The Bill of Rights and the States: An Overview From One Perspective

MICHAEL KENT CURTIS*

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* Michael Kent Curtis © 2008 and 2009. Judge Donald Smith Professor of Constitutional and Public Law, Wake Forest University School of Law. B.A. University of the South, J.D. University of North Carolina, M.A. University of Chicago. My thanks to librarian Jason Sowards and to my research assistants, Lyndsey Marchman and Greg Kupka, for great assistance in the preparation of this article. Thanks to Professor Richard Aynes, who has done so much to advance our understanding, for reading and commenting on an earlier draft of this article, and to all participants in this conference for illuminating the issues. This article together with others on application of the Bill of Rights to the States was published in The Journal of Contemporary Legal Issues.
I. INTRODUCTION: MY PERSPECTIVE

A. I Begin to Write About Incorporation

In 1960, I was a college freshman studying American Government. In my undergraduate casebook, Justices Black and Frankfurter were debating application of Bill of Rights liberties to the states.¹ We read the Black-Frankfurter debates in *Adamson v. California*² and some of the other cases. I was quite interested in the issue. The "incorporation" battle was still going on, and I studied it when I was a graduate student at Chicago.³ It continued when I was a law student at Chapel Hill.

Before going to law school, I had read the Fairman-Crosskey debates⁴ on application of liberties in the Bill of Rights as a limit on the states, and I read much of the debate in the Thirty-ninth Congress. I thought Crosskey had the stronger argument. At any rate, Crosskey clearly showed that Fairman misread and misunderstood parts of the evidence.⁵

². *Id.*
³. One text was C. HERMAN PRITCHETT, THE AMERICAN CONSTITUTION (1959) [hereinafter PRITCHETT]. It discussed application of the Bill of Rights and (almost uniquely as it turned out) both the Crosskey and Fairman articles. *Id.* at 369–82 (citing Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949) [hereinafter Fairman] and William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limits on State Authority, 22 U. CHI. L. REV. 1 (1954) [hereinafter Crosskey]).
⁵. Crosskey, *supra* note 3, at 24–25 (Republican anti-slavery constitutional theory), 27 (Fairman testing Congressman Bingham against Supreme Court doctrine and giving him a failing grade because he held different views), 27–28 (responding to the
When I got to law school, my constitutional law casebook had *Adamson v. California* and some other leading cases on "incorporation." In a note, the editors cited Professor Fairman's one hundred and thirty-four page article rejecting incorporation. They did not cite Crosskey's one hundred and forty-three page rebuttal. I complained to one of my law teachers about the practice of citing Fairman and not Crosskey, but he had a low opinion of Professor Crosskey.

Ignoring Crosskey's article was pretty standard at the time. Though my casebook simply cited Fairman, many law Professors would mention Justice Black, but then suggest that his views had been demolished by Professor Fairman. Nor were law professors alone. In 1968, in *Duncan v. Louisiana*, the Court required states to provide defendants with a jury trial for all but petty offenses. Justices Harlan and Stewart dissented. They announced that "the overwhelming historical evidence marshaled by Professor Fairman" demonstrated "conclusively" that those who wrote and debated the Fourteenth Amendment "did not think they were incorporating the Bill of Rights . . . ." The dissent did not mention Professor Crosskey's article responding to Fairman.

When I was practicing law in Greensboro, North Carolina, I bought and read the book *Judgments* by Leonard Levy, the distinguished legal historian. Levy discussed the incorporation controversy, among others. Professor Levy's book cited Professor Fairman's article, harshly criticized Justice Black, and did not cite the Crosskey rebuttal. (Professor Levy did criticize Fairman for leaving out too much historical

suggestion that Bingham's references to the Bill of Rights did not include the first eight amendments). See also Pritchett, supra note 3, at 379 (Fairman and Crosskey on Bingham). For an article that compared the two and generally supported Crosskey, see Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968). Pamela Brandwein argues that Fairman's victory in the 1950s was "not a product of the intrinsic merit of his argument." *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* 15, 101 (1999). She credits Fairman's victory to the fact that his assumptions were widely held at the time, that Crosskey's views lacked academic support that would come later, and that Crosskey's reputation had been tarnished by attacks on his book.

6. NOEL T. DOWLING AND GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 734 n.* (1965).
8. Id. at 174 (Harlan & Stewart, JJ., dissenting) (citing Fairman, supra note 3).
9. LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64–79 (1972) [hereinafter JUDGMENTS] (criticizing Justice Black's history, harshly criticizing the Court decisions rejecting incorporation, and also criticizing Fairman for ignoring the larger historical context).
context.) I telephoned Levy, who lived in California, to complain. He did not know me and was amused to get the phone call. But he was quite polite. He suggested if I cared so much about the issue, I should write about it. I continued practicing law.

Then the general counsel of the Clothing and Textile Workers Union gave one of my law partners a copy of Raoul Berger's book, *Government by Judiciary*, published by Harvard University Press. My partner showed the book to me, I thumbed through it, and I saw the chapter on incorporation. So I borrowed the book and read the chapter. Mr. Berger's thesis was that the intent of the framers was the way to understand the meaning of the Constitution, intent could be found by looking at the statements of leading proponents, and a rollback of incorporation (and lots more) was in order. The book made Mr. Berger a celebrity. He also became a hero in certain political circles.

The time was ripe. Beginning in 1964, the Goldwater revolution made "conservatism" a major force in the Republican Party, and the Republican Party soon became dominant nationally. Goldwater and other leading "conservative" Republicans were hostile to decisions of the Warren Court, to the Civil Rights Act of 1964, and to the Voting Rights Act of 1965. These, they said, failed to follow the true meaning of the Constitution and violated states' rights. They also disliked many Warren Court decisions on the Bill of Rights. A rollback of incorporation seemed a quick and easy way to get rid of lots of Warren Court decisions in a single stroke.

In his incorporation chapter, Mr. Berger seemed to make a compelling case. But he had said that the expressed intent of leading proponents was the key to meaning. John Bingham, the main author of Section 1, was one leading proponent of the Fourteenth Amendment and Jacob Howard, who presented the amendment to the Senate on behalf of the Joint Committee, was another. When I had reviewed the evidence years before, I thought both supported application of the liberties in the Bill of Rights to the states. By the time Berger was finished with him, Bingham looked dumb and contradictory. Relying on a writer harshly critical of

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11. Id. at 136–37.
13. BERGER, GOVERNMENT, supra note 10, at 141–47. As Michael Zuckert noted, "[I]mportant historical actors . . . make sense to those around them; that is why they are
Reconstruction and congressional Republicans, Mr. Berger dismissed Howard as "'one of the most reckless of the radicals'" (he had supported black suffrage) and a "'Negrophile.'"14 In addition, Berger dismissed Howard's statement on application of the Bill of Rights as a "remark casually tucked away in a long speech."15 In a footnote, Berger noted that no newspaper reported Howard's discussion of privileges or immunities.16 That was still another reason it could be disregarded. Mr. Berger cited Fairman.17 He did not cite (or apparently even read) Crosskey.

I read Berger more than ten years after I had studied the application issue. I was puzzled that my understanding at the time could have been so wrong. Since Berger noted the lack of newspaper coverage of Senator Howard's discussion of "privileges or immunities," I went to the library and looked at the New York Times for the day after Howard's speech. That happened to be the only 1866 newspaper that library had. There on page one was a very long report of the speech with its full discussion of privileges or immunities and the Bill of Rights. I later found it in the Philadelphia Inquirer (though I forgot to include it in my book). Charles Fairman noted that the section of Howard's speech on applying liberties in the Bill of Rights had also been published in the New York Herald, the most widely circulated paper in the country at the time, and he quoted a summary of it from the Boston Daily Advertiser which described the privileges or immunities clause as protecting fundamental rights and Constitutional guarantees that the states had theretofore been able to violate. More recently, other researchers have found verbatim reports of Howard on the Bill of Rights in the National Intelligencer and in a Michigan paper.18 (Actually, Fairman and Crosskey's reply to Fairman...
had cited the *New York Times* piece and several others, but I had forgotten that.)

I did a quick measurement in the *Globe*. The discussion of "privileges or immunities" as embracing the Bill of Rights was a substantial part of Howard's speech, not a casual remark.

I re-read Crosskey and Fairman. I bought a microfilm reader and rolls of the *Congressional Globe* on microfilm. My local library began to order newspapers on microfilm for me. Berger's statement about lack of newspaper coverage of Howard's speech was not an isolated mistake. Mr. Berger's work on privileges or immunities and "incorporation" was filled with significant factual mistakes and omissions, many of which could have been avoided had Mr. Berger read Professor Crosskey.  

Of course, the historical case against application could be strong, even if much of the evidence marshaled for it was mistaken. Ordinarily, those who advocate a massive rollback of Supreme Court precedent based on history should bear the burden of proof. The burden is not satisfied if the historical case is riddled with crucial mistakes.

Thanks to Mr. Berger and the Harvard University Press, I decided that there were some new things to say about incorporation. I wrote a response to Mr. Berger, and eventually found a law review to publish it. I sent Mr. Berger a copy. I got a curt note back about those (like me) who seek to teach what they have not learned. The next thing I heard was from another law review. The editor asked me if I wanted to write a reply to Mr. Berger's response to my piece. I did not know there had been one. So I got a copy of Mr. Berger's response, "Incorporation of

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the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat."\(^{21}\) In it he explained, accurately, that I was a practitioner in Greensboro, North Carolina apparently publishing his first law review article.\(^{22}\)

Mr. Berger's response contained significant new factual mistakes. I wrote a rejoinder, "Further Adventures of the Nine Lived Cat . . . ."\(^{23}\) The exchanges continued; I wrote more about the issue, and eventually wrote a book on the subject.\(^{24}\) All of this was thanks to my benefactor Raoul Berger.

Shortly before my book was to be published, a new benefactor appeared. Mr. Edwin Meese, Ronald Reagan's Attorney General, gave the press copies of a speech he was to give to the ABA. In the text he released, Mr. Meese reiterated the claim that text and intention were the one true method of interpreting the Constitution, and he implied that the incorporation doctrine was historically baseless: "nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests."\(^{25}\) Since my book *No State Shall Abridge* argued that there was in fact substantial historical support for the doctrine, thanks to the Attorney General, my book got far more attention than it otherwise would have.

Mr. Meese was not alone in his attack on the historic basis for application of the Bill of Rights to the states.\(^{26}\) In those days, many who characterized themselves as conservative were vigorously attacking incorporation and demanding a rollback. The *Wall Street Journal* published an op-ed piece by Charles Rice attacking incorporation. It was entitled "Flimflam Under the 14th," and the headline to the concluding paragraph was entitled "Doctrine is a Fraud."\(^{27}\) Terry Eastland, Mr. Meese's press spokesman, announced that the idea of applying Bill of Rights


\(^{22}\) Id. at 435, n.4.


\(^{25}\) Edmund Meese, Address before the American Bar Association, July 9, 1985, at 14. Mr. Meese distributed the speech to the press but did not read the passage about incorporation to the audience.

\(^{26}\) E.g., RICHARD POSNER, *The Federal Courts–Crisis and Reform* 194 (1985) (the doctrine attributes to those who framed the Due Process Clause "truly revolutionary intentions"); Gary McDowell, *Activists' Offense Against the Bill of Rights*, N.Y. TIMES, Apr. 6, 1984, at A34, col. 4 (letter to editor) (doctrine is the result of "judicial rewriting" and "activism").

\(^{27}\) Charles Rice, *Flimflam Under the 14th*, WALL ST. J., July 31, 1985, at 18, col. 4.
Rights liberties to the states was a comparatively recent invention, so it could hardly fit the original intent mode of analysis: “The belief that the provisions of the Bill of Rights were incorporated into the 14th Amendment . . . did not begin until the 1920s.”28 (This was clearly incorrect.) George Will, the nationally syndicated columnist, wrote that the Supreme Court took a “radically wrong turn when it incorporated the First Amendment into the Fourteenth.”29 Senator East of North Carolina even introduced a bill to eliminate Supreme Court and lower federal court jurisdiction over Bill of Rights questions.30

On the historical point, but not always what the law should be, “conservatives” were joined by a number of progressives. From the 1960s through the mid-1980s (at least), many distinguished legal scholars rejected the historical basis for applying liberties in the Bill of Rights to the states. (Not all of these rejected application, however.) In 1962, Alexander Bickel (a Frankfurter disciple) announced that the historical case for applying the Bill of Rights’ liberties to the states had been “conclusively disproved.” In 1975, Thomas Grey denounced Justice Black’s historical case for application as “flimsy.” In 1978, Dean Alfange wrote that it was “all but certain that the Fourteenth Amendment was not designed to apply the Bill of Rights to the states.” In the same year Phillip Kurland wrote that application of the religion clauses to the states occurred “solely at the whim of the Court.” In 1981, Michael Perry said rejection of the historical case for application was “amply documented and widely accepted.” In 1982, Professor John Denvir (reviewing a book by Michael Perry) said it was now generally accepted that the framers of the Fourteenth Amendment intended no restrictions on government regulation of speech.31 These opinions were not expressed

after exhaustive examination of the historical record. Among those who had undertaken such an investigation, quite a number supported the historical case for application of the liberties in the Bill of Rights to the states. 32

Bryan Wildenthal has extensively and most recently documented Mr. Berger’s mistakes and his tendency to repeat them (often more than once) after they had been pointed out, also often more than once. 33 He also has, once again and with important new additions, reviewed serious problems with the Fairman analysis. 34 Still, according to Wildenthal, in spite of the “truly shocking and inexcusable extent to which Fairman, Morrison, and especially Berger, mishandled the evidence,” 35 scholars and others continue to cite and rely on Professor Fairman and Mr. Berger at least as recently as 2003. 36

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33. Bryan H. Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67, 68 OHIO ST. L.J. 1509, (2007) (hereinafter Wildenthal, Nationalizing). On Mr. Berger’s recycling mistakes, see, e.g., id. at 1551 (gross misconstruction of the remarks of Representative Hale); 1579–81 (admitting error and then recycling the claim that no newspaper reported Howard’s speech on the Bill of Rights). For a thoughtful argument that there is insufficient evidence to show that the ratifiers were on notice of application of the Bill of Rights to the states, see George C. Thomas III, The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal, 68 OHIO ST. L.J. 1627 (2007).

34. E.g., Wildenthal, Nationalizing, supra note 33, at 1540–83.

35. Id. at 1518.

36. E.g., id. at 1519 (William Graves, adding a new mistake and mis-citing Fairman and Berger for it); 1520 (same by an editor of the Texas Law Review); 1520 (Professor Charles Rice rejecting the doctrine and citing Fairman and Berger); 1520 (Professor Stephen B. Presser); 1521–25 (Richard Uviller and William Merkel relying on Berger’s scholarship to reject application of the Second Amendment and initially ignoring contrary scholarship).
B. My View of the Bill of Rights

Like all constitutional provisions, the liberties in the Bill of Rights are subject to interpretation. As *Lochner*-era decisions and some very contemporary examples show, judges can and do use them in very unfortunate ways. Still, I believe the guarantees of the Bill of Rights are wise policy. The guarantees began to take shape in the struggle for democracy and religious toleration in Seventeenth Century England. They were part of a defensive reaction to the government’s attempt to use its courts and “police” (troops, actually) to crush the pro-democracy Leveller movement. The Levellers invoked rights of religious freedom, speech, press, petition, jury trial, public trial, right to counsel, and protections against self-incrimination and broad searches. The temptation to use the criminal justice system to crush one’s political opponents is perennial. So the guarantees remain important.

The suppression of anti-slavery speech, press, and association in the South before the Civil War, cruel punishments that could be applied to opponents of slavery, and searches for and seizures of anti-slavery literature (for example) also show the importance of national guarantees of liberty. The racial caste system that replaced slavery after the Civil War and after the violent suppression of multi-racial democracy in the South was a system at war with human liberty. Such a system cannot comfortably exist when guarantees like those in the Bill of Rights are conscientiously enforced. So, it is no surprise that the Warren Court expanded the protections of the Bill of Rights to the states at the same time the Congress, the Court, and the President were dismantling the racial caste system. Of course, whether applying the liberties in the Bill of Rights to the states is on balance good or bad policy, is a question that should not be confused with efforts to weigh the historical evidence.


38. E.g., Curtis, Levellers, supra note 37, at 372–74.

C. Legal Analysis

For me, the better legal analysis comes not from one true test, but from the resultant force of multiple factors. I strongly believe that original expected application of a constitutional provision and what the law today should be are different questions. For example, that people in 1866 accepted racial segregation (to the extent they did) should not be determinative. The framers also gave us a principle that forbids irrational discrimination and caste legislation. We now know that a racial caste system destroys the liberty and equality of the segregated caste. So our understanding of the principle in light of our experience is different from the application of the principle many expected in 1866. There is nothing original in this idea.

As a legal matter, what should be applied, with reference to the Bill of Rights and the states, would typically be at a minimum the understanding of the liberty (or privilege or immunity) in 1866-1868. I do not think that free press in 1789-1791 was merely a protection against prior restraint. But if that were the case, the minimum protection of free press in the Fourteenth Amendment should be the broader understanding of 1866 to 1868—the meaning of the concept of free press to the people at the time.

Legal rules should be the result of multiple factors. Even if (contrary to fact) prior restraint were the understanding of free press in 1866-1868,
that understanding should not be followed by the Court. It should not be followed because it is inconsistent with long-standing and wise precedent, with constitutional structure, with the guarantee of republican government, with what is required to protect representative government, and with the lessons of history.

II. A Multi-Factor Legal-Historical Analysis of Application of the Liberties in the Bill of Rights to the States.

Seeking the Meaning of the Fourteenth Amendment Using Analysis of Text, Context (or Inter-Textual Analysis), History, Intent of the Drafters and Ratifiers, Structure, Precedent, and Public Policy

A. Overview

In what follows I discuss historical evidence that supports applying the liberties in the Bill of Rights to the states under the Fourteenth Amendment, particularly, but not exclusively, under the privileges or immunities clause. I do not claim that any one part of the analysis taken in isolation is conclusive. For example, in what follows we will see that from the English background, through the colonial period, the American Revolution, the debates over the Constitution, the debates over the Sedition Act, debates over slavery and anti-slavery speech, and in following years, rights such as those in the Bill of Rights, and then those very rights, were commonly described as "privileges" and "immunities." By the 1830s, in response to attacks on free speech and press in the interest of slavery, critics of suppression explicitly claimed that Bill of Rights privileges (or rights or liberties) belong to American citizens; they described the rights as "privileges" (and "rights") of American citizens and as rights under the federal Constitution.

The evidence does not show that the words "privileges" or "immunities" were never used in other ways. They were. It simply shows that "privileges or immunities of citizens of the United States" would be an understandable way to refer to constitutional rights, including but not limited to those in the Bill of Rights. (For an example of what is now seen as a different usage, we will see that the words "privileges" and "immunities" appear in Article IV.)

The case for application is not supported simply by this fact. It is supported by a web of justifications. These include the history of denials of liberty and equality in at least the thirty years before 1866, aspirations for a new national freedom expressed in the Thirty-ninth Congress, and speeches in 1866 by Representative Bingham and Senator Howard
indicating that the words "privileges or immunities" included rights in the Bill of Rights. Senator Howard indicated that the amendment was designed to reverse *Barron v. Baltimore*, which held that the Bill of Rights did not limit the states. Bingham had also noted the problematic holding in *Barron* and the need to correct it by constitutional amendment. The case for application is further supported by widespread assertions that the amendment would protect all rights of citizens, all constitutional rights, freedom of speech and other liberties, and by the history of abuses and denials of liberty that led up to the amendment. Because this is an historical question, there is also some evidence (such as silence) that has been marshaled in the other direction.

The contested question is how much evidence is enough and which way silence should cut. So far as I know, no scholar has found anyone who, between 1866 and 1868, explicitly denied that the amendment would require the states to respect the national liberties in the Bill of Rights. Some, however, said things that seem implicitly inconsistent and some states took actions that were not consistent (as they still do today).

The privileges or immunities clause of the Fourteenth Amendment ought to mean something. In the search for history bearing on legal meaning, it is incumbent on critics of application of the liberties in the Bill of Rights to suggest a better meaning—one that is truer to the historical evidence. The question is which hypothesis better fits the evidence: whether in the light of all the cumulative evidence, the case for reading the amendment to apply liberties in the Bill of Rights as limits on the states is stronger than a proposed negative case. The same question can be asked issue by issue: original meaning, historic background, etc. Regression analysis is a useful metaphor. Of course, there will be some divergent data points. The question is what line best reflects the multiple pieces of data.52

When I started writing about incorporation, I was a practicing lawyer. I knew nothing about the work of Phillip Bobbitt on types of constitutional argument or the work of Charles Black on analysis from structure and relationship. It is a tribute to the insight of these works that even those ignorant of the names of types of constitutional argument find themselves dealing with them, though without naming them. Now,

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thanks to the work of Phillip Bobbitt, Charles Black, and Akhil Reed Amar, who first systematically applied multiple types of argument to the incorporation issue, (and to my colleague Wilson Parker who first taught me about styles of argument and suggested “incorporation” would provide a fine case study for teaching them), I now organize my discussion by focusing on multiple types of analysis. Most of these help us to understand the meaning of the words in the text. The broader history of application of the Bill of Rights to the states is a good vehicle for teaching students about types of constitutional argument and the history of slavery and civil liberty. So we devote a good bit of space to the historical and legal context in our constitutional law casebook.

B. Historical Analysis—Historical Context

The place to start historical analysis seeking the meaning of Section 1 of the Fourteenth Amendment is the historical context from which the Fourteenth Amendment emerged. Charles Fairman and Raoul Berger, whose work shaped so much thought about incorporation at least through the 1980s, looked at a narrow historical context. They examined the debates over the prototype of the Fourteenth Amendment, over the Civil Rights Act, and over the final version of the Fourteenth Amendment, and they discussed the Black Codes. They did not look, for example, at anti-slavery legal thought of Republican congressmen or at the other debates over Reconstruction in the Thirty-ninth Congress—even though the Fourteenth Amendment was a centerpiece of Reconstruction policy. They did not look at the debates from a few years before about the amendment to abolish slavery. And they ignored the controversies over slavery and civil liberty that unfolded in the thirty years before the Civil War. As a result, Mr. Berger could suggest that a congressional design to protect liberties in the Bill of Rights from denial by the states was not plausible because there was “no inkling” that people in the North had become dissatisfied with protections the liberties in the Bill of Rights had received from the states between 1789 and 1866. In light of history, that assertion is entirely mistaken.

44. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
46. MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON DOUGLAS, AND PAUL FINKELMAN, CONSTITUTIONAL LAW IN CONTEXT (2d. ed. 2006) [hereinafter CURTIS, PARKER, DOUGLAS & FINKELMAN].
47. BERGER, GOVERNMENT, supra note 10, at 182.
Professor Crosskey made four great contributions to the scholars who have followed him and paid attention to his work (or who have expanded the work done by those of us who did). His first contribution was to provide a crisp technical legal meaning of the Fourteenth Amendment’s first Section in light of prior law. His second was broadening the context by looking at Republican and anti-slavery legal thought. His third was broadening the context by acknowledging the suppression of civil liberty and especially free speech for opponents of slavery in the years before the Civil War, and the effect the repression had on Republican thought. Fourth was his analysis of the debates and other historical evidence that Professor Fairman and later Mr. Berger focused on. Those of us who have argued for application have diverged from Professor Crosskey in various ways. His work was not perfect; no one’s is. He sometimes found more uniformity in the historical record than I would today. But we have further explored trails he blazed. Our collective debt to this pioneer is substantial.

Mr. Berger chose to ignore Professor Crosskey’s long article in response to Fairman because a review of an earlier Crosskey book found it “without merit.” Had Mr. Berger not ignored Crosskey, he could have avoided a number of significant mistakes. Do not ignore a long article responding to the article on which you rely, even if you don’t think much of the author.

The Fairman-Berger analysis of application of the Bill of Rights to the states suffered from another defect. Though the South lost the Civil War, for a long time the Southern elite won the battle for the history books. Both Fairman and Berger were influenced by an earlier school of Reconstruction history that had a quite negative view of Reconstruction, and of the period of black-white majority rule in Southern states—later replaced thanks to violence and disfranchisement with white minority rule. They also had a negative view of Republicans in Congress. By the late Nineteenth and early Twentieth Centuries, the negative view of Reconstruction and a more accepting view of Klan political terrorism

49. Id. at 11–21.
50. Id. at 20.
51. Id. at 21–100. For Crosskey on ratification, see id. at 100–19.
52. Berger, Incorporation, supra note 31, at 437.
53. Curtis, Further Adventures, supra note 20, at 91 (listing these significant mistakes).
became dominant in elite institutions in the North, including Columbia University in New York City.

Professor J. G. De Roulac Hamilton was a disciple of the Southern elite version. In 1914, he wrote that Reconstruction in North Carolina was an episode when “selfish politicians, backed by the federal government, for party purposes attempted to Africanize the State and deprive the people through misrule and oppression of most that life held dear.” In Louisiana, as in other Southern states, terrorist groups used murder, physical violence, burning houses, whipping people, killing their animals, fraud, and intimidation to dislodge Republican rule. In his 1939 biography of Justice Miller, published by the Harvard University Press, Charles Fairman referred to the Louisiana government supported by whites and blacks as the “carpetbag government.” According to Professor Fairman, when that government was removed (by terror and fraud, actually), “self government was restored in Louisiana.” In his effort to show that the views of Senator Howard, which strongly supported incorporation, were unrepresentative, Mr. Berger quoted Benjamin Kendrick, another historian who followed the Southern elite’s approach to Reconstruction history. “Howard, according to Kendrick, was ‘one of the most . . . reckless of the radicals,’ who had ‘served consistently in the vanguard of the extreme Negrophiles.’”

During the second Reconstruction of the 1960s—with its battles over integration and the right of blacks to vote and its politically inspired murders and bombings—historians revisited the first Reconstruction, and produced studies that saw Reconstruction as the first national effort moving toward bi-racial democracy. Eric Foner, the leading modern authority on Reconstruction, cites Professor Fairman’s Stanford article on incorporation and Mr. Berger’s book as influential examples of common faults: failing to provide adequate historical context and relying on “a now outdated interpretation of Reconstruction.”

Legal scholars often fail to see Court decisions removing the Bill of Rights from the Fourteenth Amendment as part of a retreat from

56. BERGER, GOVERNMENT, supra note 10, at 184.
58. FONER, supra note 57, at 257, n.53.
Reconstruction that obstructed the effort to suppress Klan terror against black and white Republicans, but that was the effect these decisions had. By the early 1900s, Justices (including Justice Holmes) were simultaneously rejecting Bill of Rights challenges to state prosecutions and handing down outrageous decisions upholding disfranchisement of blacks. In United States v. Harris, the Court also obstructed the effort to punish lynch mobs.

I will now look at various ways of searching for the meaning of Section 1. Since all meaning is contextual, I will start with the historical context.

The Fourteenth Amendment was shaped by the struggles that divided the nation from the 1830s through the Civil War. These were intertwined conflicts over slavery, abolition, civil liberty, the status of Americans of African descent before the Civil War—both slave and free, and the status of the newly freed slaves after.

As Republicans recognized, slavery was a crime against humanity; it deprived the slaves of virtually all rights, including rights to family ties, to basic bodily security, and to the fruits of their labor. Slave states also denied slaves the right to assemble, to preach, and to bear arms, and a number made it a crime to teach them to read. As Andrew Taslitz has

59. See e.g., United States v. Cruikshank, 92 U.S. 542, 554–55 (1876) (“The fourteenth amendment . . . does not . . . add any thing to the rights which one citizen has under the Constitution against another. . . .”); cf. Slaughter-House Cases, 83 U.S. 36, 75 (1873) (“If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizens of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by the paragraph of the amendment. . . .”). For a recent article that sees “Redemption” for the anti-democratic movement it was, see generally Gabriel Chin & Randy Wagner, The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty, 43 HARV. C.R.-C.L. L. REv. 65 (2008).

60. E.g., Giles v. Harris, 189 U.S. 475, 486 (1903) (denying equitable relief to a black voter in Alabama who, accurately, alleged a general plan under the Alabama constitution to disenfranchise blacks); Giles v. Teasley, 193 U.S. 146, 164 (1904) (denying damages to the same plaintiff). In Williams v. Mississippi, 170 U.S. 213, 222 (1898), the U.S. Supreme Court held that the grand jury that indicted the defendant had not been picked in a racially discriminatory manner, though in Ratliff v. Beale, 20 So. 865, 868, the Mississippi Supreme Court had recognized that the Mississippi constitutional convention had “swept the field of expedients, to obstruct the exercise of suffrage by the negro race . . . . Restrainted by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics . . . .”

61. United States v. Harris, 106 U.S. 629, 639 (1883) (“these provisions of the Fourteenth Amendment have reference to State action exclusively, and not to any action of private individuals . . . .”) (quoting Virginia v. Rives, 100 U.S. 313, 318 (1880)).
noted, "slavery was sustained largely by search and seizure practices. Slave patrols . . . consisted of state officials whose authority stemmed from an antebellum version of general warrants." Slave cabins were subject to searches, of course. Slaves might be learning to read, or worse, reading anti-slavery literature or possessing weapons. Blacks were subject to stop and seizure to determine if they were slaves improperly off their plantations.\textsuperscript{62} Slaves and "free persons of color" could be arrested (seized) for assembling in crowds at night.\textsuperscript{63} Harsh restrictions were imposed on free blacks as well. But the effects of slavery did not stop there. To make slavery secure, slave states abrogated the rights of whites as well.

Nor were the effects of slavery on liberty limited to the South. In the North, mobs broke up abolitionist meetings, destroyed anti-slavery printing presses, killed anti-slavery editor and minister Elijah Lovejoy who was defending his fourth printing press from a mob, and burned a hall abolitionists had constructed in Philadelphia for free discussion.\textsuperscript{64} For years, the House of Representatives had a gag rule that banned consideration of anti-slavery petitions. Still, free states in the North refused to pass laws silencing abolitionists, and Northern mob violence produced a backlash. Finally, on December 3, 1844, on the motion of seventy-six year old Representative John Quincy Adams, the House of Representatives repealed the gag rule.\textsuperscript{65}

Things were different in the South. There also violence was a weapon used to silence critics of slavery. Southern states also silenced anti-slavery expression by law. They made it a crime to publish papers or pamphlets (or books) with a "tendency" to make slaves or free blacks discontent. As the Civil War approached, this bad tendency ban covered virtually all anti-slavery literature, on the theory that criticism of slavery would tend to produce black discontent.\textsuperscript{66} The South became a closed society.

\textsuperscript{62} ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH & SEIZURE 1789-1868 at 12–13 (search and seizure of blacks and slaves), 109–10 (searches and other activities of slave patrols), 112 (restrictions on unlawful assembly) (2006) [hereinafter TASLITZ]. I am indebted to Professor Carolyn B. Ramsey for pointing me to pertinent pages in Professor Taslitz's book.

\textsuperscript{63} Id. at 110 (duties of the constable).

\textsuperscript{64} See generally LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970); CURTIS, FREE SPEECH, supra note 39, at 131–54, 216–40 (Lovejoy), 248–50 (burning of Pennsylvania Hall).

\textsuperscript{65} CURTIS, FREE SPEECH, supra note 39, at 175–80 (the gag rule). For a wonderful account of Adams' long fight against the gag rule, see WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1996).

\textsuperscript{66} CURTIS, FREE SPEECH, supra note 39, at 260–63, 289–99 (discussing the use of North Carolina's bad tendency statute against a minister distributing Republican campaign literature). For suppression in the South, see generally EATON, supra note 39.
In 1850, a Wesleyan minister in North Carolina gave a teenage girl a pamphlet on the Ten Commandments that said that slavery violated the Commandments. The minister was tried for violating the state’s bad tendency statute, convicted, and sentenced to a year in prison, to stand in the pillory for an hour, and to twenty lashes. He escaped the punishment only by agreeing to leave the state.  

By the 1850s, whether slavery should be allowed to expand or be contained to its present boundaries was the central political issue facing the nation. In 1856, the Republican Party platform pledged to ban slavery in the nation’s territories, and the new party made a strong run for the presidency. Its slogan was “Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont.” In their famous 1858 debates, both Lincoln and Douglas agreed that Republicans could not campaign in the South. One of the leading political parties in the nation could not support its candidates and espouse its views in almost half the states.  

In the 1856 election, Benjamin Hedrick, a Chemistry Professor at the University of North Carolina, told some of his students he favored John Fremont for President. Hedrick was publicly outed as a Fremont supporter by the Raleigh Weekly Standard and fired from his job by the University’s board of trustees. When he returned to his home in Salisbury, North Carolina, a mob drove him from the state. The Raleigh newspaper crowed that it had established the principle that no supporter of John C. Fremont would be allowed to tread the soil and breathe the air of North Carolina. Hedrick’s case was not unique.  

In Congress, in 1859-1860, Republicans repeatedly referred to the suppression of constitutional liberty, democratic rights, and free speech in the South. John Bingham noted that “Mr. Underwood was driven away from the State of Virginia” because “as a citizen of the State he insisted on the right to discussing this [slavery] question among her people, and dared to attend the Republican convention” of 1856 in Philadelphia. Similarly a pro-slavery mob prevented citizens from

67. CURTIS, FREE SPEECH, supra note 39, at 262–63.  
69. E.g., CURTIS, NO STATE, supra note 24, at 27, 31, 46–47 (citing original sources on the rise of the Republican Party, the Lincoln-Douglas debates, and the Republican Party Platform).  
70. CURTIS, FREE SPEECH, supra note 39, at 290–92 (discussing the discharge and exile of Professor Hedrick).
holding a Republican meeting in Wheeling, West Virginia. When Democratic
Senator George Pugh of Ohio suggested that the Republicans were a
sectional party, Senator Lyman Trumbull responded: "The men who do
not allow our principles to be proclaimed in the South talk to the other
party about sectionalism. A sectionalism, so pure . . . that it will not
tolerate the exposition of the principles of its opponents at all where it is
in power talks about sectionalism."\(^71\)

In 1860 the United States Congress erupted into an acrimonious
debate over free speech and slavery. Hinton Helper, a North Carolinian,
had written an anti-slavery book, The Impending Crisis of the South, and
the Republican candidate for Speaker of the House had endorsed a
project to abridge it as a Republican campaign document. Helper’s book
asserted that the slave system injured non-slaveholding whites and kept
the region economically backward. He urged the Southern states to
abolish slavery state by state through the democratic process. Helper
sought peaceful change; but he warned that if the “lords of the lash” and
their “cringing lickspittles” used violence to deny free speech to those
who supported abolition, the anti-slavery people should fight back.
There were three of them to every slave holder, not counting the slaves
who, in nine cases out of ten, “would be delighted with an opportunity to
cut their masters’ throats.”\(^72\)

Almost half of the Republicans in the House had endorsed the project
to publish an abridgment of the book as a Republican campaign
document. In the South, however, distributing the book was a felony,
punishable by whipping and imprisonment. In the debate over Helper’s
book, Southerners said that Republican endorsers of the book were
accessories before the fact to the John Brown raid on Harper’s Ferry and
should be hung.\(^73\)

Daniel Worth was a Wesleyan minister and a Republican party
activist. Worth had been distributing copies of Helper’s book in Guilford
and Randolph Counties, North Carolina. He was arrested, tried, convicted,
and sentenced to prison. Out on bond, Worth fled the state and went on a
speaking tour of the North to raise the funds to repay those who raised
his bond. Failing that, he said, he would return to be
imprisoned.\(^74\)

\(^71\) Id. at 282 (Pugh-Trumbull exchange); CONG. GLOBE, 36th Cong., 1st Sess.
\(^72\) CURTIS, FREE SPEECH, supra note 39, at 271–72; HINTON ROWAN HELPER, THE
IMPEENDING CRISIS OF THE SOUTH: HOW TO MEET IT 43, 149 (George M. Fredrickson, ed.
\(^73\) CURTIS, FREE SPEECH, supra note 39, at 274–75 (attack on Republican endorsers as
criminals who should be hung).
\(^74\) Id. at 272, 289–99 (discussing the Worth Case).
Worth’s defense that he had given the book only to whites was unavailing. The North Carolina Supreme Court affirmed his conviction. It held that the legislature could ban distribution of the book to whites to ensure that it would not reach blacks and slaves. The result was clear. White citizens were denied the right to read and distribute anti-slavery political literature because the court considered it unsuitable for slaves (who anyway were often denied the right to learn to read). On the eve of the Civil War, the North Carolina legislature amended its bad tendency statute to provide the death penalty for the first offense.

The relation of free press to search and seizure is highlighted by a comment from a Raleigh paper in the wake of Worth’s arrest: “We would,” the Raleigh Standard sternly lectured, “again remind Postmasters of their duties. . . . Let every copy of Helper’s book, and every copy of the New York Tribune, and every document franked by [Republican senator] Seward, [Republican senator] Wilson [and other named Republican congressmen], and other abolitionists which may come to their offices, be committed to the flames.”

Republicans responded by invoking free speech and other constitutional rights. In the debate over Helper’s book, Representative Sidney Edgerton of Ohio complained about the suppression of free speech in the South: “For years, 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?” Preachers could not discuss “the moral bearing of slavery.” Representative Henry Waldron of Michigan complained that the “slave Democracy tramples [the Constitution] under foot.” Slavery could “only exist and prosper at the sacrifice and expense of the constitutional rights of the citizen. Where slavery is there can be no free speech, no free thought, no free press, no regard for constitutions, no deference to courts.” He also complained about searches of the mail, violations of the

75. State v. Worth, 52 N.C. 488, 492 (1860) (“it was not necessary, in order to constitute the offence, that the sale should be to a slave or a free negro, nor that the matter should be read in the presence of either. . . .”).
77. Quoted in CURTIS, FREE SPEECH, supra note 39, at 291. On state statutes authorizing punishment for the delivery of anti-slavery publications, see e.g., TASLITZ, supra note 62, at 227.
78. CONG. GLOBE, 36th Cong., 1st Sess. 930, col. 3 (1860).
sanctity of private correspondence, and of "a system of espionage . . . which would disgrace the despotism and darkness of the middle ages."\textsuperscript{79}

Every Republican in the Senate voting on the question supported a resolution that provided 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 that freedom of speech and of the press on this and every other subject of domestic and national policy, should be maintained inviolate in all the States."\textsuperscript{80} The word "domestic" in the resolution referred to matters of state policy.

In the 1860 congressional debate over Helper's book and Republican support for it, Owen Lovejoy (brother of the slain anti-slavery editor) supported the right to distribute Helper's book, and he supported Helper's object of organizing a Republican party in the South. He said that those objecting to the book were insisting that "an American citizen address[ing] himself to his fellow-citizens, in a peaceful way, through the press . . . must be hanged."\textsuperscript{81} Lovejoy complained that Southern states imprisoned or exiled ministers of the Gospel.

Lovejoy told his fellow congressmen that he claimed the free speech right to distribute Helper's book or Thomas Paine's \textit{Age of Reason} anywhere in the country, in any place to which "the privileges and immunities of the Constitution extend" because "that Constitution guarantees me free speech." Congressman Elbert Martin of Virginia rejoined, "And if you come among us we will . . . hang you . . ."\textsuperscript{82} Lovejoy said he did not doubt it.\textsuperscript{83}

John Bingham, the future author of Section 1, minus the citizenship clause, had been an endorser of Helper's book. In 1866, so had two of his Republican colleagues on the Joint Committee for Reconstruction that prepared the Fourteenth Amendment, for a total of three out of seven Republicans on the Committee. Other endorsers included the Republican Speaker of the House in 1866 and a number of other Republican congressmen.\textsuperscript{84}

Southern states like North Carolina had considered those Republican congressmen who had endorsed the book and subscribed to the fund to publish it to be parties to the crime of its distribution. Had the Republican congressional endorsers come within North Carolina, for example, they faced, at best, arrest, trial, and punishment—including

\textsuperscript{79} Id. at 1872; \textit{Curtis, Free Speech}, supra note 39, at 284–85.
\textsuperscript{81} \textit{Curtis, Free Speech}, supra note 39, at 287.
\textsuperscript{82} Id. at 288.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 360 (listing other endorsers of the Helper book).
whipping and imprisonment. If they had persisted in supporting the book after the North Carolina statute had been amended, they would have faced the death penalty. People threatened with criminal prosecution typically have a heightened respect for the criminal procedure guarantees in the Constitution, including those in the Bill of Rights.

In response to slavery and the suppression of civil liberty in the South, many opponents of slavery, including leading Republicans, developed a constitutional theory by which states were required to respect the liberties in the Bill of Rights—at the very least as a matter of (legally unenforceable) constitutional obligation. A number, including John Bingham, read the privileges and immunities clause of Article IV with the meaning explicated by the works in brackets: “the citizens of each state shall be entitled to all privileges and immunities [of citizens of the United States] in the several states.” For Bingham and others who shared his views, these privileges included the rights in the Bill of Rights. Some relied on the guarantee of republican government or due process to achieve the same end. In the end, as we will see, Bingham did not use the language of Article IV when he drafted Section 1. Instead, Bingham explicitly protected the privileges and immunities of citizens of the United States in the final version of his amendment.

As they considered the need for a new birth of freedom in 1866, Republicans did not forget the suppression of civil liberty in the South. As Republicans in the Thirty-ninth Congress saw it, the Southern elites were resurrecting slavery under another name. As in the years before the Civil War, a new birth of slavery threatened the liberty and safety of the Southern Republicans, of the loyalists, and especially of Americans of African descent, who had done much to save the Union. This point was reiterated again and again in the Thirty-ninth Congress. Slavery, said Congressman Newell, had been “contrary to the genius of free government” and it “gave the lie direct to its declaration of rights.” Congressman Cullom said that he would not accept “the ancient order of
things when liberty of speech was abridged . . ."^{89} Representative Plants reminded his listeners that for the safety of slavery "freedom of speech and the press must be suppressed as the highest of crimes and no man could utter the simplest truths but at the risk of his life."^{90} Congressman Donnelly supported Bingham's earlier version of a Fourteenth Amendment and called for enforcement of "all the guarantees of the Constitution." The alternative was to return to "the old reign of terror" in the South.\(^91\)

Senator Nye insisted that "the enumeration of personal rights in the Constitution to be protected, prescribes the kind and quality of the governments that are to be established and maintained in the States . . . . The framers of the Constitution apparently specified everything they could think of 'life,' 'liberty,' 'property,' 'freedom of speech,' 'freedom of the press,' 'freedom in the exercise of religion,' 'security of person,' &c." They had added the Ninth Amendment in case anything had been overlooked. "This amendment completed the document . . . . All these rights are established by the fundamental law." Would it be claimed at this day, Nye asked, that "any State has the power to subvert or impair the natural and personal rights of the citizen?" Congress and the state legislatures were prohibited from subverting or impairing "the natural or personal rights enumerated or implied in the Constitution."\(^92\)

Representative Ward complained that "in not a single southern State have they done justice to the freedmen." Rebels were in control. "Freedom of speech, as of old, is a mockery."\(^93\) Representative Ward was right. After the Thirteenth Amendment, Southern states and localities passed Black Codes to reduce the newly freed slaves to semi-slavery. The codes denied blacks all sorts of basic rights.

The ordinance of St. Landry Parish, Louisiana, provided that "no negro" could "pass within the limits of said parish without special permit in writing from his employer;" blacks could not be absent from the residence of their employers after 10 p.m.; blacks could not rent or keep a home within the parish; and "[e]very negro" was required "to be in the regular service of some white person, or former owner." In addition, no black was allowed to "sell, barter, or exchange any articles of merchandise without special permission of his employer, specifying the article . . . ."

89. Id. at 911, col. 2 (Rep. Cullom).
90. Id. at 1013, col. 3.
91. Id. at 586, col. 2.
92. Id. at 1072, col. 2 and 3 and 1075, col. 2 (Sen. Nye).
93. CONG. GLOBE, 39th Cong., 1st Sess. 783, col. 1 (1866).
In addition to racial discrimination, the ordinances also targeted what many Republicans saw as basic national constitutional rights: "No public meetings or congregations of negroes shall be allowed within said parish after sunset;" meetings at other times required special permission of the captain of patrol; "[n]o negro shall be permitted to preach, exhort, or otherwise declaim to congregations of colored people, without a special permission in writing from the president of the police jury;" and no black not in the military was allowed to carry firearms or any weapon within the parish without special permission of his employers and approval by the nearest chief of patrol. Violators were to have a barrel placed over their shoulders, but the confinement could not exceed twelve hours.  

Republicans rejected such ordinances. Some emphasized the constitutional right of the newly freed slaves to equality with other state citizens; most emphasized liberty and equality. For people, like many Republicans, who thought states were obligated to respect the liberties in the Bill of Rights, the Codes raised two constitutional problems—the denial of equality in basic rights based on race and the violation of constitutional rights, including the right to free speech, the free exercise of religion, and the right to bear arms.

Congress responded to the Black Codes by passing the Civil Rights Act of 1866. It made all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, "citizens of the United States." Section 1 of the Act continued:

[S]uch citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.


96. An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication, 14 Stat. 27 (1866).
“Full” protection seems to go beyond simple equality under state law, however limited the “equal” state law rights might have been.\(^9\) In addition, there was a long history of describing liberties such as those protected in the Bill of Rights as provisions for the security of person and property,\(^9\) which, of course, they are. One finds the usage in Kent’s Commentaries, in Supreme Court opinions, and most significantly in the Thirty-ninth Congress. There a version of the Freedman’s Bureau Act guaranteed to Americans of African descent “the full and equal benefit of all laws and proceedings for the security of persons and estate, including the constitutional right of bearing arms.” The italicized words were added as an amendment, which Senator Trumbull said did not change the meaning of the bill.\(^9\)

Republicans asserted congressional power to pass the Civil Rights Act under the Thirteenth Amendment, under the privileges and immunities clause of Article IV, and under the power to enforce the Bill of Rights, particularly the Fifth Amendment. John A. Bingham denied that Congress had the power to enforce the Bill of Rights or to pass the act. To justify passage, he said, a constitutional amendment was necessary to allow the Congress to enforce the guarantees of the Constitution. Both James Wilson, chairman of the Judiciary Committee who managed the Civil Rights Act in the House, and John Bingham saw the bill as an attempt to enforce the guarantees of the Bill of Rights, particularly the

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\(^9\) This important point which led to me rethinking the protections of the Civil Rights Act was noted by Avaim Soifer in his article Protecting Civil Rights: A Critique of Raoul Berger’s History, 54 N.Y.U. L. REV. 651, 684 (1979).

\(^9\) E.g., 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1-14 (O. W. Holmes, Jr. ed., Little, Brown, and Company 1896) (1827); Robert Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. REV. 863, 923, 932 (1986) (citing Kent and reliance on him in the 39th Congress); Dred Scott v. Sanford, 60 U.S. 393, 449–50 (1857) (“the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved . . . . For example, no one, we presume, will contend that Congress can make any law in a Territory respecting that establishment of religion, or the free exercise thereof. . . . These powers, and others, in relation to rights of person . . . are, in express and positive terms, denied to the General Government, and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law”); CURTIS, NO STATE, supra note 24, at 72, 237–38, n.116.

\(^9\) CONG. GLOBE, 39th Cong., 1st Sess. 743 (1866); CURTIS, NO STATE, supra note 24, at 104. See also Bryan Wildenthal, Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873, 18 J. CONTEMP. LEGAL ISSUES 153, at 246 (Samuel S. Nicholas equating civil rights with state and federal bill of rights guarantees).
Fifth Amendment. Wilson justified the passage partly on this ground. Bingham denied it.\footnote{100}{\textit{CONG. GLOBE, 39th Cong., 1st Sess. 1291, col. 1 (1866) (Rep. Bingham: “I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that constitution. I know that the enforcement of the bill of rights is the want of the Republic,” but insisting a constitutional amendment was needed to that effect to confer power to pass the Civil Rights Act), 1294, col. 3 (1866) (Rep. Wilson, supporting the power to pass the first section of the Civil Rights Act: “I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that ‘no person shall be deprived of life, liberty, or property without due process of law.’ I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named . . . . [Wilson here read extensively from \textit{Prigg v. Pennsylvania} for the proposition that Congress has power to enforce rights in the Constitution.] Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy.”).}}

Bingham had proposed an amendment providing congressional power.

The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.\footnote{101}{\textit{CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866) (Rep. Bingham).}}

The proposal had significant support, but also aroused significant opposition among Republicans. There were two main objections: first, that the amendment would allow Congress to legislate on virtually all subjects of state law, and second, that the legislation passed under the amendment could be repealed if Republicans lost control of Congress. Bingham said the amendment was needed to enforce the guarantees of the Bill of Rights. He noted the uniform construction had been that “these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.”\footnote{102}{\textit{Id. at 1034, col. 1.}} During the debate, no Republican criticized the idea that states should be required to respect the liberties in the Bill of Rights, and a number, like Representative Hale (a major critic), assumed and asserted that states were already legally obligated to respect the rights, which, Hale mistakenly thought, could be enforced in the courts.\footnote{103}{\textit{Id. at 1063 (Rep. Hale).}}

In response, Bingham referred (indirectly) to a provision of the Oregon constitution that denied free blacks the right to prosecute a suit
in Oregon courts. He asked Hale to cite a single decision protecting the
due process right to sue. Hale responded, "I do not know of a case where
it has ever been decided that the United States Constitution is sufficient
for the protection of the liberties of the citizens. But still I have,
somehow or other, gone along with the impression that there is this sort
of protection thrown over us in some way . . . ." 104 As his references to
the Oregon constitution show, Bingham and others were entirely aware
that protections of liberty and equality would extend to the North as well
as the South, and history taught them that national protection was
essential. 105

When he next had a chance to speak, Bingham cited the case of
Barron v. Baltimore, holding that the liberties guaranteed in the Bill of
Rights did not limit state power. He again asserted the need for power to
enforce "the Bill of Rights." 106 Bingham's earlier version of the Fourteenth
Amendment was postponed. The Joint Committee subsequently reported
the amendment largely in its current version. I will deal with discussion
of the final version in connection with textual methods of interpreting
the Fourteenth Amendment.

At this point, however, I want to make a few comments on the final
version. Republicans assumed, contrary to existing Supreme Court
precedent, that blacks and others generally born in this country were
citizens. Nevertheless, in the final version of the amendment they wrote
their understanding into law. The meaning of the "declaratory" citizenship
clause did not depend on the Supreme Court changing its view of the old
law. The declaratory clause changed the law.

Bingham's first version of the amendment gave power to enforce
privileges and immunities, but used the words of Article IV: "Congress
shall have the power to make all laws which shall be necessary and
proper to secure to the citizens of each State all privileges and immunities
of citizens in the several States . . . ." In terms of Bingham's very often-
repeated goal of enforcing "all the guarantees" of the Constitution (absolute
guarantees in the sense that state law could not change them), this
version was radically defective.

Bingham thought the proper reading of the Article IV clause was that
it included all privileges and immunities [or rights] of citizens of the
United States in the several states. For him such rights included those

104. Id. at 1064, col. 3.
105. CURTIS, No State, supra note 24, at 59–62 (discussing the Oregon
constitution and Bingham's view that it violated due process). Indeed, in 1866, Bingham
clearly suggested that many Northern states had violated the liberty of citizens, as indeed
they had, particularly in the case of free Americans of African descent. Id. at 59 and 69
(Bingham again citing the Oregon constitution).
specified in the Constitution belonging to and shared by all American citizens (including the liberties in the Bill of Rights). By the view held by Bingham and others, these federal constitutional rights did not depend on state law and state legislatures could not repeal them. Under Bingham’s theory, states like the Southern states that equally deprived in and out-of-staters of federal constitutional rights (such as free speech and press, for example) were still violating the right, though Bingham thought the federal government lacked power to enforce the obligation.

It is not a defense today to a violation of free speech, for example, that you take it away from in-state residents too, as Southern laws making criticism of slavery a crime did. But, it was a defense to a claim based on a more conventional understanding of Article IV. Indeed, Amos Kendall, Andrew Jackson’s Postmaster General, had said that Southern states could pass laws banning anti-slavery literature and such a ban would not violate the Article IV privileges and immunities clause. That was so because it simply gave out-of-staters the same right to advocate abolition as enjoyed by Southern state residents, which is to say none.107 In 1869, in Paul v. Virginia,108 the Supreme Court expressly rejected the national rights view, holding the Article IV clause gave visitors from out of state “the same freedom possessed by citizens of those states” in certain fundamental interests.

Even in 1866, one common judicial reading of the Article IV clause was that it protected temporary visitors in equal enjoyment of [only some] privileges and immunities [rights] granted by state law. Once a person settled in a state, that person lost the protections of Article IV equality rights since these only protected temporary visitors from out of state from being discriminated against because they were temporary visitors from out of state. In addition, Article IV only protected out-of-staters from being discriminated against in certain rights granted by state law. States could deny rights (say to criticize slavery) to all its citizens and to those temporary visitors from out of state. If no one in the state got the right, no out-of-state visitor was being discriminated against.

For Bingham’s amendment to have had the full effect he intended, the Court would have had to have done one of two things. It would have had to accept the Bingham reading of Article IV (as Justice Bradley came

107. CURTIS, FREE SPEECH, supra note 39, at 138.
close to doing in the *Slaughter-House Cases*)\(^{109}\) or it would have had to follow his intended meaning of the proposed new Fourteenth Amendment, as opposed to the non-discrimination understanding of the same words in Article IV. Had the Court read the clause in this early proposed Fourteenth Amendment as designed (as it was) to let *Congress* protect all constitutional rights against state action, it would not necessarily have overruled *Barron*.\(^{110}\) State option could have been replaced with congressional option. Fully correcting *Barron* would have also required accepting that it was wrong from the start, because of the national liberty reading of Article IV.

So there were three problems with Bingham’s drafting. First, barring an interpretation of Article IV as including absolute rights in the Bill of Rights or a broad purpose-inspired reading of the same words in the earlier version of the amendment, it did not allow Congress to protect national constitutional rights such as those in the Bill of Rights from generally applicable state statutes that deprived everyone of the right. Article IV, Section 2 was typically interpreted to protect “all [some] privileges and immunities [state law rights] of [temporarily visiting] citizens [in the state they temporarily visit].” Second, as Giles Hotchkiss pointed out, the amendment did not establish judicially enforceable rights; it simply provided congressional power to legislate.\(^{111}\) What this Congress gave, the next Congress could take away. Finally, there were no words in the Bingham prototype that were likely to be read explicitly to overrule *Barron*. Bingham’s view that the states were already morally

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109. *Slaughter-House Cases*, 83 U.S. 36, 118 (1873) (Bradley, J., dissenting) ("It is true the courts have usually regarded the [Article IV] clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship. . . . The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, [etc.] But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal Government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, . . . the right to be secured against unreasonable search and seizures, and above all, and including almost all the rest, the right of not being deprived of life, liberty, or property without due process of law. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States....")


required to obey the Bill of Rights and that all that was needed was enforcement power may have blinded him (temporarily) to this problem.

The final version of the amendment repaired these problems. It provided guarantees for all privileges [rights] or immunities belonging to and shared by all citizens of the United States and guaranteed due process to all persons. It no longer used the words of Article IV. Instead of referring to rights of state citizens (as a more conventional judicial reading of Article IV said it did) it protected national rights of citizens of the United States. The temporary visitor limit and revocable nature of the rights (if revoked for all) were gone. The privileges and immunities of citizens of the United States, first and foremost, would be rights in the Constitution. These, as Bingham explained in 1871, were chiefly set out in the Bill of Rights, all of which he read word for word. In the same speech, Bingham again cited *Barron v. Baltimore* to show that these rights had not limited the states: “These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment. The words ‘no state shall abridge the privileges or immunities of citizens of the United States,’ are an express prohibition upon every State of the Union . . . .”

All persons were protected by due process and equal protection.

Second, Section 1 provided a new and broader security device for these federal constitutional rights (privileges or immunities)—“no state shall abridge” them. They would be judicially enforceable guarantees. States were now limited in ways courts or Congress could enforce—by privileges or immunities, due process, and equal protection which no state could abridge or deny. Congress was given enforcement power in Section 5. The rights to be protected were “privileges or immunities of citizens of the United States,” national rights (including constitutional rights), not rights exclusively coming from state law. Of course, one, but only one, of these national rights was equal benefit of state law rights secured by Article IV and by equal protection.

Next, I will look at the text of Section 1 of the Fourteenth Amendment. The text of the Fourteenth Amendment should be considered in light of the historical context described above.

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112. CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871).
C. Reading the Text

1. What Principles of Liberty Are Incorporated By Reference or Applied to the States?

We commonly refer to the doctrine applying the liberties (or the "privileges" and "immunities") in the Bill of Rights to the states as "incorporation of the Bill of Rights." We speak and write about the incorporation of the First Amendment as a limit on the states. But, of course, that is not what is going on. What gets incorporated or applied is the right, such as freedom of speech or freedom of the press, not the "Congress shall make no law" security device for the right. The idea is not that "no state shall make or enforce any law requiring Congress to make a law abridging freedom of speech." Obviously no state could do that; that is not the problem the text addresses. What gets incorporated by reference is the right, the liberty, the privilege or immunity. As noted above, it typically would be the liberty at least as understood in 1866-1868. The idea of popular sovereignty requires no less.

2. A Simple and Direct "Popular" Meaning of the Text of the Privileges or Immunities Clause

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

According to Felix Frankfurter (concurring in Adamson v. California and citing Justice Holmes), "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.... For it was for public adoption that it was proposed.'"

113. Ironically, in Palko v. Connecticut, 302 U.S. 319, 324–26 (1937), Justice Cardozo used the words "privileges" and "immunities" to describe each and every liberty in the Bill of Rights ("immunities that are valid as against the federal government [such as the First Amendment] by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty.... The exclusion of.... [other] immunities and privileges [such as right to jury trial, indictment by grand jury, and protection from compulsory self-incrimination] from the privileges and immunities protected against the action of the states has not been arbitrary or casual. ...."). Justice Cardozo's use of the words "privileges" and "immunities" to describe every right in the Bill of Rights is ironic because Justice Cardozo held only some of these privileges and immunities limited the states under Section 1's due process clause.

What follows is a common, natural, and direct reading of the privileges or immunities clause:

No state shall make or enforce any law which shall abridge [reduce in scope or diminish] the privileges [rights] or immunities of [shared by all and secured to all] citizens of the United States.

Of course, the security provided by the original Bill of Rights was incomplete, as Barron v. Baltimore established. That is why the additional "no state shall" security was needed. One logical place to look for rights of citizens of the United States would be the rights set out in the Constitution. The major group of these rights is the liberties in the Bill of Rights. There are a number of others such as habeas corpus. Does the Bill of Rights contain rights? We do describe it as a “Bill of Rights.” The rights are declared. However, as the Supreme Court ruled in Barron, the rights were secured only against federal invasion.

There are two aspects of the rights in the Bill of Rights. There is the right and the security device. This can be seen most clearly in the First Amendment, “Congress shall make no law . . . abridging the freedom of speech or of the press.” The rights are freedom of speech and of the press. The security device is that Congress shall not abridge these rights. Barron v. Baltimore interpreted all other provisions of the Bill of Rights as limiting only the federal government, thus providing an implied (and limited) security device for these rights—protection only against federal power. Under Barron, amendments one through eight in the Bill of Rights also have a dual character—a right plus a limited security device. These rights are declared, but protection for them is limited.

When he proposed the Bill of Rights, James Madison clearly distinguished between the rights and security for them. Madison also wanted to protect certain basic rights from infringement by the states—freedom of the press, equal rights of conscience, and trial by jury in criminal cases. He proposed to put these provisions in Article I, Section 10: “No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” 115 Though some state constitutions protected these rights, Madison could not “see any reason against obtaining even a double security” on those points. 116 Nothing, he

116. Id. at 1033 (emphasis added).
said, would better show the attachment of the Anti-Federalists "to these great and important rights, than to see them join in obtaining the security I have now proposed; because it must be admitted . . . that the State governments are as liable to attack the invaluable privileges as the General Government is . . ." Madison, like Bingham, believed these were rights people should and did have.

"No state shall" is obviously a new security device for "privileges or immunities of citizens of the United States." The restriction is transparent. States cannot abridge privileges or immunities of citizens of the United States. Section 1 uses the "no state shall" security device chosen in Article I, Section 10 to limit states in the interest of liberty. It is the security device Madison chose for his proposed limits on state power.

But what are the "privileges or immunities of citizens of the United States?" Historic usage is a guide, illuminated by historic problems to which political leaders, speakers, and writers reacted. During the more than one hundred years prior to the framing of the Fourteenth Amendment, people repeatedly used the words "privileges" and "immunities" as equivalent to rights and liberties that appear in the Bill of Rights. They also often asserted that these privileges or immunities in the Bill of Rights were rights (or privileges) of American citizens or rights belonging to citizens under the Constitution. There are a great many examples. The argument here is not tied to an assumed public understanding of Republican or anti-slavery constitutional theory. It simply focuses on the way the words "privileges" or "immunities" were used to include the liberties set out in the Bill of Rights guarantees. This usage long preceded the Republican Party. In the Civil War era, Democrats as well as Republicans used the words this way.

In debates over the Constitution and its lack of a Bill of Rights, the words "privilege" and "immunity" are used to describe rights missing from the original constitution and that will later appear in the Bill of Rights. The words are used to describe Bill of Rights liberties in the

117. Id. (emphasis added).
118. For an eighty page discussion of the use of the words privileges and immunities filled with many, many examples, see Michael Kent Curtis, Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. Rev. 1071 (2000) [hereinafter Curtis, Historical Linguistics]; see also, e.g., CURTIS, NO STATE, supra note 24, at 64–65, 75; AMAR, THE BILL OF RIGHTS, supra note 49, at 166–68. For examples from the colonial and early American background, see, e.g., Curtis, Historical Linguistics, supra this note at 1090, 1094–1132 (setting out a great number of examples from English, colonial, and American history), e.g., 1095 (William Penn on jury trial), 1096 (Benjamin Franklin), 1096 (William Blackstone describing the rights and liberties of Englishmen—including forerunners to the Bill of Rights liberties—as privileges and immunities), 1099–1102 (debates on ratification of the Constitution), 1104–1110 (discussion of the Sedition Act).
Sedition Act debates, in debates over free speech for opponents of slavery, and so on up through the Civil War. Once the Bill of Rights was adopted, people commonly referred to a right in the Bill of Rights as a "privilege" or an "immunity." Finally, these privileges, immunities, or rights were often described as the rights of Americans, American citizens, or citizens of the United States. As we have seen, James Madison alternately described those rights he wanted to limit the states as "these great and important rights" and as "the invaluable privileges." Taken all together, these facts support reading the "privileges and immunities of citizens of the United States" as including the privileges and immunities in the Bill of Rights.

There are many other examples preceding and following Madison. Here I can only provide a few illustrations, including some from the English background of American liberties. In the Writs of Assistance Case, James Otis complained that general warrants endangered "the freedom of one's house." He said that "[t]his writ, if it should be declared legal, would totally annihilate this privilege." Cato's Letters were influential essays on liberty in colonial America and were quoted throughout the colonies. Cato described Freedom of Speech as the "Right of every Man" and wrote that "[t]his sacred Privilege is . . . essential to free Governments." Additionally, many American constitutional rights were derived from limits on the power of the King in British history, from Magna Carta, the Petition of Rights, the English Bill of Rights, the Habeas Corpus Act, and so on. William Blackstone described all these rights as "privileges" or "immunities."

In the controversies over slavery leading up to the Civil War, newspapers, resolutions of meetings, congressmen, and others often refer to particular liberties in the Bill of Rights as a "privilege" (or sometimes as an "immunity") belonging to American citizens under

119. Curtis, Historical Linguistics, supra note 118, at 1103, 1104, 1107, 1110, 1111, 1113, 1114, 1115, 1117, 1123 (examples describing Bill of Rights liberties or privileges as rights of American citizens or rights guaranteed by the Constitution.). Similar Republican usage in Congress or in the 1866 congressional campaign was not at all unique. Id. at 1132–36. See generally, Michael Conant, Anti-Monopoly Tradition Under the Ninth and Fourteenth Amendments, 31 EMORY L.J. 785 (1982) (discussing "historical linguistics" in connection with Section 1 and using that phrase).

120. Id.

121. Id. at 1094–95.

122. Id. at 1095.

123. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125–29 (1765).
their Constitution. For example, free press and free speech were often described as rights of American citizens and as citizens’ rights under the national Constitution. In the 1830s, commenting on the killing of Elijah Lovejoy, resolutions and newspaper articles typically did two things. First, they used the words “right” and “privilege” interchangeably. So the “right of free discussion” was described as an “inalienable privilege of a freeman.” “Liberty of speech” was “one of the privileges left to us by our fathers.” Second, writers and public meetings asserted that such rights were guaranteed to every citizen by the Federal Constitution or were rights of American citizens. They referred to “rights guaranteed by the Constitution of his country,” “sacred rights secured to the citizens by the Constitution of the U.S.,” and “rights acknowledged and guarantied by the Constitution of these United States.”

In the discussions of slavery and constitutional rights in the years before 1866, prominent congressmen followed historic usage: they used the words “privileges” and “immunities” to describe rights in the Bill of Rights. Republican congressman Owen Lovejoy, for example, insisted that he had “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. [T]hat Constitution guarantees me free speech.” To the extent that we focus here on the popular usage and understanding of the words, the fact that public usage and understanding diverged from judicial understanding should not deprive the words of their popular meaning.

Such usage was not limited to Republicans and opponents of slavery. During the Civil War, when President Lincoln lifted General Ambrose Burnside’s ban on publication of the Chicago Times newspaper, the newspaper celebrated a large public protest that preceded Lincoln’s revocation order. As the Chicago Times saw it, protestors had “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.” These rights, the paper asserted, were “the inborn right of the American citizen.” On the other side of the debate over constitutional liberties during the Civil War, the Chicago Tribune wrote that “since the arrest of the treason-shrieker, Vallandigham, his disciples fill the air with cries about the Constitutional right of ‘free

speech.' [W]e wish to ask those Copperhead defenders of free speech how much of this Constitutional and sacred privilege did their party allow to be exercised in the South before the war . . . .

In speaking in favor of a resolution for a constitutional amendment abolishing slavery, Representative James Wilson of Iowa (chairman of the Judiciary Committee in the Thirty-ninth Congress) said that

[f]reedom 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.

Still, slavery had practically destroyed these rights because it persecuted religionists, denied the privilege of free discussion, prevented free elections [and] trampled upon all of the constitutional guarantees belonging to the citizen . . . . [T]he 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.

Wilson's specification of constitutional rights was only illustrative. Wilson said he "might enumerate many other constitutional rights of the citizen which slavery" had "practically destroyed . . . ."

Usage of "privilege" or "immunity" to describe a constitutional liberty was by no means limited to free speech and press. Jury trial, the right to confront witnesses, and other rights in the Bill of Rights were historically described as privileges or immunities. The usage appears in treatises by William Blackstone and Justice Story. State courts under state constitutions frequently described such rights as constitutional privileges or immunities (though not of the United States): the privilege and immunity of grand jury indictment; the privilege against double jeopardy; the privilege of jury trial; and guarantees of the right to worship and of conscience (these "religious privileges"). Federal court usage dealing with the liberties in the Bill of Rights was similar. Courts referred to the "privilege" of confronting witnesses, the privilege of assistance of counsel, and "the constitutional privilege of trial by jury." Similar usage comes from arguments of counsel in famous federal cases. In Prigg v. Pennsylvania,

127. Quoted in CURTIS, FREE SPEECH, supra note 39, at 332–33 (emphasis added).
129. Id. at col. 3 (emphasis added).
130. Id.
counsel for the state referred to the "constitutional privilege" against unreasonable searches and seizures. In the famous and well-publicized Vallandigham case, involving a congressman arrested and tried by a military commission for making an anti-war speech during the Civil War, his lawyer described Fifth and First Amendment rights as "constitutional privileges." As Richard Aynes has shown, John Norton Pomeroy, a New York University Law Professor, in his treatise *An Introduction to the Constitutional Law of the United States*, "described the first eight amendments as the 'immunities and privileges guarded by the bill of rights.'"

These examples show that it was common to describe the liberties in the Bill of Rights as privileges and immunities, and in light of the widespread usage of the terms, the usage would be understandable. It also shows that in popular usage these privileges and immunities were seen as rights of American citizens. It does not show that this usage was the only way the words "privileges" and "immunities" were used. But if that is the test, then no alternative reading can pass it either.

One leading alternate reading is less likely to have been commonly understood by ordinary readers of the text as an exclusive meaning. By that reading, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" meant that states could not discriminate based on race or caste or similar bases in allocating certain basic rights under state law, but states could deprive persons of rights provided the denial was, for example, racially neutral. By this reading, the term "privileges or immunities of citizens of the United States" does not refer to national constitutional rights at all; it refers to rights under state law. Abridge does not mean reduce. It means discriminate based on characteristics such as race or caste. The denial of rights of speech and press and other basic liberties in the South before the Civil War was racially neutral; neither whites nor blacks, Southerners or Northerners, could engage in anti-slavery or pro-Republican speech. Still, some seem to read the words as merely a ban on discrimination.

3. *A Technical Legal Meaning*

Instead of common understanding one might appeal to the technical legal meaning of the term "privileges or immunities of citizens of the United States." Professor Crosskey wrote that the term should be read in

light of prior law.\textsuperscript{133} \textit{Dred Scott} had (dubiously) limited each and every federal constitutional right to citizens. It described each and every constitutional right as "rights, privileges, and immunities." Blacks could not be citizens or possess any federal constitutional rights. So, under \textit{Dred Scott} all constitutional rights became the exclusive "rights, privileges, and immunities of citizens of the United States." Did \textit{Dred Scott} distinguish between rights and privileges, that is, did the words have different meanings? No. Chief Justice Taney explained that the question in the case was:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States . . . .\textsuperscript{134}

Again, when the \textit{Dred Scott} majority refers collectively to the two big categories of constitutional powers and citizens' constitutional rights, it describes the \textit{rights} as \textit{privileges}: "[The Constitution] speaks in general terms of the people of the United States, and of citizens of the several states, when it is providing for the exercise of the powers granted or the privileges secured to the citizen."\textsuperscript{135}

In \textit{Dred Scott}, national constitutional rights were described as privileges. They belonged to a unique group, citizens of the United States, a class that excluded blacks descended from slaves. Under \textit{Dred Scott}, the privileges and immunities of citizens of the United States included \textit{all constitutional rights}. For that reason, obviously, it included the liberties in the Bill of Rights. Interestingly, the understanding of "privilege" as a basic right granted to a limited group of people is consistent with a (relatively) modern dictionary definition. "Privilege: 1. A right or immunity, or benefit enjoyed by a particular person or a restricted group of persons. . . . 5. Any of the rights common to all citizens under a modern constitutional government."\textsuperscript{136}

The Fourteenth Amendment’s first section overruled \textit{Dred Scott} by making all persons born in the United States and subject to its jurisdiction citizens. It provided that no state shall abridge the privileges

\textsuperscript{133} Crosskey, \textit{supra} note 3, at 4–7.
\textsuperscript{134} \textit{Dred Scott} v. Sandford, 60 U.S. 393, 403 (1857) (emphasis added.).
\textsuperscript{135} \textit{id.} at 411 (emphasis added).
\textsuperscript{136} \textit{RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY} 1074 (1991).
or immunities of citizens of the United States. *Barron v. Baltimore*\(^{137}\) held that the liberties in the Bill of Rights did not restrict the states. According to *Barron*, had the framers of the Bill of Rights intended to restrict the states, they would have followed the pattern of the original constitution and prefaced the restriction with the words, "no state shall."\(^{138}\)

In light of prior law, Section 1 had a threefold purpose. It overruled *Dred Scott* and made all persons born in the country and subject to its jurisdiction citizens. It overruled *Barron* and granted all citizens the protection of the privileges and immunities (liberties) in the Bill of Rights (and other constitutional rights), *at least* against state abridgement. It also granted due process and equal protection to all persons.

Under prior law, the Fourteenth Amendment Due Process Clause would mean at least what the Fifth Amendment clause had been held to mean. In 1856 in *Murray's Lessee v. Hoboken Land and Improvement Co.*,\(^{139}\) the Court suggested a test to determine the content of due process. First, "we must examine the constitution itself, to see whether this process be in conflict with any of its provisions." Many of the provisions of the Bill of Rights are process guarantees—jury trial, grand jury, public trial, the privilege against self-incrimination, etc. These would be guaranteed to all persons, whether citizens or not. This additional protection for persons is in accordance with concern for the rights of non-citizens expressed in the debates in the Thirty-ninth Congress.\(^{140}\) There is substantial historical support for reading the Due Process Clause to include other basic rights such as grand jury indictment and jury trial.\(^{141}\)

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138. *Id.* at 250 ("Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."); see U.S. Const. art. I, § 10, where this form is used to restrict state power to invade certain rights of citizens. For Crosskey on Section 1 in light of *Dred Scott*, see Crosskey, *supra* note 3 at 4–6.
140. CURTIS, NO STATE, *supra* note 24, at 107.
141. See id. at 181 (citing Coke, William Penn (grand and trial juries), John Adams (grand jury), and the Massachusetts high court—all on the law of the land clause, ancestor to the Due Process Clause); JUDGMENTS, *supra* note 9, at 66 (stating "the history of due process shows that it did mean trial by jury and many of the other traditional rights of accused persons that were specified separately in the Bill of Rights"). Professor Wildenthal points out that Joel Bishop in editions of his treatises noted that jury trial and grand jury indictment did not limit the states, though in the 1880 edition of CRIMINAL PROCEDURE he criticized these holdings. In the 1895 edition of his book, noting that criminal jury trial did not limit the states, he asked, "What is there left of the constitutional amendment?" Bishop focused on due process, not privileges or immunities. Wildenthal, *Nationalizing, supra* note 33, at 25–33. On grand jury Wildenthal finds that 86% of American states guaranteed or used grand jury in 1868. Id. at 60 and nn. 177 & 178. He also reconciles John N. Pomeroy's finding of incorporation of all the rights with his personal objection to grand jury and the privilege against self-incrimination. Id. at
Is reading "privileges and immunities of citizens of the United States" to encompass all national constitutional rights the only possible technical legal meaning? No. One might instead use the conventional legal meaning of privileges and immunities in the interstate privileges or immunities clause. By the more conventional interpretation, that clause protected the right to equality for out-of-state temporary visitors in certain rights accorded under state law. The reading confronts some difficulties. It only protects temporary visitors. It treats the privileges or immunities of citizens of the United States as privileges under revocable state law, not as those shared by and secured to all citizens of the United States.

But this is not the only possible technical meaning of Article IV in 1866-1868. Another reading of the clause seems to give it, at least in part, a fundamental rights construction as well as an equality component. That would go beyond mere equality under state law and would not clearly exclude Bill of Rights liberties. But could references to fundamental rights in the 1860s include the rights in the Bill of Rights? Yes. James Wilson, Chairman of the Judiciary Committee and manager of the Civil Rights Act in the House, said that "in relation to the great fundamental rights embraced in the Bill of Rights, the citizen being possessed of them is entitled to a remedy." In the Thirty-ninth Congress Senator Howard (in presenting the amendment to the Senate) described the rights in the Bill of Rights as "these great fundamental guarantees."

Another possibility would be to read the Article IV clause in a way courts typically did not, to secure racial and similar equality for all in-state citizens and out of state visitors in certain rights having their source in state law. Some Republicans in the Thirty-ninth Congress seem to have read the Article IV provision at least partly in that way. This reading would correspond to one, but only one, way to read Section 1 of the Civil Rights Act of 1866. This is a major alternative suggested by nn.153–168 and accompanying text. See also id. at 30–33 (and n.116), 158–59 (discussing text writers who failed to discuss the Fourteenth Amendment from 1866-1873).

142. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) ("What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . .").

critics of reading the privileges or immunities clause to protect the privileges and immunities in the Bill of Rights. While embracing an unorthodox reading of the Article IV clause, critics often fault John A. Bingham because he held an unorthodox reading of Article IV. Some even suggest that his unorthodox reading of the different wording of Article IV somehow disqualifies his Bill of Rights reading of the significantly different wording of the Privileges or Immunities Clause in the Fourteenth Amendment.

One objection to reading the privileges or immunities clause to protect the liberties described in the Bill of Rights is the claim that protecting these liberties does not accord with prior Supreme Court precedent. That objection is better applied to competing theories of meaning that rely on Article IV, Section 2 and give it an unorthodox meaning—protecting in-state residents as well as out-of-staters.

There is still another quite technical reading, one that emerged as the Court was crippling the Reconstruction amendments and the power of Congress to protect basic rights from political terrorists. By this approach, set out in United States v. Cruikshank, there are no rights in the misnamed Bill of Rights. There is only federal protection against infringing state constitutional rights—if they happen to exist under state law and are enforced. The so-called right turns entirely on state law and is entirely revocable by the state.

4. Contextual (Intra-textual) Analysis

In Article I, Section 10, the framers of the Constitution protected certain fundamental liberties (such as the protection against ex post facto laws) from the states by using the “no state shall” formula. Chief Justice Marshall relied on contextual analysis to argue that the takings clause of the Fifth Amendment did not limit the states. He pointed out that elsewhere limits on the states were prefaced with the words “no state shall.” In 1871, John A. Bingham, the principal drafter of Section 1, explained that after the postponement of his earlier version of the Fourteenth Amendment, he had re-read Barron and followed Marshall’s instructions and the approach of the framers of the original constitution. That is, he had used the “no state shall” formula Marshall had said

144. United States v. Cruikshank, 92 U.S. 542, 553 (1876) (For example, the court found “[the right to bear arms] . . . is one of the amendments that has no other effect than to restrict the powers of the national government. . . .”). For a fine discussion of the history surrounding this loathsome case, see CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) [hereinafter LANE, THE DAY FREEDOM DIED].

should have been used to require states to respect liberties in the Bill of Rights. In the same speech Bingham recognized the now reinforced orthodox interpretation of Article IV, Section 2, as protecting only temporary visitors in rights granted by state law. He said it was clear from the language of the privileges or immunities clause that it protected other and different privileges. 146

5. Another Due Process Life for the Nine Lived Cat

The analysis above has focused on history and on the privileges or immunities clause, but has also referred to due process criminal procedure guarantees for all persons. Assuming that the privileges or immunities clause is permanently killed off as a method of incorporation, the "nine lived cat" has another life, one it is currently enjoying—application under the Due Process Clause. Charles Sumner, speaking in Congress in 1864, said that the Due Process Clause, “Brief as it is, it is in itself a whole bill of rights.” 147 That was close to the view of Justice Bradley in the Slaughter-House Cases. 148 Thomas Cooley believed that the Due Process Clause protected free speech. 149 At any rate certain procedural rights would be protected by an historical view of the Due Process Clause. As we have seen, the law of the land clause of Magna Carta (the source of the Due Process Clause) historically had been interpreted to include basic guarantees such as the grand jury right. 150 In the Nineteenth Century some clearly read the Due Process Clause to contain many guarantees in the Bill of Rights, including some rights we now think of as substantive.

D. Precedent

One could, and the Supreme Court did, invoke Barron v. Baltimore to prove that, even after the Fourteenth Amendment, the Bill of Rights did
not limit the states. This approach is weakened by statements by both John A. Bingham and Jacob Howard that the amendment was designed to reverse the ruling in Barron, by the text of the amendment, and by other methods of analysis. It is weakened by chronology. The amendment comes after Barron. In any case, since the amendment uses Barron's "no state shall" cookbook formula for making Bill of Rights liberties a limit on the states, Barron provides support for application.

E. The "Intent" of the Framers

Obviously the intent of the framers of the Fourteenth Amendment is difficult to discern because there are so many people involved. If one considers all those voting for the provision to be its framers, then there are lots of people to consider. The ratifiers are an even bigger group. On this sort of historical question there is always likely to be divergence. If one takes the drafter and leading proponents as the crucial framers, the task is easier, but may be less reflective of congressional purposes. The leading framers would be Bingham, the author of Section 1 (minus the citizenship clause), Senator Howard, who explained the amendment on behalf of the Joint Committee, and Thaddeus Stevens, who presented it to the House on behalf of the Committee. Of these Howard and Bingham support incorporation. Stevens' remarks are ambiguous, but can also be read to support incorporation. Howard says that the privileges or immunities of citizens of the United States include "the personal rights guaranteed and secured by 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 a redress of grievances . . . ; the right to keep and bear arms," etc. Howard was listing as illustrations most, but not all, of the guarantees. Howard went on to note the Barron doctrine and the purpose of Section 1 to change it: "to

151. United States v. Cruikshank, 92 U.S. 542, 552 (1876) ("[The first amendment] like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate on the National government alone . . . It is now too late to question the correctness of this construction.").

152. CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) ("The course of decisions of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it . . . do not operate in the slightest degree as a restraint or prohibition upon state legislation, States are not affected by them. . . ." [Howard referred to the Barron decision by its holding, not its name.] "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees"; see id. at 1189–90 (Rep. Bingham, discussing the earlier version of the amendment and referring to the need to correct Barron).

153. Id. at 2765 (emphasis added).
restrain the power of the states and compel them at all times to respect these great fundamental guarantees.”  

Howard and Stevens read the equal protection clause as preventing state discrimination at least in certain basics.  

In discussing his earlier version of the Fourteenth Amendment, Bingham said that his amendment was needed because by all constructions of the Constitution “these great provisions in the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the states . . .” But the states “have violated in every sense of the word these provisions of the Constitution . . .” As we have seen, Bingham also made clear the need to correct the decision in Barron v. Baltimore. In his speech on the Fourteenth Amendment Bingham explained that it would “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.” As an example of the need for the legislation, Bingham said that “contrary to the express letter of your Constitution, ‘cruel and unusual punishments’ have been inflicted under State laws within this Union upon citizens. . . .”

Representative Stevens quoted Section 1 and suggested that “every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States.” That would be true for the Bill of Rights, due process, and equal protection, but was not true for the equal state rights granted to temporary visitors under Article IV. Those did limit the states and were in theory, but not always in practice, judicially enforced. Stevens continued, and seemed to focus on equal protection: “This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that

154. Id. at 2766.
155. Id. at 2766 (Howard) (equal protection bans class and caste legislation; equal punishment under criminal law for the same offense; no separate codes); id. at 2459 (Stevens) (equal protection for white and black; same punishment for white and black individuals; same means of redress).
156. Id. at 1034.
157. Id. at 1064, 1089–90.
158. Id. at 2542, col. 2.
159. CONG. GLOBE, 39th Cong., 1st Sess. 2542, col. 3 (1866).
160. Id. at 2459, col. 2.
the law which operates upon one man shall operate equally upon all . . . Whatever law protects the white man shall afford ‘equal’ protection to the black man.”161 Stevens said it was only partly true that the Civil Rights Bill secured the same things, but “a law is repealable by a majority.”162

Stevens considered Section 2 the most important part of the amendment. He said it would compel states to grant universal [male] suffrage or shear them of much of their power.163 Unfortunately, the section was never enforced. Curiously, those who embraced original expectations to criticize the Court’s Brown v. Board of Education164 decision and others dismantling the racial caste system165 lacked the same enthusiasm for enforcing Section 2.166

Discussion of Section 1 of the amendment was typically brief and sometimes cryptic. Senator Henderson said the section provided citizenship and “merely secures the rights that attach to citizenship in all free Governments.”167 The statement is consistent with Howard’s speech if Henderson, like many at the time, regarded the rights in the Bill of Rights as rights that attach to citizenship in all free governments.

Following Howard’s speech, a number of speakers treated the amendment as protecting the constitutional rights of American citizens. Representative Baker believed that the amendment would prevent the states from “rob[bing] the American citizen of rights thrown around him by the supreme law of the land. When we remember to what extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.”168 Senator Yates noted that the amendment made all persons born in the nation citizens and that “[the amendment] goes on to provide that their rights shall not be abridged by any State.”169 Representative Windom understood the amendment as “guarantees in all the rights of citizenship.”170 Congressman Orth said Section 1 secured to all persons born or naturalized in the United States “all the rights of citizenship.”171

Others said other things. Congressman Farnsworth said Section 1 was equal protection with harmless surplusage. So he must have thought that

161. Id. at 2459.
162. Id. at col. 3.
163. Id.
167. CONG. GLOBE, 39th Cong., 1st Sess. 3031 (1866).
168. Id. at app. 255–56.
169. Id. at 3038. Yates made a similar statement in the campaign of 1866, referring specifically to constitutional rights.
170. Id. at 3167.
171. Id. at 3201.
the states were at the very least already limited by a federal standard of due process. Representative Latham treated Section 1 as prohibiting discrimination in civil rights of citizens on account of race or color, and he thought Section 1 did not go beyond what was originally intended. He said the Civil Rights Act “covers exactly the ground of this amendment.” To the extent that was so, the Civil Rights Act must have stood at the very least for the proposition that no state can deprive any person of life, liberty, or property without due process of law. If one believed states were already obligated to secure due process (and probably other Bill of Rights liberties) to citizens, then the Due Process Clause might be found in the Civil Rights Act guarantee of “full and equal benefit of all laws and proceeding for the security of person and property as enjoyed by white citizens.” Even then, the correspondence between the Fourteenth Amendment and the Civil Rights Act is incomplete because the Due Process Clause protected persons while the Civil Rights Act protected citizens.

Making blacks citizens and securing to them certain absolute rights such as a federal standard of due process and other Bill of Rights liberties guarantees a substantial measure of equality. Today we don’t typically think of guarantees of basic liberties that protect all persons or all citizens as anti-discrimination provisions, though in a real sense they are. John Bingham made this point in a debate over abolishing slavery in the District of Columbia, a result he thought was required under the Due Process Clause of the Fifth Amendment. Bingham noted that the American Constitution provided that:

No person shall be deprived of life, or liberty, or property, without due process of law. This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century . . . . The barons of England demanded security of law for themselves; the patriots of America proclaimed the security and protection for all. [A]ll men are equal before the law. No matter upon what spot of the earth’s surface they were born; no matter whether an Asiatic or African, a European or American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor; no matter whether wise or simple; no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law.

172. Id. at 2539.
173. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866).
175. Id.
In defending the Civil Rights Act, Representative Broomall argued that the federal government had the power to protect the liberty of the citizens within the states. He rejected the idea that the government was powerless to protect this liberty, though he recognized that had been the prevailing view. Protection was needed because the rights of citizens of the United States could not safely be entrusted to the several States. "For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to citizens of other States: the right of speech, the right of transit, . . . the writ of habeas corpus." While he referred to citizens of other states, it is dubious that Broomall was referring to an orthodox view of Article IV, Section 2, by which a state could deny a right to an out-of-stater provided the same right was denied to in-staters. Restrictions on anti-slavery speech covered in and out-of-staters alike.

In discussing the Fourteenth Amendment Broomall said the Fourteenth Amendment proposed to give power to the government of the United States to protect its own citizens within the States, within its own jurisdiction. Those who voted for the Civil Rights Act had accepted this "proposition in another shape."

Statements by Congressmen in the campaign of 1866 describing the Fourteenth Amendment in terms of the Civil Rights Act (one common description) have been used to deny incorporation. But the evidence is far from conclusive on that score and the statement can equally support the opposite conclusion. Many congressmen thought that American citizens had a right to free speech and other Bill of Rights liberties that states could not abridge. For these people, a statute granting all citizens the full and equal benefit of laws and proceedings for the security of person and property (a phrase historically used to encompass liberties in bills of rights) could well overlap with a clause protecting Bill of Rights privileges or immunities of citizens of the United States. For example, Senator Dixon seems to have read the Civil Rights Act to protect a national, absolute right of freedom of speech: "Congress has given us, in the Civil Rights Act, a guarantee for free speech in every part of the Union." In addition, Congressmen Bingham and Wilson spoke of the Civil Rights Act as enforcing the guarantees of the Bill of Rights. Bingham thought the Civil Rights Act unconstitutional because Congress lacked

176. CONG. GLOBE, 39th Cong., 1st Sess. 1263, col. 2 (1866).
177. Id. at 2498.
178. Id. at 2332.
such power, so his remarks got particular attention. As a precaution the
Act was passed again after the Fourteenth Amendment was ratified.\(^\text{179}\)

In any case, the requirements of due process clearly do not allow
deprivations equally imposed—e.g., trial by ordeal imposed on all.
Equating Section 1 with the Civil Rights Act is weak evidence for
excluding rights in the Bill of Rights.

Senator Poland said the privileges or immunities clause "secures nothing
beyond what was intended by the original provision in the Constitution,
that 'the citizens of each state shall be entitled to all privileges and
immunities in the several States.'" But as a result of slavery, the original
purpose of the clause had been practically repudiated. "State legislation
was allowed to override it." After quoting the due process and equal
protection clauses, which he described as "the residue of the first proposed
amendment," Poland said that "[i]t [the residue] is essentially declared in
the Declaration of Independence and in all the provisions of the
Constitution." Still, state laws existed "in direct violation of these principles."
Congress had shown its desire to uproot "such partial legislation" in the
Civil Rights Act. But the power of Congress to do so had been denied by
"persons entitled to high consideration." So it was desirable to clear up
any doubt.\(^\text{180}\) It is not clear from this to what extent Poland in 1866
shared an absolute, national, fundamental rights reading of the Article IV
privileges or immunities clause, or followed the majority judicial rule, or
favored some alternative reading of Article IV. Taken literally his
remarks can also suggest finding Bill of Rights liberties in the Due
Process Clause. Of course, one could believe that Article IV both required
equality under state law and protected some absolute rights. Still, it is
unclear whether or not Poland agreed with Howard's views.

A common refrain in Congress was that the amendment would protect
"the principles of liberty and equal rights," "all the rights of citizenship," "the
personal and property rights of the citizen in all the states," the
"rights thrown around [the citizen] by the supreme law of the land," and
"that [the citizen's rights] shall not be abridged by any state."\(^\text{181}\) Critics
find these phrases far too vague to include constitutional rights, including
those in the Bill of Rights. On the other hand, read in light of the broader

\(^{179}\) An Act to enforce the Right of Citizens of the United States to vote in the
several States of this Union, and for other Purposes, 16 Stat. 140 (1870). Section 18
provided that the Civil Rights Act of 1866 "is hereby re-enacted...."
\(^{180}\) CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).
\(^{181}\) CURTIS, NO STATE, supra note 24, at 89–91.
historical context, they provide support for the Bingham-Howard view. It is unprovable, but I suspect that the ordinary American was far more likely than a constitutional lawyer to think that she or he had rights, against states as well, such as free speech, jury trial, and freedom from cruel and unusual punishments, protected by the national Constitution. Of course, we know that by the technical legal understanding and a positivist view of the law, this view was mistaken.

F. The Amendment Before the People in 1866

1. The Campaign of 1866

The congressional campaign of 1866 was a referendum on Republican plans for Reconstruction, of which the Fourteenth Amendment was a centerpiece. In terms of finding the likely public understanding related to ratification, the 1866-1868 period is key. The most crucial period would be before and during the 1866 elections. Many of the state legislators would likely have run and been elected in that period.

Those skeptical of application of the liberties in the Bill of Rights to the states suggest that the nation was not put on sufficient notice of any such plan. Consequently, application must be rejected, whatever the intent of those in Congress. The skeptics rely primarily on what they read as silence on the subject. Surely, critics suggest, had the objective been clear Democrats would have made it a potent campaign issue. But they did not. Therefore, they must not have understood the plan.

That view is mistaken. If the Democrats thought applying the liberties in the Bill of Rights to the states or congressional enforcement of the rights was a winning campaign issue, lots of Democrats were on plenty of notice. There was Howard’s speech on the floor of the Senate and in the Congressional Globe. Surely many Democrats in Congress and many others in the country knew about that. Then the speech was published in the New York Times and other papers, informing more Democrats. Had they wanted to use the plan against the Republicans, Democrats had plenty of notice and could have sent the word to their fellows in the hinterland. But in spite of notice and incontrovertible documentary evidence of the supposedly unpopular plan to require states to obey the Bill of Rights, Democrats said almost nothing about it. Instead, they appealed to racism and fear of Americans of African descent. Why did they do this? There is one very likely answer: Democrats saw the race and immediate reunion issues as their best hope—not an attack on national power to protect Bill of Rights liberties. Some Republicans were clearly defensive on the race issue, assuring voters that the amendment did not confer black suffrage or protect interracial marriage.
In just a few years, the race issue and hostility to protection of the rights of blacks in the South did work for Democrats. By 1874, Democrats seized control of the House of Representatives. In 1866-1868, racial and similar appeals were not totally ineffectual, but were somewhat ahead of their time. Things were different in the 1870s. As historian David Blight has noted, "In these years of Southern redemption and the steady Northern retreat from Reconstruction, Republicans paid dearly for their recent history of support for black liberty and equality. White fears of an imagined racial equality, coupled with economic insecurity and increasing hostility toward the activist state, drove Reconstruction into the ground."182

In the 1866 campaign, there was frequent, but often brief discussion of the effect of the amendment. Section 2 got a great deal of attention. Many reported statements about the amendment presented it as protecting all constitutional rights of American citizens. The Republican National Committee issued a statement supporting the amendment: "All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens ever more, and no State shall have power to contravene this most righteous and necessary provision."183

If one accepts the idea that the rights in the Bill of Rights were rights of American citizens, which, however, the states had previously been allowed to violate, the address supports the Bingham-Howard position. An Iowa newspaper noted that the privileges or immunities clause "prohibits any state from making laws to abridge the privileges rightly conferred on every citizen by the federal constitution . . ."184 A letter from Southern Unionists reprinted in the Republican press alluded to the suppression of abolitionist sentiments in the South before the war. "At last," the writers said, "it is to be asserted that it is the paramount duty of the government to protect its citizens in the full enjoyment of all constitutional rights, among which are the right to free speech and to be secure in their personal property . . ."185

Southern Unionists took a major role in the campaign of 1866, and their September convention was reported in major Republican papers.

183. CURTIS, NO STATE, supra note 24, at 131. The address seems to have been carried in many Republican newspapers. See id. at 251, n.1.
184. Quoted in id. at 132.
185. Id.
The call for the Convention, which was reprinted in a number of Republican newspapers, posed the issue.

The majority in Congress and its supporters, firmly declare that “the rights of the citizen enumerated in the Constitution, and established by the supreme law, must be maintained inviolate.” Rebels and Rebel sympathizers assert that “the rights of the citizen must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe.”

The call asserted that “no State, either by its organic law or legislation, can make transgression on the rights of the citizen legitimate.” It agreed with the plan of Congress “whereby protection is made coextensive with citizenship.” It also demanded “protection to every citizen of this great Republic on the basis of equality before the law.”

Governor Andrew Jackson Hamilton, a Texas Unionist who had been appointed provisional Governor of Texas, explained that President Johnson had decided to return to the old condition of things, to remit power over basic rights to the states, “which at their will and tender discretion might strike down the principles of human rights . . . ” The Convention was convened to help bring the people back to the “old platform of the Constitutional rights of every citizen in our land . . . .”

Other proceedings at the Convention elaborated on the idea of constitutional rights of the citizen. The Convention’s Appeal of the Loyal Men of the South to their Fellow Citizens said that the slave states had “entrench[ed] themselves behind the perverted doctrine of states’ rights. The principles of constitutional liberty languished for want of government support.” The result was the slave power’s “despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition . . . ; it proscribed democratic literature as incendiary; it nullified constitutional guarantees of freedom and free speech and free press; it deprived citizens of other states of their privileges and immunities in the States . . . .” The report of the Committee on Non-Reconstructed states to the Convention complained about people being imprisoned for telling blacks they were entitled to vote. It also voiced a litany of other Bill of Rights violations: people thrown into prison, retained for months, tried by a judge without a jury, refused time to send for witness or counsel, convicted and sentenced to punishment in the penitentiary. It also called on Congress to enforce by
legislation "the birthright of impartial suffrage and equality before the law." 190

The chairman of the Convention of Southern Loyalists was Governor Andrew Hamilton from Texas. On a speaking tour in the North, Hamilton defended the Fourteenth Amendment and called for "the union as it wasn’t and the constitution as it isn’t. He wanted a Union of loyal men in which all, even the humblest can exercise the rights to speak, to write and to impress their thoughts on the minds of others. . . . Any other [Union] than one which guaranteed these fundamental rights was worthless to him." 191 As we have seen, complaints about denials of free speech by Southern states had been a common Republican argument before the Civil War and during it, inside of Congress and outside of it. For example, as Richard Aynes has discovered, the January 16, 1864 Harper's Weekly said "Calhoun and all his school knew ‘that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South slavery would be destroyed by the common sense of the Southern people.’" So they "insisted[ed] upon suppressing it.” As a result, “in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years.” 192

A number of Republican officials spoke about the amendment in the campaign. Here I will quote only a few excerpts. More can be found in Professor Fairman’s article. Governor Hawley of Connecticut insisted on protection for the right to petition and bear arms. The war was not over until “every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.” 193 Senator Yates also posed the issue as protecting the citizen so he could “enjoy his Constitutional rights.” Yates asked his listeners if they supposed they could “go down South and express your sentiments freely in safety? No; and yet the Constitution of the United States guarantees to the citizens of each State all privileges and immunities in the several States.” In that speech and another Yates referred to protection for freedom of speech and freedom of discussion. 194 One can read Yates’ references to Constitutional rights

191. Curtis, No State, supra note 24, at 137.
192. Harper's Weekly, Jan. 16, 1864, at 34. Richard Aynes called this article to my attention.
194. Id.
as including the Bill of Rights, and free speech as illustrative. This reading is supported by Yates reference to enjoying “Constitutional rights.” Or one can assume that the only Bill of Rights liberty included in the phrase was free speech. At any rate, a number of speakers struck similar themes.

A speech in Congress by Congressman Jehu Baker was printed and circulated as a campaign document as well as being reprinted in the Chicago Tribune. As to the privileges or immunities clause, as we have seen, Congressman Baker asked, “What business is it of any State to do the things here forbidden? To rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.”  

Columbus Delano, an Ohio Congressman, said the amendment provided a definition of citizenship and “that the privileges and immunities of these citizens shall not be destroyed or impaired by state legislation . . . .” It also provided for due process. Men had been driven out of the South because of their political opinions. The need for the amendment was shown by the fact that Northern and Southern citizens were not “safe in the South for want of constitutional power in Congress to protect them.”  

Another Republican speaker said that the amendment “declares that citizens of the United States shall be clothed with the same rights, and entitled to the same protection in all the States of the Republic.” White men had been driven from the South when their opinions did not conform to those of slaveholders. It was an “extraordinary thing that in a republican Government like this, we had to wait nearly a century to secure the rights of person and property” in the South. Congressmen Bingham, James Wilson, and William Boyd Allison also referred to the protection of free speech or press. Allison explained that he did not want “the Constitution as it was and the Union as it was . . . No. I want a Constitution and Union where free speech is possible and where a man is a man and not three fifths of a man.”  

But of course there were other statements as well. Senator John Sherman said Section 1 embodied the Civil Rights Act and equal rights before the law—to contract, to travel, to sue and be sued. That he said

195. Fairman, supra note 3, at 7; id. at 71 n.130 (referring to publication in the Chicago Tribune).
196. CURTIS, NO STATE, supra note 24, at 138–39.
197. Id. at 139.
198. Id. at 144–45.
was the substance of Section 1. That was all there was to it. But, as Bryan Wildenthal has noted, because of the Due Process Clause that was not all there was to it. Sherman also referred to the duty to protect the former black soldiers "in all their natural rights," a category hardly exhausted by Sherman's list. A number of others also cited the Civil Rights Act. Later, in 1872 in Congress, Sherman said trial by jury was one of the privileges protected from state denial by the Fourteenth Amendment. He may always have read the Civil Rights Act as protecting such basic rights. Professor Fairman sets out a number of excerpts in his article. Except for the publication of Howard's speech in several papers he found, none of these expressly declare in so many words that amendments one through eight will bind the states. None explicitly reject that claim.

I read old newspapers from 1866, mostly after Congress adjourned and during the congressional campaign. Because Democrats generally opposed the amendment (and because of time constraints), I looked at Republican papers. George C. Thomas has provided additional evidence and insight. He shows that outside of Congress, as within it, Democrats played the race card early and often. They (contrary to repeated assurances from Republicans in the 1866 campaign) claimed that the amendment would provide black suffrage. With rare exceptions, no Democrat complained that the hated Bill of Rights (or even due process) would be imposed as a limit on the states. Professor Thomas found a New York Times article and some others that described the privileges and immunities clause as "intended for the enforcement of the Second Section of the Fourth Article of the Constitution." Professor Thomas also found a Times article that specifically referred to enforcing the Bill of Rights under the Fourteenth Amendment. He found references to equal rights under state law. Some of these statements seem inconsistent with protection of "absolute" national constitutional rights—but only if intended as a total explanation. None, however, explicitly reject application of the Bill of Rights to the states. There is no doubt that the amendment secured substantial equality under state law. Professor

199. CINCINNATI COMMERCIAL, Sept. 29, 1866, at 1; quoted in CURTIS, PARKER, DOUGLAS & FINKLEMAN, supra note 46, at 696.
200. Wildenthal, Nationalizing, supra note 33, at 1574–75, n.222.
201. CURTIS, NO STATE, supra note 24, at 164.
Thomas and his research assistant read some 650 articles and found only a few references to "the Bill of Rights."\textsuperscript{203}

As I understand the better reading of the privileges or immunities clause, it would not be limited to rights in the Bill of Rights. It would include other constitutional rights (habeas corpus and Article IV rights, for example) and other fundamental rights, a category that for many would include, but not be limited to the Bill of Rights. So a more comprehensive phrase than "the Bill of Rights" is natural and appropriate. Since Americans had the rights in the Bill of Rights (though not protected against state action) and other constitutional rights, I read references to all constitutional rights or all rights of American citizens as including the Bill of Rights. References to free speech seem to be one example of fundamental constitutional rights—suggesting others. In part I base these conclusions on my study of the 1830s through 1866, a period during which it was common to refer to Bill of Rights guarantees as rights (or privileges) of American citizens.

For example, I read the address of the Republican National Committee as not only consistent with, but as supporting application. "All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens evermore; and no State shall have power to contravene this most righteous and necessary provision."\textsuperscript{204} I read references to "privileges . . . conferred on every citizen by the federal constitution," to "all constitutional rights," to "rights of the citizen enumerated in the Constitution," to "all constitutional rights of American citizens," and to "the constitutional rights of every citizen" in the same way. As I see it, references to "these fundamental rights" accompanied by references to free speech, references to "every right guaranteed . . . by the Constitution," and to the ability of the citizen to "enjoy his Constitutional rights," and references to free speech as among the privileges and immunities of citizenship also allude to Bill of Rights liberties.\textsuperscript{205} I know that one can quarrel with this reading, and some, like Charles Fairman, require the words "the Bill of Rights" to be included for a statement to count. Professor Thomas found an additional reference to "all the guarantees contained in that instrument [the Constitution]" but thinks a typical reader in 1866 would not think of the Bill of Rights in connection with the phrase. He does find a \textit{New York Times} article that refers specifically to the protection of the Bill of

\textsuperscript{203} Thomas, \textit{Newspapers}, supra note 18.
\textsuperscript{204} CURTIS, \textit{No STATE}, supra note 24, at 131.
\textsuperscript{205} \textit{Id.} at 132–33.
Rights and that he finds sufficient.\textsuperscript{206} Taken together with the papers that reprinted what Howard had to say about the Bill of Rights (including the most widely circulated paper in the nation), the references I found, and the examples Professor Thomas adds, this amounts to around 30 statements and these come mostly between May and October 1866 when the discussion of the meaning of the amendment was at its height. The reference to thirty or so instances understates the number significantly, though I do not know how much. That is because when I did my limited search of papers in 1866 I found that three or four Republican papers reported the Convention of the Southern Loyalists and their address at great length and a number reported the resolution of the Republican National Committee. Professor Richard Aynes has found additional examples including some in 1868 that refer to amendments one through eight or the Bill of Rights.\textsuperscript{207}

Do all statements at the time agree? No. Professor Thomas has reported potentially contrary examples and there are a number of examples that equate Section I with the Civil Rights Act. Just as I would find more statements consistent with application than Professor Thomas apparently does, I would read some statements that Professor Thomas sees as opaque as potentially inconsistent with application.\textsuperscript{208}

We might improve on Professor Thomas’s innovative and important approach. We could do this by counting the various categories of statements and comparing the numbers for competing statements, rather than comparing references that seem to encompass “the Bill of Rights” to the total number of articles examined. We could also usefully expand the search terms used. I found a number of references that support application of the Bill of Rights to the states that were not, initially at least, uncovered by Professor Thomas’ search terms. Richard Aynes found very significant speeches by Bingham that were not revealed by the search. The PDF word search used may be defective; it seems to miss things we know are there and that it should find.

In the search for the purposes of the Fourteenth Amendment’s first section, one can demand unanimity in each case—the meaning of the text, the purposes of the drafters, the understanding presented to the country,

\textsuperscript{206} Thomas, Newspapers, supra note 18, at 325 (quoting The Proposed Constitutional Amendment—What it Proves, N.Y. TIMES, Nov. 15, 1866).

\textsuperscript{207} Aynes, Misreading, supra note 132, at 89–90, n.218 (citing THE NATION, July 16, 1868, at 53, 54).

\textsuperscript{208} Thomas, Newspapers, supra note 18.
etc. But with so many people involved, it is unrealistic to expect unanimity. The better approach is to ask which hypothesis better fits the facts. Today, when the Court clashes over constitutional issues and the Justices appeal to history, the historical record is almost always mixed.209

2. Ratification

Much of the ratification record is sparse and cryptic. Messages from governors were general and in many legislatures Republicans simply voted without discussing the issue. There are exceptions in Ohio, Pennsylvania, and Massachusetts. These support the idea that the privileges or immunities clause protected constitutional rights in the Bill of Rights.

Governor Cox of Ohio said Section 1 provided power to protect the citizens of the whole country in their legal privileges and immunities should any state attempt to oppress classes or individuals. The protection was necessary because of the refusal in Southern states to tolerate freedom of discussion on slavery. In the South there had been no protection for such "immunities... which are of the very essence of free government."210 Speakers in Pennsylvania recounted the suppression of free speech and the need to protect such rights of citizens.211 The majority report in the Massachusetts House considered the amendment useless and redundant because Bill of Rights liberties already limited the states. It quoted the Due Process Clause, the First, Second, Sixth and Seventh amendments and suggested that these covered the whole ground of the amendment.212 A scholar who has looked extensively at ratification supports Professor Thomas’s skepticism.213

G. Additional Evidence

In Congress after the ratification of the Fourteenth Amendment quite a number of congressmen read the amendment to protect specific Bill of Rights guarantees against the states and to protect the rights of American

210. CURTIS, No State, supra note 24, at 147 (quoting the message of Governor Cox).
211. Id. at 148–49 (excerpts from Pennsylvania debate).
212. Id. at 149–51 (Massachusetts report).
citizens set out in the Constitution. As we have seen, John Bingham described the clause as protecting privileges and immunities chiefly set out in the Bill of Rights, not rights based on state law. He read each of the guarantees of the Bill of Rights and explained that the form of the amendment had been changed after he studied *Barron v. Baltimore* and its insistence on the “no state shall” formula to protect Bill of Rights liberties. Representative Henry L. Dawes described the rights in the Bill of Rights as privileges and immunities, summarized the provisions of the Bill of Rights and the Thirteenth Amendment (another privilege or immunity), and then said, referring to the Fourteenth Amendment, “every person born on the soil was made a citizen and clothed with them all.” Representative George Hoar described the privileges and immunities as “all the privileges and immunities declared to belong to the citizen by the Constitution itself” together with “those privileges and immunities which all Republican writers of authority agree in declaring fundamental and essential to citizenship.” Several others expressed agreement with Hoar’s views. Later, Senator Maynard and Representative Fowler expressed views consistent with Bingham’s.

In 1872, Senator John Sherman said that the old amendments to the constitution “bristle all over with the word ‘rights.’” Sherman said he did not distinguish between the words privileges, immunities, and rights. (In this he was consistent with long historic usage). But the privileges and immunities protected by the Fourteenth Amendment were, he said, not “only those [privileges and immunities] defined in the Constitution, the rights secured by the amendments.” They also included comprehensive common law rights, and these Sherman believed supported a law to guarantee blacks equal access to places of public accommodation. Democrats resisted this broad reading but several in these years supported the view that the privileges or immunities clause encompassed the rights in the Bill of Rights.

215. Id. at 475–76.
216. Id. at 334.
217. CURTIS, NO STATE, supra note 24, at 162–63.
218. Id. at 163.
219. Id. at 165.
220. Id. at 166–67. For recent and important additions, see Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051,
Quite a number of Republicans cited the privileges and immunities clause (and sometimes the Due Process Clause as well) to protect specific rights in the Bill of Rights from state denial, for example: Representative Lawrence (civil jury trial in eminent domain cases, relying both on due process and privileges or immunities); Representative Hawley (free speech); Senator Frelinghusen (no taking of private property without compensation); Senator John Sherman (jury trial).

In 1871, Congress was faced with political murders, whippings, house burnings, and similar acts of terror designed to punish people in the South for holding Republican views. Most of the 1871 debate dealt with whether Congress had the power under the Fourteenth Amendment to punish private persons for conspiring to deprive citizens of their rights. As a result, many of the speakers focused on state action.

We have seen that many Republicans read the privileges or immunities clause to protect rights of American citizens listed in the Constitution. Did every Republican agree? No. Representative Farnsworth was tired of Reconstruction. He “feared we are governing the South too much.” Farnsworth said the Fourteenth Amendment was motivated by the Black Codes and was passed “because of the discriminating, and unjust legislation of the States . . . by which they were punishing and oppressing one class of men under laws different from another class.” He cited the speech of Representative Eliot in 1866 as being to the same effect. While Farnsworth discussed the debate in the Senate, he did not mention Senator Howard’s speech. Representative Garfield said the substance of the privileges or immunities clause was in the main text of the Constitution. He also failed to mention Senator Howard’s speech. When Bingham interjected that the words of the clause were not the same as in Article IV, which had been interpreted to turn on state law rights under state citizenship, Garfield agreed but suggested that since all persons born or naturalized in the United States were citizens of the United States “it brings us to the same result as though national citizenship had been expressed in [Article IV].”

Senator Trumbull said the privileges and immunities clause was substantially identical to that of Article IV; it had not “enlarged the protection of American citizens at all.” It had not changed the Constitution.


223. Id. at app. 116.
224. Id.
225. Id. at app. 152.
“one iota.” According to Trumbull, “The government of the United States protects the citizen of the United States to the same extent in Carolina or Massachusetts as it protects him in Portugal or in England.” This is a curious view. Under it, the government could not, for example, protect an American citizen in Portugal in the rights of free speech and press. What rights he had in Portugal would turn on Portuguese law. Presumably, the same would be true for South Carolina.

H. Constitutional Structure

Structural analysis asks how the Constitution should be interpreted to achieve its overall objectives. Of course, objectives can be in tension with each other. Before the Civil War, during Reconstruction, “Redemption,” and for many years thereafter, federalism, or states’ rights, was in serious tension with democratic values including freedom of speech, press, and association, as well as with other values of individual liberty, racial equality, and the right to vote.

States have their own bills of rights, and it is always possible that they will be more faithful to these values than the nation. In the South before the Civil War that was not so. Free speech, political association, protection against unreasonable searches and seizures, and meaningful democracy were abrogated. After the Civil War, private terror, violence and fraud helped to end Reconstruction and majority rule. The vote was taken away from Americans of African descent. The Court facilitated the process of restricting liberty and abrogating democratic rights. Decisions excising Bill of Rights liberties from the amendment were one facilitating factor and a very broad state action doctrine was another.

On balance, if faithfully applied, rights in the Bill of Rights support democracy and individual liberty. That is clearly so for freedom of speech, press, and association. If one believes, as I do and de Tocqueville did, that the jury (civil or criminal) is preeminently a democratic institution, it is true for jury trial as well. Limits on the power of the government to search also support individual autonomy and protect free speech, free press, free association, and democratic values. Equally

226. Id. at 557.

227. Alexis de Tocqueville, DEMOCRACY IN AMERICA 294 (Henry Reeve translation, revised by Francis Bowen, Vintage Books 1945) (“The institution of the jury . . . places the real direction of society in the hands of the government . . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage”).

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supportive of these ends is the right to public trial, the right to confront an accuser and cross examine a witness, to subpoena witnesses, the right to counsel, the protection against ex post facto laws and double jeopardy, and the privilege against self-incrimination. In this I agree with Justice Black:

Past history provided strong reasons for the apprehension which brought these procedural amendments into being and attest the wisdom of their adoption. For fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limits of courts' power were ... essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views. . . .

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket."... Its provisions may be thought outdated abstractions by some. And it is true they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of the many.228

If this vision is correct, then structural analysis supports application of the Bill of Rights (or at the very least most of them) to the states. Of course, the Court can make a mess of our liberties, and historically it has often done so. The failure to follow the historic understanding of jury trial as requiring twelve members and unanimous verdicts, as the rule for the states, is one example. The abuses of the Lochner era are another. There are plenty of more contemporary examples. Justice Black, by limiting fundamental protections to those in the Bill of Rights read narrowly, sometimes undermined this structural mission. For example, he did not believe due process required proof beyond a reasonable doubt, because the requirement was not spelled out in the Constitution in so many words.229

In light of abuses, we need more rather than fewer checks on prosecutors who abuse their power for narrow political purposes. A substantially reinvigorated grand jury told to recognize its historic function of checking prosecutorial abuse could be useful. Precedent and practicality (the great number of those convicted under what would be the unconstitutional system) are strong factors against change. Stronger support for the legitimacy of application of the right to jury trial to the states might help to return to the historic unanimous jury of twelve.

229. In re Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting) ("I believe the Court has no power to add to or subtract from the procedures set forth by the Founders.").
I. Other Considerations, Including Policy

As Donald Dripps has shown, a few states were beginning to reject grand jury indictment in favor of information by 1866-1868. Several had done so and more did after the amendment was enacted. This is some evidence that people at the time did not understand the Fourteenth Amendment to incorporate all of the rights in the Bill of Rights.

Still, ratification of the amendment by the states under these circumstances is not particularly probative. The Fourteenth Amendment, unlike the Bill of Rights, was a package deal. The consequence of rejection was greatly to increase the political power of the former Confederate states, a result wholly unacceptable to most in the North. For that reason, states were unlikely to reject the amendment, whatever they thought of grand jury. But that is not a full answer, because these states failed to change their systems to require grand jury. But here history cuts in two directions. In addition to privileges or immunities, there was a strong historic case for applying grand jury to the states under the Due Process Clause, but these states ignored that too.

When it rejected application of Bill of Rights guarantees, the Supreme Court rejected treating history as determinative. In Twining v. New Jersey, the Court rejected the claim that states were required to obey all of the Bill of Rights (including the privilege against self incrimination) under the privileges or immunities clause. It recognized that Justices Harlan and Field had held that view (but forgot Justices Bradley and Swayne); and that view “was undoubtedly ... entertained by some of those who framed the Amendment.” “It is, however, not profitable to examine the weighty arguments in ... favor [of application], for the question is no longer open in this Court.” The Court did not protect the privilege under due process either; it was not a ‘fundamental principle of liberty and justice” as ascertained from time to

231. Hurtado v. California, 110 U.S. 516, 530–32 (1884) (rejecting the strong historical case for finding the right to grand jury indictment in the Due Process Clause).
232. Twining v. New Jersey, 211 U.S. 78, 99 (1908) (“All the arguments for the other view were considered and answered, the authorities were examined and analyzed, and the decision rested upon the ground that this clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments, because those rights were not within the meaning of the clause ‘privileges and immunities of citizens of the United States . . . ’”).
233. Id. at 98.
234. Id. (emphasis added).
time by the Court.  The Court cited the trial and banishment of Ann Hutchinson to support the lack of a consistent historical application of the privilege against self-incrimination! Ann Hutchinson’s crime was holding and advocating disapproved religious views.  Requiring her to state them at the trial was useful to the prosecution. There was a silver lining: the Court suggested that some Bill of Rights liberties might coincidentally be protected under due process.

Whether grand jury and the privilege against self-incrimination are wise public policy is a factor the Court considered in rejecting application of the Bill of Rights to the states. Whether, in light of all the evidence, public policy should be determinative is always an important question. One argument against incorporation turns on public policy.

Southern states had grand jury requirements (though not as a result of federal constitutional decisions) and they had lynching. In a more nuanced argument than I summarize here, Professor Dripps has speculated that the grand jury requirement obstructed prosecution of lynching in the South. This might suggest that grand juries are bad public policy. It is true that jury trial and grand juries can make prosecute on of crime more difficult, assuming the judges and prosecutors are eager to prosecute the crime. Still, blaming lynching on grand juries leaves out much of the story.

Once white supremacists took control of Southern states and disenfranchised blacks and intimidated white opponents, they controlled the levers of power—prosecutors, judges, juries, legislators, and governors. Had the right of blacks to vote and serve on juries been protected, they could often have constituted a majority or substantial minority of grand and petit juries. Prosecutors and judges would often have been Republican. During Reconstruction, federal grand juries indicted political terrorists for violation of Reconstruction Acts, and some juries returned convictions.

There is no doubt, however, that jury trial posed difficulties for government where many citizens opposed equal rights and condoned violence, perjury, and intimidation of jurors as a political weapon. Still, restrictive Supreme Court decisions about federal power, including restrictive decisions about what privileges or immunities were protected by the Fourteenth Amendment and restrictive decisions about the power

235.  Id. at 114.
236.  Id. at 103–04.
238.  E.g., LANE, THE DAY FREEDOM DIED, supra note 145, at 203; on problems with obtaining a conviction in the South, see id. at 186–87.
to punish private political terrorists, undermined these prosecutions.\textsuperscript{239} The terrorists seized power. The Supreme Court also held that a Reconstruction statute could not be used to prosecute a lynch mob.\textsuperscript{240} Increasingly over time, the federal government gave up on protecting the fundamental rights of American citizens in the South and gave up on protecting the right of Americans of African descent to vote. Under the circumstances, the problem seems to be not too much federal supervision with too broad an understanding of federal constitutional rights in the states, but too little supervision and too crabbed an understanding of citizens’ rights.

\textit{J. Evaluating Multiple Factors}

Because, on balance, multiple methods of analysis support applying the Bill of Rights to the states, the case for application is strong. As to the historical case for application (including text, context, and history–grievances, original meaning, legal meaning, intent, and precedent in 1868), the question is whether the case for application is stronger than competing theories. The issue is always “compared to what?” So the textual analysis here would need to be compared to its competitors. It is not enough to say simply that there is another historically grounded way to read the text. There always is. In historical analysis on questions of this sort, there will always be crosscurrents and inconsistencies. If that is enough to dismiss a theory, then we might as well abandon seeking historical answers—at least in most cases. Similarly structure and sound public policy are factors to consider and weigh.

Take one example to consider which hypothesis better (not perfectly) fits the facts–grievances. One way to understand a constitutional provision is to consider the grievances that gave rise to it. One analysis of the meaning of Section 1 or the privileges or immunities clause sees it as a response to the Black Codes. This approach reads these codes only as discriminating based on race in certain rights under state law. By this view, the grievance was denying to blacks state law rights enjoyed by whites. The solution, by this view, was to prohibit discrimination in state law rights based on race or caste and, by this view, that is what the privileges or immunities clause did. (I think the equal protection clause did that work, in addition to requiring protection of the laws.)

\textsuperscript{239} See generally, Slaughter-House Cases, 83 U.S. 36 (1873) and United States v. Cruikshank, 92 U.S. 542 (1876).

\textsuperscript{240} United States v. Harris, 106 U.S. 629 (1883).
This analysis responds to the racial discrimination aspect of the Black Codes. It ignores the second problem with the codes for those who felt Bill of Rights liberties needed to be respected—their denial of free speech, freedom of religion, the right to assemble, freedom from unreasonable searches, and the right to bear arms. In any case, it fails to respond to the suppression of anti-slavery speech, press, assembly, and association in the South before the Civil War—a suppression that was not racially discriminatory. That, understandably, was a suppression to which Republicans vehemently objected, and it was a suppression that a number of them discussed in 1866 to show why the Fourteenth Amendment was needed. A theory that includes both this grievance and racial discrimination is a better explanation of Section 1.

Another theory is that the privileges or immunities clause was simply equivalent to the conventional reading of Article IV, Section 2, by which it prohibited discrimination against those from out of state in some (repealable) rights states granted their own citizens. By this view all the clause accomplished was to allow congressional enforcement to protect out-of-staters’ equality as to some state law rights. The limited protection those from out of state enjoy against discrimination in Article IV state law rights is of course a constitutional right. The reading of the privileges or immunities clause that sees it as covering constitutional rights also includes those encompassed in Article IV. So it is consistent with this objective. It also encompasses protection of Bill of Rights liberties such as freedom of speech. So it is consistent with the evidence on that score also.

K. Additional Considerations

Because the "compared-to-what-is-a-better-interpretation" approach is more difficult for opponents of incorporation, some have responded with an elegantly simple solution. They blandly announce (or slyly suggest) that we should read the privileges or immunities clause out of the Constitution. To protect us from the danger of courts reading the clause to do whatever they want (or perhaps just what the critics do not want) they will just eliminate the privileges or immunities clause. This radical constitutional surgery is supported by the claim that the clause is vague and can be read to cover practically anything. That is hardly so. If the rights are federal constitutional rights including those in the Bill of Rights, they hardly cover everything. Reading the clause also to cover

241. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990); for other critiques of the clause by various scholars, see Dripps, On Criminal Procedure, supra note 110, at 1589.
less textually explicit fundamental rights is reasonable as well, and that
does not cover everything either, any more than it does in the case of due
process. Of course, that will be cold comfort for opponents of less
textually explicit personal rights. Curiously, some of the Justices who
get most upset about less textually explicit human rights support less
textually explicit states’ rights.\footnote{See Alden v. Maine, 527 U.S. 706, 713–14 (1999) (providing an example of a
less textually explicit state right).}

\textit{Slaughter-House} read the Fourteenth Amendment as designed to
protect the newly freed slaves (a half-truth).\footnote{Id. at 79–80.} It virtually read the
privileges or immunities clause out of the Constitution. According to
\textit{Slaughter-House} the clause protected national rights of American
citizens. That was a correct reading, but the list of national rights was
pretty ludicrous. American citizens were protected in their visits to the
sub-treasuries, on the high seas, and in foreign lands.\footnote{Slaughter-House Cases, 83 U.S. 36, 81 (1873) (“It is so clearly a provision for
that race and that emergency, that a strong case would be necessary for its application to
any other.”).} (They were also
protected in their previously protected right to petition the national
government.) Protecting citizens on their trans-Atlantic cruises and in
Paris did not respond to the pressing needs of the newly freed slaves,
Southern loyalists, and Southern Republicans. \textit{Slaughter-House} ignored
an obvious middle ground. The choice was not only between the utter
destruction of federalism of which the majority warned (or establishing
perpetual censorship of all state health, safety, and environmental laws)
and the Court’s constricted reading of the clause. One middle ground
was protecting the rights in the Bill of Rights and a limited set of
other fundamental rights.

Even if the constricted reading of privileges and immunities of
citizens of the United States in \textit{Slaughter-House} is a possible reading of
the words, it is not a reasonable one. It is not reasonable because it lacks
any meaningful connection to historical context that gave rise to the
amendment. The words “privileges” and “immunities” were used to refer
to constitutional rights in the years leading up to the Fourteenth
Amendment, but protection on the high seas and in Paris and the right
to visit sub-treasuries was never discussed.
Still, by one view, *Slaughter-House’s* liquidation was an act of extraordinary judicial statesmanship, protecting us from *Lochner*\(^{245}\) jurisprudence.\(^{246}\) In fact, *Slaughter-House* was the first in a long line of ever more restrictive cases that hobbled the power of the Federal Government to protect blacks and Republicans from political terrorists.\(^{247}\)

Liquidating the privileges or immunities clause did little good and significant harm. The Court greatly shrunk the rights, privileges, and immunities of citizens of the United States that were protected by key Reconstruction statutes. As a result, it hobbled federal protection against both state actors who violated Bill of Rights liberties and against private conspiracies aimed at punishing people for exercising their constitutional rights.\(^{248}\) So the Court greatly reduced the acts’ effectiveness. While it is possible that police or other state actors might injure people by preventing their right to visit the sub-treasuries, travel on the high seas, or while in Paris, it is unlikely. Gross abuses of constitutional rights by, for example, blatantly unconstitutional searches, are more likely.

Hymns of praise to the excision of the Bill of Rights from the Fourteenth Amendment fail to recognize the effect of *Slaughter-House* and subsequent cases on democracy and liberty. Faced with Klan political terrorism designed to destroy meaningful democracy and majority rule in the South, the Congress passed laws designed to enforce the Fourteenth Amendment. Klan terror was aimed at white and black Republicans and sought to punish Republicans for and deter them from political speech, press, and association and voting. Congressional

\(^{245}\) Lochner v. New York, 198 U.S. 45, 57–58 (1905) (“It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”).

\(^{246}\) That may be part of the story. See Dripps, On Criminal Procedure, *supra* note 110, at 1589.

\(^{247}\) Cruikshank v. United States, 92 U.S. 542, 554–55 (1876). For a full discussion of the case and its lamentable aftermath in helping to undermine Reconstruction, see *generally Lane, The Day Freedom Died, supra* note 145.

\(^{248}\) See An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, 16 Stat. 140, § 6 (1870) (protection against a conspiracy to threaten or intimidate any person with the intent to prevent or hinder his free exercise and enjoyment of any right or privilege secured by the Constitution or laws of the United States); An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, 17 Stat. 13 (1871) (giving a civil action against any person who “under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States”).

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statutes also made it a crime for private persons to conspire to deprive persons of rights, privileges or immunities of citizens granted or secured by the Constitution and laws of the United States. The statutes also provided a civil action to those injured by persons who acted under color of law to deprive citizens of rights, privileges, or immunities granted or secured by the Constitution or laws of the United States.

Decisions like *Slaughter-House* and *Cruikshank* dramatically shrunk the protective power of these laws by eliminating Bill of Rights and other liberties from the statutory description of protected rights. *Cruikshank* also embraced (to some extent at least) the state action syllogism: The Fourteenth Amendment limits only actions of states; Klan terrorists are not the state or its agents; therefore the Amendment does not provide congressional power to limit Klan terrorists.

Once the Fourth Amendment was held to limit the states, the protection against unreasonable searches became one of the rights, privileges, and immunities protected by the Constitution and the surviving Reconstruction acts. Decisions applying Bill of Rights guarantees to the states increased the rights, privileges, and immunities of citizens of the United States protected by the 1871 statute and gave a remedy, for example, to people injured by serious police misconduct in violation of their constitutional rights.

In spite of the destruction of the privileges or immunities clause, *Lochner* jurisprudence soon emerged under the commerce, due process and equal protection clauses anyway. The Court made the corporation a person under the Due Process Clause and broadly protected this new “person’s” liberty rights against regulation. This result would be even more dubious under the privileges or immunities clause.

249. Monroe v. Pape, 365 U.S. 167, 172 (1961) (“The question with which we now deal is . . . whether Congress, in enacting section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position . . . We conclude that it did so intend.”).


251. *E.g.*, Coppage v. Kansas, 236 U.S. 1, 10 (1915) (striking down a statute protecting against employer retaliation for joining a union); Adkins v. Children’s Hospital, 261 U.S. 525, 545–46 (1923) (striking down minimum wage law for women and minors in District of Columbia).

252. Gulf, Colo., & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 155 (1897) (holding that in small claims in which railroads refused to settle, taxing attorney’s fees to the losing railroad, but not to the losing plaintiff, violated equal protection).
The law had protected the ability of capital to combine in powerful corporations. The *Lochner*-era Court treated the corporation as just another person. The worker could quit for any reason—in the absence of a contract. The corporation could fire him for any reason—such as joining a union. Under the *Lochner* approach, the law could not recognize what Adam Smith recognized: the huge power imbalance between the corporation and the lone worker. The corporate person had a due process liberty right to use its corporate power to fire workers who joined unions. It could use power, amassed thanks to protective laws, to keep workers from combining in an effort to deal with the massive corporate power of their employers.

So the judicial liquidation of the privileges or immunities clause did not keep the Court from embracing *Lochner* jurisprudence under due process and equal protection. Should the Court also have liquidated the due process clause, as Justice Frankfurter once believed? Unlike the defunct privileges or immunities clause, that clause was used to advance *Lochner*-era jurisprudence.

Jerome Frank commented on the ideal of a government of laws and not of men. He recognized that laws and constitutional clauses are not self-executing. We need instead, he said, a government of the right sort of laws interpreted and enforced by the right sort of people. The New Deal Court was not going to revive the abuses of *Lochner* jurisprudence, whatever happened to the privileges or immunities clause. The earlier Court did give us *Lochner* jurisprudence, in spite of liquidation of the privileges or immunities clause. The most effective way to prevent a revival of the abuses of *Lochner*-type jurisprudence is to elect presidents who will not appoint judges with such inclinations.

253. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 83 (R. H. Campbell & A. S. Skinner eds., Oxford University Press, 1976) (1776) ("Workmen desire to get as much, masters to give as little, as possible. . . . It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute...The masters being fewer in number, can combine much more easily. . . . In all such disputes the masters can hold out much longer."); id. at 145 ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

254. See *Coppage*, 236 U.S. at 26 ("to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization ... is repugnant to the 'due process' clause of the Fourteenth Amendment. . . .").


256. JEROME FRANK, THE SELECTED WRITINGS OF JUDGE JEROME FRANK 84, see generally 77-111 (1965).
Those who fear a revival of Gilded Age jurisprudence have a point. It is already going on, without a revival of the privileges or immunities clause. For example, the Court is reading the First Amendment to confer on corporations the right to use their huge treasury funds (funds that belong to shareholders) to influence federal elections of candidates.\(^{257}\) This undermines nearly a century of efforts to prevent such use of corporate treasury funds and contributes to the pervasive (legal) corruption of American politics. Protecting the use of corporate treasury funds to influence elections may change the political landscape more dramatically than *Lochner* jurisprudence ever did. It may also help to elect presidents who will appoint judges far more sympathetic to corporate power.

**L. What Have We Learned?**

Here is what I think we have (or should have) learned. First, the claim that the historic case for application of the Bill of Rights to the states is “flimsy,” has been “conclusively disproved,” is “flim flam under the Fourteenth,” etc. does not withstand analysis. Many, but not all, of the arguments advanced to support this result were fallacious. However one comes out on this issue, there is very substantial evidence supporting application. The more one looks, the more one finds. There is also some evidence that can be used to support rejecting application, as the work of scholars in this conference shows.

Scholars who announced that application had been conclusively disproved, etc., apparently relied on studies of Professor Fairman (and later of Mr. Berger), while ignoring Mr. Fairman’s main critic as well as other scholars who had looked more closely at the historical record. Professor Fairman and Mr. Berger have made contributions to our understanding, but their work is flawed by errors of fact, by errors of interpretation, by hostility to leading framers, and by looking at too narrow a context—a problem that threatens us all. Following Berger and Fairman, some skeptics still overlook scholarly responses to their work and give too little attention to context.\(^{258}\) Context helps to avoid mistakenly

\(^{257}\) FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2697 (1977) (Souter, J., dissenting) ("Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of 'grassroots' about them.").

using parts of quotations to support rejection of application. On issues such as equating Section 1 with the Civil Rights Act and treating such statements as disproof of application, we need both to recognize the argument and to come to grips with oft repeated and too often ignored responses to it. The best of the latest skeptical work has sharpened the issue without dismissing evidence that points in the other direction. In that respect these scholars have set a standard for us all.

Second, some false facts once asserted and critiqued have been repeated. This is something we must strive to avoid, lest the discussion become a revolving door with refuted claims constantly reappearing.

Third, to understand the Fourteenth Amendment, as well as the Civil Rights Act debates and Fourteenth Amendment debates, we need to expand the context. We need to look at the crusade against slavery, the suppression of civil liberty and free speech and press on the subject of slavery in the South, discussion of free speech and civil liberty in debates in Congress before 1866, the full discussion of Reconstruction, and the constitutional ideas entertained by many Republicans. The context includes the history of the thirty years or so leading up to the amendment. The reaction against Reconstruction is also part of the story since it helps to explain the behavior of the Court.

Reaction against Reconstruction began quite soon, and by 1874 Democrats were returning to power. In that year Democrats turned a prior 198-88 Republican majority in the House of Representatives into a Democratic majority of 169-109. If one seeks the purposes of the framers and ratifiers, the most relevant time to focus on ends in 1868. Of course, the effect of the Constitution and the way it is understood by those in power changes over time without amendment. It changes both in positive and in negative directions. From the perspective of racial equality, democratic government, and civil liberty, the changes in the practical constitution were quite negative after 1872 and continuing at least until the 1930s.

Fourth, critics of application have performed a service by highlighting potentially conflicting evidence. Some have too quickly assumed that the existence of potentially conflicting evidence disproves application. To make a decision, we should identify competing theories and decide which most persuasively explains the facts. If one accepts the idea that history is one factor relevant to a legal decision, no hypothesis on the

259. For some examples, 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, 56–65 (1996).


261. RACE AND REUNION, supra note 182, at 130.
overall issue or the various sub-issues is disproved by the fact that there are alternate interpretations and some potentially conflicting evidence. That is almost always the case.

Fifth, all scholars on all sides of the debate have enriched and advanced our understanding and sharpened the issues. After the work of Professor Crosskey and my own, as well as that of Professor Fairman and Mr. Berger, substantial evidence and interpretation has been provided by the work of Professors Richard Aynes, Akhil Reed Amar, Bryan Wildenthal, Kurt Lash, Earl Maltz, Steven Halbrook, James Bond, Donald Dripps, George Thomas, Larry Rosenthal, and so many others who should be mentioned.

M. Possible Effects of Reviving the Privileges or Immunities Clause

Reviving the privileges or immunities clause might actually have an anti-Lochner effect by weakening the claim that artificial corporate persons always have full Bill of Rights liberties similar to those of natural persons. Reviving the privileges or immunities clause might revive heightened scrutiny of economic issues for natural persons—or much more dubiously for corporations. That may explain the interest Justice Thomas and Justice Scalia have expressed in the clause. Under the privileges or immunities clause as a vehicle for application, legal resident aliens should still have all the procedural guarantees of the Bill of Rights against the states (under due process) as well as other due process and equal protection rights. I once assumed they might be denied constitutional protection for substantive rights such as the right to bear arms. I am less sure of that, particularly in light of equal protection concerns. Whether doctrinal change is wise is more than an historical question.

III. CONCLUSION

The current battle over “incorporation” began with clarion calls to roll back the entire doctrine. Because precedent and structure are factors, the burden of justification should be on those who seek a rollback. Though most of the rights had been incorporated by the 1970s, rollback advocates assumed that the burden of proof lay with those who sought to maintain the current protections. Curiously, some of those who favored
rejecting any incorporation of any right cited and relied on Professor Fairman, who in the end came down on the side of selective application.

At any rate, battle lines shift. As “conservative” justices moved into the seats of power and as some of the weaknesses of the attack on incorporation’s historical basis became apparent, calls for a total rollback have lessened. More “conservative” justices have reshaped the meaning of the guarantees, thus mitigating the harms they associated with incorporation and potentially enhancing its benefits (as they see it). The enthusiasm for judicial protection of the right to bear arms is an example of a right many (but not all) movement conservatives are enthusiastic about.

The historical evidence for application of liberties in the Bill of Rights to the states under the Fourteenth Amendment is substantial—under both due process and privileges or immunities. Whether it is substantial enough is the debate. The obituary for opposition to application is premature, as the recent work of Bryan Wildenthal shows. If the right to bear arms is applied to the states, the question will then shift to what regulations of firearms are constitutional.

It is an historical irony that some (but not all) of the most fervent opponents of applying the Bill of Rights to the states may now have a much more favorable opinion of the doctrine. Doctrines often look better or worse depending on our view of the judges they empower. Jerome Frank had it right. We need the right sort of laws enforced and interpreted by the right sort of people.