original intent of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. The author plans to do this through a variation of original intent originalism, the philosophy that the original meaning of the text should be what the framers (and secondarily the ratifiers) said the text means. The author believes that original intent originalism is the correct method to interpret the Constitution. This thesis will begin with a defense of this philosophy. Then the author will use this philosophy to determine the original intent of these two sections of the Constitution. The purpose of such research is to determine whether 1) there are indeed unenumerated rights, and 2) if so, which unenumerated rights are protected under these two sections of the Constitution. After outlining the analysis, the author concludes that there are indeed unenumerated rights that are protected in the Constitution in these two sections. The original intent and interpretation of the Ninth Amendment was that it would protect rights--including those not explicitly written in the Constitution--that were commonly considered to be rights by the general public at the time when the Constitution was written and ratified. The original intent of the

Privileges or Immunities Clause of the Fourteenth Amendment was to 1) protect certain unenumerated rights, and 2) apply the Bill of Rights to the actions of individual state governments as well as to the federal government.

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I. Introduction

This research aims to determine what the author believes is the original intent of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. The author plans to do this through a variation of original intent originalism, the philosophy that the original meaning of the text should be what the framers (and secondarily the ratifiers) said the text means. The author believes that original intent originalism is the correct method to interpret the Constitution. This thesis will begin with a defense of this philosophy. Then the author will use this philosophy to determine the original intent of these two sections of the Constitution. The purpose of such research is to determine whether 1) there are indeed unenumerated rights, and 2) if so, which unenumerated rights are protected under these two sections of the Constitution. After outlining the analysis, the author concludes that there are indeed unenumerated rights that are protected in the Constitution in these two sections. The original intent and interpretation of the Ninth Amendment was that it would protect rights--including those not explicitly written in the Constitution--that were commonly considered to be rights by the general public at the time when the Constitution was written and ratified. The original intent of the Privileges or Immunities Clause of the Fourteenth Amendment was to 1) protect certain unenumerated rights, and 2) apply the Bill of Rights to the actions of individual state governments as well as to the federal government.

II. Background

The Constitution of the United States protects constitutional rights. The rights to freedom of speech and assembly, to bear arms, to have trial by jury, and numerous other rights are explicitly enumerated in the Constitution. There are claims that there

are also rights that are protected which are not explicitly stated in the Constitution. These rights are called unenumerated rights.¹

The Fourteenth Amendment's Due Process Clause has been used by the Courts to note the presence of and protect unenumerated rights in the constitution. For example, the Supreme Court from 1973 to June 2022 stated that the Constitution protects a woman's right to have an abortion. In 2015, the Court said the Due Process Clause protects the right of same-sex couples to marry. Despite these Court rulings, however, not everyone agrees that the Due Process Clause can protect unenumerated rights--assuming they even exist². For example, Justice Clarence Thomas, in his concurring opinion in the *Dobbs v. Jackson's Women's Health Organization* case said that "As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution (*Dobbs v. Jackson Health Association*, 597 U.S. ____ (2022) [Concurring Opinion], 2).'" In a separate case, Justice Antonin Scalia was also skeptical of the Due Process Clause's ability to point out and protect unenumerated rights, calling it a "judicial usurpation (*Chicago v. Morales*, 527 U.S. 41 (1999) [Dissenting Opinion], 74, 85)." Several additional legal Scholars have also expressed skepticism.³

¹ Please refer to footnote 2 for an explanation of this principle.

² One unenumerated right that is considered by almost all scholars and judges to be protected is the right to travel. See *United States v. Guest*, 383 U.S. 745 (1966), and *Saenz v. Roe* 526 U.S. 489 (1999). However, not everyone agrees with this. For example, Dr. Rob Natelson, legal scholar and former law professor, believes that the right to travel is not in Article IV of the Constitution. See Natelson, Robert G. 2009. "The Original Meaning of the Privileges and Immunities Clause." *Georgia Law Review* 43, no. 4 (Summer): 1183. Even if all legal scholars and justices say that the right to travel is a protected unenumerated right, it does not mean that such a right exists. As will be seen in this paper, the legal philosophy promoted in this paper is that the correct legal interpretation of statutes should not derive from court decisions. It comes, instead, from the intentions of the framers (and also, secondarily, the ratifiers). This philosophy assumes that no unenumerated rights exist unless the research says otherwise.

³ The late legal scholars Dr. Charles Fairman and Dr. Raoul Berger did not believe that unenumerated rights exist in the Constitution. For more information, see Fairman, Charles. 1949. "Did the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2, no. 1 (December): 5-139; Berger, Raoul. 1977. *Government by Judiciary: The Transformation of the Fourteenth Amendment*. Cambridge, Mass: Harvard University Press.

If the Due Process Clause does not note the presence of or protect unenumerated rights, it does not necessarily mean no such rights exist in the Constitution. There are other provisions in the Constitution less often researched by legal scholars that are just as potentially able to provide and protect unenumerated rights. Examples of this are the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment.

The Ninth Amendment to the Constitution says the following: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The text appears to be clear: rights held by the people are not to be unprotected in the Constitution solely due to such rights not being specifically enumerated in the Constitution. However, not everyone agrees with this interpretation.

For over 200 years, the Ninth Amendment was mostly ignored by the Supreme Court; it was not used as the basis for Court decisions regarding constitutional rights except for *Griswold v. Connecticut* (1965). Furthermore, Justice Reed in 1947 essentially stated that the Ninth Amendment has no meaning outside of its ties to the Tenth Amendment (Barnett 2006, 2). In 1987, Judge Robert Bork, who was nominated to the Court, expressed that the Ninth Amendment cannot be used to make judgments on cases due to a lack of a method to interpret it. This statement caused much controversy among many judges and legal scholars. (Lash 2013, 219-220) Bork’s remarks began a movement among legal scholars to begin researching the original meaning of the Ninth Amendment.

Just as with the Ninth Amendment, the Court neglected to interpret the Fourteenth Amendment’s Privileges or Immunities Clause in most cases deciding constitutional rights. The Clause says: “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 United States....” Logic would dictate that the Clause would protect rights. However, the Court views such protections to be rather limited. The ruling of the Slaughterhouse Cases in 1873 determined that the Privileges or Immunities Clause does not incorporate the Bill of Rights to the states. (Chemerinsky 2017, 541) Consequently, this Clause was ruled by the Court to have a narrow definition and was therefore seen to have limited substance. For this reason, the Clause, with only a few exceptions, had not been revisited by the Court for several decades. However, in a dissenting opinion in 1999, Justice Clarence Thomas expressed that the Privileges or Immunities Clause should be revisited. (*Saenz v. Roe*, 526 U.S. 489 (1999) [Dissenting Opinion], 113) Sometime later, Justice Gorsuch purported the same belief. (Mauro 2019)

Both the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment have the potential ability to note the presence of and protect unenumerated rights of Americans. However, despite these important implications, legal scholars and the courts have neglected to thoroughly investigate these provisions for long periods of U.S. history. Only in the last several decades has research been performed in an attempt to interpret these constitutional provisions. Knowing the correct interpretation of these provisions can inform the American public if and/or what their unenumerated rights are.

III. Legal Philosophy

Many philosophies aim to identify the correct way to interpret the constitution. For example, many believe that the correct way to interpret the Constitution is to determine the interpretation of the words of the text at the time the Constitution was written and adopted by the framers. This is referred to as originalism. This philosophy

is founded on the following principle of the rule by law: all laws should have a fixed definition throughout its duration of it being in force. With this reasoning, the interpretation of all laws, including the Constitution, should remain the same until the Constitution is changed by utilizing the Amendment process outlined in Article V.

In contrast, there are others who believe the interpretation of the Constitution should be based on the societal values held at the time this text is being interpreted. This philosophy is known as nonoriginalism. (Chemerinsky 2017, 14) Nonoriginalists espouse this view for three principal reasons. First, they feel that the document is too old to be interpreted in the way it was originally intended. Second, these people believe a document written almost 250 years ago by exclusively white males should be interpreted differently in order to accommodate to the needs of a more diverse and modern nation. (Libell 2023, 358, 360) Third and finally, these people believe that the framers were nonoriginalists themselves. For example, Thomas Jefferson said that “as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.” (Jefferson 1816) Nonoriginalists use this Jefferson quote to justify their position that the Constitution should be interpreted according to the values of contemporary society. (Dobbs 2016)

This paper argues that originalism is the correct way to interpret the constitution. The primary reasons for this are twofold. First, originalism is closer to the principle of the rule of law. Second, the interpretation of the constitution according to how the document was drafted and ratified is already the law. The rule of law is one of the most important principles of our Republic, and it should be protected in the way courts review cases. If America is ruled by law, then laws should have a fixed definition as long as they remain on the books. The respective fixed definition

should be what the framers said it was. This can be defined by the Congressional Debates, Ratification Debates, in legal dictionaries, and from the plain meaning of the words from the time period in which the Amendments were written. Nations with laws lacking a fixed definition and which are changed by trends in society are not ruled by law. Instead, they are ruled by men. In order for a nation to be ruled under laws, each law needs to be treated as having a single unchanging definition.

In response to Jefferson's statement quoted by nonoriginalists, it must be noted that the former President was not advocating that the Constitution's interpretation be changed overtime rather having it remain stable across time. Rather, Jefferson *did* state that institutions should be changed with the times, if the people want the changes. However, such changes must come about using the proper legal procedures outlined in Article V of the Constitution. Otherwise, this quote would contradict another statement of his directed towards an incoming Supreme Court justice when he said the following: "On every question of construction, carry ourselves back to a time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning can be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." (Cooke 2015, 103) From this statement, it is clear that Jefferson was advocating for a stable interpretation of a constitutional provision by consulting the records of the congressional debates as a means of finding the correct interpretation. From this perspective of interpreting these two quotes, both statements can be perfectly reconciled with each other. One could argue that the Constitution should be interpreted according to original intent, yet believe that as times change, institutions should also change, but *through the amendment process*.

It is important to know that many other Founding Fathers besides Jefferson also believed that the Constitution should be interpreted to reflect the intentions of the framers/ratifiers of the convention. For example, James Madison, in a letter to Henry Lee in 1824, said that “I entirely concur in ... resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution.” He also said in the same letter that without this manner of constitutional interpretation, “there can be no security for a consistent and stable, more than for a faithful exercise of its powers.” . He furthermore posed, “What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.” (Madison 1824) James Madison clearly warned against those who ascribe to the belief that interpretation of the text of the Constitution should be changed over time. He was undoubtedly an endorser of interpreting the Constitution according to its original intent.

George Washington likewise supported interpreting the Constitution according to original intent. In his farewell address as President of the United States, he declared, “If, in the opinion of the people, the distribution or the modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.” (Cooke 2015, 103) Washington emphatically believed that any changes to the Constitution should be accomplished only by the amendment process under Article V.

Though originalism utilizes the best framework to interpret the Constitution, it must be noted that there are actually three main types of originalism: original public meaning originalism, original ratifiers’ understanding, and original intent originalism.

Original public meaning originalism is the belief that the original meaning of the text of the Constitution is determined by how a “reasonable listener of the public” at the time a constitutional provision was ratified would have unbiasedly understood that particular provision. (Barnett 2004, 92) In contrast, original ratifiers understanding is the belief that the stable definition of the Constitution is derived from the understanding of the ratifiers of the Amendments among the several states as to what the amendments were supposed to mean. (Barnett 2006, 3). Finally, original intent originalism is the belief that the original meaning of text of the founding documents is determined by the intentions of the framers and the ratifiers on what the text should mean. (Boykin 2021, 247) This paper will argue that a particular brand of original intent originalism, which is that the views of the ratifiers are necessary but only secondary to the framers, is the correct way to interpret the Constitution.

There are many concerns and criticisms against original intent originalism, of which only a few of them will be addressed in this article.⁴As an example, original intent originalists have been criticized for seeking to find the “secret intentions” of the framers in order to find the original intent of the text, which critics say is impossible to retrieve. (Southeast Missouri University, “Originalism”). However, these notions are false. In response to the aforementioned statement, no one promoting original intent originalism supports the idea that secret intentions should constitute the original interpretation of a constitutional amendment. None of the academic journal articles rigorously studied in this analysis ever pointed to evidence of secret conversations

⁴ A major aspect of this paper’s purpose is to defend the belief that original intent originalism is the best way to interpret the Constitution. However, this is not the article’s only and/or main purpose. Rather, the main purpose of this article is to apply the use of the legal philosophy of original intent originalism to interpret the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause. Therefore, to prevent having this article veer from its intended purpose, some of the objections of original intent originalism will be covered here, but not all of them.

used to justify an original interpretation of a constitutional amendment. Dr. Scott Boykin, a defender of original intent originalism, proclaimed, “[Constitutional] provisions should be interpreted in light of the problems they were designed to resolve, according to public statements made by advocates of the provisions during their drafting and ratification...” (Boykin 2021, 247) Therefore, it is public statements that are generally used to determine the correct interpretation of the Constitution.⁵

Many justices have interpreted the Constitution according to the intentions of the framers. For example, Justice Hugo Black of the US Supreme Court attached an appendix to his dissenting opinion in *Adamson v. California* with the sources of the original interpretation of the Fourteenth Amendment’s Privileges or Immunities Clause. All of his sources were from what he says were the framers of the Privileges or Immunities Clause as recorded in the Congressional Debates. (*Adamson v. California*, 332 U.S. 46 (1947), 92-123) This is powerful evidence of Justice Black’s belief that the views of the framers are the most important source for determining the actual original interpretation of the Privileges or Immunities Clause.

An additional point needs to be made regarding the critique from public meaning originalists toward original intent originalists for consulting “secret meanings.” In this criticism, original public meaning originalists believe in the premise that every speech spoken in the congressional debates, by definition, contain messages with esoteric meaning. However, for purposes of legal analysis, speeches given in Congress or in ratifying debates are determined to be sincere. The exception is when ample evidence exists from multiple sources from the time period that the speeches were actually intended to convey a hidden message.

⁵ There is an exception to this principle which cannot be ignored, however, which is explained briefly in the beginning of page 10 as well as in Page 14 of this article.

Donald Drakeman, a research professor from the University of Notre Dame, proclaimed that original intentions cannot be secret intentions, as the intentions were already made public at the time the constitutional provisions were being debated. He explained that when the Bill of Rights was being debated, "those provisions were debated in the 1st Congress. And the House of Representatives' debates were carried in the newspapers. And so, our sources are their sources... [So, is it really true that] only the framers were huddled together and it was all in secret? It's just not the case." (Reinsch II 2021) Drakeman, therefore, makes the clear case that public meaning originalists who claim that original intent originalism is based on "secret intentions" are incorrect. In fact, the intentions of the Founders were quite clear and widely understood. Records outlining the intentions of the framers and the original meaning of particular provisions were and still are easily accessible to the public.

This particular research in determining the original meaning of both the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause is based on the philosophy of "Realism." This philosophy ascribes to the belief that there is an answer to every question even if it may be impossible to know the answer. (Christensen 2022) According to this philosophy, there is an answer as to the original intent of the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause. However, the answers that can be found are limited due to the lack of access to information, and because debates were not recorded in most of the states.

The difficulty to find information on the State legislative debates among the several states does not mean that such debates did not occur. The Wisconsin record of the Fourteenth Amendment's ratification mentions that deliberation occurred, but there were no notes of those details. Records merely state that there was debate until a

successful motion was made to delay further consideration until the next day, as it says in Wisconsin's Senate Journal (Wisconsin Senate 1867,109); and in the House Journal, a motion was made to "further consider..." the proposed Fourteenth Amendment "after some time spent in deliberation..." (Wisconsin House 1867, 195) Those debates that took place in Wisconsin certainly contribute to the text's meaning, as that ratification was necessary in order to ratify the Fourteenth Amendment into law. However, those contributions cannot be known (unless such such contributions were recorded in newspaper reports or in the personal journals of the legislators involved in the ratification of the Amendment) since there were no records of notes taken of the actual deliberations.⁶

Even with the previously mentioned limitations in being able to research the original intent of both the Ninth and Fourteenth amendments, there is information from multiple states that provide clues regarding their meanings. Ultimately, the objective of this research is to determine the most approximate estimate of the original intent of these amendments given the information that is available. As more information comes to light, legal scholars will have a better idea as to the true interpretation of these provisions. Libertarian originalist scholar Randy Barnett believed that originalism is discoverable (Barnett 2006, 3), and originalist Supreme Court Justice Amy Coney Barrett purports that the original meaning of a text is known "so far as it is discovered." (Barrett 2017, 1971) These two sources illustrate the aspect of originalism that declares that the original meaning of founding

⁶ It should be noted, however, that newspaper sources and personal journals, while useful, are inferior sources to that of legislative journals when determining original because there is bias in newspapers and personal journals, while the legislative journals are supposed to report official proceedings as to how the proposed laws are made and be neutral in reporting them. Therefore, if the legislative journals do not record the ratification debates, the newspaper reports and personal journals could provide useful information and should be utilized, but with the understanding that it would likely not be as pure of an account on a constitutional amendment's ratifying than on a legislative journal.

documents is dependent on the discoveries of evidence that gives originalist legal scholars their conclusions.

Those aligned with the originalist faction of “original ratifiers understanding” argue that only the ratifiers should have the ultimate say over the Constitution’s meaning, as it could not have been ratified without them. (Barnett 2006, 6) However, it is important to remember that states legislatures could not--and still cannot--ratify amendments by themselves necessarily. While it is true that one of the methods for amending the constitution does not require going through Congress, the fact is that the Ninth and Fourteenth Amendments were framed by going through Congress first, and only then considered and ratified by the required states in order for these Amendments to be added to the Constitution. (US Constitution, Article V) This means that Congress certainly had not only a crucial role, but an authorship role in the framing of the Amendments. Therefore, the views expressed in the Congressional Debates are certainly no less important than those discussed in the ratifying conventions. This illustrates that the philosophy of “original ratifiers’ understanding is flawed.⁷

Drakeman also believes that the ratifiers cannot be ignored during constitutional interpretation, which indicates their importance to determining original intent. It should be noted that the beliefs of the ratifiers would not have contradicted the views of the framers. They would have been made well aware of the will of the framers on the national level based on the records that were published. Moreover, they would have voted on the proposed

⁷ It is true that the Constitution, according to Article V, can be amended in multiple ways, and one of the ways does not involve Congress (see Article V). However, the intended point is that if the Constitution is to be amended using the avenue that *does* require Congress, then the Congress’s views of this Amendment should not be treated as less important than those of the ratifiers when determining the Constitution’s original meaning. Just like the Constitution cannot be amended without the States’ ratifications, neither can the Constitution be amended without Congress.

constitutional provisions based on the framers' interpretation on those respective provisions. Drakeman stated the following:

"[the views of the framers] had to be understood by the ratifiers and the public. Because otherwise, the ratifiers and the public wouldn't know how to obey the law. And public meaning had to be used, even if it was sometimes public meaning that differed from state to state. And besides, there was a framer at every ratifying convention. And there were framers, other than James Madison, who later published his notes, of framers who wrote lengthy discussions of what went on at the Convention. So that what was going on, what the framers were trying to do, was information available to the public and to the ratifiers when ratification was happening. So they, for all we can tell, were on board with what the framers had done and why they had done it and had information to that extent."(Reinsch II 2021)

Therefore, according to Dr. Drakeman, the ratifiers clearly had to know how the framers interpreted the words in the proposed constitutional texts. In other words, the ratifiers voted for or against the amendments based on the framers' understanding on how the Constitutional provisions were supposed to be interpreted. The ratifiers' perspectives still matter for legal interpretation purposes. Their views--based on their knowledge of the Founders' views of those amendments--were crucial to making proposed constitutional provisions law.

Another criticism of original intent originalism, according to Dr. Paul Brest, is that it requires considering too many ratifiers' and congressmen's views on the meaning of amendments in order for original intent to be a logical method to interpret the constitution (Boykin 2021, 262). However, these assertions are not entirely correct. For example, original intent originalists consider drafters' claims or declarations of a constitutional provision's meaning only if the quote(s) originated from the following three settings: 1), in committee when the newly proposed constitution was debated; 2), on the floor of a legislative session; or 3), In a state ratifying convention. The reason is that these are the settings in which the laws are officially made, proposed, and

debated. Any written records not kept of such individuals who had different opinions--who either neglected to share their insights in those three settings and/or they shared thoughts in casual settings--are not available to be discovered, researched, and employed in original intent analysis simply because they were not written. Therefore, no one should be judged critically for determining the original intent of a constitutional provision in a certain way if a legislator failed to speak up and did not have his insights recorded.

Nevertheless, there is one exception that should be made. Suppose that most if not all legislators in a particular setting were well aware--through closed-door discussions--that the original intent of a constitutional provision was actually based on secret intentions and agendas instead of the reasons openly discussed in floor speeches and debates. In such a scenario--and if wide spread knowledge among those legislators of the hidden intentions were proven--the original intent of the provisions discussed in those secret conversations should reign supreme over the "original intent" discussed in the public settings. However, the likelihood of this type of scenario having transpired is very low. Therefore, unless there is concrete evidence that an unlikely event such as the one just described has ever occurred, one can only logically conclude that the common understanding and interpretation of a constitutional provision among the legislators was that which was openly discussed and recorded in the debates, speeches, and the ratifying conventions.

As Dr. Barnett said, originalism is discoverable. The original interpretation of a constitutional text is determined by the discovered evidence gathered thus far (Barnett 2006, 3). To clarify, just because some framers, congressmen, or ratifiers did not expound on their opinions, it does not mean that other perspectives on a

constitutional provision did not exist. However, it does mean that we cannot use that unknown to help us determine what a constitutional provision means.

As new information comes to light, legal scholars accept those findings as authoritative on what the Constitution is supposed to mean. For example, if researchers find that the drafters stated what a provision was supposed to mean, there was no objection among the supporters of it, and the legislators voted to approve it, then the available evidence would suggest that everyone voted in approval of that provision with the drafters' understanding of its meaning. However, if there is disagreement between the ratifiers and the framers on what a provision means, the views of the framers take precedence. For example, if others in the chamber (or if ratifiers) disagreed with the proposed amendment's interpretation but voted for the provision anyway, it would not matter what the other legislators' (or those ratifiers') unique views were. Unless the framers somehow accepted a correction from legislators on what an amendment was trying to accomplish, it is ultimately the views of the framers that matter.

A related question pointed against original intent originalism is as follows: can statements from one lawmaker be deemed more important than those of other lawmakers in the chamber when all lawmakers in a respective chamber have the same power? In response to this critique on this form of originalism, the author's position on this point is as follows: the opinions of lawmakers who were framers of a document in question should be given precedence over the views of the other lawmakers of the same chamber not involved in its drafting. This is because the framers, by virtue of creating a respective document, are the ones who assigned the meaning to the text. By this token, the framers had the best understanding on what a clause was supposed to mean when it is passed. Therefore, it would not be appropriate

for a non-framer lawmaker to hypothetically believe that their different interpretation of a proposed text be the more correct interpretation of that given text than that of the framers themselves.

If a lawmaker were to oppose a proposed legislation, such interpretations from those opposers may be correct if such claims are obvious. For example, suppose that one opposing the Fourteenth Amendment were to say that passing the Amendment would strengthen the power of the federal government and would therefore lead to negative consequences. In this case, logic would dictate that such interpretation would indeed be accurate. This is because an amendment designed to protect more rights of citizens on the federal level than it had previously would imply that federal government power would have to increase. If, however, an interpretation offered by one opposing a proposed amendment were to have less obvious consequences than that of the previous example was, then it would not be automatic whether that precise interpretation of a proposed text would be a correct interpretation.

If a statement from a legislator belonging to the same chamber as that of a framer were to be contradictory to what a framer said the proposed law was supposed to perform, then the framer's words would take precedence over the non-framer's perspective. If a statement from the opposer were to not be contradictory to the views espoused by the framer, then such interpretation may or may not be included as part of the original intent depending on the context. Suppose that the intended application of the law according to the view of one opposing an amendment is different from the intended application of the law in the view of its framers. In this case, the perspective of the opposer of the amendment should not be included as part of the original intent of that proposed constitutional amendment. In an unlikely and nonsensical scenario, suppose that someone were to support the amendment but insisted that its meaning

were different from what the framers said it meant. In this case, the Framers' words would take precedence because, as mentioned earlier, it is the framers that defined what the proposed Amendment will mean if adopted.

Original intent originalists have also been criticized for considering the intentions of the framers as higher law than the text itself. The late originalist Supreme Court Justice Antonin Scalia, who was an originalist who criticized original intent originalism, said the following: "I don't use legislative history. The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the intent of our legislators, but by the laws which they enacted, laws which are set forth in words, of course." (Scalia 1995) It is true that the words of a text are the law. However, debate emerges when trying to determine what the words of a law actually mean, especially when the words in the text themselves may be insufficient to define what they mean.

In certain instances, a simple plain reading of the text is all that is needed to determine its meaning, such as the Third Amendment prohibiting the quartering of troops in homes without homeowners' consent. Other situations call for referencing a dictionary from the time period of the Amendment's crafting (in addition to reading the text, of course) to understand the text's meaning, such as the Impeachment Clause. However, in some cases, a plain reading of the text nor referencing time-period dictionaries suffice. For example, the first definition of the word "privilege" in the 1828 Webster's Dictionary, is as follows: "A particular and peculiar benefit or advantage enjoyed by a person, company or society, beyond the common advantages of other citizens. A privilege may be a particular right granted by law or held by custom, or it may be an exemption from some burden to which others are subject." The second definition of the word "privilege" is "Any peculiar benefit or advantage,

right or immunity, not common to others of the human race. Thus, we speak of national privileges, and civil and political privileges, which we enjoy above other nations.” (Webster 1828) Even if it were clear which of the two definitions of the word “privilege” more accurately described the framers’ use of the word, the question would remain as to what rights did the Framers of the Fourteenth Amendment precisely have in mind when they used the term "privileges" in the Constitution. Time-period dictionaries are essential but may not be sufficient in many circumstances.

Another response can be made to Scalia's objections to using "intentions." There must be a consensus on what the word "intentions" means. Justice Scalia appeared to think that the word "intentions" meant what the Framers would have liked to have required it in a text, but which was not necessarily in the text. However, to get some insight into how original intent originalists define “intentions,” Raoul Berger, an original intent originalist and legal scholar, defined "original intention" as "the meaning attached by the Framers to the words they employed in the Constitution and its Amendments." (Berger 1977, 402) In other words, it is the interpretation of the text assigned to it by the framers of that text and what it will mean once the Amendment is added to the Constitution.

One of the main reasons that original public meaning originalism is flawed is because it includes the perspectives of those who did not write or ratify the amendments. Is not appropriate for a jurist to interpret the Constitution based on the perspective of individuals who did not author these constitutional provisions nor were involved in its drafting, debating, or ratifying these provisions. Even if such individuals came from the time period in which the Constitution was drafted and ratified, it is still not appropriate for the views of such people to be taken into account

in order to determine the original interpretation of these constitutional provisions. The reason for this is as follows: “reasonable listeners,” or educated speakers of English in society who were not lawmakers or ratifiers were not involved in the negotiations nor were they aware of the context in which those laws were made. These people may not understand legal terms, despite their intellect and linguistic fluency. As an example, many people in contemporary society--including highly educated people--go to lawyers when buying a house to understand a contract to receive clarification on the implications of signing such a technical legal document. In a similar manner, reasonable listeners without knowledge of legal jargon living at the time of the Constitution’s drafting and ratification may have misunderstood many of its provisions. The view of the framers--and to a lesser extent, the ratifiers--of these constitutional provisions are the only individuals whose insights should matter since they were the ones who made these provisions law.

As mentioned earlier, original public meaning originalism is the belief that the original meaning of the text of the Constitution is determined by how a “reasonable listener of the public” at the time a constitutional provision was ratified would have unbiasedly understood that particular provision. (Barnett 2004, 92) The fact that non-lawmaker individuals central to this form of legal interpretation is a flaw of this legal philosophy. Even if a common citizen had understood what a provision meant, that citizen did not compose the text so their view should not be considered. The only role a citizen legally has in the lawmaking process is the electing of representatives to assemblies to craft laws. It is the representatives who have the job to craft the laws on behalf of the people. As aforementioned, the framers’ perspectives and to a lesser extent, those of the ratifiers matter by virtue of writing or ratifying the text,

respectively. For all these reasons, the original public meaning's philosophy should not be the governing stable interpretation of the Constitution.

The views of reasonable listeners, from the time periods of these constitutional amendments' ratifications can be of some interest for historical purposes. Their views should even be considered in determining the Constitution's original intent when gaps exist in research findings of the framers' and ratifiers' original intent. With those gaps, understanding what educated members of society would have understood to be the meaning of various provisions would give potential clues as to what the framers meant in the text they drafted. However, this should be used as a last resort. Therefore, if any educated English speaker's understanding of an amendment contradicts the findings of legal scholars from the approximate time period of the provisions' drafting and ratification, the findings of the legal scholars should take precedence. To reiterate previous points, the perspectives of "reasonable listeners" of the time period should not be the primary sources to consult for original intent and interpretation of any constitutional provision since such individuals were not involved in the writing of those documents and likely did not fully understand legal jargon.

It is important to note that the main reason for preferring original intent originalism is not because many of the framers themselves endorsed this method of constitutional interpretation, although this is true. Rather, it is because the principle of the rule of law itself requires such an approach in order for laws to be enforced. To be ruled by law and not by men means there should be one fixed interpretation across time, not a changing definition. If the people themselves had written the laws, then their views would reign supreme over all. It would not matter if some of the framers were to disagree with the original intent interpretation of the Constitution since the fundamental principle goes beyond mere individuals. It is the essence of making and

following the law itself. For example, James Madison said the following, “the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it rec[eived] all the authority which it possesses...” (Madison 1821)

There is overlap between what Madison believes and what is promoted here on how to correctly interpret the constitution. Both philosophies pertain to the overarching philosophy of originalism and agree that discovering the views of the ratifiers are crucial to understanding the original intent of constitutional provisions. However, there are some important differences between the two philosophies. However, those differences do not matter. It is important to understand the reason for interpreting the Constitution is not merely because one or even many of the framers wanted it to be interpreted a certain way. It should be interpreted a certain way because that is what the law is.

While original intent originalism is preferred in this research to other forms of originalism, the sources that original intent originalism uses need to be expanded in contrast to what is currently being consulted. For example, original intent originalists consult the legislative debates, contemporary legal sources from the time period, and the documents that influenced the framers. Certainly, these sources should be researched. However, legal dictionaries also need to be considered. Legal dictionaries should be consulted with determining original intent because 1) the Constitution is a legal document, and 2) the framers must have chosen to include specific words for a particular reason. (Boykin 2021, 248, 249) This is similar to a textualist approach to

interpreting the Constitution, and some people have stated that such an approach is important to determining the original meaning of the text.

IV: Research Methodology

The sources that are considered most crucial to interpret these constitutional provisions, are ranked in the following order by importance⁸: 1) the text; 2) historical context; 3) the congressional debates; and 4) the state ratification debates. The text is the most important source because it is the law itself; it rules over the government and the people. Historical context is crucial since it helps current researchers understand the climate in which an amendment was proposed as well as the way words were used to convey specific messages.

The congressional debates are also important in that they help determine the meaning of the words of the text. The text of the Constitution is the law, but the Congressional Debates assist in revealing to the public what the framers' intentions were in drafting and ratifying the various provisions in the Constitution. Since the Constitution did not become law until the states ratified it, the ratification debates are also important to research to help legal scholars understand the original intent understood by those ratifying the Constitution. Unless research brings to light evidence that proves otherwise, it can be assumed that the ratifiers of these Amendments interpreted the Constitution based on what the framers' interpretation of the Amendments were. However, if it is proven that such a scenario is not the case, then the interpretations of the ratifiers need to be incorporated in a way that does not

⁸ For narrative purposes in presenting the research, however, the results of the author's findings will not be in this order. The purpose of ranking these steps of researching the original intent is not to guide the reader on how future sections of this article will be structured. Rather, the purpose of ranking the order of importance of these sources is to demonstrate the method in which the author will come up with his determination as to the original intent of the Constitutional provisions being studied in this research.

contradict the views of the framers. The framers, being the ones who wrote the texts, have the ultimate say on these matters.

Therefore, as part of the original intent originalist methodology employed in this inquiry, the following methods when determining original intent will be utilized in the following steps⁹: 1) research the textual definition of the provisions to be studied, including consulting legal dictionaries to aid in discerning its meaning; 2), study the historical context of the amendments to be analyzed; 3), research the congressional debates to discover what the framers of these amendments said those provisions meant; 4), examine the sources that influenced the framers to write these amendments to the Constitution. Examples of such sources include works of philosophers, speeches of important figures, and prior laws on the books; 5), compare between the perspectives of the framers to those of the other legislators regarding the same clause to see if discrepancies in opinions exist between the two groups that should be considered when interpreting these amendments; and 6), consult the ratification debates among the states to learn each of their respective interpretations of the amendments, although if there are differences between the ratifiers and the framers, the framers would reign supreme.

If the words in the sources that influenced the framers (e.g. past laws, state constitutions, philosophical works) differ or contradict the words of the framers themselves on the conceptual framework of the constitutional amendments, the words of the framers will take precedence. The reason for this is as follows: according to the legal philosophy promoted in this paper, it is ultimately the original intentions of the framers (and only secondarily the ratifiers) that determine what the Constitution means. While philosophers have certainly influenced the framers, these philosophers

⁹ Please refer to footnote 8.

may have had some distinct or opposite opinions from those of the framers on certain issues. Therefore, the words of the framers are more important when compared to statements from philosophers influential on the framers.

For purposes of this research, it will be assumed that the original interpretation of what a constitutional provision means is that which is stated in official statements of the framers on the floor of Congress regarding its meaning. The legislature voted according to their understanding of what a provision meant. Their understanding inevitably derived from their interpretations of the statements made by those drafters speaking on the floor. It will be assumed that the words legislators used or the plain meanings of the words themselves are not esoteric in nature, according to the available evidence. There is every reason to assume, by virtue of using language in their common meaning to express their feelings, that the words people used are accurate interpretations of their views unless there is proof that there was an intent to deliver an esoteric message. In other words, the interpretations made in this research will inevitably have errors in it because of the lack of further documentation. However, it is the best decision possible to base the interpretation of constitutional provisions only according to the information that is available.

V. Literature Review

Research has been performed by originalists investigating the proper meaning of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment, but no consensus has been made as to their respective meaning. Legal Scholar Randy Barnett, professor of Georgetown University, claims that the Ninth Amendment is meant to protect individual rights that were not stated in the Bill of Rights. (Barnett 2006) Dr. Kurt Lash, legal scholar and professor of the University of Richmond, believes that the Ninth Amendment protects individual rights, majoritarian

rights, the rights to local self-government, and preserves federalism. He also claims that the Ninth rather than the Tenth Amendment protects the system of Federalism. Accordingly, Dr. Lash believes that federalism is best preserved through the Ninth Amendment instead of the Tenth Amendment (Lash 2008, 932-935)

Thomas B. McAfee, then-law professor at Southern Illinois University School of Law (William S. Boyd School of Law), believes that the Ninth Amendment protects “residual rights.” In other words, it protects people’s rights by limiting the power of the federal government. He does not believe that the Ninth Amendment refers to judicially enforceable individual rights not stated in the Constitution. (McAfee 1990, 1221-1224) Akhil Amar, a law professor at Yale University, believes that the Ninth Amendment is related to the Tenth Amendment in preserving federalism, and that it protects the collective right of the people “to alter or abolish government, through the distinctively American device of the constitutional convention.” However, Dr. Amar also believes that the Ninth Amendment has nothing to do with individual rights. (Amar 1998, 120) Finally, Russell L. Caplan, JD, from the Civil Division of the Department of Justice, believes that the only rights protected under this Amendment would be all rights mentioned in the state constitutions. (Caplan 1983, 227-228)

As for the Fourteenth Amendment’s Privileges or Immunities Clause, It is clear from this evidence presented that there is no consensus among originalist scholars as to what it means. Professors Randy Barnett and Evan D. Bernick said that “these [privileges and immunities from the privileges or immunities clause] were not whatever states say they are[, and] they were not all and only those rights that Republican members of the Thirty-Ninth Congress would agree among themselves to include on a list of such rights; nor were they all and only enumerated rights.”

(Barnett and Bernick 2021, 377) Kurt Lash, in contrast, claimed that “privileges and immunities” protects only “those rights enumerated in the citizen’s Constitution.”

Lash does not believe that the Privileges or Immunities Clause protects “unenumerated absolute rights.” (Lash 2019a, 591, 660) Akhil Amar advocates for what he called “refined incorporation”, which comprises of, as he called it, the merging of three “seemingly incompatible ideas” of zero incorporation, total incorporation, and select incorporation. (Amar 1992, 1196)

It has been demonstrated that research from an originalist perspective has been performed to determine the original meaning of these amendments. The aforementioned quotes all come from prominent originalist legal scholars. However, no such research has been performed from the lens of original intent originalism. In fact, Barnett, in his work, explained that original intent originalism inadequate in comparison to public meaning originalism (Barnett 2004, 89-93; Barnett & Bernick 2021, 6) Kurt Lash did not say what form of originalism he employed, but he has criticized original intent originalism in his work (Lash 2010, 1246-48; Lash 2019, 678) Therefore, it is safe to say that he does not subscribe to that legal philosophy. Thomas McAfee did not specify what form of originalism he identifies with, but did criticize originalists who believe in an “affirmative rights” reading of the Ninth Amendment. (McAfee 1990, 1316-1319) All this information underscores that new research--utilizing original intent originalism with a legal analysis perspective--is needed to determine the correct original interpretation of these Amendments.

Before analyzing the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause, it should be noted that this research investigating these two provisions of the Constitution using original intent originalism is due to the personal interest of the author. Both sections deal with unenumerated rights:

constitutionally protected rights which are not stated explicitly in the Constitution. Many, but not all legal scholars believe in the concept of unenumerated rights in the Constitution. Therefore, it is important to determine through research whether unenumerated rights in the Constitution exist. Since original intent originalism has not been used to answer this question, it is important attempt to interpret both the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause using the framework of original intent originalism as described.

VI. Original Intent of the Ninth Amendment

A. Historical Context

As noted by legal scholars Randy Barnett and Louis Michael Seidman, “Although there is much dispute among constitutional scholars about the meaning and legal effect of the Ninth Amendment, there is consensus about its origin.” (Barnett and Seidman) Specifically, the origin of the Ninth Amendment was the debate over whether to include a Bill of Rights in the Constitution. This controversy served as one of the reasons why the Constitution itself was heavily disputed for many months before its ratification.

There were many who supported a constitution without a bill of rights. For example, Alexander Hamilton said that “the Constitution is in itself...a BILL OF RIGHTS.” He further added that “the people surrender nothing; and as they retain everything they have no need of particular reservations.” (Hamilton 1787, Federalist Papers #84) In other words, Hamilton thought that the Constitution was already a bill of rights. Therefore, no additional bills of rights were needed. In another example, James Wilson, an influential Founding Father from Pennsylvania, said that a bill of rights “would be not only unnecessary, but preposterous and dangerous” and “highly imprudent.” He then elaborated the following, “If we attempt an enumeration [of

rights], everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration [of rights] would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.”

(Wilson 1787, 436) In other words, Wilson feared that rights neglected to be enumerated in the Bill of Rights would be treated as being unprotected by the Constitution and therefore subject to congressional discretion. This would directly threaten the liberties of the people.

In contrast to the views espoused by Hamilton and Wilson, Patrick Henry, another founding father, was against the Constitution's ratification due to its lack of a bill of rights. In fact, Henry hoped that Virginia would either reject the Constitution outright or ratify it with the condition of amendments so that other states could follow suit. (Lakunski 2006, 66) Besides Henry, others also opposed the Constitution for not approving a bill of rights. Though the Constitution was ultimately approved by the required states, many people were not happy with the non-inclusion of the Bill of Rights. The margins for some of these states in support of ratification were very close. For example, the margins for the last three states in ratifying the Constitution leading up to the debate over the Bill of Rights (which were New Hampshire, Virginia, and New York) were 10, 10, and 3 respectively. (Vile 2012, 145; Hofstadter, Miller, and Aaron 1957, 136)

B. Congressional Debates

The context surrounding the approval of this second U.S. Constitution despite a lack of inclusion of a Bill of Rights led James Madison to say in Congress that “[Despite] the ratification of this system of government by eleven of the thirteen United States,...there is a great number of our constituents who are dissatisfied with [the Constitution].” Certainly, this is true, based on the evidence just presented.

Because Madison wanted to ameliorate conditions, he proposed that “We ought not to disregard their inclination, but on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution.” It is evident that Madison was influenced to promote the inclusion of a bill of rights to a constitution to prevent friction and faction among many leaders in the young country. He was initially skeptical of having a bill of rights, believing that it was not necessary and that it could even be dangerous (Labunski 2006, 62). Eventually, Madison was willing to support a bill of rights, whether it was for political reasons or because of an ideological conversion. (Labunski 2006, 62; Finkelman 1990, 328)

In a speech to Congress given by James Madison when promoting the addition of a bill of rights to the Constitution, he stated that one of the strongest arguments against this addition was the belief that “by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.” In response, he believed that such a situation “...may be guarded against” and invited Congress to refer to the last clause in the fourth resolution he had just proposed. (Annals of Congress 1789, 456) That clause read that “The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” (Annals of Congress 1789, 453) In other words, Madison said that to counteract the concerns of having a Bill of Rights, it would be needed to have an

amendment protecting all other rights not explicitly enumerated from government infringement.

When the Ninth Amendment was officially being debated, the proposed amendment stated the following, “The enumeration of the constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The word “construe,” according to Samuel Johnson’s Dictionary of the English Language, means “To range words in their natural order; to disentangle transposition” or “To interpret; to explain; to shew the meaning” (Johnson 1785 Vol. 1, 465). Although both of these definitions appear to be related to one another, the more likely definition of the word is the second one, given the way the Ninth Amendment is structured. The word “disparage,” according to the same English language dictionary, has numerous meanings. However, the most likely meaning of the word “disparage” based on the context is “to treat with contempt; to mock; to flout [or undermine]; to reproach.” (Johnson 1785 Vol. 1, 614)¹⁰ Relying solely on the text, the Ninth Amendment appears to state that the enumeration of rights in the constitution should not be interpreted to deny, treat with contempt, mock, or undermine what the people consider to be rights despite not being explicitly in the Constitution.

Representative Gerry of Massachusetts (Billias 1976, 218-235), proposed that the word “disparage” be replaced with the word “impair,” since the word “disparage,” according to him, “was not of plain import.” (Annals of Congress 1789, 783) According to how the phrase “plain import” has been used, it appears that the

¹⁰ The reason for this assumption (albeit a strong assumption from the author due to the examination of other interpretations) is that the other possible definitions of the word in that dictionary include the following: One meaning means to “To marry one to another of inferior condition.” Other meanings include “to match unequally; to injure by union with something inferior in excellence,” “to injure by comparison with something of less value,” and finally “to bring reproach upon; to be the cause of disgrace.”

respective phrase means the “plain meaning” of a text.¹¹ Therefore, it appears that according to Rep. Gerry, the word “disparage” was not sufficiently “clear” to his satisfaction to convey what he thought was the intent of the Ninth Amendment.

The word “impair” according to Samuel Johnson’s Dictionary of the English Language, 1785 edition, has various meanings. Those meanings include “to diminish; to injure; to make worse; to lessen in quantity, value, or excellence,” or “to be worn out,” or “to be lessened or worn out.” (Johnson 1785 Vol. 1, 1006). Based on the text of the Ninth Amendment, it appears that the most likely definition(s) of “impair” are “to diminish,” “to injure,” or “to lessen in quantity.” Therefore, it appears that Rep. Gerry wanted the proposed amendment to affirm unambiguously, to his satisfaction, that the Bill of Rights’ list of rights could not be interpreted in a way to deny or diminish rights considered by the people to be theirs.

Nevertheless, the House of Representatives did not agree with Rep. Gerry. In fact, his motion was defeated. The Ninth Amendment subsequently passed the House, on August 17, 1789. There is no record of the actual vote totals. (Annals of Congress 1789, 783)

In the Senate, there was not much debate either on the Ninth Amendment. This Amendment was recognized at the time as the “fifteenth article proposed by the House of Representatives,” as there were seventeen proposed amendments to the Constitution by the House of Representatives at the time this amendment was being

¹¹ In *Marbury v Madison*, Marshall says that “When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish;... the *plain import* of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original.” In this quote from the Chief Justice, it appears that “plain import” seems to mean “plain meaning.” In Michael L. Geis, *On Meaning* he says that “Unfortunately, the Court seems too little to appreciate how rarely the language comprising disputed legal texts...have a “plain meaning” or a “plain import” or “clear import,” all terms the Court uses.” It appears that according to this professor, it is clear that “plain import” is synonymous with “plain meaning.”

debated. (Annals of Congress 1789, 74) There was a proposal to add the following words to the amendment:

“That the General Government of the United States ought never to impose direct taxes but where the moneys arising from the duties, impost, and excise are insufficient for the public exigencies, nor then... until Congress shall have made a requisition upon the States to assess, levy, and pay their respective portions of such requisitions; and in case any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such State’s proportion, together with interest thereon, at the rate of six per cent per annum, from the time of payment prescribed by such requisition.” (Annals of Congress 1789, 78)

However, the aforementioned proposed change to the Amendment was defeated. (Annals of Congress 1789, 78). On September 9, 1789, the 15th Article proposed by the House, appeared to pass the Senate, given that the legislative record stated that the Senate “agreed to part of [the proposed amendments], and disagreed to others;...” (Annals of Congress 1789, 80) Since this proposed amendment was eventually sent to the states, it is clear that this amendment was one of those amendments that passed the Senate.

Finally, one speech from the congressional debates by James Madison on the bill to establish a National Bank has been used by some legal scholars to help determine the original intent of the Ninth Amendment. (Lash 2004, 333-336) This speech should be considered as a less important (but still useful) source because at the time this speech was made, in the words of professor Randy Barnett, the Bill of Rights was still “pending” in the states at this time (Barnett 2006, 13). This means the views espoused by this speech had no effect on the ratifiers’ understanding of the framers’ intent of this Amendment on the states which already ratified the Bill of Rights. For in the remaining states that would need to approve the Ninth Amendment before it became law, this speech could have contributed to these states’ ratifiers’

understanding of the framers' views of the Ninth Amendment although not exclusively, as there was the major speech, of course, on the need for a Bill of Rights with an explanation of what is now the Ninth Amendment, which probably served as the main tool for the ratifiers in determining the original intent. Therefore, this speech has a contributing but less important role in determining the original intent of the Ninth Amendment.

With regards to the creation of a national bank, Madison was strongly opposed to its creation, arguing that such a move was unconstitutional. Specifically, he said that "The latitude of interpretation required by the bill [to create a national bank] is condemned by the rule established by the Constitution itself." (Annals of Congress 1789, 1949) To further continue his point, the Annals of Congress narration said that "He read several of the articles proposed, remarking particularly on the [Ninth] and [Tenth Amendments to the Constitution], the former, as guarding against a latitude of interpretation; the latter, as excluding every source of power not within the Constitution itself." (Annals of Congress 1791, 1951) It is therefore apparent here, combining the two statements mentioned previously, that the Ninth Amendment is also intended to not allow for the Constitution to be interpreted in a way that would strengthen the power of the federal government, and in doing so, infringe on the rights held by the people, even if those rights are not stated in the Constitution. Any interpretation of the text of the Constitution that is done by people in power for the purpose of justifying government actions that would infringe on the rights of the people both mentioned and not mentioned in the Constitution is unconstitutional. Although this reading is not as important as the interpretation from Madison's earlier speech on the need for a bill of rights, this is a contributing interpretation of the original intent of the Ninth Amendment.

C. Ratification Debates

Most states who ratified the Ninth Amendment had no recorded debate or motions that either revealed or led to changes in the meaning of the text of the Ninth Amendment. All states fall under this category except for Virginia and New Hampshire.¹² As such, no specific findings from any other state who ratified the Ninth Amendment will be presented in this article.¹³ No records exist from these states of any proposed word changes of what is now the Ninth Amendment. Furthermore, no record indicates that any state ratified the Ninth Amendment under the condition that it meant something different from the Congress's interpretation of it. Therefore, given the current evidence, according to this legal philosophy, it should be assumed that all state legislatures ratified the Ninth Amendment under the original congressional understanding on its meaning unless new evidence comes to light. The only state legislative records which could not be found by the author were those of the Pennsylvania State Legislature. Upon inquires of the author, an archivist from the State Archives of Pennsylvania stated that no online or hard copy records of the Bill of Rights' ratification are available. (Reigh 2022) In the case of Virginia and New Hampshire, sections of their respective legislative records either reveal the meaning of the Ninth Amendment or could lead/or have led to any change in the meaning of its text. As a result, these findings will be presented in this article.

¹² The states that fall under this category were New Jersey, Maryland, Delaware, North Carolina, New York, Vermont, and Rhode Island. Massachusetts considered the Ninth Amendment, but ultimately did not ratify it at this time. Nevertheless, Massachusetts was studied to determine whether any of their records provided some evidence as to the Ninth Amendment's original intent.

¹³ However, for the interested reader, the findings from the statements are found in the following Journals from the following states: New Jersey (New Jersey General Assembly 1789 22, 26-27, 80); Maryland (Maryland State Archives 2000, 367); North Carolina (North Carolina House of Commons 1789, 251, 260, 266, 271, 287, 293, 318; North Carolina Senate 1789, 616, 664); South Carolina (South Carolina Senate 1790, 13, 38-42; Stevens, and Allen 1984, 301-302, 303, 305, 349-351, 374) Delaware (Delaware State Archives); New York (New York House of Assembly 1791, 48, 49; New York Senate 1790, 24, 27); Vermont (Vermont State Papers, Part 5 of vol. 2, 6, 71, 74, 82, 87-88); Rhode Island (Rhode Island State Archives, 2, 3, 6, 10); Massachusetts (Massachusetts Senate 1790, 23, 26; Massachusetts House 1790, 209, 217; Kyvig 1996, 107-108). See References section for the full citation of all these sources.

In Virginia in 1789 when the Bill of Rights was first debated, there were statements made that provide clues as to this state's original interpretation of the Ninth Amendment. Some context needs to be presented before discussing the proceedings of the Virginia Legislature. When the Bill of Rights was debated in Virginia, James Madison wrote to George Washington stating his concern of Edmund Randolph's opposition to the Ninth Amendment.¹⁴ According to Madison's letter, Randolph's "principal objection was pointed [against] the word "retained" in [this]...proposed amendment." (Madison 1789) Madison's understanding of Randolph's arguments was as follows:

"as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe and more consistent with the spirit of the 1st & 17th [amendments] proposed by Virginia that this reservation [against] constructive power, should operate rather as a provision [against] extending the powers of [Congress] by their own authority, than a protection to rights reducible to no definitive certainty." (Letter from James Madison to George Washington, Dec. 5th, 1789)

It appears from this letter excerpt that according to Madison, Randolph was concerned that the rights of the people not mentioned explicitly in the Bill of Rights were not adequately protected by the Ninth Amendment. Randolph felt that the best way to protect those enumerated rights was to limit government power rather than protect certain rights.

Furthermore, there is a record of a majority faction of state delegates who stated their opposition to the Ninth Amendment. This group said that if "the [ninth] amendment is meant to guard against the extension of the powers of Congress by implication, it is greatly defective." They further indicated that "as it respects personal

¹⁴ Edmund Randolph at this time was the former Governor of Virginia, so his opinions would have a major impact in the Commonwealth during this period.

rights, [the amendment] might be dangerous, because should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have retained; and such as could not from that instrument be proved to be retained by them, they might be denied to possess.” (Virginia Senate 1828, 63-64) In short, the delegates believed that if the amendment was intended to either limit government power or protect citizens rights, which in effect is the same thing, it is not going to adequately perform its intended purpose. They maintained that the amendment would make it more difficult for the citizens to defend their rights that are not enumerated in the Constitution for the very fact of not being explicitly mentioned and protected. For example, if citizens would need to defend their rights, they would be unable to point out those rights which are theirs and thereby not be able to defend them. (Virginia Senate 1828, 63-64) All rights not explicitly stated in the Constitution would simply not be protected, according to these delegates.

In the end, the Virginia State Legislature did not approve the Bill of Rights in the legislative session of 1789. The House of Delegates ratified the first ten of twelve amendments but rejected the eleventh and twelfth Amendments (what is currently the Ninth and Tenth Amendments) by November 26, 1789 (Randolph 1789), and the Senate voted to delay consideration until next year what is now the first, sixth, ninth, and tenth Amendments on December 8th, 1789. (Virginia Senate 1828, 51, 52) Because of division among the two chambers, the Bill of Rights was not ratified this year (Kyvig 1996, 108, 105) There were state senators who voiced their disappointment with the Senate’s refusal to ratify the Ninth Amendment. They said that the Amendment, “though not called for by any of the adopting States,” had the function to “quiet the minds of many, and in no possible instance productive of danger to the liberties of the people...and because the constitution gives to Congress a

right to propose, when two-thirds concur, amendments to the state legislatures for their ratification.” In other words, they thought that this amendment would satisfy the desires of certain people as to protections of constitutional rights, and this statement makes it abundantly clear that the supporters of the Ninth Amendment opposed the changes the actions of the State Senate to not ratify it. (Virginia Senate 1789, 66-67).

In 1791, however, the Bill of Rights passed the Virginia Legislature. The House of Delegates ratified the Bill of Rights at or before December 6, 1791, and the State Senate both ratified the Bill of Rights on December 15 of the year. (Virginia Senate 1791, 60) The Ninth Amendment was therefore ratified by the Commonwealth of Virginia.

In the State of New Hampshire, on Wednesday, January 20, 1790, the Senate initially voted to ratify all of the original 12 Amendments to the Constitution except the first two amendments. They then voted with an amendment to the proposal, which was to ratify all the Bill of Rights minus the 2nd Amendment. (New Hampshire Senate 1790, 655) On January 23, the Senate read 11 of the 12 original proposed Amendments, and were agreed to. (New Hampshire Senate 1790, 663) On January 25, the proposed Bill of Rights was approved by the Senate for final passage after these proposed amendments were "read...and maturely considered..." (New Hampshire Legislative Assembly 1790, 732) Although the legislative journals did not record the debates, it is clear from this quote that active discussion of these Amendments took place. Such debates, if recorded, would have given us additional insight as to what the Ninth Amendment could have meant to them. However, as we do not have those records, we can assume that New Hampshire's interpretation of the Ninth Amendment's interpretation was the same as that of Congress. This is because there

was no motion recorded that stated that the Amendments were ratified only under the condition of interpreting the Ninth Amendment differently from that of Congress.

It appears that after studying the congressional debates, the textual definition, the historical context, and the state ratification debates, the original interpretation of the Ninth Amendment is that the enumeration of the rights in the Constitution should not be used to justify the federal government in removing any other rights of the people that were considered to be rights at the time the Ninth Amendment was written not considered to be explicitly stated in the Constitution. The text makes this clear when it says that it should not be “construed to deny or disparage other rights retained by the people.” Therefore, any rights widely considered as such by the general populace of the United States at the time the Ninth Amendment was written are to be protected. Examples of these rights could be those that are enshrined in the Bills of Rights of the State Constitutions not found in the US Constitution. However, it could also include any rights perceived by the people to be general rights. These rights can be discovered when looking at the historical context of the time period, and this could tell us what the people at large thought their rights were as Americans but which were not stated explicitly in the Constitution. The rights under this specific category cannot be determined in this research. Rather, this research provides direction as to what should be researched to determine what is included in those additional protected rights.

As a result of this research, Akhil Amar’s view that the Ninth Amendment has nothing to do with individual rights and protects only the collective right of the people to “abolish a government” cannot be correct. Russell Caplan's view that the only rights protected under this Amendment would be all rights mentioned in the state constitutions is also not a view the author agrees with. (Caplan 1983, 227-228) The reason is that, as mentioned before, there could be many rights considered by the

people by the time to be so obvious that it is not needed to be mentioned in the constitution, yet it's considered commonplace. This was actually part of the argument the Federalists had as to why a Bill of Rights was not necessary. In the debates regarding the First Amendment, Rep. Sedgwick said that he thought that when stating in the First Amendment the freedom of speech, he thought it would not be necessary to include the right to assembly. The reason was that if someone exercises a freedom of speech, that would necessarily be applied to assembling together. When Rep. Benson said the committee responsible for proposing the Bill of Rights thought that the right to assembly was inherent in the people and should therefore be included, (Annals of Congress 1789, 759) Rep. Sedgwick replied, saying that "if the committee were governed by [the] general principle [of enumerating all these inherent rights held by the people, then] they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat is he pleased; that he might get up when he pleased, and go to be when he thought proper;..." Sedgwick continued, saying that "he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a government where none of them were intended to be infringed..." (Annals of Congress 1789, 760) The Annals of Congress further reported that he essentially said that "if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he please; the he might get up when he pleased, and go to bed when he though proper." (Annals of Congress 1789, 759-60) So what he's saying is that there are many rights that people hold as protected which are not explicitly stated in the Constitution. This means that just because rights are not explicitly stated in the many different state constitutions at the time period of the Ninth Amendment's ratification,

(or even in only a few of the states for that matter), it does not mean that these rights are not supposed to be protected either. Many other rights are supposed to be protected as well, in other words. For sure, natural rights are protected in this amendment, as these were rights that were generally accepted to be considered protected according to those people.

The conclusions reached in this research would prove mostly correct the conclusion reached by Dr. Barnett that the Ninth Amendment protects unenumerated individual rights, and that there is a “presumption of liberty” in the Constitution from it. This author also believes the unenumerated individual rights are intended to be protected, as well as the belief in a presumption of liberty, for the most part. The “presumption of liberty” should include a caveat, which is the presumption of Christian morality. While this research did not explore the religiosity of the American people during the general time period of early American History in specificity, it has been documented that there was strong religiosity in the Christian religion among the people in early America (Hofstadter, Miller, and Aaron 1957, 57, 77-78), with a likely strong sense of Christian morality attached to this influence. (Hofstadter, Miller, and Aaron 1867, 77) Although more research is needed to confirm this, it would be safe to say, given this understanding of Christian religion and practice among early America, that the people in early America would not consider as protected rights behaviors that were considered to be sinful behavior at that time given their religiosity. This would have major implications as to the interpretation of the Ninth Amendment.

VII. The Original Intent of the Privileges or Immunities Clause of the Fourteenth Amendment

A. Historical Context

It is apparent from the evidence provided by many legal scholars and the congressional debates, that an important part of the context for the Fourteenth Amendment's Privileges or Immunities Clause was the passage of the Civil Rights Act of 1866. (Congress's Power 2015, 1216, 1220-1221; Barnett and Bernick 2021, 128) As it pertains to what would eventually become the Fourteenth Amendment's Privileges or Immunities Clause, the Act says, in part, "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; and 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, 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." (Sangar ed, 1868, 27) So this Act gives all Americans, including the former slaves, American citizenship, and bestows upon all Americans the abovementioned rights. However, before declaring indefinitely what rights Americans gained as a result of this act, it is important to examine the congressional debates of this to see what the original intent of this act was.

On June 12, 1866, Sen. Trumbull introduced Senate Bill 61, which he characterized as a bill "to protect all persons in the United States of their civil rights, and furnish the needs of their vindication." In his speech promoting the bill on

January 12, 1866, he said that “[The bill] declares 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...” He continued his speech, saying that “...the inhabitants of every race and color...shall have the same right to make and enforce contract, 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...” He also referred to this bill as “affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color.” The bill would also call for an increase in judges in order to handle any cases arising from alleged violations of this proposed law, “so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of the act” or, in other words, to bring out swift justice among the people.” This is also supposed to ensure that the military and all federal authorities “insure a faithful observance of the clause of the Constitution which prohibits slavery; in conformity with the provisions of this act. (Congressional Globe 1866, 39th Congress 1st Session, 211)

Senator McDougall asked Sen. Trumbull to explain what he meant when it said “civil rights” in his bill, as he said that the bill will protect the civil rights of African Americans as well as the white Americans. Sen. Trumbull, in response, repeated the list of rights mentioned in the Bill, as he defined the term “civil rights” as the rights that would be protected under this bill. He said that those rights were “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.”

Sen. Trumbull referred to civil rights as “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.” Sen. McDougall asked whether these civil rights included political rights, Sen. Trumbull responded that it does not, that “this bill has nothing to do with the political rights or status of parties.” (Congressional Globe 1866, 476) So this means that this proposed Civil Rights Act was not intended to give voting rights, including to blacks. (Congressional Globe 1866, 599) This bill was not meant to apply to the Indians who were living in their separate tribes, as they were considered to be separate nations from the other Americans and were considered to be foreigners by law for that reason (Congressional Globe 1866, 498)

To summarize, the Civil Rights Act of 1866 aims to provide “reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery in involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, ...” (Sangar ed, 1868, 27) Trumbull made clear that this bill was intended to “give effect” to the Thirteenth Amendment eliminating slavery. (Congressional Globe 1866, 474) According to the debates, it appears that the intended meaning of the text is just the words of the text itself. All the protected rights that were supposed to be protected in this bill were supposed to be those rights protected, according to their literal meaning of the text. The rights that were not meant to be protected were not protected. The Senate passed the Civil Rights Bill 33-12, with 5 absent or not voting after amendments were made to the bill but did not change the character of the rights protected in it (Congressional Globe 1866, 606-607) On March 15, 1866, the House passed the bill 111-38, with 34 being absent (Congressional Globe 1866, 1367) Although President Andrew Johnson vetoed the bill on March 27, 1866 (Barnett and

Bernick 2021, 124), the Civil Rights Act became law after both houses overrode the veto. The Senate overrode the veto by a 33-15 vote (Congressional Globe 1866, 1809) and the House overrode the veto by a 122-41 vote (Congressional Globe 1866, 1861)

Although the bill passed, there was opposition to the proposed bill, saying that, as one of the reasons, that passing this law would be unconstitutional because Article I does not give Congress the authority to makes the former slaves citizens, and that the Thirteenth Amendment was only designed to eliminate slavery except as a punishment for crimes, and that it was pointless to say in the Thirteenth Amendment the Congress could enforce the Thirteenth Amendment by appropriate legislation, as eliminating slavery was the only thing that needed to be fulfilled (Congressional Globe 1866, 499, 476, 475)

Even among supporters of the bill, there was some concern about whether Congress had the ability to pass such legislation under Article I, despite the fact that a major point among the supporters was that the Thirteenth Amendment gave Congress to pass “appropriate legislation” to enforce the abolition of slavery. (Rosen 2007, 79) Rep. Bingham, the framer of the Privileges or Immunities Clause, was one of those people. (Curtis 1986, 80) There was also concern among the Republicans in Congress that the Democrats, if they returned to power in Congress, would simply repeal this law, which would take away those rights given to the former slaves (and of course all Americans). (Goldstone 2011, 22-23) As a result, Rep. Bingham crafted a part of the Fourteenth Amendment, the Privileges or Immunities Clause, that would protect these rights given in this law in the Constitution, so it cannot be easily repealed.

B. Congressional Debates

Representative John Bingham of Ohio was the sponsor of the Privileges or Immunities Clause in the House of Representatives and was the author of the clause. As such, he deserves to be its most important authority on its interpretation. (Barnett and Bernick 2021, 137) He began his speech on the House floor by saying that this amendment will deliver "by express authority of the Constitution to do that by congressional enactment with hitherto they have not had the power to do," which 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." (Congressional Globe 1866, 2542) In context, he is saying that Congress did not have the power to protect the rights listed in the Civil Rights Act of 1866 by that act alone, but this part of the Amendment to the Constitution will give Congress that power.

Rep. Bingham clarifies that the states would not lose any power to the federal government in this Clause because the Constitution never allowed the state governments the right to deny these privileges and immunities to their respective citizens. Bingham includes in this definition of "privileges and immunities" to be the "right to bear true allegiance to the Constitution and laws of the United States" and "to be protected in life, liberty, and property." (Congressional Globe 1866, 2542) Also included as a privilege of a US citizen is the "franchise of a federal elective office...as is the elective franchise for choosing Representatives in Congress or presidential electors." However, he did clarify that franchise is "one of the privileges of a citizen of a Republic [that] is exclusively under the control of the states." (Congressional Globe 1866, 2542)

One valuable ally to Rep. Bingham in the House was Representative Thaddeus Stevens of Pennsylvania. (Andreasen 2000, 75) (Congressional Globe 1866, 2459) He said the following about the proposed Fourteenth Amendment: “this [Fourteenth] amendment supplies that defect [which is that the Constitution only limits congressional laws and not state laws], and allows Congress to correct the unjust legislation of the states, so far that the law which, operates upon one man shall operate equally upon all.” In response to claims that the Civil Rights Act of 1866 already covered these protections that were then being considered when drafting this amendment, Stevens responded by saying that “that is partly true, but a law is repealable by a majority.” (Congressional Globe 1866, 2459) For other legislators, the Civil Rights Act preserves some privileges and immunities as well as provide equal protection of the laws. However, if such law were repealed, then there would no longer be protected privileges and immunities by the federal government. Furthermore, if there is an amendment to the Constitution rather than merely law that protects these rights, a legislative repeal would be nearly impossible to be successful. This was why the passage of the Privileges or Immunities Clause as part of the Fourteenth Amendment was important for these lawmakers.

It is interesting to note that Rep. Stevens did not offer any different interpretation of the Privileges or Immunities Clause from that of Rep. Bingham. If Rep. Stevens had a contradicting view from that of Rep. Bingham regarding the meaning of the 14th Amendment, he would have shared it in his speech. However, Stevens did not state any contradictory view. It can be assumed from this evidence that Rep. Stevens supported Rep. Bingham’s intentions on what the Privileges or Immunities Clause would mean when passed.

The Fourteenth Amendment passed the House on May 10, 1865 by a 128-37 margin, with 15 not voting (Congressional Globe 1866, 2545), but it needed to pass the Senate in order for the Amendment to get passed and be subsequently sent to the states. Senator Jacob Howard, from Michigan, was the Senate sponsor of the Amendment, and is therefore another one of the most important voices on the meaning of the Fourteenth Amendment. Howard interpreted the Clause to mean that the states would be prevented from infringing on the privileges and immunities of the United States. What this means, according to Howard, is that it will "restrain the power of the states and to compel them at all times to respect these fundamental guarantees. (Congressional Globe 1866, 2766) This means that the citizens all have Privileges and Immunities which will be protected wherever they go in the United States." (Congressional Globe 1866, 2765)

Sen. Howard had no intention of giving a comprehensive definition of the term "privileges and immunities." However, he did cite an opinion from Justice Washington in *Corfield v. Coryell* which offers examples of what privileges and immunities are according to Article IV Section 2 of the Constitution. Among many purposes, Justice Washington said that the Privileges and Immunities Clause protects those that "are, in their nature, fundamental," and "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." While Justice Washington had no intention of giving a complete list, he said that some privileges and immunities may include the following:

- "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; ...
- an exemption from higher taxes or impositions than are paid by the other citizens of the state; and [maybe]
- the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised' *may* also be considered to be a privilege or immunity". (Congressional Globe 1866, 2765)

In addition to these privileges and immunities expounded by Justice Washington, Sen. Howard also said that "the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for redress of grievances, a right appertaining to each and all the people; [and] the right to keep and bear arms [among others]..." should also be considered as privileges and immunities. Although Howard quoted the abovementioned opinion from *Corfield v. Coryell* that the elective franchise "may be considered to be a privilege and immunity" under certain conditions, he did say that voting for one's elected officials is not considered one of the protected privileges or immunities in this specific amendment. He said that "the first section of [the Fourteenth Amendment] does not give to either [person] the right of voting. The right of suffrage, is not, in law, one of the privileges and Immunities thus secured by the Constitution." (Congressional Globe 1866, 2766)

In the same floor speech, Sen. Howard said that according to the Court, the Constitution proscribes limits to the federal government only and does not apply limits on the state governments. According to Sen. Howard, neither the articles in the Constitution nor the Privileges or Immunities Clause of the Fourteenth Amendment grant Congress the power to enforce these guarantees. Rather, such power is granted in the fifth section of the Fourteenth Amendment, which says that “the Congress shall power to enforce by appropriate legislation the provisions of this article.” (Congressional Globe 1866, 2767)

Sen. Wade disagreed with Sen. Howard’s objection to including suffrage as a part of the privileges and immunities of the several states. (Congressional Globe 1866, 2769) Wade believed that Blacks as well as those in the South who opposed the Southern secession against the North in the Civil War, “should not be excluded from the right to vote in elections.” Sen. Wade clarified that he was not angered with what the Senators’ committees proposed, given what they had been receiving in opposition from outside. He only asked that they make some additional adjustments to improve the amendment. After the Senate finished debating the amendment, the Privileges or Immunities Clause--as written in the Fourteenth Amendment--was passed on June 8, 1866 by a 33-11 vote, with 5 people absent. (Congressional Globe 1866, 3042)

C. State Ratification Debates

For the purposes of determining original intent, the only ratification debates that will be analyzed will be from the states that either ratified or rejected the Fourteenth Amendment before it was officially ratified in the Constitution. According to the methods used in this paper, it should be assumed that the states with no legislative debates had the same interpretation of the amendments as that of the framers in Congress. The reason is because of a statement from the Governor of

Wisconsin to his legislature in promoting the Fourteenth Amendment. It reveals implicitly how states are notified (or should be notified)¹⁵ on what Amendments discussed by Congress intended to mean could reveal some additional insight about the original interpretation of the Fourteenth Amendment. He stated that “This resolution has for many months been before the people, and during that time its several sections has been for many months before the people, and during that time its several sections have been made the subject of earnest discussion.” He continued saying that “The People of this state, are thoroughly familiar with its provisions, and with full understanding of them in all their bearing, have by an overwhelming majority declared in favor of its immediate ratification. It is formed the basis of the campaigns, and been made the issue of the late election, in every northern state, and most of you are here to-day, because your constituents knew that you deemed this amendment just and necessary.” (Wisconsin Senate 1867, 32) The Wisconsin Governor declared that the people of his state were well aware of the Fourteenth Amendment’s meaning. This means that the state legislators must have known what these provisions meant, and would have voted according to their understanding of the amendment’s meaning.

Someone had to have informed the people of the state what the Fourteenth Amendment was purported to mean in order for the public to learn about its meaning and form their views on it. It had to mean that the Congress shared this information with the people. Perhaps the newspapers did so, but they would have had to get such information from those who were actually debating the amendment, which were the Congressmen and Senators. In other words, for the state legislators, the Congressmen’s views were key to understanding the meaning of the Fourteenth

¹⁵ Please see footnote 20 for an explanation of the principle “should be notified.”

Amendment. Therefore, the statements from Congressmen that publicly state the meaning of the Fourteenth Amendment should be regarded as its official original intent insofar as no additional information stating the contrary is discovered. Even if this amendment were to have an esoteric meaning or its lawmakers had a different interpretation, those findings would need to be verified before scholars today can accept a new interpretation of this amendment's original intent. As part of the evolving nature of originalism, the original interpretation of a provision is determined according to the evidence available. Such interpretation should not change until new evidence comes to light.

Congress had a clear view on what the Privileges or Immunities clause meant. Representatives from states who voted for the amendment shared--with their respective state level legislators who were about to vote--on the amendment's meaning at the time the Congress approved it. There are, however, claims from Lambert Gringras, PhD student in 1996, who said that the states did not know how Congress interpreted this clause to incorporate the Bill of Rights against the states. (Gingras 1996, 64) However, the source he used to justify that statement, in the next page of that source, said that "it may be inferred that [incorporation of rights to the Constitution] was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, was secured by it." (Flack 1908, 153-154) In other words, even though it may not have been explicit on what the Fourteenth Amendment was going to accomplish, it can still be implied that what was promoted in the states was an amendment to the Constitution that would incorporate the Bill of Rights against the states. Therefore, it can be stated with confidence that the states were aware of the intended impact of the Privileges or Immunities Clause from the framers in Congress. Therefore, Gringras

was incorrect in stating that “Flack produced evidence that showed...that the framers’ intent to incorporate the Bill of Rights remained widely unknown in the states.”

(Gingras 1996, 64)

If the States do have records, then those should be taken into account as to the original intent of the Privileges or Immunities Clause. If there is a difference between the States and the Congress as to what the Privileges or Immunities Clause means, then the Constitution needs to be interpreted in a way that brings the interpretations together without undermining the views of the framers. If there is only a minority of states who had a different opinion from that of the framers and of the rest of the states, then the views of the latter two groups would reign supreme.

There were states that ratified the Fourteenth Amendment with either no recorded debate or with no motions that either revealed any meaning of the Fourteenth Amendment or that led to any change in the meaning of the Text of the Fourteenth Amendment’s Privileges or Immunities Clause. The States that fall under this category were Illinois, West Virginia, Minnesota, Nevada, Rhode Island, Massachusetts, Florida and South Carolina. As a result, none of these specific findings from these states will be presented in this article.¹⁶ However, there were other states which either had debates or had motions in the legislature, gubernatorial statements, or any other statements that could either reveal the meaning of the Privileges or Immunities Clause or could lead/or have led to any change in the meaning of the text of the Clause. Below will first be a brief history of the

¹⁶ However, for the interested reader, the findings from the statements are found on the following legislative journals from the following states: Illinois (Illinois Senate 1867, 47-49; Illinois House 1867, 54-55, 154-155); West Virginia (West Virginia Senate 1867, 23-24; West Virginia House 1867, 11); Minnesota (Minnesota State House 1867, 25-26; Minnesota Senate 1867, 22-23); Nevada (Nevada State Assembly 1867, 19, 21, 25; Nevada Senate 1867, 26, 42, 47); Rhode Island (Carlson 2022; Rhode Island House 1867, 222, 266, 272-272; Rhode Island Senate 1867); Florida (Florida Senate 1868, 8-9; Florida House 1868, 8-9); South Carolina (South Carolina Senate 1868, 10-12; South Carolina House 1868, 46-47, 50); Alabama (Alabama House 1868, 9-10; Alabama Senate 1868, 10) See References section for the full citation of all these sources.

Ratification of the Fourteenth Amendment among those specific states that ratified the Fourteenth Amendment before it became part of the Constitution either initially or after initial rejection, of which there were either debates, motions in the legislature, gubernatorial statements, or any other statements that could reveal something about the original intent of the Privileges or Immunities Clause. The only state which ratified the Fourteenth Amendment of which no findings could be found was that of Arkansas. The author has requested information on two occasions from Arkansas State Archives but with no success.

In the state of Connecticut, on May 23, 1866, Mr. Ballard from the Senate proposed a resolution that would “urge the ratification of ‘such’ amendments to the Constitution of the United States “as will secure to the white men of Connecticut a representation in Congress equal to that accorded to the white men of South Carolina.” (Connecticut Senate 1866, 145) He is likely trying to say that he wants to make sure Section 2 of the Fourteenth Amendment is included in the Fourteenth Amendment so that states like South Carolina would lose representation given the amount of confederates living in that state, thereby equaling Connecticut’s influential power in the Congress vis-a-vis South Carolina. From his perspective, Connecticut would stand to benefit from this amendment politically. When this resolution was being considered, Senator Fairman motioned to transfer this bill to the Joint Select Committee on Constitutional Amendments.” But this motion was defeated 9-11. (Connecticut Senate 1866, 145) After this vote, Sen. Bishop motioned to table the bill “for the purpose of printing,” but this motion was also defeated. (Connecticut Senate 1866, 146) The Senate then resumed consideration of the ratification resolution when the same Senator Bishop motioned add the following words to the proposed resolution: “and as will secure to the colored people of the State of South Carolina a representation in

Congress equal to that accorded to the colored people of the State of Connecticut.”

After this amendment was proposed, Senator Bond proposed to delay consideration of the resolution until the next day at 11am. This motion was agreed to and was “ordered to be printed.” (Connecticut Senate 1866, 146) On the next day, May 24, when the proposed resolution with that amendment was taken up, the Senate rejected that amendment. Then, Sen. Bishop proposed two further amendments. The first amendment would be to take out the phrase “white men of” from his first motioned amendment and in its place say “citizens of the United States residing in,” and the second amendment was to say, “and which shall also secure to the white men of New Haven, Hartford, Bridgeport, Norwich, and other large towns in this State a representation in the legislature of Connecticut equal to that accorded to the white men of Darien, Union, Lisbon, Prospect, and other small towns of this State.” Both of these amendments were rejected. (Connecticut Senate 1866, 157) Finally, the Senate voted on the adoption of the original amendment, and it was passed 10-8, with three senators not voting. (Connecticut Senate 1866, 158) On June 25, 1866, a motion was made to postpone consideration of the amendment until the people had an opportunity to vote in an election. However, that motion was defeated. The State Senate went on to ratify the Fourteenth Amendment 11-6. The Democrats in general who opposed the Fourteenth Amendment said that the federal government should not push the amendment while many of the states in the south were unable to participate in the amendment process in Congress because their representatives were not allowed to participate in Congress. (The American Annual Cyclopaedia 1867, 255; Connecticut Senate 1866, 375)

In the Connecticut State House, on June 26, 1866, the House received from the State Senate the proposed resolution ratifying the Fourteenth Amendment.

(Connecticut House 1866, 383-385) A representative successfully motioned for the proposed Amendment to be discussed the next day at 10am. (Connecticut House 1866, 385) On June 27, when the House restarted discussion of the Fourteenth Amendment, Rep. Taylor motioned to postpone discussion of the Fourteenth Amendment until the next legislative session, which was rejected 84-107. Then, the House adjourned after there were remarks from the two representatives which may or may not have been related to the Fourteenth Amendment. (Connecticut House 1866, 395). Despite noted opposition from the Amendment, it passed the House 125-88. (Cylopaedia 1867, 255)

As for the State of New Hampshire, the State House of Representatives considered the Fourteenth Amendment first. On June 21, 1866, the Governor of New Hampshire sent a copy of the Fourteenth Amendment to the State House with a brief message requesting and hoping that the legislature would ratify it. After this, the message and copy of the Amendment was referred to the Committee on National Affairs, and it was agreed upon to print the usual number of copies of the document. (New Hampshire House 1866, 137) On June 22, Rep. Sawyer motioned successfully to instead refer this proposed Fourteenth Amendment to the “select committee on the proposed amendment of the Constitution of the United States.” (New Hampshire House 1866, 154)

On June 26, the special committee on the Constitutional Amendment reported the proposed Fourteenth Amendment, which was read the first time and was ordered a second reading. (New Hampshire House 1866, 174-176) After the proposed Amendment was read the first time, the minority of the Committee reported its own statement stating their opposition to the Fourteenth Amendment. As it pertains to the Privileges or Immunities Clause, the Committee said it was hypocritical for the Fourteenth Amendment declare that no state shall “deny the Privileges or Immunities

of citizens of the United States,” of which the right to vote “being claimed as one of the Privileges or Immunities,” yet in Section two it would grant the States the right to vote for people who fail to follow the provisions in the Amendment. (New Hampshire House 1866, 176)

In analyzing their opposition statement, the minority in the Committee on National Affairs did not provide examples of Privileges or Immunities except for the right to vote. When this report indicated that suffrage was “being claimed as one of the Privileges or Immunities,” they were considering suffrage to be a privilege and immunity. By saying what they said, they were implying that they did not come to this conclusion themselves. Rather, they were relying on someone’s interpretation of the Amendment. (New Hampshire House 1866, 176) Nevertheless, the New Hampshire minority report was wrong. In this, there is something important that must be noted. Just because a state interprets an amendment to be a certain way, does not necessarily mean their interpretation is correct. This is especially the case when the representatives of state did not personally write the text and when a respective interpretation from a state originates from another source. It was clear that the Federal Congress did not consider suffrage rights to be protected in the Fourteenth Amendment’s Privileges or Immunities Clause.¹⁷ Therefore, the minority in the Committee on National Affairs misinterpreted the Fourteenth Amendment. As such, its flawed interpretation cannot be used to provide evidence that suffrage rights were considered to be protected in Privileges or Immunities Clause. This incorrect interpretation should therefore be discarded.

After the report on the Fourteenth Amendment from the minority of the Committee on National Affairs was delivered, the rules were temporarily suspended.

¹⁷ Please refer to statements made by Rep. Bingham’s and Sen. Howard’s remarks on pages 45 and 48 respectively in this article on these issues.

Via orders, the Amendment was read a second time and was to be read a third time. (New Hampshire House 1866, 176) On June 28, the proposed Fourteenth Amendment was going to be discussed again, but the House voted to adjourn shortly thereafter. (New Hampshire House 1868, 223) Later in the day, a representative initiated discussion on the proposed Fourteenth Amendment by motioning to call for the yeas and nays of the Amendment. A second representative motioned to have the Speaker of the House vote as well, which was an exception to the rules. A third representative motioned to have the proposed Fourteenth Amendment read, likely for the third time. (New Hampshire House 1866, 231). When the Amendment was voted on, the Fourteenth Amendment passed the House 207-112. (New Hampshire House 1866, 231-233)

After the House passed the Fourteenth Amendment, the Senate then considered it. On June 29, 1866, the Senate was notified of the House's passage and was asked to concur accordingly. The proposed Amendment was then read twice and was referred to an unspecified committee for further consideration. (New Hampshire Senate 1866, 63) On July 6, the proposed Fourteenth Amendment was untabled, and it was successfully motioned to have the Amendment read a third time. Once this occurred, a vote was held and the Amendment passed 9-3. Thus, the Fourteenth Amendment was ratified by the state of New Hampshire. (New Hampshire Senate 1866, 94)

The state of Tennessee was the only state in the Union during Reconstruction to ratify the Fourteenth amendment. There was not much debate in the Tennessee State House, at least according to the records. The Amendment passed the House 43-11. (Tennessee House 1866, 25) In the Tennessee Senate there was an amendment proposed stating that the Fourteenth Amendment would be enacted into law under the

condition that it would mean that blacks had no right to vote, run for office, marry with whites, or sit on juries. This amendment was rejected. (Tennessee Senate 1866, 23) After this failed vote, the 14th Amendment passed the Senate 14-6 with the Privileges or Immunities Clause's text unchanged. (Tennessee Senate 1866, 24)

The most likely reason for the Senate Amendment banning blacks from several rights being rejected was that the Tennesseans did not want the blacks long-term to be banned from voting in state elections. They understood if they would have ratified the Fourteenth Amendment as saying that the blacks could not vote or have many of these privileges of citizenship, then they would have not been able to accomplish what they wanted to accomplish in their state as to the black males being allowed to vote eventually. This does not mean, however, that the Tennessee Senate interpreted the Fourteenth Amendment from saying that blacks were obligated to be given voting rights nationwide. One could still believe that the country as a whole would not be obligated to grant African Americans the right to vote because of its textual structure while still believing that the same text does not prevent them from achieving their policy objectives, which was granting black males the right to vote in their state eventually. In other words, it is possible to analyze the events in the Tennessee Senate as indicating the desire for blacks to have civil rights without them saying that Tennessee's Constitutional Interpretation means that blacks had to be given the right to vote.

In the state of Vermont, its State Senate reviewed the Fourteenth Amendment before its State House did so. Before the Senate took action on the Amendment, the Vermont Governor addressed the Legislature on the Fourteenth Amendment, among other topics. On the Fourteenth Amendment, the Governor claimed that it will bring about "the restoration of the states lately confederated in rebellion to an equal

participation in the Government with the states which always remained true to the flag, as shall secure to the original Union men of the South equal rights and impartial liberty, while it stamps upon treason the indelible mark of the people's condemnation." The Governor also stated that "the elections already held have resulted in the triumphant approval of the Congressional Policy, and there is no reasonable Doubt that the elections yet to be held will pronounce as unmistakable in favor of the Constitutional Amendment." (Vermont Senate 1866, 28) This provides additional strong evidence that the general populace had to have known the framers' intent regarding the Fourteenth Amendment. Therefore, the legislators most likely voted based on the framers' interpretation of the Amendment's meaning. (Vermont Senate 1866, 29)

On October 12, 1866, a little after the Governor delivered his address, a motion was made to invite the Congressmen and Senators representing the State on the national level to address the State Legislature on the proposed Fourteenth Amendment and other political issues. (Vermont Senate 1866, 30) A little while later, the Senate was notified that the House passed a resolution to have a joint committee composed of members of both chambers to consider the proposed Fourteenth Amendment. The House requested that the Senate concur with them (Vermont Senate 1866, 31). Then, that proposed resolution was read, and by motion, the resolution was tabled (Vermont Senate 1866, 31).

On October 16, the President of the Senate appointed some chamber members to represent the Senate on the special joint committee. (Vermont Senate 1866, 44) The next day, the proposed joint resolution ratifying the Fourteenth Amendment was assigned to the Joint Committee appointed to consider this bill. (Vermont Senate 1866, 58) On October 23, when the Joint Committee recommended changing the preface to

the proposed Amendment on the text of the Resolution. The Senate agreed, and unanimously approved the resolution. (Vermont Senate 1866, 75) Once this occurred, the Vermont State Senate ratified the Fourteenth Amendment.

In the State House, on Oct. 12, 1866, the Governor determined to create a joint committee of the senators and representatives to further discuss the proposed constitutional amendment (Vermont State House 1866, 34). On Oct. 15, the House was notified that the Senate approved a resolution to have a special joint committee to review the parts of the Governor's address to the legislature related to the proposed Fourteenth Amendment. The Senate requested the House's concurrence. (Vermont State House 1866, 47) The next day, Representative Rounds introduced the House to the Joint Resolution that would ratify the Fourteenth Amendment. (Vermont State House 1866, 61-62) When the following question was posed before the chamber, "Shall the resolution be adopted on the part of the House?" Rep. Rounds successfully motioned for the aforementioned joint committee created to consider the Fourteenth Amendments bill to do so. (Vermont State House 1866, 62)

On October 23, the Joint Committee issued a statement recommending passage of the resolution ratifying the Fourteenth Amendment under the condition that a section be eliminated from the Preamble of the resolution, and have another section put in its place. Rather than saying "Whereas, the Congress of the United States, pursuant to Article Five of the Constitution of the United States, has proposed to amend the said constitution by adding thereto the following, viz: 'Article XIV,' " The preamble would instead read as follows; "Whereas, the Congress of the United States, on the thirteenth day of June, 1866, by joint resolution, proposed to the legislatures of the several states an amendment of the Constitution of the United

States, in the words following, viz:.." The Fourteenth Amendment itself would not be changed. (Vermont State House 1866, 78)

When the following question "Shall the resolution, as amended, be adopted on the part of the House?" was posed to the House, Rep. Brigham successfully motioned to have further discussion take place the next Friday at 2:30pm (Vermont State House 1866, 78) On Oct. 24, Rep. Brigham successfully motioned to further delay consideration until the next Tuesday at 2:30 pm rather than the previously agreed time. (Vermont State House 1866, 87) Later in the day, the proposed resolution ratifying the Fourteenth Amendment was read. However, the House then agreed to discuss the resolution further starting at next Tuesday at 2:30, even though the House already agreed to this earlier in the day (Vermont State House 1866, 91-93) As previously mentioned, on Oct. 26, the two Congressmen and the two Senators addressed a combined legislature on the proposed Fourteenth Amendment. This is extremely clear evidence that Federal Level elected officials had informed the legislature on the understanding of the framers as to their intentions on the Fourteenth Amendment. (Vermont Senate 1866, 30) As such, the state legislators would have had to have the correct understanding of the bill. This strengthens the argument that states had to know the original intent of the constitutional amendments, and that they gained the understanding from their elected representatives among other sources and methods.

In the State House, on October 30, the Fourteenth Amendment was brought up to be discussed in special order for the day. No debate was recorded in this chamber. (Vermont House 1866, 139) The Amendment was voted on, and it passed 196-12. (Vermont House 1866, 139-140) By unanimous vote, those who were not present for the vote were nonetheless allowed to record their votes (Vermont House 1866, 141.)

As for the State of New York, the State House started considering the Fourteenth Amendment first. On January 1, 1867, Representative Wilber proposed a resolution and accompanying preamble to ratify the Fourteenth Amendment (New York Assembly 1867, 9-10). Afterwards, following a successful motion, the resolution was tabled (New York Assembly 1867, 10). On January 2, the Governor of New York addressed the legislature, with the Fourteenth Amendment being one of the topics. In endorsing the Amendment, he said the following, "It will be your privilege, in the name of the people of this State, to ratify the proposed constitutional amendment, which I have the honor to transmit upon this opening day of your session." Regarding the Fourteenth Amendment's meaning, he stated, "I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved." He further commented that "Never before in the history of the Government, upon any great question affecting our national interests, has there been such unanimity in the expression of the popular will." He finally said that as regards to the Fourteenth Amendment, "There is no other plan among the people, and the verdict of the ballot-box implies that no other plan is desired." (New York Senate 1867, 7) These quotes serve as strong evidence that the people and the legislators were aware of the framers' intentions of the Fourteenth Amendment.

Later in the day on January 2, Representative Havens announced that he would soon officially propose a bill to ratify the Fourteenth Amendment of the United States. However, it was Representative Littlejohn, who officially introduced the proposed Amendment, who read it once, and then a second time after everyone agreed to have it read a second time. (New York House 1867, 42) A motion was made to

create a committee of assemblymen and senators to discuss the Fourteenth Amendment. However, that motion was tabled. (New York House 1867, 42)

Even though the bill was read twice, Rep. Havens introduced another bill to ratify the Fourteenth Amendment. Included in the long title of the Havens' bill was the stated purposes of the bill which was the following: "establishing who shall be citizens of the United States and of each State; regulating the apportionment of representatives among the several States; prohibiting certain persons from holding office under the united states, or under any State; recognizing the validity of the public debt of the United states; and prohibiting the United States from paying or assuming to pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave."(New York House 1867, 46-47) It is interesting to note that the Privileges or Immunities Clause was not included in list of purposes of the Amendment. The bill was read once, and as a result of unanimous approval, it was read a second time and was then referred to the committee on federal relations (New York House 1867, 47).

Later in the day, Rep. Wilber motioned to untable a proposed resolution that would ratify the Fourteenth Amendment. However, the House rejected that motion (New York House 1867, 49). On January 8, certain assemblymen submitted a petition to the Federal Relations Committee to voice their opposition to the Fourteenth Amendment (New York House 1867, 56). On January 9, the Assembly was informed from the Senate in a message that they passed a resolution ratifying the Fourteenth Amendment. This message was then "referred to the Committee on Federal Relations." (New York House 1867, 64) On January 10, the Chair of the Committee on Federal Relations notified the Assembly on their approval of the Senate Concurring Resolution ratifying the Fourteenth Amendment. However, three

assemblymen dissented from that report (New York House 1867, 73-74). After the Chair finished his statement, the resolution was voted on and passed in the House with a 77-40 vote. (New York House 1867, 74) With this vote, the Fourteenth Amendment was officially ratified by the State of New York.

The Senate considered the Fourteenth Amendment after the New York Governor gave his address on the subject. On January 2 after the Governor's speech, Senator Williams officially proposed the Fourteenth Amendment. Afterwards, a senator motioned to refer this proposal to a three-man committee "for revision and correction" and to have them report their decision early the next day. (New York Senate 1867, 31-32) The Senate agreed to this motion, followed by which the Senate President promptly appointed the three Senators for this committee (New York Senate 1867, 32). On the morning of January 3, the three-man committee released their proposed amendment resolution which kept the text of the Amendment unchanged. (New York Senate 1867, 33-34) After its release, the Senate voted and passed the resolution with a 28-3 result. After the vote, the senators who were not present for the vote were able to cast their votes (New York Senate 1867, 34, 37, and 40). On January 11, the Senate was notified that the General Assembly ratified the Fourteenth Amendment on the previous day. (New York Senate 1867, 48)

As for the state of Michigan, the state Senate reviewed the Fourteenth Amendment before the State House. On January 9, 1867, the Fourteenth Amendment was read the first two times. (Michigan Senate 1867, 48) On January 12, the Chair of the Senate addressed the Senate stating that the chamber directed him to report the resolution to the Senate and recommended that the Senate pass the resolution ratifying the Fourteenth Amendment to the Chamber. (Michigan Senate 1867, 100) This passage was obtained on January 15, 1867, when the proposed amendment was read a

third time. It passed with a result of 25-1. (Michigan Senate 1867, 125) Also on January 15, the Fourteenth Amendment was read two times. (Michigan House 1867, 181). Representative Mead then motioned successfully to suspend the rules in order to immediately approve the resolution. He subsequently motioned to add to the resolution the words, “and that he transmit a like copy to the Secretary of State of the United States.” The motion passed unanimously. (Michigan House 1867, 181) Then, the chamber voted on the Amendment, which passed 77-15. (Michigan State House 1867, 181-182)

In the State of Kansas, the Governor addressed the State House, read the proposed Fourteenth Amendment and declared his support of Fourteenth Amendment. He stated that the Amendment as worded had some imperfections, but he argued that it was the legislature’s responsibility to obey the public’s “demands” to ratify it. (Kansas House 1867, 64) On January 10, 1867, the Fourteenth Amendment was read in the House for the first time (Kansas House 1867, 73). Later in the day it was read two more times. (Kansas House 1867. 78). The Amendment was then voted on, and the House passed it 76-7. (Kansas House 1867, 79)

In the State Senate, on January 11th, 1867, the proposed Fourteenth Amendment was read two times (Kansas Senate 1867, 70, 76). Then, following a 19-4 vote, the rules were suspended to have the second reading count as the third reading in order to vote on the Amendment. Once the Fourteenth Amendment was brought to a final vote, it was passed unanimously. (Kansas Senate 1867, 76)

As for the State of Maine, on January 3, 1866, their Governor addressed the state’s legislature and spoke about the Fourteenth Amendment, among other issues. The governor considered the Amendment to be imperfect, but he expressed that the legislature’s support of its ratification would be a "step in the right direction." He

considered the alternative to be unacceptable since it would "place... it in the power of the South to introduce into the Constitution a disability founded on race and color" (Maine Senate 1867, 22-23).

The State House considered the Fourteenth Amendment first in Maine. On January 10, the House chamber received a letter from the Governor with a copy of the proposed Fourteenth Amendment. Right afterwards, the proposed Amendment was sent to the Committee on Federal Relations following a successful motion to do so. The Amendment was then sent to the Senate. (Maine House 1867, 72) On January 11, the Federal Relations Committee submitted a bill to the House that would ratify the Fourteenth Amendment to the Constitution. The bill was initially read twice but due to a suspension of the rules, the bill was able to be read a third time. (Maine House 1867, 78) The bill was then voted on in the House where the Amendment passed 126-12. (Maine Senate 18667, 78-79) Following a successful motion, all representatives in the House who were absent for the main vote on the Fourteenth Amendment bill were ordered to cast their votes before the adjournment of the House's session that year. (Maine Senate 1867, 79) Over time, those previously absent house members recorded their votes (Maine Senate 1867, 84, 92).

On January 10, the Maine State Senate Chamber received, from the State House, the Governor's letter containing the Fourteenth Amendment. Right afterwards, the Amendment was referred to the Committee on Federal Relations. (Maine Senate 1867, 10) On January 12, the Committee on Federal Relations submitted a bill to the Senate that would ratify the Fourteenth Amendment. Once the bill was read the first time, 350 copies of it were ordered to be printed. The bill was then scheduled to be read again on the next Wednesday, January 16, at 11am. (Maine Senate 1867, 87) Once that day came and the bill ratifying the Fourteenth Amendment was read a

second time, 30 senators unanimously voted to engross the bill. However, some additional senators were absent for this vote. This prompted a senator to successfully motion to allow any senator who were unable to vote on the Fourteenth Amendment bill to do so at any time before the adjournment of the Senate Session that year. (Maine Senate 1867, 101) One of the senators who was absent during the vote recorded his vote in favor of the Amendment. (Maine Senate 1867, 108)

As for the State of Indiana, in the Indiana State Senate, no debate was recorded. However, there was a minority report from the Committee on Federal Relations, the committee responsible to review this Amendment. The report stated that it was too soon since the end of the Civil War for the people to really determine whether such an important amendment was needed. Because of this, the report recommended waiting longer and giving more time for the people to give their input on the matter before proceeding with making a decision on this amendment. (Indiana Senate 1867, 77-78) Most senators disagreed with the recommendations, as the amendment passed the chamber 29-18. (Indiana Senate 1867, 79)

Although there was no debate recorded in the Indiana Senate, there was debate in the Indiana House of Representatives. Representative Kizer opposed the amendment, saying that it would be “a covert attempt to subvert our form of government.” (Brevier Reports 1867, 79) Representative Ross, who also opposed the Fourteenth Amendment, said that the Privileges or Immunities Clause would “repeal all of our states laws making distinctions because of race and color,” thereby making black men “co-citizens to white men.” Rep. Ross said that under the clause, blacks would be able to vote in elections, hold seats in the legislature, and “become eligible... to the speakership [of the State House of Representatives].” Finally, Rep. Ross said that the Privileges or Immunities Clause would allow blacks to “sit with

[whites] in the jury box” and to “be with [white children] in the schools.” (Brevier Reports 1867, 80) It is clear from Rep. Ross’s remarks that the Fourteenth Amendment, according to him, would give blacks the same rights as whites, including allowing black men to vote in elections, to be elected to the legislature, to do jury duty, and desegregate schools.

However, Rep. Ross’s interpretation was not uniformly shared. Rep. Dunn defended the amendment and corrected what he saw were misconceptions of what the amendment was supposed to accomplish. While those who opposed the amendment feared that the Privileges or Immunities Clause would give blacks the right to vote, Rep. Dunn said that “suffrage was not a right inherent in citizenship,” which meant that blacks being made citizens would not necessarily grant them the right to vote. Representative Dunn quoted Chancellor Kent, a law professor and judge (Langbein 1993, 550), on this point to defend his position. He also said that the section of the amendment dealing with suffrage was in the second section of the amendment, rather than the first section with the Privileges or Immunities Clause. He also seemed to imply that the Fourteenth Amendment would ensure the status of the Civil Rights Act of 1866, as he said that “If you have not this amendment, and the civil rights bill declared unconstitutional, the negro will be in a worse condition than he was before his emancipation.” In short, evidence exists that the Privileges or Immunities Clause was intended to solidify the status of the Civil Rights Act of 1866 without fear of being struck down. (Brevier Reports 1867, 89)

Representative Moore, another supporter of the amendment, also clarified that the Privileges or Immunities Clause would not give voting rights to Blacks. He explained that just as women’s and children’s status as US Citizens did not automatically grant them suffrage, neither would the Blacks’ new status as US

citizens give them voting rights under this amendment. Rep. Moore also said that the federal government would have the right, should this amendment be passed, to determine who would become citizens. (Brevier Reports 1867, 89)

Representative Green opposed the Fourteenth Amendment as he said it was “intended to destroy the power of the States to determine the status of citizenship,” and that “its ratification would be dangerous, if not a crowning step towards that consideration against which the country has been warned by the fathers.” Finally, he said that it was “a sectional, partisan effort to degrade the ballot by conferring suffrage upon the inferior and incompetent blacks.” (Brevier Reports 1867, 88)

Representative Shuey, in closing the discussion on the Amendment, responded to Representative Ross’s claim that blacks were not considered to be citizens. He said that “Chancellor Kent decides that accident of birth confers citizenships. So also does Mr. Attorney General Bates.”¹⁸ (Brevier Reports 1867, 89-90) After Rep. Shuey’s remarks, debate on the Fourteenth Amendment ended and the voting on the Amendment began. The Fourteenth Amendment passed the House 55-36. (Brevier Reports 1867, 90)

From these debates, it is clear that there was confusion as to the proper interpretation of the Privileges or Immunities Clause. At least two of the opponents of the Amendment argued that the Clause would grant voting rights to blacks, but the three supporters who reportedly supported the bill said it did not grant voting rights to blacks despite giving citizenship to them. The interpretation that reigns supreme here is the view that the Privileges or Immunities Clause does not grant voting rights to blacks. The reason is that this is consistent with the views of the framers of the Fourteenth Amendment--Rep. Bingham and Sen. Howard, who said that this

¹⁸ Edward Bates was Attorney General under then-President Abraham Lincoln. (Williams 2009, 9)

Amendment would not grant voting rights to blacks on a national level.¹⁹ This is an example as to why the views of the framers are so important, so that when there is a disagreement as to the proper original interpretation of a Constitutional Amendment such as this, the framers can give us the crucial explanations for this interpretation.

From those debates, it is clear that the interpretation of the Fourteenth Amendment, according to the House of Representatives of Illinois, grants citizenship to Blacks but not voting rights. As stated above, Rep. Ross believed that the Fourteenth Amendment granted voting rights to blacks, but the supporters disagreed. When there is a conflict as to the interpretation of the Amendment, the prevailing interpretation should be (according to the method used in this paper) based on the views of the majority of the legislators present, or at least of those who spoke in the debates. According to the record, one person said that blacks would have voting rights, but three legislators said they would not. From this it is clear that the interpretation should be from the Indiana State House that voting rights are not given to blacks because that was the consensus of the majority--according to the information available--in terms of what was recorded. We should consider, therefore, the interpretation of the Fourteenth Amendment by the Indiana House to be that blacks would be given citizenship but not voting rights.

In Missouri, the governor gave a speech promoting the Fourteenth Amendment in the legislature. Regarding the first section of the amendment, which the Privileges or Immunities Clause is located, he said that it “secures to every [citizen] the rights of a citizen thereof in any of the states, and that it “prevents a State

¹⁹ Rep. Bingham implied this when he said that the Fourteenth Amendment “does not give...the power of Congress of regulating suffrage in the several states.” This means, by implication, that no state would be required to grant blacks voting rights under this Amendment (Congressional Globe 1866, 2542) Sen. Howard explicitly said that the Privileges or Immunities Clause does not grant voting rights to blacks (Congressional Globe 1866, 2766)

from depriving any citizen of the United States or any of the rights conferred on him by the laws of Congress...”(Missouri Senate 1867, 14) This means that the Amendment will make the rights of a state resident of Missouri, for example, protected in all the states of the union that this resident would be in, and that no state can deny any citizen the rights given him by Congress. The “Laws of Congress” can refer to the rights given in the Civil Rights Act of 1866, as well as any other laws passed by Congress that give certain rights. It is unclear, however, whether “Laws of Congress” also refer to the Bill of Rights. Rep. Bingham and Sen. Howard, by framing the Fourteenth Amendment, were creating a law that would protect rights on a national level by applying the Bill of Rights against the states. However, it is unclear whether the Governor was trying to say that through this Amendment, the Fourteenth Amendment specifically would apply the Bill of Rights to state governments.

In the Missouri State Senate, a Senator motioned that a “special committee appointed to-day” to consider the proposed Concurrent Resolution to ratify the Fourteenth Amendment. Then, on January 5, 1867, the committee proposed to the Senate a substitute resolution to ratify the Fourteenth Amendment in place of the original resolution. (Missouri Senate 1867, 30) After the Amendment was read on the floor, and then Sen. Woener motioned to essentially remove the second section from the Fourteenth Amendment, but that proposal was rejected 6-26. (Missouri Senate 1867, 31) Then Senator Bohnam motioned that the proposed amendment with the changes made to the resolution’s text (though not the amendment’s text) be “engrossed by the Senate.” This proposal was approved, but then a motion was made to reconsider this approval of those changes, and the motion was passed. Then, the

proposed changes to the Fourteenth Amendment's resolution were voted on, and it passed with a 26-6-2 margin (Missouri Senate 1867, 32)

In the Missouri State House, on January 4, 1867, the Fourteenth Amendment was read for the first time. (Missouri House 1867, 39-40) After it was read, the House adjourned for the day. (Missouri House 1867, 40) On January 7th, the House was officially notified by the Senate that they adopted the proposed resolution to ratify the Fourteenth Amendment and asked the House to do the same. (Missouri House 1867, 41) The next day, on January 8th, the House rejected a motion to begin discussing the Fourteenth Amendment by a 37-62 vote. Not long after this vote, the House received and read a statement from the State Senate Secretary who again reported to the House of the Senate's passage of the resolution ratifying the Fourteenth Amendment. The Senate again asked the House to pass the resolution (Missouri Senate 1867, 49) Despite the House recently rejecting a proposal to begin discussing the Fourteenth Amendment, the proposed resolution was read the first time, and following a motion, the rules were suspended and read a second time. A little while later on the same day, the proposed resolution was read a third time and passed the House with a 85-34-3 vote (Missouri House 1867, 50) On January 25, the ratifying resolution was sent to the Governor for his signature.

In Pennsylvania, the State Senate considered the Fourteenth Amendment before the State House did. No information of debates or specific views of the Fourteenth Amendment's Privileges or Immunities Clause were recorded. However, records with the sequence of dates and meetings leading up to its ratification are numerous. Consideration in the State Senate was initiated on January 2, 1867 when Senators Bigham and Lowry independently presented the Fourteenth Amendment to the House Chair. (Pennsylvania Senate 1867, 13) Later that same day, the Governor

declared his support for the Fourteenth Amendment in a speech. (Pennsylvania Senate 1867, 16-18). Still later on January 2, the Senate resumed consideration of the Fourteenth Amendment. The rules were suspended and the Fourteenth Amendment was read a second time. The Amendment passed the second reading 19-12. (Pennsylvania Senate 1867, 23)

A third reading on the Fourteenth Amendment would not occur in the Pennsylvania State Senate until January 14. Supporters of the Amendment would make the following statement, “Shall the resolution pass?” before the chamber to initiate a final vote for ratification. In at least five cases, the Senate would vote to delay or adjourn proceedings whenever that particular phrase was uttered. Though one delay was due to the inauguration of a new governor, the rest of the delays and adjournments were left unexplained and the reasons for them have since been lost in history. (Pennsylvania Senate 1867, 90-91; 96-97; 106; 117; 119-120; 125) After several delays and adjournments, the Senate finally ratified the Fourteenth Amendment on January 18 with the result of 21-11. (Pennsylvania Senate 1867, 125-126)

In the Pennsylvania House, on January 14, 1867, Representative Mann presented to the chair the Fourteenth Amendment, which was titled “Joint Resolution to ratify the amending to the Constitution of the United States, relating to slavery.” (Pennsylvania House 1867, 94) It is interesting that the Fourteenth Amendment was considered by the introducer to be “relating to slavery.” This has implications to what Pennsylvania’s opinions were on the original intent of the Fourteenth Amendment. The Fourteenth Amendment was done to undo the effects of slavery itself or even slavery itself. Four days later, on January 18, the proposed Fourteenth Amendment was read the first time and was assigned to be considered further by the Committee on

Federal Relations. (Pennsylvania House 1867, 128) On January 21, Senator Mann proposed a resolution which would require that the Senate meet every day of the week at 3pm, starting on January 23, with the exception of Fridays, for the purpose of discussing the Fourteenth Amendment. This resolution was read twice and adopted (Pennsylvania House 1867, 142) On January 23, the proposed Fourteenth Amendment was read a second time, after which the question “Will this House agree to the resolution,” was brought before the chamber. Right afterwards, a motion was made to adjourn, and the Senate agreed. (Pennsylvania House 1867, 169) On January 30th, a resolution was proposed saying that “That the House of Representatives of Pennsylvania acknowledge, with gratitude, the course of Andrew Johnson, President of the United States, in discouraging every attempt, whether by radical at the north or secessionists at the south, to overthrow the liberties of the people, and the Constitution of the nation, and that his firm, judicious exercise of the veto power, and his faithful adherence to the true principles of a republican government, mark him alike as a statesman and a patriot.” (Pennsylvania House 1867, 188) The proposed resolution was read twice, after which the question “Will the House agree to the motion?” was brought before the House. Rep. Lee motioned to assign this resolution to the Committee on Vice and Immorality, but Before the House could vote on the motion, a motion was made to delay consideration of this resolution until further notice. This motion passed 49-33. (Pennsylvania House 1867, 188-189) Later on the same day, the House resumed consideration of the Fourteenth Amendment. The proposed resolution was read a second time, and when the question “Will the House agree to the resolution?” was considered, a representative motioned to adjourn for the day, and the House agreed. (Pennsylvania House 1867, 208). On Jan. 31st, the resolution was discussed again, and the House voted against voting on the resolution

by a 17-57 vote. (Pennsylvania House 1867, 215) After the vote, Rep. Kimmel, with permission from the House, gave his speech on the floor expressing his dismay that the Fourteenth Amendment was not going to be voted on at that time. He said that when he gets to vote for the Amendment, he will “enjoy so great a privilege to vote for measures so humane in their character, and so much required for the good of our whole country.” This seems to imply that among the reasons the Amendment was written, which is why he is supporting it, is that it will give blacks more rights than they ever had. This does not mean that the whites would not also have their rights protected, but that certainly the blacks would receive more rights, hence the Fourteenth Amendment being “humane,” according to him. (Pennsylvania House 1867, 216) On February 6, the Fourteenth Amendment was discussed again, and when the question was brought before the chamber whether the House was going to vote on it, a motion was made to add to the resolution ratifying the Fourteenth Amendment saying that “...Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas are States of this Union, and should therefore be considered in ascertaining the number of States requisite to ratify the foregoing amendments, and make them part of the Federal Constitution.” The motion was rejected 31-57. (Pennsylvania House 1867, 278) Then the House finally voted on the proposed resolution, and it passed 62-34. Then, the clerk was ordered to “return the [resolution] to the Senate.” (Pennsylvania House 1867, 278-279)

There was an amendment to the resolution that passed the Senate because the House had to review the proposed Fourteenth Amendment again. The amended resolution ratifying the Fourteenth Amendment was read and passed on February 7th. (Rhode Island House 1867) With this vote, the Fourteenth Amendment was ratified in Rhode Island.

As for the state of Wisconsin, on January 10, 1867, the Governor transmitted the Fourteenth Amendment to the Senate for their consideration. (Wisconsin Senate 1867, 32-34) However, that was not accomplished until the next day when Senator Wilson introduced the Fourteenth Amendment to the State Senate. After the Fourteenth Amendment was officially introduced in the Senate, it was “referred to the Committee on Federal Relations.” (Wisconsin Senate 1867, 38) On January 14, the Governor, through the Senate, presented the communication from the State Department regarding the proposed Fourteenth Amendment. The proposed resolution ratifying the Fourteenth Amendment and the text of the Amendment itself was followed immediately afterwards. (Wisconsin Senate 1867, 40-42) The resolution reiterated that it was being referred to the Committee on Federal Relations. (Wisconsin Senate 1867, 42)

On January 22nd, the Committee on Federal Relations reported that the majority of their members endorsed the Fourteenth Amendment and recommended its passage. Wisconsin Senate 1867, 95) However, the minority of the committee submitted a report that stated their reasoning for opposing the ratification of the Fourteenth Amendment. The report said that the purpose of the Fourteenth Amendment was to give the “Africans” citizenship, and therefore give them the right to vote. They feared that the federal government would gain more power at the expense of the states and the people. Specifically, the report said that the Fourteenth Amendment “will be a surrender of certain rights and powers which the several states of the union now hold with their severing government...to the federal government, so as to make it the arbiter between the states and the citizens and resident thereof.” (Wisconsin Senate 1867, 96)

With regards the Section 1 of the Amendment, which contains the Privileges or Immunities Clause, the report said that that section “contains a surrender to the federal government of a portion of the reserved powers belonging to the states, and is a long stop in the direction of consolidation,” while Section 5 gives Congress “authority to provide ‘with appropriate legislation’ for the powers thus voluntarily surrendered by the States” and “makes the federal government[to be] the arbiter between the citizens of the same state, and give it the power to assume and judge of state law, and of the manner in which the state authority exercises its trust over its citizens.” (Wisconsin Senate 1867, 96, 97-98.) The states would lose some of their power to the federal government, which they were not in favor of. Some states were also concerned that the Amendment would lead to possible change in political power with a new segment of the population gaining suffrage rights.

Later in the day, which was January 22, Senator Littlejohn successfully motioned to begin discussion on the Fourteenth Amendment. After the discussion started, another senator’s motion to adjourn was defeated. Then, yet another senator, Senator Browne, motioned to delay further consideration until the next day at 2 pm, which motion was passed 28-10. (Wisconsin Senate 1867, 109) Then, at 2 pm. On January 23, the Fourteenth Amendment was passed 22-10. (Wisconsin Senate 1867, 119)

The State House of Wisconsin was notified of the State Senate’s passage of the Fourteenth Amendment on January 24. (Wisconsin House Assembly 1867, 110) However, the proposed resolution was finally taken up on February 5 on special order, 11 days after the House received the news. (Wisconsin Assembly 1867, 195) After some debate on the Amendment, Representative Wakely motioned successfully to postpone further consideration of the Amendment until the next day at 7:30 pm.

(Wisconsin Assembly 1867, 195) After additional debate that next day, February 6th, Representative Clason motioned to further postpone consideration until the next day at 7:30 pm. (Wisconsin Assembly 1867, 210) On February 7th, there was more debate, though their details were not recorded. Representative Printiss then motioned to end debate, which was sustained. Representative Gault motioned a call on the House, which was ordered, but a later motion to end the call of the house succeeded with a 69-17 vote, with 14 absent or not voting. (Wisconsin Assembly 1867, 223-224) Following that vote, the House voted to consider the passage of the Fourteenth Amendment by a 84-6 vote, with 13 abstaining or not voting. (Wisconsin House Assembly 1867, 224) Finally, the chamber voted on passage of the Fourteenth Amendment, and the Amendment was adopted by a 69-10 vote, with 13 absent or not voting. (Wisconsin Assembly 1867, 224-225)

In Massachusetts, on January 11, 1867, the Governor received a copy of the proposed Amendment passed by Congress and gave it to the Senate. The Senate in turn gave the proposed amendment to the House for their concurrence, which was subsequently given to the House Committee on Federal Relations for their consideration. (Massachusetts House 1867, 28) On March 1, 1867, Representative Wadpole of the Committee on Federal Relations recommended that this Amendment be considered on the next session of the Massachusetts legislature or “General Court.” Representative Loring of the minority received permission from the committee, “to make a report, concluding with a resolution providing for the ratification of the amendment.” (Massachusetts House 1867, 166-167) Therefore, the majority appeared to oppose the amendment, while the minority appeared to support the Amendment.

Regarding the Massachusetts State House, on March 5, Representative Newton motioned successfully to postpone the report of the Committee on this

Amendment until the next day. (Massachusetts House 1867, 175) However, on the 6th, the same report of the committee was tabled. (Massachusetts House 1867, 180) It was untabled, however, on March 9, and was once again put on the agenda for the whole chamber's consideration on the upcoming Monday. (Massachusetts House 1867, 194) However, on Monday, March 11, the House agreed to postpone the report of the Committee on Federal Relations on the proposed Fourteenth Amendment until the next day. (Massachusetts House 1867, 198-199) On March 12, Representative Mason motioned to eliminate the last paragraph of the Federal Relations Committee's report of the Fourteenth Amendment, and instead "[recommended] that the subject be referred to the Next General Court," or have the next session of the legislature consider this Amendment rather than that General Court. (Massachusetts House 1867, 202) The next day, this motion was approved by a 120-22 margin. (Massachusetts House 1867, 207)

Representative Bird motioned to ask Congress to change the Fourteenth Amendment to "prohibit...the disfranchisement of any citizen on account of color." However, that motion was overwhelmingly defeated by a 14-130 margin. (Massachusetts House 1867, 202) On March 14, the House resumed discussion of the Fourteenth Amendment, and agreed to have the Amendment read a third time by a 97-29 vote. (Massachusetts House 1867, 211) Finally, on March 15, the House passed the Fourteenth Amendment, although there is no record of the vote totals. (Massachusetts House 1867, 216-217).

Regarding the Massachusetts State Senate, on January 5th, 1867, the proposed Fourteenth Amendment was referred to the Senate's Committee on Federal Relations. (Massachusetts Senate 1867, 27) On January 8th, a copy of the proposed Fourteenth Amendment was transmitted to the Senate from the Governor. (Massachusetts Senate

1867, 39) On January 10th, 14, and 26th, and February 1st, 6th, and 24th, various senators and others stated their opposition to the ratification of the Fourteenth Amendment, which statements were each referred to the Committee on Foreign Relations. (Massachusetts Senate 1867, 49, 78, 112-113, 145, 170, 265) (Gifford and Robinson 1867, front cover, 1, 2) On January 26, the Senate ordered that the Committee on Federal Relations “be authorized” to include in the Journal a message from the Governor regarding the proposed Fourteenth Amendment to the Constitution. (Massachusetts Senate 1867, 262-263) On January 30, Sen Pratt reintroduced “certain resolutions concerning the proposed Amendment to the United States...” and they were referred to the Committee on Foreign Relations. (Massachusetts Senate 1867, 130) On March 16th, the proposed resolution ratifying the Fourteenth Amendment was read and was appointed to be discussed on March 19th at 2:30 pm. (Massachusetts Senate 1867, 377) On March 19th, Sen. Ball motioned to have the next General Court consider this proposed resolution instead of the current one, and the motion was defeated by a 5-26 vote (Massachusetts Senate 1867, 395-96) On March 20th, the Senate voted to ratify the Fourteenth Amendment by a 24-6 vote (Massachusetts Senate 1867, 402).

In Nebraska, a special session was called for the State Legislature; of which one of the reasons was to discuss and ratify the Fourteenth Amendment. To open the session, the Governor addressed the legislature on May 17, 1867, regarding the merits of the Fourteenth Amendment, as well as other things. Though he discussed several provisions in the Amendments, he neglected to elaborate on or define the Privileges or Immunities Clause. (Nebraska House 1867, 74-75) The resolution passed the House, after several delays, by a 26-11 vote. (Nebraska House 1867, 148-149)

In the Nebraska State Senate, when the Amendment was before the floor on its second reading, Senator Hascall, on June 14, 1867, proposed a change to the Amendment that he wanted approved by Congress. He proposed that any person who denied suffrage rights to any citizen allowed to vote, such a person would not be allowed to vote in any state or jurisdiction of the Union. This proposal was rejected. (Nebraska Senate 1867, 163) Senator Reeves proposed another change to the Amendment: that it would be ratified by the state unless the people of that state were to reject it via referendum in which case the amendment could not be ratified. This proposal was rejected by a 3-6 vote. (Nebraska Senate 1867, 163) On June 15, The Amendment was then given its third reading, and the amendment was approved by an 8-5 vote. (Nebraska Senate 1867, 174)

In Iowa, the proposed 14th Amendment was transmitted to the State House of Representatives on January 14, 1868. In a statement the Governor of Iowa, announcing the proposed Amendment declared, "This proposed amendment embraces vast considerations of what is of vast importance and peace to the country; and is designed to secure in a more permanent form the dear-bought victories achieved in the mighty conflict carried on by the loyal men of the country for the preservation of the Union." (Iowa Senate 1868, 33) Based on this Governor's statement, it would make sense to interpret the Fourteenth Amendment within the context of the Civil War and the aims of the North. The objectives for the Union side were most likely to restore the Union as it was before the Civil War. Also, the North aimed to eliminate slavery and the distinctions between blacks and whites under the law for large segments of the population.

In part of the same speech mentioned in the previous paragraph, the Governor of Iowa reflected on the Civil War and Reconstruction. He proclaimed that "No

discrimination [should] be made against the black man,” and that “Consistency, therefore, requires that emancipation should be followed by the right of suffrage, for equality is a cardinal principle of the American Constitution.” (Iowa Senate 1868, 47) The Governor seems to imply that the Fourteenth Amendment should be interpreted as granting voting rights to African American males.

On January 27, 1868, the 14th Amendment was read before the State House of Representatives, and it was approved 68-12, with 20 being absent. (Iowa House 1868, 133) In the Iowa Senate, on January 28th, 1868, the joint resolution was read twice and referred to the Committee on Constitutional Amendments for further review. (Iowa Senate 1868, 112) On January 30th, the Committee on Constitutional Amendments reported that the majority of the members recommended passage of the Fourteenth Amendment. (Iowa House 1868, 122)

There were hurdles to passing the Fourteenth Amendment in the Iowa State Senate. While being reviewed in the State Senate, Senator Hollman motioned to remove the first three of five sections of the Fourteenth Amendment. After some procedural debate, the motion was defeated. (Iowa Senate Journal 1868, 265) Another Senator, Senator Fellows, motioned to debate each section of the Amendment separately, but that motion was declared to be out of order, given that, as a state senator pointed out, the Amendment cannot be divided into parts for the purposes of voting. (Iowa Senate 1868, 264-265) Finally, the Amendment was voted on. It passed 34-9, with six senators absent. However, five of the six absent senators requested that records indicate that they voted in favor of the Amendment, and their request was granted (Iowa Senate 1868, 265)

In North Carolina, the North Carolina Legislature initially rejected the Fourteenth Amendment before ratifying it two years later. The legislature interpreted

the Privileges or Immunities Clause to not include voting rights in the list of privileges and immunities. It talked about separate but equal accommodations for education, and the right to sue, contract, and hold property. It was a guarantee of civil equality, but not necessarily political equality. Equal accommodations were protected and encouraged, but not necessarily integrated. The Conservatives did not want the blacks to be enfranchised. The Republicans who supported the amendment also pledged that it would not guarantee social equality, but the right of political equality. (Bond 1984, 104-105) They also clarified that while this would give blacks equal property rights to those who were white, it did not guarantee the same amount of property. Rather, it was the equality of the right to own property. (Bond 1984, 104) The Republicans in North Carolina also did not intend for the Fourteenth Amendment to grant voting rights to African Americans. (Bond 1984, 104-105)

There was a joint committee composed of 12 legislators from both houses of the legislature to consider the proposed Fourteenth Amendment. Out of 12 legislators, 11 voted to reject the amendment, and one voted to ratify the amendment. As for the Privileges or Immunities Clause, the committee overall thought that there was no clear meaning on what “privileges and immunities” was. They could not determine whether “privileges and immunities” meant privileges “enjoyed [by citizens] in the past,” or whether it referred to other privileges “that the federal government may declare to belong to citizens,” such as future rights Americans may have.²⁰ As a result,

²⁰ It is true that it was stated earlier in pages. 49-50 of the article that the states should have known the framers' intent of the Privileges or Immunities Clause, with the statement of the Wisconsin governor as an example of it. While it does state the North Carolina did not know what the original intent was of the Fourteenth Amendment's Privileges and Immunities Clause, just because this particular state didn't know the framers' intention, it does not mean that the framers' intention does not reign supreme in this case. That is North Carolina's fault if they don't have that information. By the time a text is proposed to the states for their ratification, there is already an interpretation assigned to that text, which was the interpretation that passed Congress. Therefore, there is a single interpretation of the text that should be. Even if the congressional members had confusion, there was still an interpretation assigned to the text by the legislators, which is why the text was written a certain way and why the framers articulated the meaning of the text in a certain way.

these legislators were concerned about the ramifications of federalism as a result of this amendment, as the fifth section of the amendment grants Congress to pass all necessary laws to enforce the previous four articles of the Fourteenth Amendment. (North Carolina Senate 1866, 96)

The legislators of this committee did not want to be humiliated by accepting conditions to rejoin the Union in a way they did not want to accept. As a result, they recommended a resolution that would declare their rejection of the amendment.

(North Carolina Senate 1866, 104) The committee approved this resolution 12-1.

(North Carolina Senate 1866, 104) This report of the committee recommending rejection of the Fourteenth Amendment was adopted by the Senate with only two dissenting votes. (Hamilton 1914, 186) Senator C. L. Harris proposed a resolution to ratify the Fourteenth Amendment as a substitute for the proposed resolution rejecting the Fourteenth Amendment which was then being considered. However, that proposed resolution was rejected, with everyone voting against it except for him. Seven senators were initially going to support Harris' resolution overall, but all six of Harris's colleagues voted against him in the end. The resolution rejecting the Fourteenth Amendment was passed with all but Sen. Harris voting for it. Finally, Sen. Clark motioned to transmit this report to the State House to consider the resolution, with each member having ten copies of both documents (North Carolina Senate 1866, 139)

In the North Carolina House of Commons, it received notice from the Senate that it passed the resolution rejecting the Fourteenth Amendment, and that the chamber gave it to the House for its consideration. (North Carolina House 1866, 182) Soon after, Sen. Latham motioned successfully to begin the process of reading the proposed resolution as it should be. The House, "under a division [of the question],"

voted to approve the report on the resolution, by a 88-15 vote. (North Carolina House 1866, 182) Then, the resolution passed the House on the second reading 93-10. (North Carolina House 1866, 183) The resolution then passed its third reading, although there is no record on the vote totals for this particular vote (North Carolina House 1866, 184) In the House of Commons, most of the legislators voted to approve the rejection resolution except for ten of them. (Hamilton 1914, 187)

The Fourteenth Amendment was considered again in 1868. The State's House of Representatives considered the Amendment first. In the House, the Amendment was passed 82-19 after its reading and with no debate. (North Carolina House 1868, 13-15) In the Senate, a senator motioned to amend the Amendment, though no record exists as to what that proposed change to the Fourteenth Amendment entailed. The proposed change was rejected with 35 votes against. Although the number of yeas votes is unknown, it is probable that the Senator who motioned to amend the Amendment cast the only vote in favor of it. After the rejection of the proposed change to the Amendment, the Amendment passed the Senate 34-2 (North Carolina Senate 1868, 15), which were likely all the votes of the chamber.

Louisiana initially rejected the Fourteenth Amendment, but there are no records available in English as to when the Fourteenth Amendment was rejected. There is a record from one of the Chambers in French, but due to the author's inability to find a translator, it will unfortunately not be explored here the events leading to Louisiana's rejection of the Fourteenth Amendment. However, the records as to the ratification of the Fourteenth Amendment are available, and they will be explored below.

The House of Representatives considered the Fourteenth Amendment first. On July 1, 1868, the proposed Fourteenth Amendment was read for the first time.

(Louisiana House 1868, 7) Then, Representative Carr officially “offered” the Amendment to the floor. (Louisiana House 1868, 7-8) After the Fourteenth Amendment was presented, a motion was made to suspend the rules related to considerations of joint resolutions and bills. The motion succeeded 57-3. Then one representative successfully motioned that the Fourteenth Amendment be “put through its several readings.” After the proposed resolution was read all three times, the Fourteenth Amendment passed 57-3. (Louisiana House 1868, 8)

In the Louisiana State Senate, on June 30, 1868, Senator Lynch proposed the Fourteenth Amendment, but then successfully motioned to table the Amendment until the Senate was to “be notified of the permanent organization of the House of Representatives.” (Louisiana Senate 1868, 6) On July 2, Senator Lynch brought up the proposed Fourteenth Amendment again. However, another senator opposed the action, saying that the “Senate was not properly organized,” meaning many Senators had yet to take their oaths yet or were otherwise not ready to start fulfilling their responsibilities. Then the Clerk of the House of Representatives reported that the House was ready to do business followed by which Sen. Lynch withdrew his motion regarding the Fourteenth Amendment. (Louisiana Senate 1868, 8). Later in the day, Senator Lynch again initiated discussion of the Fourteenth Amendment, after which the Amendment was read. A senator unsuccessfully motioned to adjourn after the said reading. Then, an unknown Senator successfully motioned to ratify the Joint Resolution after its first reading followed by which the Senate agreed to adjourn for the day. (Louisiana State Senate 1868, 9)

There was also opposition to the Fourteenth Amendment’s ratification. Senator Bacon addressed the Senate stating his reasons for opposing the Fourteenth Amendment. However, none of the stated reasons for opposition in his speech were

related to the Privileges or Immunities Clause. Instead, he stated that the Fourteenth Amendment was already rejected the year before and as a result should not be considered. (Louisiana State Senate 1868, 20) He added that the United States made the ratification of the Fourteenth Amendment a mandatory condition for Louisiana to be readmitted into the Union. While likely referring to the disenfranchisement of former confederates--Sen. Bacon believed that this would abridge the rights of Americans and was therefore bad policy. He even stated that this "is in violation of the principles of the government," by "punishing any one by such deprivation for past acts..." (Louisiana Senate 1868, 21) Sen. Bacon emphasized his support of enforcing the laws of Americans, but believed that forcing Louisiana to ratify the Fourteenth Amendment as a prerequisite to rejoining the Union was not appropriate. After his speech, Sen. Bacon requested his speech be put in the record. (Louisiana Senate 1868, 21) After concluding his speech, the Fourteenth Amendment was voted on, and it passed the Senate 22-11. (Louisiana House 1868, 21)

Georgia was the final state that ratified the Fourteenth Amendment before the Amendment became officially part of the US Constitution. In the State Senate, when the Amendment was brought for a vote, an amendment was proposed to change language in the resolution--not the Amendment itself--that would ratify the Fourteenth Amendment. The change was going to say the following, "Resolved, That the message of His Excellency the Provisional Governor, with the documents accompanying he same, as to the Constitutional Amendment, and the action of the Congress of the United States, in reference to the Constitution of the State of Georgia, be referred to the Judiciary Committee, to be appointed, with instructions to report upon the same at as early a day as may be practicable." (Georgia Senate 1868, 45) So this was to be added to the resolution instead of the original version which did not

have this section. This amendment was defeated. Due to a successful motion from Senator Nunnally, the Senate proceeded to vote on the Resolution ratifying the Fourteenth Amendment in parts. First, the Senate voted on ratifying the text of the Amendment itself, and it passed 27-14. (Georgia Senate 1868, 45-46). The Senate then voted to agree to the Congress's preconditions in order to be given representation in Congress again, and the vote total was 30-12. Finally, the Senate voted on the resolution to ratify the Fourteenth Amendment as a whole, and the resolution passed 28-14. (Georgia Senate 1868, 47) The Senate voted to send the passed resolution to the Senate. (Georgia Senate 1868, 47) It passed, but no exact vote total was recorded. (Georgia Senate 1868, 47) The Fourteenth Amendment also passed the House. (Georgia Senate 1868, 49)

D. States who Rejected the Fourteenth Amendment

It is important to analyze the arguments of the states that rejected the Fourteenth Amendment before it was ratified. Their reasons for rejecting the Amendment--which were derived in part from their interpretations of the Amendment--are important in determining original intent. This section of the research will include the states such as Texas, Kentucky, Virginia, Ohio, and New Jersey.

As for the state of Texas, on August 9th, 1866, the incoming Governor of Texas, J. W. Throckmorton, addressed the State Legislature, and he said that "the abolition of slavery has been recognized in fundamental law. The people abide by and support the acts of Congress on this subject." (Texas House 1866, 22) This is interesting, as this stands in contrast to statements from several states which ratified the amendment, who purported that the Amendment was "concerning slavery." The Governor also said he would do to the best of his ability, to "insure exact justice to all classes of men, of every political faith, religious creed, race and color." The Governor

continued, “It is a duty we owe alike to ourselves and to humanity, to enact laws that will secure the freed people the full protection of all the rights of person and property guaranteed them by our Amended Constitution.” (Texas House 1866, 22) This is evidence of what appears to be his intention to support the Fourteenth Amendment on the grounds that it would ensure justice and equal rights for the former slaves. Of course, whites were already guaranteed these same rights, but the emphasis from the Governor appeared to be on the blacks receiving the same rights as those of whites. On August 14, 1867, the provisional Secretary of State of Texas, James H. Bell, submitted to the Texas Legislature a copy of the proposed Fourteenth Amendment to the United States. (Texas House 1866, 43)

The Texas State House appeared to consider the proposed Fourteenth Amendment before the Senate did. On October 13th, 1866, the chair of the House Federal Relations Committee, Rep. Smith, released a statement to the House stating the Committee’s opposition to the Fourteenth Amendment’s ratification. With regards to the Privileges or Immunities Clause, he said that this would now give the power to the federal government, and no longer the states, to determine who becomes a citizen. He also said that the Clause would give the freed slaves the same “privileges and Immunities” that the white citizens have, which he said would include “the exercise of suffrage at the polls, participation in jury duty in all cases, bearing arms in the Militia, and other matters which need not be here enumerated.” (Texas House 1866, 578) Therefore, he is clearly saying that all rights and duties just mentioned are included in the Privileges or Immunities Clause, and that the other rights “which need not be here enumerated” are likely referring to the rights mentioned in the Bill of Rights.

Rep. Smith continues in his speech, reiterating some of his concerns of the proposed Amendment. He said that “there is scarcely any limit to the power sought to

be transferred by this [first] section from the States to the United States. Congress might declare almost any right or franchise whatever, to be the privilege or immunity of a citizen of the United States and it would immediately attach to every citizen of every State, whether white man or descendant of African. To estimate the comprehensive scope of the power herein sought for Congress—that body might declare miscegenation a “privilege or immunity.” (Texas House 1867, 578) So he is saying that the Fourteenth Amendment’s Privileges or Immunities Clause gives the federal government the power to define what a privilege and immunity is, of which he is against.

When stating his interpretation of the second section, he said it was related to the first section of the Amendment in providing for voting rights for the freed slaves, which he opposed. He even said that the second and third sections of the Fourteenth Amendment were designed to make the blacks to head of the governments in the Southern states instead of the whites (Texas House 1866, 578-579)

There was some interesting information given in this speech. This proves that the State Legislature was well aware of the views of the framers and other key people on the interpretation of the Fourteenth Amendment. Therefore, it cannot be claimed, as it has been claimed by then Ph. D student Gingras, that the states were not aware of what was going on in Congress, or what was going on in the other states that helps determine the meaning of the Privileges or Immunities Clause, as the records state otherwise. (Gingras 1996, 64) Rep. Smith continued his speech, saying the following:

“We have been warned by the Radical Press of the North; we have been warned by letters written by gentlemen, who are avowed members of the Radical party, to hide from the threatened wrath of the Radical party in Congress, by ratifying these amendments to the Constitution. Mr. Thaddeus Stevens, the leader of that party in Congress in his place in the House of Representatives, and more recently in his speech at Bedford, has proclaimed what the punishment shall be, which is in store for our contumacy. Radical gentlemen have, in their letters told us of the consequences. Conspicuous

among the consequences are abrogation of our State Government; the restoration of martial law with a military Governor; the confiscation of the balance of our property, and the granting of freehold homestead to negroes on the plantations whereon they have been slaves; the impeachment of the President; the abrogation of all pardons granted by authority of the President, and trials for treason before military commissions, which may ensue on such abrogation; the sweeping disfranchisement of our people, and the passage by Congress of an Enabling Act to authorize certain classes, which means the black race and a fraction of our own people, to create a new State Government on the ruins of our existing Constitution, and which such new State Government for Texas to re-enter the American Union!" (Texas House 1866, 581)

After the speech was completed, the Chair officially proposed the resolution to reject the Fourteenth Amendment, and the resolution passed 70-5. (Texas House 1866, 583-584).

As for the Texas State Senate, on October 22, 1866, Senator Cook, the Senate Federal Relations Committee chairman, released a statement to the President of the Senate on the proposed Fourteenth Amendment. He urged the Senate to reject the Fourteenth Amendment, as it, according to him, disenfranchises many people from voting and gives Congress the ability to determine who are and are not citizens. This means, according to him, that the Amendment would have the ability to give blacks citizenship and the right to vote, and it would strengthen the power of the federal government and allow Congress to undermine the liberties of the people. (Texas Senate 1866, 420-422) He also said that the federal government alone would ultimately determine, due to this Amendment, whether people can "enjoy any of the privileges of citizenship." (Texas Senate 1866, 421)

The Privileges or Immunities Clause was not referenced much in his strong opposition to the Fourteenth Amendment, with two exceptions. One exception was the statement that the federal government, according to him, would determine whether individuals can "enjoy any of the privileges of citizenship." The other possible

exception was the one reference of giving Congress the ability to give the former slaves the right to vote. However, as stated earlier, this interpretation of the Fourteenth Amendment is wrong, as the framers of the Fourteenth Amendment in Congress did not intend to give blacks voting rights.²¹ Lieutenant Governor Jones also said that Texas should not ratify the Fourteenth Amendment because the Amendment was based on the premise (which he said was false), that 1) the Southerners are “hostile to [the feelings of the Northerners], and that whoever the political leaders of the Southern States “will be fraught with evil and [be] dangerous to the peace of the country,” and 2) the South was always hostile to the blacks. (Texas Senate 1866, 418-419) On October 27, 1866, the Senate passed a resolution rejecting ratification of the Fourteenth Amendment by a 27-1 vote after receiving its second and third readings. (Texas Senate 1866, 471)

As for the state of Kentucky, the State House of Representatives considered the Fourteenth Amendment first. On January 4, 1867, the proposed Fourteenth Amendment was read (Kentucky House 1867, 39-40) Rep. Bell successfully motioned to have the House receive this message and to have five thousand copies of the proposed resolution “printed, enveloped, and stamped, for the use of the members of the General Assembly.” (Kentucky House 1867, 40) Three days later on January 7, Rep. McHenry from the Committee of the Judiciary, the committee in charge of reviewing this Amendment, proposed a resolution that would reject the Fourteenth Amendment. (Kentucky House 1867, 54-55) After this proposed resolution was read, a motion was successfully made to have 300 copies of this resolution printed for the Assembly’s use, and that the House consider this resolution at 10:30am the next day on January 8th. (Kentucky House 1867, 55) When January 8th came, the House was

²¹Please refer to footnote 17 or 19, as both will lead to the same source.

notified by the Senate that they concurred with the House on the resolution called “Resolutions in regard to the proposed amendment to the Constitution of the United States.” (Kentucky House 1867, 60) A little while later, Rep. Roark proposed a resolution to ratify the Fourteenth Amendment, which would substitute for the then-current proposed resolution which would reject the Fourteenth Amendment. (Kentucky House 1867, 61-62) The House voted on whether to pass this resolution, and the resolution failed 27-67. (Kentucky House 1867, 62-63). Immediately after this vote, the House voted to pass the original resolution to reject the Fourteenth Amendment, and it passed 67-27. (Kentucky House 1867, 63-64)

In Kentucky on January 8, 1867, the State Senate voted on the same resolution that would reject the Fourteenth Amendment. After the resolution was initially read, Senator Cook motioned to remove the word “rejected” and instead use the word “ratify,” so that Kentucky would ratify the Amendment instead of rejecting it. However, the motion was defeated 9-24. (Kentucky Senate 1867, 63-64) After this vote, the Senate then proceeded to vote on the resolution as written, which would reject the Fourteenth Amendment. The resolution passed 24-9. (Kentucky Senate 1867, 64) Then, the next day, Senator Harrison spoke on the floor attacking the North for pursuing policies that were supported by only 2/5ths of the population at the opposition of the majority of the American populace.

Senator Harrison elaborated in a long speech on why the state of Kentucky would never vote to ratify the Amendment. His reasons included that it would unfairly punish those who were previously pardoned by Presidents Andrew Johnson and Abraham Lincoln. That included about 95% of people and/or military officers who allied themselves with the confederacy in the Civil War. (Kentucky Senate 1867, 70-71) This ex post facto punishment, Senator Morrison believed, would be a

violation of the Constitution, even if done by an amendment to the Constitution. Furthermore, he believed it would violate the principle of federalism since it would ban former confederates from seeking state level political offices. (Kentucky Senate 1867, 71)

Senator Harrison also said that this Amendment, by implication of the mass disenfranchisement, “confiscate[s]...much of their secured rights.” Furthermore, it would take away part of their representation since Congress would take nothing except population size into account for determining legislation. As a result of this disenfranchisement, representation from the Southern States to Congress would be limited. (Kentucky Senate 1868, 72) Senator Morrison interpreted this as an attempt by the Northern States, or 2/5ths of the population to usurp authority over the Southern States, or 3/5ths of the country. Therefore, this would undermine the principle of the rule of people, when the wishes of the majority should rule over those of the minority. (Kentucky Senate 1867, 70) Harrison worried that all these changes would further distance southerners from the respect that many still had of the Constitution. (Kentucky Senate 1867, 71)

Virginia is another state that rejected the Fourteenth Amendment before it became law. The State Senate reviewed the Amendment first. On December 3, 1866, Virginia Governor F.H. Pierpoint issued a statement with the text of Fourteenth Amendment and his views on it. However, before it could be read completely, the Senate agreed to stop the reading and ordered that two thousand copies of the Governor’s address in addition to the number of copies usually printed for Senate purposes to be printed. (Virginia Senate 1866, 34)

The statement from the Governor promoted the Fourteenth Amendment and started with a stirring opening declaration: “There is not ambiguity in the language of

the proposed amendment: It is before you for your mature consideration—for adoption or rejection; you are fully acquainted with all the circumstances which lead to its proposal.” (Virginia Senate 1866, 29) It is very evident that the Governor perceived the Amendment’s text to be clear, given that the people, according to him, “understood the circumstances which led to its proposal.” Regarding the circumstances that led to its proposal, the Governor continues by saying this: “The Congress of the United States has made its acceptance a condition precedent to the admission of representation in the councils of the nation, from states now unrepresented.” (Virginia Senate 1866, 29) In other words, the Governor made clear that the Congress wanted to be satisfied with changes made in the former confederate states in order to grant those states representation in Congress again.

There were three conditions the Governor said the southern states, including Virginia, had to comply with in order to be restored to its status in the union. The first one is to give voting rights to the freed slaves. The second condition was to ensure that all former confederate and military officers in the Civil War be denied the ability to hold political office unless Congress by a two-thirds majority allows them to. Finally, the third condition was to have Congress, and not the President, set the terms for when the former confederate states have representation in Congress again. After stating these terms, The Governor asked a rhetorical question to the Virginia Legislature on whether they would be better off rejecting the Fourteenth Amendment. (Virginia Senate 1867, 31) He explained that the Fourteenth Amendment was a condition set by the victorious Northern States in the Civil War to restore peace for the Southern States. This means that the Governor encouraged Virginia to ratify the Fourteenth Amendment in order for Virginia to have representation in the U.S. House

of Representatives. Despite this admonition, the State Legislature opposed ratification of the Fourteenth Amendment.

Although the Senate reviewed the Fourteenth Amendment first, the State House took action faster. In the Virginia State House, on January 9th, 1867, Rep. Dunnington proposed a resolution to order the Committee of Resolutions to immediately report their views of the proposed Fourteenth Amendment to the Chamber, given that the committee had evaded this exact responsibility for almost a month. (Virginia House 1867, 101) The Chamber voted against sending this bill to the Committee on Resolutions, but Representative Dunnington's own motion was passed 52-16. (Virginia House 1867, 101-102) The Committee on Resolutions complied with Rep. Dunnington's request and reported on the proposed resolution rejecting the Fourteenth Amendment on January 9th, 1867. (Virginia House 1867, 105) The resolution was read all three times and passed the House of Delegates 74-1. However, one of the delegates who voted in favor of the resolution, motioned to reconsider this vote, but it was rejected. This same delegate was then ordered by the House to notify the Senate that the House passed its version of the proposed resolution and requested their concurrence. (Virginia House 1867, 108) The Senate unanimously approved the House's version of the resolution (Virginia Senate 1867, 103)

When the Senate reported that they passed the resolution unanimously, the Joint Resolution originating in the Senate was sent to the House for their concurrence. The resolution was read the first two times. Then the rules were suspended to prevent sending this bill to committee, but by motion of Representative Keiley, the joint resolution was dismissed. (Virginia House 1867, 109) This probably occurred because the Senate already passed their own version of the House Joint Resolution. It should be noted that the records convey that the House and Senate passed their own joint

resolutions that rejected the Fourteenth Amendment, even though the House version passed the Senate. Since the House version already passed both houses, the House dismissed the Senate version, since that version was no longer necessary.

Delaware was another one of those states that rejected the Fourteenth Amendment. The Delaware House considered the Fourteenth Amendment first. On January 16, 1867, the proposed Fourteenth Amendment was received from the Governor and was read the first time. (Delaware House 1867, 105-108) Afterwards, a motion was made to temporarily delay consideration of the Fourteenth Amendment until the next Thursday "the twenty-fourth instant", which probably means the 24th of January, which motion succeeded (Delaware House 1867, 108) Despite this motion. There did not seem to be any more discussions on the Fourteenth Amendment until February 6th. On February 6, 1867, A representative from the committee appointed to review the proposed Fourteenth Amendment presented a draft resolution approved by the majority that would reject the Fourteenth Amendment. (Delaware House 1867, 223-225) Afterwards, the minority of the same committee released a report stating their support for the Fourteenth Amendment. Sen. Corbitt from the minority of the committee motioned for the Senate to approve this report, but Sen. Reed from the majority of the committee motioned to delay until further notice consideration for accepting the minority report. (Delaware Senate 1867, 225) This motion was passed 11-10 (Delaware House Journal 1867, 226) After this vote, The Senate voted on whether to approve the majority report and pass the Resolution rejecting the Fourteenth Amendment. The motion passed 15-6. (Delaware House 1867, 226)

In the Delaware Senate, On February 7, 1867, the resolution originating in the House to reject the Fourteenth Amendment was read. Afterwards, the resolution was

voted on, and it passed 6-3. (Delaware Senate 1867, 176) With this action, the Fourteenth Amendment was rejected in Delaware.

Ohio also initially ratified the Fourteenth Amendment before rescinding it later on. In the Ohio State House on January 2, 1867, Representative Hitchcock motioned to approve the proposed resolution that would ratify the Fourteenth amendment. However, it was immediately tabled “and ordered to be printed.” (Ohio House 1867, 5) On January 4, the Senate notified the House that it ratified the Fourteenth Amendment and requested that the House do the same. Representative Schneider motioned to change the last clause of the resolution of the Fourteenth Amendment to change who would receive copies of the Resolution passing the Fourteenth Amendment. This change would not lead to changes in the text of the Amendment itself (Ohio House 1867, 12). The proposed change to the resolution was adopted, and the Fourteenth Amendment passed the House 54-25. (Ohio House 1867, 12-13)

In the State Senate of Ohio, On January 3, 1867, the proposed Fourteenth Amendment was read for the first time after the Committee on Federal Relations issued a statement recommending its passage (Ohio Senate 1867, 7-9) Then, the Senate voted on the passage of the Amendment, and it passed 21-12. (Ohio Senate 1867, 9) On January 5, the House sent a message to the Senate notifying them of the House’s passage of the Fourteenth Amendment and asked that they do the same. (Ohio Senate 1867, 16) On January 9th, the resolution ratifying the Fourteenth Amendment was enrolled. (Ohio Senate 1867, 23) On January 11th, the resolution was signed by the Speaker, which signature is necessary for the Amendment to go forward. (Ohio Senate 1867, 35)

Though Ohio ratified the Fourteenth Amendment, the ratification was eventually rescinded. As for the Ohio State House, on January 6, 1868, a resolution was proposed in the House that would have rescinded the Fourteenth Amendment. (Ohio House 1868, 10-12) That resolution was “laid on the table” afterwards. (Ohio House 1868, 10) Then, on the 11th of January, the proposed rescinded amendment was untabled and debated again. (Ohio House 1868, 32) A senator then asked to be excused from voting on the appeal of the Chair's Decision, which was approved. After that, Sen. Hill motioned to end any further procedural motions related to the resolution vote. The motion passed. (Ohio House 1868, 32) When discussing to untable the amendment, an unnamed state legislator wanted to divide the single motion on voting on the rescinding of the Fourteenth Amendment into many different motions. The Speaker rejected the motion, but the legislator protested and appealed that decision to the House Chair. The Chair’s decision was upheld by the whole chamber by a 55-32 vote, so the motion of the legislator who made that motion was defeated. (Ohio House 1868, 32)

A representative then made a motion to add a paragraph to the end of the rescindment resolution, and the proposal passed 51-36. (Ohio House 1868, 32) Then, there was an additional motion to refer this proposed resolution to the Committee on the Judiciary, which was rejected. (Ohio House 1868, 33) Finally, the chamber voted on the resolution itself, and it passed 52-37. (Ohio House 1868, 33) Afterwards, the chamber voted to approve the preamble to the resolution, which was also approved by a 52-37 vote. (Ohio House 1868, 34) On the thirteenth of January, some of the legislators desired to record their votes on these resolutions. (Ohio House 1868, 39) Then the House received a message from the Senate saying they passed an alternative version of the proposed resolution. (Ohio House 1868, 44) The proposed substitute

resolution was then read. (Ohio House 1868, 44-46). Once that document was to be considered, a representative “demanded” a call of the House, which ended by a 56-46 vote to end “all further proceedings” under this call of the house. (Ohio House 1868, 46-47) A motion to adjourn in order to delay voting on the resolution was defeated by a 41-60 vote. (Ohio House 1868, 47) Once a subsequent motion to table the proposed resolution failed by a 42-56 result, the House voted to consider the substitute resolution with a 56-46 result. (Ohio House 1868, 48) After this vote, the aforementioned unnamed representative was successful in motioning exactly what he did previously: to divide the single vote on the resolution as a whole into various separate motions. (Ohio House 1868, 48) Therefore, when the chamber voted on different “resolutions” in this context, they were in fact voting on the different sections of the rescinding resolution.

The record shows that after the House voted on the different “resolutions” within the resolution, they then proceeded to vote on the different “sections” within the main resolution. Those sections include different individual sections starting with “Whereas,” which these sections comprise the whole resolution. This is rather strange, since this would mean that the earlier voting on the “resolutions” must have been a vote on a completely different aspect of the resolution, despite being related in approving the rescinding resolution. Both of these series of votes will be recorded here in this research. The first series pertains to votes on different “resolutions” within the resolution, with the second series regarding the votes on different sections of the proposed substitute rescinding resolution. As for the first series of votes, the first resolution passed 55-47 (Ohio House 1868, 48), and both the second and third resolutions passed 56-46 in each one. (Ohio House 1868, 48-49) After these three resolutions within the rescinding resolution passed, the House then proceeded to vote

on the different sections of the resolution. The House approved the section of the rescinding resolution after the first “Whereas,” with a 61-37 vote. (Ohio House 1868, 49-50) The section after the second “Whereas,” was passed 56-44. (Ohio House 1868, 50) The third section of the resolution after the third “Whereas” was approved with a 56-46 vote. (Ohio House 1868, 50-51) The House declared that by approving these three sections of the resolution, the entire substitute resolution proposed by the Senate was approved. This was because no text of the proposed resolution was written in between the various individual “whereas” sections that were not voted on by the House.

In the Ohio Senate, On January 13, 1868, the Senate was notified that the House voted to rescind ratification of the Fourteenth Amendment. The message and proposed rescindment resolution was then given to the Committee on Federal Relations. (Ohio Senate 1868, 28) Later in the day, the chair of the Committee on Federal Relations, Sen. Lawrence, recommended passage of the rescindment resolution with several changes. (Ohio Senate 1868, 33) Rep. Brooks motioned to table this report “to be printed,” but that motion was defeated 15-18. Then the Senate voted to consider the proposed rescindment resolution on the Fourteenth Amendment 19-17. (Ohio Senate 1868, 34) The Senate voted one-by-one on the different changes proposed by the Federal Relations Committee on the rescindment resolution, and all of them passed, although the vote totals varied depending on the specific amendments being voted on. (Ohio Senate 1868, 34-36) After many of the amendments were voted on, Sen. Brooks motioned to adjourn, but the vote was defeated 15-19. Sen. Corey then motioned to recess until 8:30 pm that evening, but that motion was defeated by a 17-19 vote (Ohio Senate 1868, 36) Sen. Keifer motioned to table the report on the rescindment resolution, but the motion was defeated 16-19. Then the Senate was to

vote on adopting the report on the resolution as well as the resolution itself. Following a successful motion by Senator Heifer, the question was divided, so the Senate would vote on adopting the report as well as the resolution itself in parts. (Ohio Senate 1868, 37) The Senate voted on the same divisions of the resolution as they did previously, but this time for final passage rather than just voting to change those parts of the resolution. Each of these proposed divisions of the resolution passed by a 19-17 vote in each vote. (Ohio Senate 1868, 37-38) After these votes, the Senate then proceeded to vote on the Preamble of the resolution. The preamble was then divided into three parts, with each of these preambles approved 19-17. (Ohio Senate 1868, 38-39) With these votes, the proposed rescindment resolution was approved. So the Fourteenth Amendment was rescinded in Ohio. The report on the resolution must have passed, although the record did not state explicitly that they did so.

In New Jersey, the Fourteenth amendment was originally ratified in 1866. The House considered the Amendment before their State Senate did. On January 17, 1866, the resolution to ratify the Fourteenth Amendment was proposed and read for the first time. Once the rules were suspended by the House, the resolution was passed following its second reading with the result of 33-20. (New Jersey House 1866, 39) Then the House voted to proceed to a third reading of the resolution with a 36-19 result. (New Jersey House 1866, 39-40) After the vote to have a third reading, the House decided to postpone further action for a time, and the proposed resolution was ordered to be engrossed. (New Jersey House 1866, 40) Later in the afternoon on the same day, the House resumed consideration of the Fourteenth Amendment. The resolution was then ready to be read the third time. The resolution ratifying the Fourteenth Amendment passed the third reading by a 37-15 vote, after which Representative Abbett received permission to explain why he voted against the

Fourteenth Amendment. The New Jersey House Journal does not have a record of his comments made on the floor. This is unfortunate since such a record would have provided insight as to Abbett's thoughts of what the Fourteenth Amendment's Privileges or Immunities Clause meant. (New Jersey House 1866, 44). After Rep. Abbett's speech, the proposed resolution was voted on for final passage, which it passed 42-10. (New Jersey House 1866, 44-45)

As for the New Jersey Senate, it began to consider the Fourteenth Amendment on January 18, 1866. However, the Amendment was immediately transferred to the Committee on the Judiciary. (New Jersey Senate 1866, 41) The Judiciary Committee then reported to the chamber, appearing to give committee approval on the Amendment and recommend its passage by the full chamber (New Jersey Senate 1866, 42) Following this, the Fourteenth Amendment was read a second time and considered section by section. The Fourteenth Amendment did pass the second reading, but no vote count was recorded. The Senate ordered that the resolution be read a third time, of which the Senate agreed to do so on the next Tuesday, January 23. (New Jersey Senate 1866, 42) That next Tuesday, the Senate resumed consideration on the bill, when a senator motioned to re-refer the bill to the Committee on the Judiciary. The motion failed 7-14. (New Jersey Senate 1866, 52) The Senate then proceeded to read the proposed resolution a third time, which it was passed 13-8. After the vote, the Senate notified the House of its passage of the Amendment. (New Jersey Senate 1866, 53) Therefore, the Fourteenth Amendment was ratified by New Jersey January 23, 1866.

New Jersey eventually rescinded its ratification of the Fourteenth Amendment. On January 22, 1868, Senator Anderson motioned a resolution to require the Judiciary Committee to "report joint resolutions, withdrawing the assent of New Jersey to the

proposed 14th amendment to the Constitution of the United States,” which passed 9-6. (New Jersey Senate 1868, 31) Then, on January 28, 1868, the proposed resolution rescinding ratification of the Fourteenth Amendment was read for the first time. This reading followed a report from Sen. Winfield of the Committee on Federal Relations, regarding the resolution (New Jersey Senate 1868, 39-40.) The Senate ordered that the resolution be given a second reading and was “referred to the Committee on Printing.” (New Jersey Senate 1868, 40)

On February 4, a Senator from the Committee of Engrossed Bills declared that the bill proposing ratification of the Fourteenth Amendment is “Engrossed.” (New Jersey Senate 1868, 72; 74) Senator Winfield motioned to postpone consideration of the Fourteenth Amendment resolution for a week until the next Tuesday. This motion was agreed to. The Senate then adjourned for the rest of the morning. (New Jersey Senate 1868, 82) On February 11, when the resolution resumed consideration, Senator Cobb successfully motioned to postpone consideration for yet another week. (New Jersey Senate 1868, 114.) On February 18, the proposed resolution to rescind the Amendment’s ratification resumed discussion. Senator Winfield motioned a substitute bill for the proposed resolution, which was to change some of its text while maintaining its effect of withdrawing ratification. (New Jersey Senate 1868, 177) After Winfield’s proposal, Senator Cobb motioned to eliminate lines 2 through 134--out of an unknown number of lines--of the resolution, which was defeated 7-11. (New Jersey Senate 1868, 178)

After the aforementioned failed vote, the Senate ordered the proposed resolution be given a third reading and to be engrossed. By motion of Senator Winfield, the proposed resolution was debated the next day. (New Jersey State Senate 1868, 178) That next day, February 19, Senator Cobb unsuccessfully motioned to

delay consideration of the bill again until the next day. Then, he motioned a point of order, challenging the notion that the proposed resolution was “properly brought before the Senate.” However, the President of the Senate disagreed and did not grant the motion because he said the motion was “not well taken.” (New Jersey Senate 1868, 197) The Senator then motioned to overturn the decision of the chair, but that was defeated 8-10. (New Jersey Senate 1868, 197-198) After this exchange, the proposed resolution was read a third time, and then it passed 11-8 (New Jersey Senate 1868, 198).

In the New Jersey General Assembly, on February 20th, 1868, it received notice that the Senate Substitute Resolution rescinding ratification of the Fourteenth Amendment passed the Senate and requested the concurrence of the House. The House agreed to suspend the rules, thereby not referring the proposed resolution to committee. The resolution was read all three times and it passed the House 44-11. (New Jersey House 1868, 309)

On February 22, a statement was made proclaiming that the resolution passed both houses. Following procedure, the resolution was signed by the Secretary of the Senate, as the resolution was authored in the Senate. The secretary “delivered...to the Committee on Passed Bills, to be presented by said committee to the Governor for his approval.” (New Jersey Senate 1868, 220) The signature of the Governor was needed to finalize the rescindment of the Fourteenth Amendment.

However, the Governor, Marcus L. Ward vetoed the rescinding of the Fourteenth Amendment for several reasons. His first reason for vetoing the Fourteenth Amendment was for believing that such a resolution was invalid. He felt it was unconstitutional for a state legislature to rescind a ratification of a constitutional amendment since the US Constitution did not grant the states that power. He argued

specifically that “while a State has the clear and undoubted right to repeal and rescind its own laws, subject to its contracts, yet that in all its relations to the general Government, its actions are conclusive and final.” (New Jersey State Senate 1868, 250) Therefore, once New Jersey made the decision in 1866 to ratify the Amendment, the Governor believed that such a commitment could not be undone.

Second, the New Jersey Governor claimed that the Constitution did not imply that a state can rescind its ratification after the necessary states had already ratified amendments to the Constitution. He followed by saying that three-fourths of the states “that have maintained their fidelity to the Union” ratified the amendment. Therefore, he believed that this was sufficient to determine the status of the Fourteenth Amendment as legally part of the Constitution. Moreover, the Governor believed that the state of New Jersey could not rescind the ratification of the Amendment to the Constitution, since it was already the law of the land. (New Jersey Senate 1868, 251)

While it is true that the majority of the states who were in the United States during the civil war ratified the Amendment, the Fourteenth Amendment was not ratified by this time. After all, for constitutional ratification purposes, the federal government counted the former confederate states as states in the union. In other words, for the Fourteenth Amendment to be enshrined into law, 3/4ths of *all* the states, including those under the reconstruction, were required to ratify it. Governor Ward mistakenly believed that only 3/4th of the “loyal states to the Union,” needed to ratify the Amendment to make it become law. Therefore, his legal reasoning was flawed since it was founded on wrong information.

The third reason for the governor’s veto was his claim that the state election results after ratification illustrated the majority of New Jersey in support of the Fourteenth Amendment. Therefore, he felt he would be doing a disservice to his

constituents to approve such a rescindment. (New Jersey Senate 1865, 251-252) The fourth and final for the Governor's veto was his support of the Amendment, thinking that it would greatly benefit the country. Regarding the Privileges or Immunities Clause specifically, he stated that he liked that fact that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," although he did not expound his understanding or thoughts of that section's meaning; he was merely restating the text itself. He mentioned the other sections of the Amendment and why he supported them. (New Jersey Senate 1868, 252) For all the reasons just mentioned, among others the New Jersey Governor vetoed the resolution to rescind the ratification of the Fourteenth Amendment. (New Jersey Senate 1865, 252-253)

On March 5, 1868, the Senate began discussing the possibility of overriding the Governor's veto. Immediately after a senator's motion to override the Governor's veto, the Senate adjourned, as it was the end of their scheduled debating time that morning. (New Jersey Senate, 355) When the Senate reconvened later that day in the afternoon, they restarted the discussion to override the Governor's veto. The Senate successfully overrode the veto with the result of 11-9. (New Jersey Senate 1868, 356)

Immediately after the Senate voted to override the Governor's veto, the Senate Secretary informed the House of the Senate's actions. (New Jersey Senate 1868, 356) The General Assembly then considered the same action. The resolution was first read on March 24, 1868 followed by additional discussion later in the day²², the House successfully overrode the Governor's veto with the result of 45-13. (New Jersey House 1868, 736, 742-743). In the New Jersey Legislature, a two-thirds majority vote

²² This is yet another evidence that original intent originalism requires discovering the most plausible original interpretation of a legal text as possible, according to the given evidence, as it says that there was discussion to the motion to rescind ratification of the Fourteenth Amendment, yet the record does not say what was said at the discussion. Unfortunately, this exact discussion may be lost.

was not necessary to override a veto. Only a simple majority from both houses was needed, following certain conditions outlined in the then-current State Constitution of 1844. (New Jersey Department of State, 7)

As for the State of Oregon, the State Senate considered the Fourteenth Amendment first. On September 11, 1866, Senator Dolph presented the Fourteenth Amendment for the first time (Oregon Senate 1866, 25-26). A motion was then successfully passed to refer this proposed amendment to a “committee.” (Oregon Senate 1866, 27) On September 13, after a brief objection, the Chair of the Senate Federal Relations Committee reported to the Senate on its recommendation to approve ratification of the Fourteenth Amendment. Then the Committee officially recommended ratification of the Amendment. After the report was made, Senator Miller motioned to table the Fourteenth Amendment, but the motion was defeated by an 8-14 vote. (Oregon Senate 1866, 31) A senator motioned to consider the Amendment on the following Wednesday, but another senator motioned to consider it on the very next day at 10:30 am. (Oregon Senate 1866, 31) The Senate agreed to the latter motion. (Oregon Senate 1866, 32)

When the Fourteenth Amendment was discussed again on that next day, Thursday, September 13, Sen. Miller motioned to eliminate sections 3-5 from the Fourteenth Amendment, but the motion was considered “out of order.” Then, Senator Crawford motioned an amendment to the resolution ratifying the Fourteenth Amendment, saying that the fate of the Fourteenth Amendment should be “hereby referred to the people of Oregon, to be voted on at their next general election.” When this proposed amendment to the resolution was officially being discussed, Senator Palmer moved to end debate and vote on this amended resolution. The motion passed 13-9. (Oregon Senate 1866, 34). When the amended resolution was voted on, it was

defeated 8-14. (Oregon Senate 1866, 35) Later that day, the Senate voted on the originally written resolution to ratify the Fourteenth Amendment after two earlier motions to adjourn (in order to prevent the vote from taking place) were defeated. The resolution passed 13-9 (Oregon Senate 1866, 36)

After the Oregon State Senate ratified the Fourteenth Amendment, the State's House of Representatives considered the Fourteenth Amendment. On September 17, 1866, the Fourteenth Amendment was read for the first time in the House (Oregon House 1866, 55-57). On September 19, the House Judiciary Committee recommended the House to ratify the Fourteenth Amendment. After this recommendation, the Chair of that committee, Representative Olney motioned to ratify the Amendment. Representative Worth, who opposed the Fourteenth Amendment, subsequently motioned to reject the Judiciary Committee's report. (Oregon House 1866, 72) Then, a third representative, Representative Cox, motioned to table the report, but it was defeated by a 21-26 vote. (Oregon House 1866, 72-73) After more motions to postpone or adjourn discussion were brought forth, debate ended for that morning. (Oregon House 1866, 73-74)

In the afternoon of the same day, once the legislature resumed business, the Fourteenth Amendment was again discussed. Rep. Worth issued a statement explaining his opposition to the Amendment. He stated that the Chair of the Judiciary Committee announced the committee's recommendation of the Fourteenth Amendment without the input of two of the committee's members. Furthermore, Rep. Worth claimed that some of the representatives were illegitimate and should therefore not be considered representatives. With these reasons, he concluded that the House was not in a position to consider the Fourteenth Amendment. (Oregon Senate 1866,

74-75) The House then adjourned until the evening of that day. (Oregon Senate 1866, 75)

Once the House reconvened that evening, the two Judiciary Committee members who claimed they were not notified of the Judiciary Committee's meeting on the proposed Fourteenth Amendment submitted a statement referring to the incident as "a gross outrage on the minority of said community as well as on the whole house." (Oregon House 1866, 76). Furthermore, their statement echoed a previous opposition statement claiming that several representatives in that chamber were elected by fraud and proposed that such officials should be removed from their posts before the legislature could vote on an issue of such great importance as that of the Fourteenth Amendment. (Oregon House 1866, 76) After the statement was made, Representative Lockhart "moved the previous question," which succeeded 27-19. Then, Oregon was able to ratify the Fourteenth Amendment once the House voted in favor of it with a 25-21 vote. (Oregon House 1866, 77)

However, the fate of the Fourteenth Amendment was not yet secured. Representative Olney motioned to reconsider the ratification vote. (Oregon House 1866, 77) Then, Representative Garlick motioned to "indefinitely postpone the motion to reconsider." Representative Humason then motioned to adjourn, but it was rejected by a 22-24 vote. After this rejection, the motion to indefinitely delay the motion to reconsider passed 26-20. Then, a representative requested to have his vote counted in favor of ratifying the Fourteenth Amendment. After this motion, the State House adjourned. (Oregon House 1866, 78) With this action, the Fourteenth Amendment was officially ratified. On September 21, 1866, the Speaker signed the proposed Fourteenth Amendment to the Constitution. (Oregon House 1866, 92)

Despite the aforementioned actions taken in 1866, Oregon rescinded its ratification of the Fourteenth Amendment in 1868. The Senate rescinded the Amendment first. Senator Treavitt introduced a resolution titled Senate Joint Resolution 4 (SJR 4) to rescind ratification of the Fourteenth Amendment. (Oregon Senate 1868, 32-36) Another senator motioned to assign this bill to the Committee on Federal Relations, which was apparently approved due to events that transpired afterwards. (Oregon Senate 1868, 36, 66) A third Senator motioned to print one hundred copies of the proposed resolution, but that motion was ruled “out of order.” (Oregon Senate 1868, 37) On September 23, the Senate Committee on Federal Relations submitted a statement recommending adoption of the resolution rescinding ratification of the Fourteenth Amendment (Oregon Senate 1868, 66-67) Several days later, on October 5, 1868, the Senate voted on the resolution rescinding ratification of the Fourteenth Amendment, and it passed 13-9. (Oregon Senate 1866, 131)

As for the Oregon State house, the Speaker announced to the House of a statement signed October 8, 1868, from the Senate informing that they passed the SJR 4 resolution. (Oregon House 1868, 176) Later that day, SJR 4 was going to be discussed. However, a representative successfully motioned to have the whole house discuss this proposal the next Saturday at 10am. (Oregon House 1868, 176-177) When Saturday arrived, a representative successfully motioned to not have the entire legislature consider rescinding of the Fourteenth Amendment on that day after all. (Oregon House 1868, 204) On a later day when SJR 4 was finally read, another representative quickly went to other business (Oregon House 1868, 256)

Finally, on October 15, 1868, the Speaker of the House announced the beginning of consideration of the resolution to withdraw the ratification of the Fourteenth Amendment. Representative Cox officially motioned to pass SJR 4, after

which other representatives successfully motioned a call of the House. Then, Rep. Davenport offered an amendment to SJR 4. A motion was made to debate this amendment to the resolution (Oregon House 1868, 271); however, the House did not consider that amendment as the motion failed by an 18-26 vote. Then, discussion resumed on the originally written resolution to rescind ratification of the Fourteenth Amendment. A motion was made to officially debate the proposed resolution, and it passed 27-17. A motion was subsequently made to call the House, which also passed. Only two representatives were absent at the floor. (Oregon House, 272) The House then voted on SJR 4, with the resolution passing on a 26-18 vote. (Oregon House 1868, 272-273) With this action, the Fourteenth Amendment was officially rescinded by the state of Oregon.

However, right after the vote to rescind the Fourteenth Amendment, a representative motioned to reconsider its passage. Afterward another motion--which was passed--was made to “indefinitely postpone,” reconsideration of the Amendment’s rescindment. (Oregon House 1868, 273) On October 16, Rep. Davenport motioned again to amend SJR 4. However, it could not even be entertained since the Speaker declared it to be “out of order” as the House had already agreed to “indefinitely postpone” consideration of the Fourteenth Amendment. (Oregon House 1866, 276-277) Rep. Davenport motioned to appeal the Speaker’s position. Therefore, the House was to vote on whether to uphold the Speaker’s decision. However, another representative motioned to table Rep. Davenport’s motion, but that motion was defeated 20-24. The vote to uphold the Speaker’s decision was still the matter at hand, but the vote did not take place because the House agreed to adjourn until the afternoon of that day. (Oregon House 1868, 277) The issue of whether to uphold the Speaker’s decision resumed once the House had reconvened after some time. The

vote happened, and the decision of the speaker was upheld 27-15. (Oregon House 1868, 281-282) By this vote, it was certain that the rescinded ratification resolution would remain in place. On October 20, 1868, the Chair of the Committee on Enrolling announced that the resolution to rescind ratification of the Fourteenth Amendment was enrolled (Oregon House 1868, 352) On October 21, the Speaker of the House signed SJR 4, which made the resolution become law. (Oregon House 1868, 352)

E. Discussion

Many states did not hold debates regarding the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, at least according to the records kept in legislative journals. As previously stated, the assumption taken by the author is that the lack of debate over this provision suggests support for the framers' interpretation of this Amendment, for the aforementioned reasons. This follows that by implication, the vast majority of states, at a minimum, agreed to the framers' interpretation of the Privileges or Immunities Clause, at least according to the information available.

Only a few states mentioned the Fourteenth Amendment specifically in either the gubernatorial statements or in the debates. The states that included gubernatorial messages were the following: Wisconsin, Iowa, Texas, Kansas, Missouri, Virginia, Nebraska, and Pennsylvania. There was not a unified consensus among these states as to what the Privileges or Immunities Clause meant. Some of these governors did not comment on the clause; at least two governors said it would give voting rights to the freed slaves (Iowa's and Virginia's governors); Texas's governor thought it would ensure "equality and justice" for all people regardless of color and other classes. Finally, Missouri's governor thought it was intended to ensure that no state would ever take away citizen's rights given by the laws of Congress.

Other states had minority statements voicing their concerns with the Fourteenth Amendment. The overarching arguments of these minority report statements against the Fourteenth Amendment were that it would undermine federalism and would grant blacks suffrage and additional rights they did not previously have. The opposition was wrong on their interpretation that the Amendment would give blacks voting rights, as the record is mostly clear on this note.²³ However, the opposition was correct that this Amendment, by implication, would strengthen the power of the federal government and weaken the power of the states. The states who ratified the Fourteenth Amendment did not challenge the suggestion that the federal government would be more powerful due to the Amendment. Logic dictates that the Fourteenth Amendment would strengthen the power of the federal government. As the Clause protected more rights from potential encroachment, certainly the implication of this would be that the states would lose power to do what they originally could do, given that according to consensus, the Bill of Rights did not apply to them. Therefore, Rep. Bingham wrongly said that the Fourteenth Amendment would not strengthen federal government power.

There is another reason why the framers' views remain supreme on the Privileges or Immunities Clause of the Fourteenth Amendment. The framers stated their interpretation of the Clause, and the states did not appear to officially challenge its meaning, meaning that a state ratifies a Constitutional Amendment under the condition that it means something different from the framers' interpretation. The ratifiers among the various states could have taken the opportunity to argue alternative interpretations of the other sections, but with the exception of a failed attempt from

²³ See footnote 19 for information on this note.

Tennessee, most of them did not do so, according to the records.²⁴ Even if they would have, the legal interpretation according to this legal philosophy would not have a major impact unless many states did the same thing. This provides yet another reason to safely say that any state's silence on their views of a particular clause of the amendment means that the original interpretation from the Fourteenth Amendment, stands. This is not because issues such as states' rights or federalism are unimportant. Rather, it is because the ratifiers from the state legislatures were not the ones who originally crafted the Amendment itself. In other words, they were not the framers. On many occasions, when different legislators, primarily those who opposed the Amendment, did offer their personal interpretations of what the Privileges or Immunities Clause does when the Clause was being discussed (such as the belief that the Clause gives voting rights to blacks when the framers said it does not), they simply misunderstood the framers' intentions on the Fourteenth Amendment, which means that their alternative interpretations in this case do not matter in determining original intent,²⁵ and the framers' original intent is what matters. If the states were to have drafted the Amendment, then the views espoused by the legislatures from the States would have mattered instead of those from the U.S. Congress. Since Congress in this case authored the text, then their views stand.

Whenever there is a difference between the views of the ratifiers from those of the framers, the views of the framers would reign supreme. Statements from ratifiers can add ideas to the meaning of the text, so long as their ideas did not contradict those of the framers. The ratifiers did not compose the text of the Amendments. The

²⁴As was mentioned in page 57-58 of this article, members of the Tennessee Senate tried to do this, but they failed. This was the only state found in this research to have this attempt.

²⁵ The exception to this is if the views espoused by those contrary to the Amendments are either not opposed by the framers or are obvious effects of the Amendments. For example, the fact that the Fourteenth Amendment would strengthen the powers of the federal government vis-à-vis the states is correct, because beforehand the Congress could not pass laws to protect the rights of individuals if the states had laws to that effect.

ratifiers were supposed to either consent or reject the text of those Amendments as written by the framers. The author finds it illogical to conclude that the views of those who wrote the text itself can be overridden by those whose responsibility was to simply determine whether to accept or reject a text as written. This is a further explanation regarding why the views of the framers should be supreme over any other potential source of information.

The Virginia governor was aimed to explain that no Privileges or Immunities of any citizen, black or white, would be violated. It can be assumed that he believed the Clause, as described by the framers on its meaning, was self-explanatory. It is rather evident, from the Wisconsin Governor's statements, that the elected officials or other government officers in Virginia were made aware by Congress of the meaning of the Fourteenth Amendment.

Given the evidence discovered up to this point--from the sources of exploring the historical context, congressional debates, and ratification debates--there are clear findings from the research on the Privileges or Immunities Clause as to its meaning and to its protection of unenumerated rights.

It appears that the original intent of the Privileges or Immunities Clause of the Fourteenth Amendment was that Article IV and the first eight amendments of the Bill of Rights was supposed to be applied to the states through incorporation. Regarding Article IV, Rep. Bingham said that that Privileges or Immunities Clause was not supposed to incorporate the Privileges and Immunities Clause of Article IV to the states. Rather, it was to enforce what was already granted to congress, to ensure that the state legislatures would not violate these privileges already granted against the states. Bingham was incorrect in his understanding that Article IV applied to the states,

as it was not intended for this Article to apply to the states. (Fairman 1949, 24-26)²⁶ However, he was correct that in performing his function of “enforcing the powers already granted to the federal government, to apply this to the states,” he was incorporating this provision of the Constitution against the states. In other words, the effect of his design of the Fourteenth Amendment would incorporate those rights against the states.

Also, all the privileges and immunities quoted by Bingham and Howard, including those listed in the sources that those men quoted are protected under this Amendment. These framers of the Fourteenth Amendment, in giving specific examples of such privileges and immunities, and by also quoting who they quoted, were espousing what they wanted the Privileges or Immunities to include. For example, Rep. Bingham said that examples of Privileges and Immunities include the "right to bear true allegiance to the Constitution and laws of the United States" and "to be protected in life, liberty, and property." (Congressional Globe 1866, 2542) So these privileges/immunities espoused by Bingham would be among those protected in this part of the Constitution. Also among the quotes used by these framers includes Justice Washington’s opinion in *Corfield v. Coryell*; when he said that the following privileges protected under the Constitution in Article 4 may include the following:

- “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.

²⁶ Particularly in page 26 of the Fairman article, the author referred to Bingham’s understanding of how Article IV works as a “befuddled construction of the constitution.”

- 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; ...
- an exemption from higher taxes or impositions than are paid by the other citizens of the state; and (maybe)
- the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised” may also be considered to be a privilege or immunity.”

The decision of the *Corfield v. Coryell* case was considered at time to be a controversial one, as almost everyone disagreed with it. (Natelson 2009, 1124)

However, by quoting Justice Washington’s list of rights protected by the Privileges and Immunities Clause, Sen. Howard, one of the Amendment’s framers, demonstrated his intention to incorporate Washington’s opinion of the Clause into his proclamation on what the Privileges or Immunities Clause is supposed to mean, or what it is going to mean when it is passed. This list, by definition, has to be included as part of the privileges and immunities that are protected as part of the Fourteenth Amendment of the constitution. The original intent analysis of the Privileges or Immunities Clause would be incomplete without it. The only privilege in this list that would not be included as a privilege and immunity under the Fourteenth Amendment would be the right to vote. There are several reasons for this. To mention merely a few of them, Rep. Bingham made clear that voting rights would not count. Also, Sen. Wade supported the Fourteenth Amendment, but was outspoken in his disappointment that the Amendment would not include voting rights for black individuals. (Congressional

Globe 1866, 2769) Furthermore, it was evident that the franchise was considered an immunity, “as regulated and established by the laws of constitution of the state in which it is to be exercised....”. Therefore, since the blacks had not yet been granted suffrage rights, this immunity would not have applied to them. Therefore, it is safe to say that the Fourteenth Amendment's Privileges and Immunities Clause does not protect voting rights.

Additionally, given that the Privileges or Immunities Clause was influenced by the Civil Rights Act of 1866, all the rights given in that Act are also considered to be a portion of the protected rights under the Clause. The rights protected under this Clause from the 1866 Civil Rights Act, which, as indicated earlier, were for both the whites and the blacks, include 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 full and equal benefit of all laws and proceedings for the security of person and property...” The rights not granted in that act--according to the Congressional Debates--were political rights, including the right to vote.

VIII. Conclusion

The purpose of this research was to determine the original intent of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment to determine, as far as possible, the protected unenumerated rights Americans have under the Constitution. All rights protected in the Fourteenth Amendment's Privileges or Immunities Clause, whether enumerated or unenumerated, were just mentioned. However, a list immediately following this paragraph will detail all the protected *unenumerated* rights of American citizens based on the results of researching both aforementioned sections of the Constitution —according to the given evidence. The

final conclusion as to the protected unenumerated rights in the Constitution are the following:

-All rights considered by the people of the United States, in 1789 and earlier, to be protected rights regardless of whether those were listed in the Constitution. Such rights could be found among the State Constitutions at the time and also includes the protections of various behaviors not considered to be against state law of the due to being very commonplace among the people:

-Right to Bear Allegiance and swear loyalty to the United States of America

-Natural rights, including the right to life, liberty, and property

-Rights mentioned in the Civil Rights Act of 1866

-Rights mentioned in the Corfield v. Coryell opinion referenced by Senator Howard in promoting the Privileges or Immunities Clause which were not already enumerated in other sections of the Constitution, which are the following:

- “Protection by the government;
- 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 institute and maintain actions of any kind in the courts of the state;
- an exemption from higher taxes or impositions than are paid by the other citizens of the state; and (maybe)

- the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”

-Any additional rights considered by the people in 1866 (the year the Fourteenth Amendment was initially ratified) to have been fundamental to maintaining liberty in a society, and therefore, must needs be protected. The exceptions to this include the rights Representative Bingham and Senator Howard clearly stated were *not* protected by this Amendment, including the right to vote.

-All rights included in the first eight amendments of the Bill of Rights incorporated against the States.

-All Privileges and Immunities protected in Article IV applied to the states.

IX. Implications of these Findings

As the aforementioned unenumerated rights are protected in the Constitution, they are supposed to be protected in the Courts against encroachment. Barnett believed that the rights protected in the Ninth Amendment are supposed to be judicially enforceable. (Barnett 2006, 2, 13-14) As such, those rights protected in the Fourteenth Amendment’s Privileges or Immunities Clause should also be protected by the Courts. No other conclusion would be plausible. It would be nonsensical to have rights in the Constitution be unprotected from government infringement and to have citizens barred from seeking recourse through judicial remedy in the Courts. Rights protected in the Constitution need to be preserved from Congressional encroachment of those rights.

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