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Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper

Michael Kent Curtis*

Introduction

Jeff Rosen seeks to use the original meaning of the Fourteenth Amendment to address a difficult problem—affirmative action in the context of awarding government contracts.¹ In part, he tells us that his problem implicates the relation of the original understanding of the Privileges or Immunities Clause² to the *Lochner*³ doctrine—the now rejected judicial practice of striking down many maximum hour, minimum wage, and health and safety regulations as violations of the liberty of contract.⁴ In addition to the affirmative action and *Lochner* complexities, the problem involves the government acting, not as a regulator, but as a participant in the market.

Professor Rosen concludes that shifting the analysis to the Privileges or Immunities Clause and using the tools of original meaning and text do not help much.⁵ He quite reasonably thinks that many current doctrines might have evolved simply under the Privileges or Immunities Clause.⁶ He believes that both original meaning and textual analysis fail to provide crisp, helpful, or satisfactory answers to his problem,⁷ and I assume for present purposes that he is correct. He is distressed. Where, he asks, has he gone wrong?

In this Commentary, I will first apply text and original meaning to an easier problem with a more satisfying answer. Professor Rosen uses original

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1 See Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1243 (1998).

2 U.S. CONST. amend. XIV, § 1. I have reservations about treating the Privileges or Immunities Clause primarily as the home of an antidiscrimination norm. I think the Equal Protection Clause makes both current and historical sense as the location of both a doctrine of unreasonable classification and an affirmative duty to protect. Based on my limited present knowledge and understanding, however, I agree with Jeff Rosen's lucid conclusion that neither originalism nor textualism provides either clear or satisfactory answers to the problem of affirmative action in the context of awarding government contracts.

3 *Lochner v. New York*, 198 U.S. 45 (1905).

4 See Rosen, *supra* note 1, at 1248-50. In *Lochner*, the Supreme Court found that the Due Process Clause of the Fourteenth Amendment protected an individual's liberty to contract. See *Lochner*, 198 U.S. at 61-62.

5 See Rosen, *supra* note 1, at 1249-50.

6 See *id.* at 1259-63.

7 See *id.* at 1267-68.

meaning to address a difficult problem and believes that he is left without a satisfactory solution. Comparing his analysis of a difficult problem with my analysis of an easy one highlights limits of original meaning as a method of Constitutional interpretation. Second, I will make a few tentative comments about the *Lochner* problem. Finally, I will make a few concluding observations about method.

I. Text and Original Meaning Applied to an Easy Problem

A. An Easy Problem

An easy problem is the Court's power to strike down state laws that unconstitutionally abridge freedom of speech, press, religion, and petition. There are two independent arguments against such a power. The first argument is that the Fourteenth Amendment, as originally understood, simply does not address the problem. This argument claims that although the Amendment prohibits denials of liberty without due process, one cannot read that prohibition to encompass substantive freedoms of speech, press, religion, or petition.⁸ A second argument is that the First Amendment is simply a government disability to act on certain subjects—"Congress shall make no law."⁹ So, the Amendment creates neither a freedom nor a liberty that could limit the states. The second argument claims that even if one reasonably could read the language of the Fourteenth Amendment to require states to respect constitutional liberties, the language would not include First Amendment rights because, as a textual matter, no rights exist in the First Amendment.¹⁰

Requiring states to respect a national right to free speech is hardly at the forefront of contemporary controversy on the Court. Still, some commentators assume that the Court's power to strike down state laws that abridge free speech is illegitimate. If we accept original meaning as the sole test of the Court's power, must we abandon any national protection for the freedoms of speech, press, religion, and petition? To this question, the text offers a simple, direct, and reasonably convincing answer based both on plain meaning and on a widely shared original historic usage. If one requires more certainty, then text and original meaning cannot answer most questions.

⁸ Cf., e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* ch. 8 (2d ed. 1997) (discussing incorporation of the Bill of Rights in the Fourteenth Amendment). I do not intend to endorse this doctrine by stating it. For a recent study of the Fourteenth Amendment reaching conclusions different from those that I suggest here, see JAMES E. BOND, *NO EASY WALK TO FREEDOM* (1997).

⁹ U.S. CONST. amend. I.

¹⁰ See *infra* note 21 and accompanying text.

B. *A Textual Reading of the Fourteenth Amendment As Applied to State Laws Abridging Free Speech, Free Press, or Free Exercise of Religion*

1. *A Simple, Natural, Obvious, and Ordinary Reading of the Text*

The Fourteenth Amendment confers citizenship on all persons who are born in the United States and subject to its jurisdiction.¹¹ The Amendment then provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"¹² Let's begin by reading the Constitution word for word according to its simple, natural, and ordinary meaning. We also should consider history and purpose, as Justice Hugo Black often did.¹³

The Amendment begins, "No State shall" This language obviously limits what states may do, presumably in some new and legally significant way. The "no state shall" language is the way that the original constitution, through Article 1, Section 10, imposes other judicially enforceable limits on the states.¹⁴ John Marshall said that the words "no state shall" are the introductory words that the Framers of the Bill of Rights would have used if they had intended the Bill of Rights to limit the states.¹⁵ John Bingham, the principal drafter of Section 1 of the Fourteenth Amendment, later explained that he had followed John Marshall's prescription.¹⁶ So here, history and precedent reinforce the simple meaning.

No state shall "abridge." A dictionary tells us that abridge means "diminish" or "curtail."¹⁷ No state shall abridge "*privileges.*" "Privilege," the dictionary says, means "a right, immunity, or benefit enjoyed by . . . a restricted group of persons" or "any of the rights common to all citizens under a modern constitutional government."¹⁸ "Of" (in "*privileges or immunities of citizens of the United States*") suggests that the privileges or immunities are special possessions that belong to "citizens of the United States."¹⁹

¹¹ See U.S. CONST. amend. XIV, § 1.

¹² *Id.*

¹³ See, e.g., *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting); *Bridges v. California*, 314 U.S. 252, 258-78 (1941) (Black, J., delivering the opinion of the Court).

¹⁴ See U.S. CONST. art. I, § 10 (stating that "No State shall enter into any Treaty, Alliance or Confederation; . . . coin Money; . . . pass any Bill of Attainder, . . . or grant any Title of Nobility"); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178-80 (1803) (citing similar limits in Article I, Section 9 as support for the courts' power to find legislation unconstitutional).

¹⁵ See *Baron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 248-50 (1833); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 161 (1986) [hereinafter CURTIS, *NO STATE SHALL ABRIDGE*]; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1218-20 (1992).

¹⁶ See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 15, at 161.

¹⁷ RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 5 (2d ed. 1997).

¹⁸ *Id.* at 1036.

¹⁹ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856) (pronouncing that constitutional rights and privileges belong only to citizens of the United States); see also William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 4-6 (1954) (discussing the *Dred Scott* doctrine that the privileges of the Constitution and its amendments belonged only to citizens of the United States). Free blacks, however, even free blacks who were citizens of the states, were not entitled to federal

So, by a simple and direct reading, the “privileges or immunities of citizens of the United States” would include all those rights and liberties belonging especially to citizens of the United States. These privileges would clearly include rights recognized by the federal Constitution, such as the freedoms of speech, press, and religion; the guarantee against bills of attainder; the Article IV, Section 2, Clause 1 protections for citizens from one state who are in another state; and the Fourteenth Amendment’s guarantee of equal protection. The privileges or immunities of citizens would also include other rights uniquely belonging to American citizens, though not spelled out in the text—such as the right to travel—if a widely shared consensus understood these rights as national rights belonging to citizens of the United States. After ratification of the Fourteenth Amendment, states may no longer abridge these privileges.

Because *Barron v. Mayor and City Council of Baltimore*²⁰ held that the privileges in the Bill of Rights did not limit the states, the Amendment makes both linguistic sense and sense in light of prior law. The Amendment would protect citizens of the United States against both state and federal action abridging the liberties of speech, press, religion, and petition (to mention only four of the guaranteed rights or immunities).

That conclusion still leaves the claim that one may not apply these rights or immunities—especially the liberties or immunities recognized in the First Amendment—to the states because the rights or privileges of speech, press, religion, and petition do not exist in the federal Constitution. Instead, the argument claims, all that exists is a congressional disability.²¹ There is no federal privilege or right, just a lack of federal power. By this view, the First Amendment is simply a jurisdictional provision that leaves control over speech, press, religion, and petition to the states. As “immunities,” free speech and press similarly could limit state power, a possibility that the theory ignores.

The retort to this “nothing to apply” claim is simple. The First Amendment has two components. It recognizes, but does not create, rights—the freedoms of speech and of the press, for example. It also provides a security device—“Congress shall make no law abridging”—that provides an immunity against federal abridgment of those rights. The phrase “privileges or immunities of citizens of the United States” refers to the rights or privileges of Americans that the First Amendment recognizes, not the security device. The Fourteenth Amendment adds a second security device for rights that it assumes to exist or, alternatively, adds a second denial of power.

I want to return to this distinction between the right or privilege on one hand and the security device on the other, but first, let’s look at the leading

constitutional rights, according to Chief Justice Taney’s opinion in *Dred Scott*. See *Dred Scott*, 60 U.S. at 404-10; Crosskey, *supra*, at 4-5.

²⁰ 32 U.S. (7 Pet.) 243, 247-48 (1833).

²¹ Cf., e.g., Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1589 (1995) (“Rather than recognizing the First Amendment as a disability on the power of Congress, [John Bingham and his supporters] treated it as . . . a personal right.”).

alternative reading, often suggested as the exclusive reading of the Privileges or Immunities Clause.

2. *A Subtle, Complex, and Recondite Reading*

An alternative reading of the Privileges or Immunities Clause of the Fourteenth Amendment recognizes that “no state shall” means just that.²² No state shall make or enforce any law that “abridges.” “Abridge,” by this reading, means “discriminate with reference to.”²³ As far as I know, no dictionary, now or since, has ever defined the word “abridge” in that way. No clause of the Constitution has ever used the word in that way—certainly not Section 2 of the Fourteenth Amendment, which refers to abridging the right to vote.²⁴ Section 2 provides for reduction of representation of those states that deny or abridge the right to vote of any male over twenty-one years of age (except on the basis of a crime).²⁵ In Section 2, to “abridge” the right to vote means to reduce or diminish the right. A state abridges the right, for example, by allowing a voter to vote for some offices but not others.²⁶ Still, according to the alternative meaning, “abridge” means “discriminate with reference to.” “Privileges or immunities of citizens of the United States,” by the alternative reading means rights that citizens enjoy by virtue of state laws that are subject to repeal.²⁷

These are the two leading competing readings of the Privileges or Immunities Clause. You, gentle reader, can decide which makes the most sense, which is the most faithful to the text, and which is most likely to have been the understanding of the ordinary reader when the Fourteenth Amendment was drafted.²⁸

C. *An Original Meaning Reading*

The reading of the Privileges or Immunities Clause that I suggest is a simple and direct, but current, textual reading. The natural contemporary reading, however, may not be the “original meaning.” The theory of popular sovereignty seems to require us to consult the meaning intended by the people who, through their representatives, adopted the Fourteenth Amendment. As Justice Frankfurter wisely reminded us, “an amendment to the Constitution should be read in a ‘sense most obvious to the common understanding at

²² See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 47-50 (1996) [hereinafter Curtis, *Resurrecting*]. For other alternative understandings of the Privileges or Immunities Clause, see BERGER, *supra* note 8, ch. 2; DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS*, 342-51 (1985); and John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

²³ See Curtis, *Resurrecting*, *supra* note 22, at 47.

²⁴ See U.S. CONST. amend. XIV, § 2.

²⁵ See *id.*

²⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866) (statement of Sen. Howard).

²⁷ See Curtis, *Resurrecting*, *supra* note 22, at 47.

²⁸ Some of the substantial literature on the subject (including important studies tending to support the mere equality reading) is set out in Curtis, *Resurrecting*, *supra* note 22, at 18 n.62, 22 n.76.

the time of its adoption For it was for public adoption that it was proposed.”²⁹ Justice Scalia suggests that we look not only at the statements of the Framers and Ratifiers, but also and equally at the statements “of other intelligent and informed people of the time,” to “display how the text of the Constitution was originally understood.”³⁰

1. *Early Use of the Words “Privileges” and “Immunities”*

The great documents in the history of liberty are full of references that describe rights and liberties like those in the Bill of Rights as either “privileges” or “immunities.” Both revolutionary Americans and English Tories, like William Blackstone, used the words in this way.³¹

Consider one of many early examples of the treatment of privileges as equivalent to rights of Americans. James Madison, in proposing the federal Bill of Rights to the First Congress, used the word “privileges” as equivalent to the American rights of free press, freedom of conscience, and trial by jury.³² Madison noted that in the British system, declarations of rights “ha[d] gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature [was] left altogether indefinite. . . . The freedom of the press and rights of conscience, those choicest *privileges* of the people, [were] unguarded in the British constitution.”³³ Madison described these rights as privileges of the people, but they were privileges that British law did not protect fully or consistently and that the federal Constitution did not yet protect explicitly. Nor did all state constitutions list those rights. Still, Madison considered these rights to exist and to belong to the people. What was missing was a security device—an amendment prohibiting states or the federal government from infringing on the rights.

In addition to the provisions that the Framers included in the Bill of Rights, Madison also proposed “that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases.”³⁴ He insisted that “every Government should be disarmed of powers which trench on those particular rights.”³⁵ Although some state constitutions secured the rights, Madison advocated “a double security on those points.”³⁶ Madison

²⁹ *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (quoting *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting)).

³⁰ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Amy Gutmann ed., 1997).

³¹ See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 64-65, 75-77.

³² See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1028 (Bernard Schwartz ed., 1971) [hereinafter 2 A DOCUMENTARY HISTORY] (James Madison in the First Congress).

³³ *Id.* (James Madison in the First Congress) (emphasis added). For recent commentary on the Bill of Rights, see Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131 (1991); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301; and Paul Finkelman, *The Ten Amendments As a Declaration of Rights*, 16 S. ILL. U. L.J. 351 (1992).

³⁴ 2 A DOCUMENTARY HISTORY, *supra* note 32, at 1033 (James Madison in the First Congress).

³⁵ *Id.* (James Madison in the First Congress).

³⁶ *Id.* (James Madison in the First Congress).

said that "State Governments are as liable to attack the invaluable privileges as the General Government is."³⁷ When a critic suggested the states should be free to decide whether to protect the rights, Madison responded that the limitation on the states was "the most valuable amendment in the whole list."³⁸

So when John A. Bingham sought, in the Thirty-ninth Congress, to require states to protect the privileges of speech, press, and religion, he followed the path that James Madison suggested (and the wording suggested by John Marshall).³⁹ Bingham, like Madison, proposed to make the rights more secure by prohibiting states from abridging these rights. More important, Bingham's use of the word "privileges" as equivalent to rights and liberties accorded with a widespread contemporary usage from 1776 to 1866.

Both state and federal constitutions often assume that a right exists and then protect that right from abridgment. The Fourth Amendment, for example, neither creates nor defines a right against unreasonable searches and seizures. The Amendment provides that the government shall not violate the right, which it assumed to exist. The First Amendment similarly assumed that the right to petition and the rights of speech and press existed and enjoined Congress from abridging those rights.

2. *Later Usage and Later History*

Some commentators consider the original meaning of the Fourteenth Amendment only to be about racial discrimination and the Black Codes. They are partly right because the Fourteenth Amendment addressed these matters. The other part of the constitutional story, however, is the suppression of civil liberties of both white and black Americans for thirty years before the Civil War. State governments suppressed free speech, press, and religion to protect slavery. One of the serious shortcomings of high school, college, and legal education is that teachers too often have forgotten, and therefore fail to teach, the rich history of attacks on free speech that grew out of the institution of slavery. In the South, the attacks came from both laws and mobs. In the North, the attacks came mainly from mobs.⁴⁰ North Carolina, like other southern states, had a law against publishing statements with a tendency to make either slaves or free negroes discontent with their condition.⁴¹

³⁷ *Id.* (James Madison in the First Congress).

³⁸ *Id.* at 1113 (Rep. Thomas Tucker in the First Congress, discussing Madison's view).

³⁹ See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 161 (discussing Bingham's reliance on John Marshall's opinion in *Barron* that the Framers would have included "no state shall" language in the first eight amendments if they had intended those amendments to limit the states); Amar, *supra* note 15, at 1218-19 (same); Crosskey, *supra* note 19, at 89 (same).

⁴⁰ See generally LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970) (discussing the use of mobs against abolitionists); Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785, 802-13 (1995) (same).

⁴¹ See Act to Prevent Circulation of Seditious Publications, N.C. REV. CODE ch. 34, § 16 (1854); Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1164 (1993) [hereinafter Curtis, *The 1859 Crisis*].

In 1836 and 1837, Elijah Lovejoy, a minister, was hounded in Alton, Illinois for publishing an antislavery newspaper.⁴² In November 1837, he was killed while defending his press from an anti-abolition mob.⁴³ Mobs had destroyed his press three times before.⁴⁴ Lovejoy's persecution and death produced a firestorm of criticism.⁴⁵ His death and the reaction to it accelerated crystallization of ideas about the rights of American citizens that were entirely consistent with the simple, clear, and natural reading of the Privileges or Immunities Clause of the later adopted Fourteenth Amendment.⁴⁶ The criticism following Lovejoy's death and other evidence show that the natural and nontechnical understanding of rights (or privileges) of American citizens later embodied in the Fourteenth Amendment was commonplace in the years before the Civil War.

The antislavery press collected and republished the protests against Lovejoy's murder. Here is what some of those who protested the killing wrote. The *Baltimore Lutheran Observer* said:

Freedom of opinion and of the press is an inalienable privilege secured to us by our political *magna charta* as well as by the original inherent right of our nature, and it is impossible that the citizens of this free and enlightened republic should consent to surrender this inestimable *privilege* in the present age of liberal views.⁴⁷

A speaker at an 1836 meeting in Willoughby, Ohio, in favor of free discussion of slavery, proclaimed the "unquestionable right of all persons in this republic, to discuss every subject pertaining to [the republic's] welfare."⁴⁸ The speaker insisted that the "[C]onstitution of the United States protects us in so doing."⁴⁹ The *Louisville Herald* asked, "Is a citizen of the United States . . . to be murdered defending the rights guaranteed to him by the Constitution of his country?"⁵⁰ The *New York Daily News* said that the people who killed Lovejoy were "violators of the rights and privileges of American citizens."⁵¹ It was disgraceful, the *New Hampshire Courier* wrote, that local authorities had failed to protect Lovejoy, who was "battling to protect the freedom of speech, and of the press[,] and of all the sacred rights secured

⁴² Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1132-42 (1997) [hereinafter Curtis, *Lovejoy*].

⁴³ *See id.* at 1110, 1142.

⁴⁴ *See id.*

⁴⁵ *See id.* at 1145-47.

⁴⁶ *See id.* at 1171. For accounts of the Lovejoy story and the reaction to his death, see MERTON L. DILLON, ELIJAH P. LOVEJOY: ABOLITIONIST EDITOR (1961); PAUL SIMON, FREEDOM'S CHAMPION: ELIJAH LOVEJOY (1994); and Curtis, *Lovejoy*, *supra* note 42.

⁴⁷ *Testimonies of the Spirit of Liberty*, 2 EMANCIPATOR 129, 129-30 (Dec. 21, 1837) (quoting the *Baltimore Lutheran Observer*); *see* Curtis, *Lovejoy*, *supra* note 42, at 1148.

⁴⁸ *From the Cleveland Whig*, PHILANTHROPIST, Mar. 11, 1836, at 4; *see* Curtis, *Lovejoy*, *supra* note 42, at 1148-49.

⁴⁹ *From the Cleveland Whig*, PHILANTHROPIST, Mar. 11, 1836, at 4; *see* Curtis, *Lovejoy*, *supra* note 42, at 1149.

⁵⁰ *The Voice of the Public Press*, 2 EMANCIPATOR 120 (Nov. 30, 1837) (quoting the *Louisville Herald*); *see* Curtis, *Lovejoy*, *supra* note 42, at 1149.

⁵¹ *The Voice of the Public Press*, *supra* note 50 (quoting the *New York Daily News*); *see* Curtis, *Lovejoy*, *supra* note 42, at 1149.

to the citizens by the Constitution of these [United States].”⁵² A meeting of young men in New York concluded that “the liberty of the press, [freedom] of speech, and the right of petition, are among the greatest blessings and proudest prerogatives of a free people, [and] that their exercise is guaranteed to every citizen by the [f]ederal Constitution.”⁵³ Assailing these rights was both “an encroachment upon the rights of citizens, and a direct and fatal attack [on that] sacred instrument which unites us as one people.”⁵⁴

The people often used the words “rights,” “liberties,” and “privileges” interchangeably.⁵⁵ The *Newark Daily Advertiser* described “the right of free discussion” as an “inalienable privilege of a freeman.”⁵⁶ The *Berkshire Courier* insisted that liberty of speech “must not be surrendered. It was one of the privileges left us by our fathers.”⁵⁷ Free speech was “a ‘home-bred right,’ a ‘fireside privilege,’” according to a Concord, New Hampshire public meeting.⁵⁸ A public meeting in Susquehanna County, Pennsylvania resolved that “freedom of the press is a right too sacred to be in the least invaded—a privilege too dear to be shackled or impaired by public enactments or lawless violence.”⁵⁹

Many more people used the word “privilege” in the same way. Of course, these statements seem strange because they were not consistent with the understanding of the United States Supreme Court at the time. In *Barron*, the Court had held that the guarantees of the Bill of Rights were limits only on the federal government and were not legally enforceable limits on the states.⁶⁰

These statements and subsequent examples show, first, a widely held belief that citizens of the United States had basic privileges or rights to free speech and free press that the federal Constitution recognized—rights that no one legitimately could deny to American citizens. Second, the evidence shows that it was common to describe these rights as privileges of American citizens.

In 1859 to 1860, a controversy over an antislavery book by Hinton Helper, a North Carolinian, provoked both an outraged Southern response and a Republican defense of free speech throughout the nation.⁶¹ Leading

⁵² *Testimonies of a Free Press*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 2; see Curtis, *Lovejoy*, supra note 42, at 1149.

⁵³ *Meeting of Young Men in New York*, 2 EMANCIPATOR 154 (Feb. 1, 1838); see Curtis, *Lovejoy*, supra note 42, at 1149.

⁵⁴ *Meeting of Young Men in New York*, supra note 53; see Curtis, *Lovejoy*, supra note 42, at 1149.

⁵⁵ See Curtis, *Lovejoy*, supra note 42, at 1149.

⁵⁶ *The Voice of the Public Press*, supra note 50 (quoting the *Newark Daily Advertiser*); see Curtis, *Lovejoy*, supra note 42, at 1149.

⁵⁷ *Testimonies of a Free Press*, supra note 52, at 3 (quoting the *Berkshire Courier*); see Curtis, *Lovejoy*, supra note 42, at 1149.

⁵⁸ *The Impartial Verdict of Free Citizens, Concord, N.H.*, 2 EMANCIPATOR 168 (Feb. 22, 1838); see Curtis, *Lovejoy*, supra note 42, at 1149-50.

⁵⁹ *The Impartial Verdict of Free Citizens, Susquehanna, Pa. County*, 2 EMANCIPATOR 168 (Feb. 22, 1838); see Curtis, *Lovejoy*, supra note 42, at 1150.

⁶⁰ See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

⁶¹ See generally Curtis, *The 1859 Crisis*, supra note 41 (discussing the impact of Hinton Helper's book).

Republicans had endorsed the book and had planned to circulate it as a campaign document.⁶² The Republican defense of free speech complained about the despotism that ruled in the South.⁶³ According to Congressman Sidney Edgerton of Ohio, southern leaders were denouncing Republicans as traitors for adopting the antislavery opinions of Thomas Jefferson, George Washington, James Madison, and Patrick Henry.⁶⁴ Meanwhile, southern leaders had suppressed free speech in the South.⁶⁵ "For years," Congressman Edgerton said,

in most of the slaveholding states, the most sacred provisions of the Constitution have been wantonly and persistently violated. Where is the *liberty of speech and of the press* in the slaveholding states? Can a northern man . . . print and speak his opinions? Not if he believes in the Declaration of Independence.

Nor could preachers "discuss the moral bearings of slavery."⁶⁶

In 1860, Congressman Owen Lovejoy, brother of the slain Elijah Lovejoy, defended the right of people to circulate Helper's antislavery book anywhere in the United States.⁶⁷ Owen Lovejoy insisted on "the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend."⁶⁸ Lovejoy proclaimed that the Constitution "guaranties to me free speech."⁶⁹ He protested the Southern states' decision to "imprison or exile [antislavery] preachers of the Gospel."⁷⁰ Indeed, North Carolina tried and convicted a Wesleyan minister for circulating Helper's book—a Republican campaign document.⁷¹ The state supreme court found that the minister's act of giving the book to whites violated a state law against circulating books or pamphlets that might cause discontent among either slaves or free blacks.⁷²

In 1860, Republicans in the United States Senate unanimously resolved that

free discussion of the morality and expediency of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and

⁶² See *id.* at 1143.

⁶³ See *id.* at 1147.

⁶⁴ See *id.* at 1155.

⁶⁵ See *id.*

⁶⁶ *Id.* (quoting CONG. GLOBE, 36th Cong., 1st Sess. 930 (1860) (statement of Rep. Edgerton)) (emphasis added).

⁶⁷ See *id.* at 1158-59.

⁶⁸ *Id.* at 1159 (quoting CONG. GLOBE, 36th Sess., 1st Sess. app. at 205 (1860) (statement of Rep. Lovejoy)).

⁶⁹ *Id.* (quoting CONG. GLOBE, 36th Sess., 1st Sess. app. at 205 (1860) (statement of Rep. Lovejoy)).

⁷⁰ *Id.* (quoting CONG. GLOBE, 36th Sess., 1st Sess. app. at 205 (1860) (statement of Rep. Lovejoy)).

⁷¹ See *State v. Worth*, 52 N.C. (7 Jones) 376, 376-77 (1860).

⁷² See *id.* at 379-80. For an account of the *Worth* trial, see Curtis, *The 1859 Crisis*, *supra* note 41, at 1159-67.

every other subject of *domestic* and national policy, should be maintained inviolate in all the States.⁷³

During the debate about the abolition of slavery, a common theme was that slavery had denied the privileges of free speech and free press to citizens of the United States. Representative James Wilson, the Chair of the Judiciary Committee in the Thirty-ninth Congress, was clear and direct:

Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together.⁷⁴

Slavery had practically destroyed these rights. It had persecuted religionists, denied the privilege of free discussion, prevented free elections, [and] trampled upon all of the constitutional guarantees belonging to the citizen. . . . Throughout all the dominions of slavery[,] republican government, constitutional liberty, [and] the blessings of our free institutions were mere fables. An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the inestimable privileges which by right they should have enjoyed . . . by the Constitution.⁷⁵

Not only abolitionists and Republicans asserted that free speech was a “privilege” or “immunity” of American citizens under the national Constitution. During the Civil War, a Union general arrested a Democrat, Clement L. Vallandigham, for an antiwar speech.⁷⁶ There were massive protests in the North, which a number of Republicans joined.⁷⁷ The press printed resolutions protesting the arrest.⁷⁸ Critics of the arrest often quoted Daniel Webster:

It is the ancient and undoubted prerogative of this people to canvass public measures and the merits of public men. It is a “home-bred right”—a fireside *privilege*. It has been enjoyed in every house, cottage[,] and cabin in the nation. . . . This high constitutional privilege we shall defend and exercise in all places; in time of war, in time of peace, and at all times.⁷⁹

⁷³ Curtis, *The 1859 Crisis*, *supra* note 41, at 1157-58 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 2321 (1860) (emphasis added) (statement of the Presiding Officer)). Although every Republican who voted supported the resolution, the Senate defeated it on a party line vote. *See id.* at 1158.

⁷⁴ CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson); *see* Curtis, *The 1859 Crisis*, *supra* note 41, at 1169.

⁷⁵ CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson).

⁷⁶ *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech During the Civil War*, 7 WM. & MARY BILL RTS. J. (forthcoming 1998) [hereinafter Curtis, *Lincoln*].

⁷⁷ *See id.*

⁷⁸ *See, e.g.,* “Shall We Remain Free”—Large and Enthusiastic Meeting at the City Hall, DETROIT FREE PRESS, May 26, 1863, at 1.

⁷⁹ *Id.*

The same Union general who arrested Vallandigham later suppressed the *Chicago Times* newspaper.⁸⁰ President Lincoln, under political pressure, countermanded that decision.⁸¹ After a mass meeting opposing the suppression of the *Chicago Times*, the paper announced:

Wednesday was a day for Chicago to be proud of. By the voice of her citizens she proclaimed to the world that the right of free speech has not yet passed away; that immunity of thought and discussion are yet among the inalienable privileges of men born to freedom. . . . Twenty thousand bold men with one acclaim decreed that speech and press shall be untrammelled, and that despotism shall not usurp the inborn rights of the American citizen.⁸²

During the campaign of 1866, many people praised the Fourteenth Amendment as protecting all rights enumerated in the Constitution, particularly freedom of both speech and press.⁸³ The natural reading of the Amendment was a contemporary reading.

Some arguments claim an indirect rejection of the application of basic Bill of Rights liberties to the states under the Fourteenth Amendment. These arguments are based on statements about the Civil Rights Act or on Article IV. Detailed discussion of these claims is beyond the scope of this Commentary. Interested readers may pursue those issues elsewhere.⁸⁴ I note, however, that the basic flaw in these claims is that for many people in 1866 to 1868, references to Article IV, Section 2 and the rights secured by the Civil Rights Act did not exclude basic constitutional liberties, such as those in the Bill of Rights.⁸⁵

When John Bingham and Senator Jacob Howard, Framers of the Fourteenth Amendment, said that the privileges or immunities of citizens of the United States encompassed rights in the Bill of Rights,⁸⁶ they were using words in ways that were consistent with a broad and popular usage that was expressed for years before the Fourteenth Amendment. They also were bringing the Constitution closer to what many Americans thought it meant.

D. *Some Thoughts about Method*

1. *How Much Proof Is Enough?*

Can one show that absolutely everyone would have understood the Amendment in this way? Did everyone necessarily agree, even before the Fourteenth Amendment (and certainly after), that state suppressions of

⁸⁰ See Curtis, *Lincoln*, *supra* note 76.

⁸¹ See *id.*

⁸² *Free Speech—Free Press*, DETROIT FREE PRESS, June 6, 1863, at 1 (quoting the *Chicago Times*).

⁸³ See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 131-45.

⁸⁴ For a more detailed discussion of these claims, see *id.* at 63, 71-72; and Curtis, *Resurrecting*, *supra* note 22, at 1, 50-65.

⁸⁵ See Curtis, *Resurrecting*, *supra* note 22, at 50-56.

⁸⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 2764-66 (1866) (statement of Sen. Howard); *id.* at 1034, 1088-89 (statement of Rep. Bingham); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 84-91, 145, 161.

speech violated the privileges recognized by the federal Constitution? Of course not. The evidence does show, however, that a reference to privileges or immunities of citizens of the United States, in light of contemporary usage, would have been widely understood to protect liberties such as those in the First Amendment. Many people naturally would have read a provision that no state could abridge privileges or immunities of citizens of the United States as a limit on the states in the interest of protecting the liberties recognized in the First Amendment—freedom of speech, free exercise of religion, and the right to petition. One can show that many read the provision in exactly that way. Indeed, even before the Fourteenth Amendment, a remarkable number of Republican representatives and senators treated the obligations of the Bill of Rights as morally or legally limiting the states.⁸⁷ Because the Privileges or Immunities Clause refers to a body of privileges that are outside of its text and that belong to Americans, for these Congressmen, liberties mentioned in the Bill of Rights certainly would have been included within the Clause.⁸⁸ In response to assumptions by his colleagues that federal protection of Bill of Rights liberties against state action justified the Civil Rights Bill, John Bingham cited *Barron*⁸⁹ to show the need for a constitutional amendment to enforce the Bill of Rights.⁹⁰

One can show more evidence for the hypothesis that the Fourteenth Amendment protected national liberties (including free speech and press) than for the alternative claim that this was not the case. One also can show that evidence to support reading the Equal Protection Clause to outlaw arbitrary discriminations, such as racial discrimination regarding the right to contract or hold property, is stronger than attempts to limit the Privileges or Immunities Clause to a provision that prohibited discrimination under state law.⁹¹

If one elects to pursue original meaning, the most one reasonably can expect is that the suggested reading is simple, direct, and natural; that it responds both to evils that led to the adoption of the Amendment and to the broad sweep of history of which the Amendment was a part; that it is consistent with widespread contemporary usage; and that it is one that a substantial number of people then understood and embraced, and that a substantial number did not repudiate directly. One can also insist that allegedly indirect repudiations must be clearly inconsistent with the suggested reading. Additionally, one can ask that the evidence for the suggested reading be stronger than evidence for a rival interpretation that would exclude the suggested interpretation. To demand a higher standard makes the search for original meaning an impossible task. The search for original meaning often can be fruitful. There are some useful guides for the search.

⁸⁷ See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 34-56 (citing numerous examples of Congressmen who insisted, even before the passage of the Fourteenth Amendment, that the states must respect Bill of Rights liberties).

⁸⁸ See *id.*

⁸⁹ *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the privileges in the Bill of Rights did not limit the states).

⁹⁰ See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 70-71.

⁹¹ See Curtis, *Resurrecting*, *supra* note 22, at 82-85.

2. *Rules (or Perhaps Just Suggestions) in the Search for Original Meaning*

a. *Our Large Group of Creators*

First, we should remember that those who gave us the Constitution include not just the Framers assembled in Philadelphia in 1787, but all the people who supported the document and its many amendments—for example, the antislavery activists and Republicans who gave us the Thirteenth and Fourteenth Amendments, the feminists and politicians who gave us the Nineteenth Amendment securing women's suffrage, and the Progressives and Populists who gave us the income tax amendment and direct election of Senators. The Framers include John Bingham and Jacob Howard from the Thirty-ninth Congress, as well as James Madison and James Wilson from the Constitutional Convention. The creators of the Constitution also include the politically active and alert sovereign people. The creators are not limited to those persons steeped in the complexities of the law, but include ordinary and extraordinary interested lay people.

b. *The Need for a Broader Context*

Second, if we search for an original meaning, we err by focusing on just the year or so in which a constitutional provision was enacted. People understand events in light of their experience. The experience of the people who gave us the Fourteenth Amendment included the Lovejoy tragedy,⁹² the uproar over the Helper book,⁹³ the mobs and laws that precluded Republicans from campaigning in the South,⁹⁴ and the indictments of some Northern Republicans in the South because of their endorsement of the Helper book.⁹⁵

The experience of the people who gave us Section 1 of the Fourteenth Amendment with its Privileges or Immunities Clause includes the Southern states' suppression of civil liberties and antislavery speech, press, and religion in the thirty years before the Civil War, and the response of antislavery activists and Republicans.⁹⁶ Many antislavery activists and Republicans insisted that such a suppression—even on the question of slavery in a single state—violated the rights or privileges of American citizens. The great shortcoming of much work on the meaning of the Fourteenth Amendment is obsessively focusing on a few months before and after the adoption of the Amendment while ignoring the history of the preceding thirty years—and even of the preceding ten.

c. *Free Speech as Understood in 1866 to 1868, not 1791*

Third, assuming that the Fourteenth Amendment nationalized certain basic liberties—like the freedoms of speech and religion—by requiring states to respect them, the original meaning that matters would be the understand-

⁹² See *supra* notes 42-46 and accompanying text.

⁹³ See *supra* notes 61-73 and accompanying text.

⁹⁴ See *supra* notes 40-41 and accompanying text.

⁹⁵ See Curtis, *The 1859 Crisis*, *supra* note 41, at 1144, 1174.

⁹⁶ See *supra* notes 61-75 and accompanying text.

ing of free speech that culminated in the years 1866 to 1868, not an understanding of free speech from 1791. The test would be the contemporary understanding at that time of the meaning of the words “privileges or immunities of citizens of the United States.” As to the freedom, privilege, or immunity protected against state action, if most people in 1866 to 1868 rejected both the Sedition Act and the Blackstonian definition of free speech as measures of the free speech and press privileges or immunities of American citizens, then their common understanding is what should count.⁹⁷ Other approaches—such as either interpreting free speech and press merely as a federal disability or limiting those freedoms to an alleged understanding from 1791—cut the tie between the understanding of the people who adopted the Fourteenth Amendment and the Amendment’s meaning.

We also should recognize the structural function of free speech in a democratic society. Because broad protection for free speech is essential to the republican government that the Constitution created, the structure of the Constitution requires broad protection for political speech, regardless of whether or not people in 1791 recognized that fact.

d. The Meaning to Whom

Fourth, if one claims that the Constitution represents the will of the sovereign people, then an original meaning would be the meaning to these people. Justice Scalia suggests that the views of people who are neither Framers nor Ratifiers are as significant as the views of people who are, because we consider the understanding of the general public during framing and ratification.⁹⁸ From this premise, it follows that our search for meaning cannot be limited to or controlled by either court decisions or legal texts.⁹⁹ The search certainly should include great documents in the history of liberty; legal texts; and debates in Congress, state legislatures, cities, towns, and the popular press. Justice Scalia’s approach is more faithful to the theory of popular sovereignty. By greatly expanding the number of understandings that count, however, his theory makes answering the question of meaning even more difficult. The understanding-of-the-people approach is in tension with canons of construction that suggest technical meanings that may conflict with popular understanding.

The problem with original meaning is not that there are too few sources, but that there are too many, far too many. Taken seriously, the search for original meaning involves a large commitment of time and difficult decisions about which understandings count most.

⁹⁷ See, e.g., Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. REV. 1106, 1108-09 (1994) (suggesting that the adoption of the Fourteenth Amendment altered and broadened the scope of religious freedoms granted by the First Amendment).

⁹⁸ See Scalia, *supra* note 30, at 38.

⁹⁹ Cf. *id.* at 38-41.

E. Conclusion to Part I

Part I of this Commentary suggests that ideas of both text and original meaning (and of both history and prior precedent, for one cannot separate sharply those ideas from common understanding) can illuminate a core meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. Racial discrimination under the Black Codes is a paradigm example of the meaning (as I see it) of the prohibition of the Equal Protection Clause. The suppression of antislavery speech, religion, and bearing arms in the years before the Civil War (and in some Black Codes) is a paradigm example for the meaning of the Privileges or Immunities Clause. The Due Process Clause addressed, among other things, the Black Codes' denial of the right to testify. It did so by providing basic procedural rights to *all persons*. The Privileges or Immunities Clause addressed general as well as race-based suppression of free speech, press, and religion by providing rights to *all citizens*.

That conclusion, however, does not make Jeff Rosen's more difficult problem go away. A very complex problem of the relation of *Lochner*-like ideas to the Fourteenth Amendment remains, whether in its Due Process Clause, Equal Protection Clause, Privileges or Immunities Clause, or any combination of these. If Fourteenth Amendment privileges or immunities encompass national rights of citizens of the United States, then they also would include the contemporaneously adopted Equal Protection Clause, any understanding of an implicit constitutional right to equality, rights under Article IV, Section 2, and other national Constitutional rights.¹⁰⁰

Because the meaning of the Fourteenth Amendment's Privileges or Immunities Clause depends on an understanding of the rights or privileges uniquely belonging to all Americans, the Amendment's meaning depends on an understanding of those unique rights. Those persons who thought that a right to equality in the sort of fundamental interests identified in an orthodox reading of Article IV belonged to all American citizens would see that privilege of equality reflected in the Privileges or Immunities Clause of the Fourteenth Amendment. Those who thought that a national right to either contract or own property existed would see those rights reflected in the Privileges or Immunities Clause. Those who believed that contract and property rights were granted along with a very broad power of the state to regulate the rights would understand the contract and property privileges to be bounded by state regulation. Those who thought that the rights of Americans under Article IV were limited to a prohibition on discrimination against out-of-state citizens would not see the Privileges or Immunities Clause as creating a major structural change as to the subset of privileges contained in Article IV, Section 2.¹⁰¹ Any attempt to find a common understanding of the meaning of both the words and directions of the Fourteenth Amendment on the *Lochner* issue must confront the problem of various understandings combined with a strong Republican commitment to federalism.

¹⁰⁰ See Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 *Ohio St. L.J.* 89, 114, 117 (1982); Crosskey, *supra* note 19, at 83.

¹⁰¹ See, Curtis, *Resurrecting*, *supra* note 22, at 31-34, 36-64, 70.

II. *Back to the Hard Problem: Lochner, Slavery, and Republican Ideology*

What do the Black Codes, which discriminated against and denied property, contract, and other rights to blacks, tell us about *Lochner's* vision of freedom of contract? Here the text reveals little directly and we must resort even more to history to fill in its meaning.¹⁰² I suggest that we think of the serfdom imposed by the Black Codes as a paradigm case.¹⁰³ But what do the history of slavery and the later serfdom attempted by the Black Codes tell us? Are minimum wage laws, maximum hour laws, worker safety laws, or laws that require employers to pay workers in cash—all of which can be and once were seen as interferences with the freedom of contract—significantly like the denial of the right of blacks to own property, to contract, or to leave the plantation without a pass? Are minimum wage laws like the denials of free labor that characterized both slavery and the serfdom of the Black Codes? How one answers that question will depend on how one understands the world and its power differences. For me, to treat such laws as similar to the Black Codes stretches the analogy beyond the breaking point and turns history on its head.

Certainly Republicans believed in both free labor and freedom of contract (limited by regulations that are in the public interest). Most of them believed in federalism with a wide role for the states. Many of them believed that the dimensions of the rights to own property and to contract were essentially state law matters, limited, at least for some of them, by a rule of equality that prohibited irrational discrimination based on race or nationality. Before we too quickly assume that the ideas of the later nineteenth century motivated Republicans of the Civil War era, we should study their ideas in more detail and recall the differences between the economic structure of the nation in 1866 and in 1896. That task is beyond the scope of this Essay. Still, some facts are worth recalling.

In his message to Congress in 1861, Abraham Lincoln warned of “the effort to place capital on an equal footing with, if not above labor, in the structure of government.”¹⁰⁴ Lincoln insisted that “[l]abor is the superior of capital, and deserves much higher consideration.”¹⁰⁵ He noted that most men neither worked for others nor had others working for them, and he noted that men hired by the capitalist could reasonably hope in time to become independent, and perhaps even to hire others themselves.¹⁰⁶

¹⁰² For an argument that legislation that advanced the interests of a particular segment of society without a sufficient public purpose was illegitimate, see, for example, Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 248 n.11 (1997).

¹⁰³ See Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1108 (1998).

¹⁰⁴ Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), in 2 ABRAHAM LINCOLN, COMPLETE WORKS: COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 105 (John G. Nicolay & John Hay eds., 1894).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 105-06.

In 1864, one Republican warned against the attitude, in both the North and the South, that “‘makes the laborer the mere tool of the capitalist.’”¹⁰⁷ Senator Henry Wilson insisted that “we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men in this country. . . . The same influences that go to keep down . . . the rights of the poor black man bear down and oppress the poor white laboring man.”¹⁰⁸ When President Andrew Johnson vetoed the Freedman’s Bureau Bill, which provided aid and security for newly freed slaves, he insisted that the slaves would be amply protected by the law of supply and demand.¹⁰⁹ Senator Lot Morrill of Maine responded:

In a condition of destitution and suffering and want, the black man cries to the nation for recognition of his manhood, for protection; the nation answers back, there is for you no justice, no protection, no courts, no rights, civil or political; in the language of the chief Executive, you are left to “the great law of supply and demand.”¹¹⁰

The understanding of Republicans in 1866 to 1868 may have been different both from our own understanding and from that of persons in the late nineteenth century, and these differences may relate to the radical changes in economic organization that took place after 1866.

Before we read too broadly the injunction that government may not take property from *A* and give it to *B*, we should explore contemporary limits on this rule and should study in detail economic regulation at both the state and federal level from 1830 to 1868. But more important, we should recall that the Constitution did not stop developing in 1868. The Income Tax Amendment¹¹¹ changed any rule that prohibited the government from redistributing wealth to the less fortunate in the interest of society at large, if any such rule ever existed.

During the Civil War, the federal government raised revenue with a mildly progressive income tax, and it gave aid through the Freedman’s Bureau to the many persons who had suffered dislocation because of the Civil War.¹¹² The federal government had attempted to promote independence by granting inexpensive government land to settlers.¹¹³ Although contemporary practices should not trump clear statements of a principle, these practices are factors to consider.

At least a few Republicans favored breaking up the large plantations and distributing the property to the newly freed slaves.¹¹⁴ These Republicans

¹⁰⁷ See Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 471 (1989) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (statement of Rep. Shannon)).

¹⁰⁸ CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Wilson), *quoted in* VanderVelde, *supra* note 107, at 483-84.

¹⁰⁹ See VanderVelde, *supra* note 107, at 484-85.

¹¹⁰ *Id.* at 485 (quoting CONG. GLOBE, 39th Cong., 1st Sess. app. 156 (1866) (statement of Sen. Morrill)).

¹¹¹ U.S. CONST. amend. XVI.

¹¹² See ERIC FONER, *RECONSTRUCTION 69-70* (1988).

¹¹³ See *id.* at 68-69.

¹¹⁴ See *id.* at 68.

pursued the principle of widespread economic independence rather than of pure laissez-faire. I do not suggest that these facts are either complete or conclusive; I suggest only these facts raise questions about the meaning of the directions from the Framers of the Fourteenth Amendment.

If the original meaning of the privileges of the Fourteenth Amendment encompassed a right to contract limited only by regulations that were both equally applicable to all persons and adopted in the public interest, we would have to decide how we understand the meaning of that protection today. Our contemporary understanding, reflecting both political and judicial decisions over at least the last sixty years, is that worker safety, minimum wage, maximum hour, and other worker protection legislation are sufficiently in the general public interest for the legislation to survive judicial review. Indeed, these are questions for the political process, as to which judicial scrutiny is minimal. If an originalist interpretation implies a much higher level of scrutiny for such laws—either intermediate or strict—then history suggests reasons for concern. In many past decisions, the Court read the Constitution through a lens of caste and class bias,¹¹⁵ and there is reason to fear that history might repeat itself.

III. *The Hard Question and the Easy Question Compared*

I suggest that one question, application of free speech and press liberties under the Fourteenth Amendment, is comparatively easy and is illuminated by both text and original meaning. Professor Rosen suggests that original meaning does not adequately address the constitutionality of state affirmative action plans for federal or state contractors (a question he sees as raising *Lochner* issues as well).¹¹⁶ What are the differences between these two questions and what do these differences suggest?

First, both the text of the Privileges or Immunities Clause plus the textual references to basic liberties, such as free speech, press, and religion, read simply and naturally, speak directly to the problem of states abridging free speech. A reading of the Fourteenth Amendment as prohibiting states from abridging free speech or press also comports with a widely held 1866 to 1868 understanding both of the plain meaning of the words “privileges or immunities” and of the rights of all Americans. A reading of the Fourteenth Amendment that creates a freedom to contract that includes a prohibition on either minimum wage laws or maximum hours laws, however, is far less immediate, clear, and direct.

¹¹⁵ See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down a minimum wage for women and children); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a ban on interstate transportation of goods manufactured by children under 14 years of age as beyond congressional power under the Commerce Clause); *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a law limiting bakers to a 60 hour work week denied liberty without due process); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that free Americans of African descent who were recognized as citizens of a northern state had no federal constitutional rights).

¹¹⁶ See Rosen, *supra* note 1, at 1254-55. For a recent discussion of original understanding and affirmative action, see Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. L. Rev. 477 (1998).

Second, for free speech and press rights, we have a very specific history of the types of pre-Fourteenth Amendment abuses that many persons in 1866 to 1868 understood and that we today understand as violations of free speech. The Framers of the Fourteenth Amendment simply were not responding to the *Lochner*-like questions involved in the problem that Professor Rosen addresses—questions that implicate minimum wage laws, maximum hour laws, and the right to payment in cash rather than in scrip redeemable only in the company store (all of which were alleged to violate the freedom of contract). So the directions from 1866 to 1868 on these questions are less clear, and the claim to leave these matters to the political process is stronger.

Third, the Court and most scholars have repudiated *Lochner*, and many of us, and probably most Americans, think of *Lochner*-era jurisprudence as an abuse of judicial power. Current precedent is squarely anti-*Lochner*, though cracks in the dam may be appearing.¹¹⁷ Modern governmental and private practice has been built around this judicial understanding. Recognition of a protection of free speech in the Fourteenth Amendment, by contrast, is consistent with widely held values, precedent, and current practice. So the original understanding of privileges or immunities as protecting free speech reinforces, rather than challenges, the present understanding that states also must respect a national right to free speech.

Fourth, intervening developments have not made the application of both free speech and press liberties to the states either obsolete or unworkable. Today, we are closer to the pre-Civil War Republican understanding of free speech as a basic American right. We are more distant from an ideology that held that legislation violated constitutional liberty if it required companies to pay workers in cash rather than scrip redeemable in the company store, or banned a sixty-hour work week in an unhealthy environment. So even if (contrary to my doubts) one finds a general understanding of a *Lochner*-like command in the Due Process, Equal Protection, or Privileges or Immunities Clause, an attempt to translate such *Lochner*-like commands given in one circumstance to a vastly changed world is a daunting task.

In short, today original meaning seems to support the application of the liberties of free speech and press to the states. If one original meaning is the *Lochner* meaning, however, then the contemporary fit does not work well. For certain types of problems, original meaning may be sufficient, at least as an answer to the general question of whether the states must respect free speech. What is entailed by free speech is a harder question. For problems that are more removed from the original text and from the historic problems that gave rise to the text, a more complex mode of analysis may be required. The less clearly the Fourteenth Amendment addresses a problem, advocates of original meaning often suggest, the stronger the argument for leaving the problem to the political processes.

One theory of American government is that constitutions represent the directions issued by the sovereign people. This idea comes from the princi-

¹¹⁷ See *Dolan v. City of Trigard*, 512 U.S. 374, 409 (1994) (Stevens, J., dissenting); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

ples of agency. By this theory, the people are the principal. Judges, legislators, and presidents are their agents, following instructions that the sovereign people issued in the Constitution. So judicial review is rationalized as consistent with democratic representative government. Judges, the theory claims, merely follow the instructions from the people.¹¹⁸ No theory, including this one, fully reflects the unruly reality of the world.

In the law of agency, the agent sometimes is expected to disregard the literal directions of the principal to further the principal's more general objectives. For example, the owner of a factory that has operated for years at half capacity because of lack of orders tells his manager to order only the usual one-half supply of raw materials for the next six months. During this period, the manager will be unable to reach the owner, who will be exploring the rain forest. Economic conditions change, and the factory has sufficient orders to operate at full capacity for two years. In this situation, the law of agency might authorize the agent to order a full supply of raw materials. The specific and explicit direction—order only the usual one-half supply of raw materials—gives way to the implicit and more general value that informed the direction.¹¹⁹

As Jeff Rosen said so well, the post-New Deal world is a changed world, and the meaning of Fourteenth Amendment directions on economic matters is far from clear.¹²⁰ Judicial agents cannot contact their principals from 1866 to 1868, so the agents need to do the best they can to understand the meanings of sometimes conflicting directions.

A return to heightened scrutiny of economic legislation, combined with the laissez-faire world view that produced *Lochner*, would roll back decades of judicial precedent and would ignore a long political tradition. Such a return would ignore vast differences in economic power. The return to *Lochner* would put the political ideas of large numbers of Americans outside of the political process, much as *Dred Scott* attempted to do in the years before the Civil War.

Theodore Roosevelt offered a summary of the anti-*Lochner* view:

The only way in which our people can increase their power over the big corporation that does wrong, the only way in which they can protect the working man in his conditions of work and life, the only way in which the people can prevent children working in industry, or secure [for] women an eight-hour day in industry, or secure compensation for men killed or crippled in industry, is by extending, instead of limiting, the power of government. There was once a time in history when the limitation of governmental power meant increasing liberty for the people. In the present day, the limitation of governmental power, of governmental action, means the enslave-

¹¹⁸ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803); THE FEDERALIST No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that judges should follow the will of the people in the Constitution when the Constitution conflicts with a statute passed by the legislature).

¹¹⁹ See RESTATEMENT (SECOND) OF AGENCY § 33 cmt. a illus.2 (1958).

¹²⁰ See Rosen, *supra* note 1, at 1255.

ment of the people by the great corporations who can only be held in check through the extension of governmental power.¹²¹

It is one thing to reject such ideas; it is quite another to find them unconstitutional.

The rhetoric of original meaning claims that it protects the democratic process from judicial usurpation. Indeed, that claim is one of the most powerful arguments in favor of original meaning. If we use original meaning to remove both much popular economic regulation of corporate power and much worker protection from the ordinary political process (as the excesses of the *Lochner* era did), however, we would dramatically shrink the democratic process. This method would look fraudulent. It assumes the judicial personification of the corporation and then treats a corporate giant as just another individual bargainer whose freely formed bargains with individual workers are often beyond state power. These ideas, however, are not true to either the principle of equality or the prohibition on serfdom of the Fourteenth Amendment. With a revival of the *Lochner* philosophy, questions of judicial legitimacy, like those raised in the *Lochner* era, would return with a vengeance.¹²²

Only a part of the American people established the national government. The original sovereign people excluded women, most African-Americans, and the poor. Today, suppose we were to set up basic rules to govern a state and we provided that the constitution would be decided by one-third of the people, excluding women, blacks, and the poor, who would be admitted to the franchise only after the other people had set the basic rules. Suppose we further provided that only the combination of a vote of two-thirds of the state legislature and a popular majority in three-fourths of the counties of the state could change the basic rules. Suppose that many of those who were excluded believed that the fundamental rules, as established, subjected them to a severe disadvantage. There would be an uproar, and properly so.

Few would view this hypothetical constitution as an acceptably democratic, or representative, system because the majority of the people would be governed by fundamental rules that a minority of the people established and that only a super-majority of the people could change. It would be difficult to argue, based on democracy, against court decisions that either would allow the legislature to improve the constitutional situation of the disadvantaged group or that would make the system more democratic. (Some other argument, however, might justify adhering to antidemocratic norms.) Meanwhile, court decisions that implemented the class bias written into the original meaning would be distinctly undemocratic.

Perhaps part of the difficulty with the problem that Professor Rosen poses is its complexity. One approach to solving complex problems is to break the problems into their component parts. One might start with the

121 HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 151 (1993) (quoting Theodore Roosevelt, Address at San Francisco (Sept. 14, 1912)).

122 See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS 1890-1937* (1994) (discussing attacks on judicial power produced by decisions like *Lochner*).

Lochner problem and devote some years to an attempt to recapture the original meaning of the Fourteenth Amendment on the *Lochner* issue.¹²³ Then one might take the affirmative action problem and attempt the same endeavor. Then one might do the same with the problem of the government as proprietor rather than as regulator. Then, in the twilight of one's career, one might seek to put it all together. But perhaps the problem is deeper.

E.F. Schumacher says that wise decisions in human affairs differ from correct decisions in either mathematics or physics.¹²⁴ In math, there is only one correct answer, and one logically arrives at that answer from one set of premises.¹²⁵ In human affairs, he suggests, the best answer comes from reconciling tensions between opposites—such as freedom versus equality, or liberty versus authority.¹²⁶ John Stuart Mill makes similar suggestions, warning that world views typically contain only a part of the truth.¹²⁷

So another possibility may be that the best judicial theory is one that somehow reconciles the tension between original meaning and contemporary needs and understanding. A related approach might look to text, history, precedent, structure of government, ethical aspirations, and sound public policy and treat the judge's decision as the resultant force of these various and sometimes conflicting vectors.¹²⁸

Perhaps Professor Rosen's thought experiment proves that reliance on a narrow understanding of original meaning, or original intent, as the sole criteria in constitutional interpretation does not always work well, and works worst in certain circumstances. Considering precedent, history, structure, major political decisions (such as the Civil War and the New Deal), ethical aspirations embodied in the text, and other criteria seems to make the enterprise both less constrained and less predictable, but perhaps the opposite is often true. Analysis should begin with the Constitution's text, the text's history, and the governmental structure that the Constitution envisions. In some cases, the text might be sufficient. But both history and the text itself might point to rights that are not explicit in the text. Sometimes, original meaning may be more indeterminate, unconstrained, and subject to manipulation than an analysis based on text, history, structure, precedent, policy, and ethical aspirations contained in the text. Perhaps fervent advocacy of original

¹²³ If we take seriously the idea that original meaning is the meaning to politically aware people at the time, then this is a big project and entails a long excursion into many primary sources. Furthermore, because we are all subject to the problems of bias and because investigators' perspectives and backgrounds will be limited, the safest approach is many independent analyses.

¹²⁴ See E.F. Schumacher, *A Guide for the Perplexed* 123-25 (1977).

¹²⁵ See *id.* at 125-26.

¹²⁶ See *id.* at 125-28.

¹²⁷ See John Stuart Mill, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 54 (John Gray ed., 1991) ("Truth, in the great practical concerns of life, is so much a question of reconciling and combining of opposites . . .").

¹²⁸ See, e.g., CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 15, at 11 (treating history as only one of the vectors producing judicial decisions); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (suggesting text, history, structure, and precedent as factors in reaching constitutional decisions).

meaning as the proper method tends to obscure other sources of practical insight that should be used to solve constitutional problems.

Few, if any, of its advocates either follow original meaning everywhere that it leads or use it to mow down mountains of unoriginal precedent. All of the supporters of original meaning seem to have poorly defined safety devices, so that the pressure built up by the method does not blow up the enterprise. Furthermore, the softer, more thoughtful, and gentler originalism that many now embrace seems to be, in fact, an effort to mediate between the claims of the past and the claims of the present. This version of original meaning seems both to overcome many objections and to provide less certainty as to how to locate the directions that the text gives. This approach also provides less robust limits on judicial action.¹²⁹ An obsessive focus on the “one true method” masks points that some, if not most, advocates of original meaning have recognized: claims for original meaning do not simply exclude other methods, such as precedent and structure. Originalism alone works best only within certain limits.

Professor Rosen’s analysis raises important questions. What shall we do if the original meaning diverges radically from existing precedent and is premised on a world that is radically different from the world in which we live?

¹²⁹ For a discussion of moderate originalism, see MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS* ch. 3 (1994). For literature on the course of the originalism debate, see Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Understanding*, 77 VA. L. REV. 669 (1991).