

Original Popular Understanding of the 14th Amendment As Reflected in the Print Media of 1866-68

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District of Columbia v. Heller,¹ decided last Term, has been described as “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”² Original public meaning recognizes that a constitutional process differs radically from a legislative one; Congress *enacts* legislation, but only *proposes* constitutional amendments. The act which gives such an amendment binding force is its ratification by the people, via their local representatives, and it is the popular understanding, not the Congressional intent, that is the key to meaning.³

The *Heller* majority described its interpretative method as keying upon an understanding that “the Constitution was written to be understood by the voters,” and that its meaning was what would have been understood by “ordinary citizens in the founding generation.”⁴ Thus the majority explored the historical background of the disputed Bill of Rights provision, analogous proposals made in the State conventions which ratified the Constitution, and the analysis given by early constitutional commentators, in determining how Americans of the period understood what they were ratifying.⁵

The purpose of this article is to apply the *Heller* interpretive methodology to another disputed area of constitutional law, *viz.*, the meaning of section one of the

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¹ 128 S. Ct. 2783 (2008).

² Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

³ See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 125-32 (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611 (1999). Prof. Barnett seeks to reconcile original public meaning with textualism by analogy to the parol evidence rule: evidence of shared understanding is admissible to explain, but not to contradict, the written text. *Id.* at 631-34.

⁴ 128 S. Ct. at 2788.

⁵ *Id.* at 2798-99, 2802-03, 2805-07. The minority approach was similar, but holds more resemblance to the quest for legislative intent. While it cited contemporary State bills of rights, the ratifying convention debates, and ratifying convention proposals, *id.* at 2825-26, 2831-36, it objected to evidence of understanding voiced after ratification, comparing that to use of post-enactment legislative history. *Id.* at 2837 & n.29.

Fourteenth Amendment. The *legislative* understanding and intent behind the Amendment have been extensively, if not exhaustively, explored.⁶ The same cannot be said of the original *public* understanding.⁷

Original public understanding is more easily ascertained in this arena than in that of the Constitution or Bill of Rights. Between 1791 and 1866, the popular media greatly expanded. The Civil War in particular led to explosive growth in the market for news; over this period the circulation of the New York Times rose to 75,000,⁸ that of the New York Herald to 80,000⁹ and that of the Philadelphia Inquirer to 70,000 (the last a ten-fold increase over prewar sales).¹⁰ In terms of proportion to the population, the combined circulation of just these three newspapers would equal a modern readership of over two million. Americans of the 1860s had, in short, become “news junkies.”

To supply the need, Associated Press telegraphed stories to subscribing newspapers, enabling detailed next-day reporting of news from distant sites.¹¹ With the end of the Civil War, the same tools were turned upon the next issues of the day: Reconstruction and, in due course, the Fourteenth Amendment. As a result, it is possible to re-create a very detailed image of what the average American citizen or legislator understood, *circa* 1866-1868, that they were being called upon to ratify. Indeed, Americans of this period were far better informed of Congressional events than they are presently. The major newspapers regularly printed transcripts of Congressional debates, and text of legislation introduced, on their front pages;

⁶ See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); AKHIL REED AMAR, THE BILL OF RIGHTS 181 ff (1998); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS (1998); Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L. J. 331 (1991).

⁷ The major explorations to date are Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STANFORD L. REV. 5 (1949), which focuses upon the Chicago Tribune and the Cincinnati Commercial, *id.* at 70-77, and James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985), which references a number of small newspapers in the named States.

⁸ HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 56-57 (1989).

⁹ <http://nyherald.com/new-york-herald-history>

¹⁰ http://en.wikipedia.org/wiki/The_Philadelphia_Inquirer

¹¹ HAZEL DICKEN-GARCIA, *supra* note ___ at 56; *AP History*, http://www.ap.org/pages/about/history/history_first.html. The original AP served seven New York City newspapers and was later expanded to other Eastern cities. 1862 saw formation of the Western Associated Press, which served newspapers in numerous other cities.

their readers were daily presented with the equivalent of the modern Congressional Record.

The 14th Amendment context thus differs radically from that of the original Constitution. In 1787-88, Americans had no access to the records of the Constitutional Convention. It met behind closed doors, and Madison's notes on its deliberations were not publicly available until half a century after ratification.¹² In contrast, Americans in 1866 had extensive and timely reports explaining the intent behind the document which Congress would put before them.

Background To The Inquiry

Section one of the Fourteenth Amendment provides that:

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.

As we shall see,¹³ its Congressional sponsors saw the "privileges or immunities" clause as protecting three classes of rights against State action:

(1) the unenumerated, and mostly economic rights, previously protected against discriminatory State treatment under the "privileges and immunities" clause of the original Constitution's Article IV §2;¹⁴

(2) other rights expressly protected by the original Constitution, *e.g.*, the bars on suspension of the writ of habeas corpus and enactment of *ex post facto* laws,¹⁵ and

¹² HARLOW G. UNDER, AMERICA'S SECOND REVOLUTION 38 (2007).

¹³ See notes ___-___, *infra*.

¹⁴ "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST., Art. IV, §2. That these rights, as recognized in case law, were "open-ended" explains the sponsors' occasional statements that they are unable to comprehensively list the "privileges or immunities" involved.

¹⁵ *Id.*, Art. I. §9.

(3) the rights guaranteed by the Federal Bill of Rights.

This understanding failed, however, to secure the endorsement of the Supreme Court. In the *Slaughterhouse Cases*¹⁶ the Court declined to hold that unenumerated rights were incorporated against the States,¹⁷ while in *United States v. Cruikshank*¹⁸ the Court held the same with regard to enumerated rights.¹⁹ “Privileges or immunities of citizens of the United States” was to be read as including only those rights which were *newly created*, rather than existing and guaranteed, by the Constitution and Bill of Rights, *e.g.*, the right to interstate travel or to petition the national government (but not State governments).

Nearly eighty years after the ratification of the Amendment, the issue was revived when, in *Adamson v. California*,²⁰ the dissenting Justice Black provided an extensive discussion of the intent of its framers²¹ and mustered four votes in support of privileges or immunities incorporation of the Bill of Rights;²² Justice Frankfurter filed a concurrence²³ taking aim at Black’s dissent. *Adamson* inspired an academic conflict that engaged Prof. William Crosskey in support of Justice Black, and Prof. Charles Fairman in opposition.²⁴ The debate stirred strong personal feelings, with the normally courteous Frankfurter throwing a Black dissent across the table and barking an insult at Black’s clerk, Black describing Fairman as “an advocate, not a historian,” and Fairman writing that Crosskey was “not candid and objective.”²⁵

¹⁶ 83 U.S. 26 (1873).

¹⁷ The challenged statute created a for-profit corporation, to be owned by named parties, which held a legal monopoly on operating slaughterhouses and other livestock-related businesses within a large area; the challengers argued that this restricted their rights to operate lawful businesses.

¹⁸ 92 U.S. 542 (1875).

¹⁹ At issue was a civil rights prosecution for a murderous impairment of rights to assemble and to bear arms.

²⁰ 332 U.S. 46 (1947). *Adamson* declined to incorporate the Fifth Amendment’s non-incrimination provision, using due process clause incorporation. This result was overruled in *Griffin v. California*, 390 U.S. 609 (1965).

²¹ 322 U.S. at 92-123 (Black, J., dissenting).

²² Justice Douglas joined in the dissent, and Justices Murphy and Rutland, separately dissenting, indicated their agreement with it. 322 U.S. at 124.

²³ *Id.* at 59.

²⁴ The debate is ably documented in Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI-KENT L. REV. 1197 (1995).

²⁵ *Id.* at 1223, 1236, 1244.

Introduction

A modern student of the Fourteenth Amendment must discard certain anachronisms if the debates of 1866-68 are to be properly grasped.

First, while the Amendment's first section is today seen as its most significant, in 1866-68 its most controversial portions were sections two, three and four. These reduced federal representation for States which denied voting rights to black citizens, deprived most former Confederate officers and officials of the power to hold elective office, and required States to disavow Confederate war debts. Opponents of the Amendment focused upon these sections, and evinced lesser concerns about section one's privileges and immunities, due process, or equal protection guarantees. Some critics and supporters of the Amendment even suggested that its first section was not controversial in the least. The New York Times thought that "To this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance."²⁶ The Brooklyn Daily Eagle, a Democratic paper opposed to the amendment, quoted the due process and equal protection provisions with "This clause, if it stood alone, is entirely unobjectionable and entirely unnecessary."²⁷

Second: then, as today, many Americans were unfamiliar with *Barron v. Baltimore*,²⁸ and simply assumed that the Federal Bill of Rights already controlled State action, making section one of the Amendment largely uncontroversial or even redundant. (In fact, State courts *had* applied the federal Bill of Rights to their States, *Barron* notwithstanding).²⁹ During the House debates, Rep. Hale insisted that the Federal Bill of Rights already "limit[ed] the power of Federal and State legislation."³⁰ In the end, a frustrated John Bingham had to settle the question by

²⁶ *The Reconstruction Committee's Amendment in the Senate*, May 25, 1866 at 4, col. 1-2.

²⁷ *Passage of the Constitutional Amendment by the House*, May 11 1866 at 2, col. 1.

²⁸ 32 U.S. (7 Pet.) 243 (1833).

²⁹ See Jason Mazzone. *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007). The State decisions stood because the 1789 Judiciary Act extended the Supreme Court's appellate jurisdiction to State decisions that upheld a statute against Federal constitutional challenge, but not to State decisions that struck a State statute down. Appellate jurisdiction was only extended to the latter class of decisions in 1914. *Id.* at 19-20.

³⁰ CONG. GLOBE, 39th Cong., 1st Sess. at 1064 (Feb. 17, 1866).

producing a copy of *Barron* and reading the opinion on the floor.³¹ And Hale was a former judge!³²

Others (including the Amendment's sponsors) believed that the federal Bill of Rights restricted State action via Article IV, §2 of the Constitution, which provided that "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Today, Article IV, §2 is seen as preventing a State from unreasonably discriminating against citizens of other States,³³ but in the mid-19th century a variant reading that treated "in the several States" as "of the United States" had a wide and respectable legal following,³⁴ with some support in the case law, particularly from Justice's Washington's Circuit opinion in *Corfield v. Coryell*.³⁵ Indeed, it represents one reading of *Dred Scott*,³⁶

³¹ *Id.* at 1089-90 (Feb.28, 1866).

³² See generally Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993). Prof. Aynes demonstrates that the sponsors' views here were not only accepted at the time, but had been a mainstay of the anti-slavery movement's argument against the fugitive slave laws – viz, that Article IV, §2's requirement that States return fugitive slaves was a duty, but could not be enforced by Congress nor the courts.

³³ See *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) ("It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978).

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³⁵ 6 F. Cas. 546 (C.C. E.D. Pa. 18230 (No. 3230) (listing, among the "privileges and immunities," "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments," including "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."). *Corwyn* is probably better read as suggesting that discrimination must be directed at economic or other important rights before Article IV, §2 bars it. While this flies in the face of "all the Privileges and Immunities," it does represent the path the Court presently follows. See *Baldwin*, 436 U.S. at 388 (ten-fold differential in resident and nonresident sport hunting permit fees not barred by Article IV, §2 since it affects recreation rather than livelihood).

³⁶ Chief Justice Taney argued that the slaveowning States which ratified the Constitution could not have understood free blacks to be citizens, since that

would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Scott v. Sandford, 60 U.S. 393, 417 (1856). This argument would make little sense if Article IV, §2 forbade only *discriminatory* treatment of citizens of other States: if a State had to accord

an opinion with which the framers of the Fourteenth Amendment were quite familiar, since a major purpose of the Amendment was to destroy that decision's holding and reasoning. Under this view, the problem was not that the federal Bill of Rights was inapplicable to the States – it was that the States had refused to comply and Article IV had no provision for Congressional enforcement. This argument, as will be seen, was made in the Congressional debates and carried over into the popular discourse.

Third, the 39th Congress debated several related measures in overlapping timeframes. Between January and July 1866, Congress considered the Freedmen's Bureau extension,³⁷ which was passed, vetoed, passed as modified, vetoed again, and at length passed over veto, and the Civil Rights Act which was also passed over a veto.³⁸ These measures established the citizenship of anyone born within the United States and protected rights to contract, own property, and testify regardless of race, thus overlapping the future Fourteenth Amendment. As part of the Amendment's rationale was to establish a constitutional power supporting the Civil Rights Act, or as Thaddeus Stevens stated, to constitutionalize it,³⁹ the Amendment's history and that of these statutes are interlinked.

With these considerations in mind, we may begin the search for the original public understanding of the Fourteenth Amendment. Four aspects merit particular consideration: the need for a constitutional amendment to void the Black Codes, State courts' refusal to enforce the Civil Rights Act of 1866, the popular understanding of the legislative history of the proposed amendment, and the popular understanding of whether the proposed amendment would incorporate the Federal Bill of Rights.

visiting free blacks only the rights given its own free black residents, Taney's "horrible hypothetical" would make no sense.

³⁷ 14 Stat. 173 (1866). At the time Congress was treating the former Confederacy as having withdrawn from the Union (notwithstanding the Union position that it could not do so), and the terms upon which those States would be re-admitted was under dispute.

The Second Freedmen's Bureau Act applied to former Confederate States that had not been re-admitted to the Union. It guaranteed to all citizens, regardless of color, "the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal property, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms..."

³⁸ 14 Stat. 27 (1866). The Civil Rights Act provided that the freedmen were citizens, and guaranteed rights similar to those protected by the Second Freedmen's Bureau Act.

³⁹ CONG. GLOBE, 39th Cong., 1st Sess. at 2459 (May 8, 1866) ("Some answer, 'your civil rights bill secures the same things.' That is partially true, but a law is repealable by a majority.")

I. Original Public Understanding of The Black Codes and the Necessity for the Amendment

After the War ended, many former Confederate States enacted “Black Codes,” specifically aimed at burdening and restricting freedmen and other black residents.⁴⁰ One purpose of the Fourteenth Amendment was to void these statutes.⁴¹ The question remains as to the degree to which the American people understood this, and what provisions of these statutes they knew were to be overthrown.

A survey of print media establishes that readers were told of the Black Codes with frequency. The press reports put stress upon three common provisions: (1) restrictions upon free blacks’ rights to own property or enter business; (2) prohibitions on blacks testifying against whites; and (3) violation of the rights of blacks and Unionists to keep and bear arms.⁴²

For example, a lengthy article in the New York Times⁴³ informed its readers that the House had requested a report on the Black Codes. The article stated that the report is too long to set forth in its entirety, and went on to quote the laws of several states as samples. The examples include a Florida law providing punishment of 39 lashes for “any negro, mulatto or other person of color” who possessed a firearm or certain other weapon; a South Carolina statute prescribing flogging for any black who broke a contract for labor; and laws of Georgia, Alabama, and Texas restricting the ability of black witnesses to testify against whites.

⁴⁰ See generally MICHAEL KENT CURTIS, note ___ *supra*, at 3; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 256 (1983).

⁴¹ AKHIL REED AMAR, note ___ *supra*, at 162.

⁴² *Contra* to Justice Stevens’ dissent in *District of Columbia v. Heller*, 128 S. Ct. at 2841-42, the latter did not come in the context of the freedmen “bearing arms” in the sense of militia duty, but rather their efforts to own and carry arms in a private capacity. The dissent correctly notes that “negro militias” were a component of Reconstruction, and their dissolution an objective of the attack upon Reconstruction. This played no role in the understanding of the 14th Amendment, however, since the destruction of the militias was a product of the collapse of Reconstruction in the 1870s, years after the Amendment was ratified. See PETER CAMEJO, RACISM, REVOLUTION, REACTION 175, 188 (1976) (Disbandment of Mississippi’s and South Carolina’s negro militias in 1875 and 1876). See generally SYLVIA R. FREY & BETTY WOOD, FROM SLAVERY TO EMANCIPATION IN THE ATLANTIC WORLD 110-12 (1999).

⁴³ *The Freedmen: Laws of the Southern States Concerning Them*, June 10 1866 at 6, col. 1-2.

The Eau Claire Free Press made a paraphrase of the Times story, including the examples it cited, half of its front page.⁴⁴ It began with the explanation that the report had been requested because during debates on the Civil Rights Act, “copperheads and the friends of the President asserted that there was no evidence that such codes had been passed; that they were merely the reports of republican newspapers. To lay at rest all doubts upon this question, Congress made a call upon the President for information....”

Likewise, the Chicago Tribune⁴⁵ reported on South Carolina statutes that forbade black residents to practice trades, own stores, or leave their employer’s land without his permission: “The whites have monopolized all the rights of citizenship, of owning or leasing land, bearing arms for self-defense, of adjusting rates of wages for labor, of deciding all questions and differences before courts and juries....” The Alton (Ill.) Telegraph informed readers that under Mississippi law “No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to the planters....”⁴⁶

In terms of depth of coverage, the grievance that stands out in the popular press is the disarmament of blacks, and of white Union veterans. In April 1866, the New York Times⁴⁷ carried a story on events in Florida:

The Assistant Commissioner of the Freedmen’s Bureau for the State of Florida, has transmitted a report to the Bureau He called the attention of Governor Walker to the provisions of section 12, of an act entitled “An act prescribing additional punishments for the commission of offenses against the State, and for other purposes” which provides for the disarming of freedmen of their private arms. He urged upon the government that it was unconstitutional, both as to regards the United States and the State constitutions, and desired to have the decision of competent authority in the

⁴⁴ *The Black Codes of the Reconstructed States*, June 21, 1866 at 1, col. 3-5. There does appear to have been some dispute:

The Clarion, the official paper of Mississippi, states that there are no laws in force in that State which prohibit freedmen acquiring real estate, but on the contrary they purchase, and the Courts declare the purchases valid; nor are they prevented from bearing arms, no license being required.

The rights of Negroes to Hold Property and to Bear Arms, NEW YORK TIMES, Dec. 21 1866 at 4 col. 8.

⁴⁵ *Black Codes*, November 29, 1866 at 2, col. 1-2.

⁴⁶ *Deplorable conditions of the Freedmen*, March 26, 1866 at 2, col. 3.

⁴⁷ *The Freedmen*, April 22, 1866, at 1, col. 1.

case. The Governor hesitated until General Foster informed him that the disarmament of negroes must cease, either through civil or military action. The opinion of the Attorney-General has been called for, who decided that the provisions of the section were unconstitutional.

The story was carried by smaller newspapers, including the Semi-Weekly Wisconsin and the Bangor Daily Whig and Courier.⁴⁸

Months later, the New York Times reported⁴⁹ on a case brought against a black Union veteran named James Lewis:

Lewis was an employee of a Northerner named Averill.... The musket, which he carried during his enlistment, was used simply for gaming purposes, and was never carried off from Averill's plantation. Nevertheless, some neighbor had him arrested, and he was sentenced to pay a heavy fine and costs of proceeding, in default of which he was imprisoned.

The article (spanning three columns) goes on to recite how another prosecution led to a more fortunate result in the case of "discharged United States colored soldiers, who had been arrested for carrying arms in violation of State laws, although a law of Congress permits them to do so."⁵⁰ The judge's ruling included (all emphasis original to the Times story):

When this act was passed our State was overrun by thieves, robbers, and murderers. It was not safe for white or black to travel, or even to remain at home. Without artificial means of defense at home, negroes who had received pay and discharge from the United States service, were special subjects for attack by these merciless brigands. The citizen has the right to bear arms in defense of himself, secured by the constitution. So, too, the citizens of other States, including thieves and robbers, have the right to bear arms. *Should not then the freedmen have and enjoy the same constitutional right to bear arms in defense of themselves, that is enjoyed by the citizen? It is a natural and personal right—the right of self-preservation.* It is not a

⁴⁸ *Doing of the Freedmen's Bureau in the Gulf States*, BANGOR DAILY WHIG AND COURTIER, April 23, 1866 at 3, col. 1; SEMI-WEEKLY WISCONSIN, April 28, 1866, at 4, col. 6. [Note to editors: latter has no title]

⁴⁹ *Mississippi – The Attitude of the State and the Explanation*, Oct. 26, 1866 at 2, col. 3-6.

⁵⁰ An apparent reference to the Second Freedmen's Bureau Act and its guarantee of "the constitutional right to bear arms." See note____, *supra*.

political right....Surely the statute must be repugnant to the good sense of the community.

Let the prisoners be discharged and their arms restored!”

It should be noted that while the Fourteenth Amendment was largely a response to the Black Codes, it also was directed at the needs of white Unionists, who were likewise under legal and personal attack.⁵¹

The Adams [Penn.] Sentinel and General Advertiser⁵² carried (next to the text of the proposed amendment) a meeting of “the State convention of the heroes of the war against treason,” which passed a resolution that:

the legislation whereby Congress attempted to defend and protect our allies, the loyal men of the south, against the deadly hatred of the common enemy, and to make good to a race the freedom proffered as the price of aid, and awarded as the due of loyalty, is deserved unqualified approval.

Accordingly, complaints about the conduct of former Confederate States are at times not race-specific. The Philadelphia Inquirer⁵³ summarized a speech by Connecticut Governor Hawley to an “immense mass meeting” of the Union League in Philadelphia:

There were men who had been honorably discharged from our armies, who had been ruthlessly stripped of the very weapons given them by the Government for their fidelity to it. He claimed that the war was not over until every man should have the free and uninterrupted possession of every right guaranteed him by the Constitution. (Great cheers.)

When President Johnson vetoed the Freedman’s Bureau Act, the Chicago Tribune ran, in its headlines, “THE FRUITS OF THE VETO: Horrible outrages upon the

⁵¹ This, too, entered original public understanding. *See The Joint Resolution to Amend the Constitution*, NEW YORK TIMES, Feb, 28, 1866 at 1, col. 5-7 (reporting House floor debate, with Rep. Bingham stating the Amendment “was meant to protect tens of thousands and hundreds of thousands of loyal white citizens of the United States,” who were victims of laws taking their property or banishing them from States.)

⁵² *The Soldiers in Council*, June 18, 1866 at 5, col. 5.

⁵³ *Speech of Governor Hawley*, Sept. 5, 1866 at 8 col. 5.

Freedmen in Kentucky” and the next day ran “THE FRUITS OF THE VETO: Union Men Driven Out of Kentucky.”⁵⁴

The Alton (Ill.) Telegraph summarized⁵⁵ an article from the Louisville Journal, stating that it:

gives a most deplorable account of the condition of the loyal whites and freedmen in the State of Kentucky. He says that in many portions of the State the courts are used as mere instruments of vengeance, so that loyal men in a number of instances are compelled to leave the State....

II. Original Public Understanding that State Courts Were Refusing to Follow the Civil Rights Act.

Congress initially responded with the Civil Rights Act of 1866,⁵⁶ which proved inadequate. There are Congressional references to it having been stricken or disregarded by State courts,⁵⁷ and the popular press may be their source.

One case in particular attracted national attention, when a court sitting in Alexandria, Virginia, refused to permit black witnesses to testify against a white criminal defendant. The court did so notwithstanding the Civil Rights Act’s proviso that a person’s right to testify shall not be abridged on account of race.⁵⁸ The story was carried by the New York Herald, which reported that the judge ruled “that no Congressional legislation could impair [Virginia’s] right to decide what persons or classes of persons were competent to testify in her courts.”⁵⁹ The story was also picked up by the Chicago Tribune,⁶⁰ and by Washington D.C.’s Daily National Intelligencer.⁶¹

The San Francisco’s Evening Bulletin⁶² reported on a murder trial in Tennessee, where

⁵⁴ Feb. 27, 1866 at 1, col. 2; Feb. 28, 1866, at 1, col. 2.

⁵⁵ *Sad Condition of Affairs in Kentucky*, Feb. 16, 1866 at 2 col. 2.

⁵⁶ 14 Stat. 27 (1866).

⁵⁷ CONG. GLOBE, 39th Cong., 1st Sess. at 3210 (June 16, 1866).

⁵⁸ See note ____ , *supra*.

⁵⁹ *Case Involving the Constitutionality of the Civil Rights Bill*, May 25, 1866 at 1 col. 1.

⁶⁰ *Case Under the Civil Rights Act*, May 26, 1866 at 1 col. 1.

⁶¹ *The Civil Rights Bill*, May 2, 1866 at 2, col. 3.

⁶² *Murder of a Negro in Tennessee*, June 1, 1866 at 1, col. 1.

Judge Laurence of the Freedmen’s Bureau remarked that there were two colored witnesses of the murder, and asked that they be summoned; that in case the State court could not take their testimony, that the case be transferred to the United States District Court under the Civil Rights Act.

On the other hand, the Galveston News⁶³ reported a Maryland case where the State judge had recognized that the Civil Rights Act required admission of black witness’ testimony, adding that the ruling “makes the radical jubilant.”

In short, newspaper-reading Americans of the 1866-68 period would have been well aware that the Black Codes restricted rights to property, employment, to own arms and to give testimony, and that State courts were declaring the Civil Rights Act to be an unconstitutional infringement of State powers.

III. Original Public Understanding of the 14th Amendment’s Legislative History

The legislative history of the Amendment, and of related legislation, was reported to the public in detail that seems unbelievable to a modern political enthusiast, accustomed to the electronic media’s sound bites and to print journalism that focuses upon condensing, digesting and interpreting events for the reader.

In sharp contrast, the 19th century journalistic style involved setting out the text of proposals and presenting transcripts of the debates, rather than interpreting them or assessing them as moves in a partisan competition. The New York Times, for instance, reported *in haec verba* the predecessors of the Fourteenth Amendment, as well as the preceding call for such an amendment.⁶⁴ The New York Herald did much the same. The custom then was to list multiple headlines at the top of the first column, and the Herald’s headlines one day read:

IMPORTANT PROCEEDINGS IN CONGRESS THE RECONSTRUCTION RESOLUTIONS IN THE SENATE

⁶³ *Washington Correspondence*, July 20, 1866 at 2, col. 5.

⁶⁴ See *Reconstruction*, NEW YORK TIMES, Jan. 30, 1866 at 1, col. 3-4 (bill providing for equal legal treatment of all); *Thirty-Ninth Congress*, NEW YORK TIMES, Feb. 2 at 1, col. 1 (reporting both a notice that the proposed amendment would be called up for debate, and proposed amendment to the Civil Rights Bill); *Amending the Constitution*, NEW YORK TIMES Mar. 2, 1866 at 1, col. 3-5 (half a page devoted to debates on the Amendment as reported by committee); *The Reconstruction Resolution*, NEW YORK TIMES, May 24, 1866 at 1, col. 6-7 (transcript of Sen. Howard’s floor speech upon introducing the Amendment in the Senate).

THE THIRD SECTION STRICKEN OUT
THE RECONSTRUCTION QUESTION IN THE HOUSE
DEBATE ON THE BILL PROVIDING FOR THE RESTORATION
OF THE SOUTHERN STATES TO THEIR FULL POLITICAL RIGHTS
INTRODUCTION IN THE SENATE OF A BILL TO SECURE THE
ELECTIVE FRANCHISE TO NEGROES
THE FREEMEN’S BUREAU BILL PASSED IN THE HOUSE⁶⁵

Smaller newspapers tended to give less coverage; some merely reprinted the text of the 14th Amendment, while others covered major events. For example, the Report of the Reconstruction Committee calling for constitutional amendments to guarantee, *inter alia*, the privileges and immunities of citizens was carried by the Adams (Penn.) Sentinel and General Advertiser,⁶⁶ with the text of the Amendment. The Report was also carried by the Galveston Daily News,⁶⁷ the Coshocton [Ohio] Age,⁶⁸ and summarized in the West Eau Claire Argus.⁶⁹

The smaller papers also gave coverage to debates over the related Civil Rights Act and Freeman’s Bureau Act. The Alton [Ill.]Telegraph⁷⁰ reported Senate passage of the Civil Rights Act, describing it as “the most important measure brought before Congress since the passage of the Constitutional Amendment abolishing slavery,” and reprinting its text. The Waukesha (Wisc.) Freeman covered the veto of the Freedmen’s Bureau Bill, reproducing its text,⁷¹ and reported letters and telegrams describing robberies and murders of freedmen attributed to the veto.⁷² The story may have been taken from the Chicago Tribune.⁷³

IV. The 14th Amendment as Incorporating the Bill of Rights: What Was the Original Popular Understanding?

We may focus here primarily upon two critical events, involving the key movers of the Amendment: the floor speeches of Rep. John Bingham on February 26 and

⁶⁵ May 30, 1866 at 1, col. 1.

⁶⁶ *The Report of the Joint Committee of Congress on Reconstruction*, June 19, 1866 at 1 col. 6-7 and 2 col. 1, 4.

⁶⁷ *Final Report of the Reconstruction Committee*, June 13, 1866 at 2, col. 4.

⁶⁸ *Final Report of the Reconstruction Committee*, June 22, 1866 at 1, col. 3.

⁶⁹ *Political Matters*, June 18, 1866 at 2 col. 2.

⁷⁰ *Civil Rights To Be Protected*, Feb. 9, 1866 at 1 col. 3.

⁷¹ *The Vetoed Freedman’s Bureau Act*, Mar. 6, 1866 at 1 col. 7.

⁷² *Fruits of the Veto – Horrible Outrages Upon Freedmen*, Mar. 6, 1866 at 1 col. 8.

⁷³ *Congress*, CHICAGO TRIBUNE, Feb. 27, 1866 at 1, col. 1.

February 28, 1866, and that of Sen. Jacob Howard on May 23, 1866. Each sponsor described the Fourteenth Amendment as protecting liberties guaranteed by the Federal Bill of Rights. The question is the degree to which each speech entered the public knowledge and thus contributed toward original public understanding.

A. Popular Coverage of John Bingham’s House Floor Speeches.

Bingham’s floor speeches of February 26 and 28, 1866, are certainly strong evidence of legislative intent to incorporate the Bill of Rights. In the first, he briefly discusses his argument that the Constitution already binds State officials, but lacks the means for Congressional enforcement.⁷⁴

His February 28 speech mentions the Bill of Rights a dozen times,⁷⁵ stressing his view that Article IV, §2 already requires States to observe those guarantees but that Article IV lacks any enforcement mechanism.⁷⁶ He asks why his opponents are “opposed to enforcement of the bill of rights, as proposed?”⁷⁷ and quotes *Barron v. Baltimore* to answer claims that the Federal Bill of Rights already is enforceable against the States.⁷⁸ Bingham asks, “Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter?” and describes the proposed amendment as “secur[ing] the enforcement of these provisions of the bill of rights in every State....”⁷⁹ He sums up the issue as:

[W]hether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of the States for violation of the oaths enjoined upon them by the Constitution? That is the question and the whole question.⁸⁰

Bingham’s explanation entered original public understanding, albeit to a lesser degree than Senator Howard’s later floor speech. The New York Herald, with a larger circulation than the Times and a claim to being “the most largely circulated journal in the world,”⁸¹ carried his February 26 speech on its front page. The Herald’s version included:

⁷⁴ Congressional Globe, 39th Cong., 1st Sess. at 1034 (Feb. 26, 1866).

⁷⁵ AKHIL REED AMAR, THE BILL OF RIGHTS 182 (1998).

⁷⁶ CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., at 1088 (Feb. 28, 1866).

⁷⁷ *Id.* at 1089.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1090.

⁸⁰ *Id.*

⁸¹ *New York Herald History*, <http://nyherald.com/new-york-herald-history/>

The proposed amendment imposed no obligation on any State nor on any citizen in a State which was not now enjoined upon them by the very letter of the constitution. ... But it was equally clear that by every construction of the constitution – its contemporaneous and continual construction – the great article contained in the second section of the fourth article, and in a portion of the fifth amendment adopted by the First Congress in 1789, that immortal bill of rights had hitherto depended on the action of the several states. The House, the country, and the world knew that all legislative, all executive, all judicial officers in eleven states of the Union had, within the last five years, violated this provision of the Constitution, the enforcement of which was absolutely essential to American nationality.⁸²

The Herald likewise carried Bingham's February 28 speech on the front page, showing him arguing that "This was simply a proposal to arm the Congress of the United States, by the consent of the people, with power to enforce the bill of rights as it stood in the constitution. It had that extent, no more."⁸³ The Chicago Tribune's front page carried the same statement.⁸⁴

The New York Time's coverage of the first debate focused more upon his opponent, Rep. Hale, and did not relate Rep. Bingham's remarks on the Bill of Rights. It did carry Rep. Hale's claim that the Federal Bill of Rights was already enforceable against the States, and Rep. Bingham's challenge that he name a single court decision to the effect.⁸⁵ Another article praised Hale's speech, but related nothing of any significance.⁸⁶ The Time's coverage of the debate of February 28 was no more impressive, dealing largely with points of order that Hale won against Bingham.⁸⁷

Smaller newspapers ran condensed versions of Bingham's speech. Washington, D.C.'s Daily National Intelligencer (which likely had its own reporter in the galleries) described Bingham as having said that "The proposed amendment simply armed Congress, with the consent of the people, to enforce the bill of rights, as now found in the Constitution."⁸⁸ Ft. Wayne's Daily Gazette simply reported

⁸² *Another Amendment to the Constitution*, NEW YORK HERALD, Feb. 27, 1866 at 1, col. 5.

⁸³ *House of Representatives*, NEW YORK HERALD, March 1, 1866 at 1, col. 4.

⁸⁴ *Proceedings of Congress*, CHICAGO TRIBUNE, March 1, 1866 at 1, col. 3.

⁸⁵ *Amending the Constitution*, NEW YORK TIMES, March 2, 1866 at 2, col. 1-4.

⁸⁶ *The Concurrent Resolutions*, NEW YORK TIMES, Feb. 28, 1866, at 1, col. 4-7

⁸⁷ *The Constitutional Amendment*, NEW YORK TIMES, March 1, 1866 at 4, col. 6; & 5, col. 2-4.

⁸⁸ *Thirty-Ninth Congress*, March 1, 1866 at 2, col. 2.

that he “briefly defined this amendment to give the whole people the care of their government and nationality.”⁸⁹ The Bangor Daily Whig and Courier described him as having argued that:

The proposed amendment imposed no obligation on any State, nor on any citizen in a State, which was not now enjoined on them by the very letter of the Constitution. It was not possible for man to frame words more obligatory than those already in the Constitution enjoining this great duty upon the several States and on the several officers of all the States. But it was equally clear that by every construction of the Constitution – its contemporaneous and continuous construction – that the great provisions contained in the second section of the fourth article, and in a portion of the fifth amendment adopted by the first Congress in 1789, the immortal bill of rights had hitherto depended on the action of the several States. The House, the country and all world knew that all legislative, all executive, all judicial officers in the eleven States of the Union had, within the last five years, violated this provision of the Constitution, the enforcement of which was absolutely essential to American nationality.⁹⁰

B. Popular Coverage of Jacob Howard’s Senate Floor Speech

A second evidence of legislative intent is the floor speech given by Senator Jacob Howard, when he introduced the 14th Amendment on May 23, 1866. Sen. Howard described its “privileges or immunities” clause by quoting *Corfield v. Coryell* as to Article IV “privileges and immunities,” and continued:

To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guaranteed 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, a right pertaining to each and all of the people; the right to keep and bear arms; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the

⁸⁹ *Another Amendment Proposed*, March 3, 1866, at 2, col. 2.

⁹⁰ *The Last Reported Amendment of the Constitution*, March 2, 1866, at 1, col. 7.

right to be secure against excessive bail and against cruel and unusual punishments.⁹¹

Howard's understanding of the role of Article IV, §2, was slightly at variance with that of Rep. Bingham. Howard sees Article IV as binding the States to protect the largely-economic liberties listed in *Corfield*, and sees the subsequent Bill of Rights as supplementing these:

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution....⁹²

Howard continues on to note that these rights were not Federally enforceable against the States, and thus presently depended upon State institutions for their protection; the object of the Amendment is to change this.

How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power be given to Congress to this end.⁹³

While this is solid legislative history, the question remains to what extent was Howard's description available to the public, thus constituting evidence of original popular understanding.

If the New York Times had been napping during Representative Bingham's speech, its reporters were certainly alert during Senator Howard's presentation.

The day after its presentation, the New York Times reported in transcript-like detail Sen. Howard's floor speech, albeit with two typographical errors and slight variances from the Congressional Globe version:⁹⁴

⁹¹ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866).

⁹² *Id.*

⁹³ *Id.* at 2766.

⁹⁴ *The Reconstruction Resolution*, May 24, 1866 at 1 col. 6-7. The variances might be attributable to (1) the Associated Press transcription varying from the original or (2) the right of the speaker to "correct", *i.e.*, improve upon, the transcript prior to its printing or (3) such improvements being made by the newspaper editors. Differences in punctuation are probably attributable to (3); the telegraphed original likely lacked punctuation.

I believe to these privileges and immunities may be added the personal right (sic) guaranteed by the first eight amendments of the United States (sic), such as freedom of speech and of the press, the right of the people peaceably to assemble and petition Government for a redress of grievances – a right pertaining to each and all of the people – the right to keep and bear arms – the right to be exempt from the quartering of soldiers in a house without consent of the owner – to be exempt from unreasonable searches and seizures, &c.. Here is a mass of privileges and immunities and rights....

.....

How will it be under the present amendment? As I have already remarked, they are not powers granted to Congress: and therefore it is necessary, if they are to be effectual and to be enforced, that additional powers should be given to Congress, to see that they are enforced.

On the same day, the New York Herald also reproduced Howard’s speech in detail,⁹⁵ including the critical paragraph, with only a few words differing from the Times transcription (and one fewer typo):

I believe to these privileges and immunities may be added the personal right (sic) guaranteed by the first eight amendments to the constitution of the United States, such as freedom of speech and of the press, the right of the people peaceably to assemble and petition Government for a redress of grievances – a right pertaining to each and all of the people – the right to keep and bear arms – the right to be exempt from the quartering of soldiers in a house without the consent of the owner –to be exempt from unreasonable searches and seizures, &c. Here is a mass of privileges and immunities and rights.....

Major newspapers, and some smaller ones, followed the Herald’s lead. The Philadelphia Inquirer carried a transcript identical to that of the Herald.⁹⁶ Washington D.C.’s National Intelligencer carried a version identical to that of the Herald, except for correction of “personal right” to “personal rights.”⁹⁷ Smaller newspapers followed the lead of the Time and Herald. The Hillsdale [Mich.]

⁹⁵ *The Reconstruction Committee’s Report*, May 24, 1866 at 1 col. 2-3

⁹⁶ *Senator Howard’s Speech*, May 24, 1866, at 8, col. 2.

⁹⁷ *Thirty-Ninth Congress*, May 24, 1866, at 3, col. 2 .

Standard reported the speech, differing only in punctuation from the Herald's account.⁹⁸

The Boston Daily Advertiser paraphrased Howard's words, telling its readers that:

The Senate having taken up the amendment, Mr. Howard explained it, section by section. The first clause of the first section was intended to secure to citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them, except by their own local constitutions and laws. The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful.⁹⁹

The Baltimore Gazette gave a far briefer version, describing Howard as having said "It will be observed that the first section is general prohibition upon all of the States of abridging the privileges and immunities of citizens of the United States, and secures for all the equal advantage and protection of the laws."¹⁰⁰ Other small papers mentioned the speech without describing its content.¹⁰¹

C. Other Indicia of Original Public Understanding

There are additional sources in the public discourse that relate to the issue at hand. Prominent among these are a manner of "Op-Eds" that ran in the New York Times, and the popular reaction to President Johnson's veto of the Civil Rights Act, in which Johnson referred to the "privileges" of citizenship.

1. "Madison's Letters"

⁹⁸ *Reconstruction*, June 5, 1866 at 1 col. 4-5.

⁹⁹ *Reconstruction: The Debate in the Senate*, May 24, 1866, at 1, col. 3.

¹⁰⁰ *Thirty-Ninth Congress*, May 24, 1866, at 2 col. 2.

¹⁰¹ See *Proceedings of Congress Yesterday*, THE [Baltimore] SUN, May 24, 1866, at 2, col. 1; *Speech of Mr. Howard of Michigan*, BOSTON DAILY JOURNAL, May 24, 1866 at 4, col. 4; XXXIX *Congress—First Session*, THE [Trenton] DAILY STATE GAZETTE, May 24, 1866 at 2, col. 5 (reporting only that "At 1 o'clock the resolutions of the Reconstruction Committee to amend the Constitution was taken up.")

In November, 1866, the New York Times ran a pair of long letters to the editor,¹⁰² amounting to early “Op-Eds,” with the author signing simply as “Madison.” The first informed readers that:

The one great issue really settled is, that the people will not lose the fruits of the victory won in the suppression of the rebellion. They demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction – *full and complete protection* in the enjoyment of life, liberty, property and the pursuit of happiness, the right to speak and write his sentiments, regardless of localities; to keep and bear arms in his own defense, to be tried and sustained in every way as an equal, without distinction to race, condition or color.... Let us see how far the Constitutional Amendment is calculated to effect this object. It reads as follows [text of the amendment inserted, followed by the President’s objections].

.....

What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of *habeas corpus*; to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.

The second letter also discussed privileges or immunities, first with reference to the freeman: “He could not change his residence, or travel at pleasure; he was liable to be enslaved under various circumstances, and such laws were often enforced.” The letter then sets out the proposed amendment’s due process clause¹⁰³ and broadly speaks of the rights of all races to freedom of expression:

For thirty years no man could speak or write or think that slavery was not of all institutions the most wise, economical, humane, Christian and divine. To be silent was to be suspected; to speak against it insured expulsion, mobbing

¹⁰² *The National Question: The Constitutional Amendments – National Citizenship*, Nov. 10, 1866 at 2, col. 2-3; *The Proposed Constitution Amend. – What it Provides*, Nov. 15 at 2, col. 1-2.

¹⁰³ Again, an indication of due process clause incorporation, under original public understanding.

... This is only a continuation of the ‘higher law’ misrule, which suppressed the circulation of all Free-Soil literature in fifteen States.

.....

But this amendment will not expend itself upon the red man, the black man, and the man of mixed color. Our government, so rapid in its advancement, so glorious in its history, will never be complete, as a great Republic, until it clearly defines citizenship and protects every man entitled to the name of American citizen, wherever on the earth he may lawfully be. This protection must be co-extensive with the whole Bill of Rights in its reason and spirit. Reason must be left free to combat error.

2. Popular Treatment of the Civil Rights Act Veto

The Civil Rights Act declared that the freedmen would be “citizens of the United States.”¹⁰⁴ Andrew Johnson’s veto message after its first passage included his fears that the freedmen would be unqualified to exercise privileges of citizenship: “Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges of citizenship of the United States?”¹⁰⁵

Johnson’s veto message was reprinted in full in newspapers ranging from the New York Times¹⁰⁶ to the Titusville [Penn.] Morning Herald¹⁰⁷ and the Cedar Falls [Iowa] Gazette.¹⁰⁸

If privileges of citizenship are quite limited (as later Supreme Courts construed the privileges or immunities clause) Johnson’s point would be rather peculiar. It is more likely that a reader would have taken “all the privileges of citizenship” to include more complex tasks.

D. Indicia of Original Public Understanding Consistent with the approach taken in *The Slaughterhouse Cases* and *Cruikshank*

¹⁰⁴ See note ____, *supra*.

¹⁰⁵ CONG. GLOBE, 39th Cong., 1st Sess. at 1679 (Mar. 27, 1866).

¹⁰⁶ *The Presidential Veto*, Mar. 28, 1866 at 1, col. 1-2.

¹⁰⁷ *Veto of the Civil Rights Bill*, March 31, 1866, col. 3-4.

¹⁰⁸ *President’s Message Vetoing the Civil Rights Act*, Apr. 6, 1866 at 1, col.3-6.

Under the combination of the *Slaughterhouse Cases*¹⁰⁹ and *United States v. Cruikshank*,¹¹⁰ the privileges or immunities clause was narrowly read as protecting only those rights which were created by the U.S. Constitution, not those which could be seen as pre-existing and guaranteed by it – viz, the very rights that we would today class as fundamental.¹¹¹ Under this view, the only rights protected by that clause are rights such as interstate travel and to petition the national government (and no other institution).

The role this view plays in original public understanding can be summarized briefly. It appears to have had none. Exhaustive search has been unable to uncover any instance of this meaning having been attached to the privileges and immunities clause in public discourse over the ratification period. The closest approach is in debates (pre and post ratification) over whether the 14th Amendment would grant electoral suffrage to blacks. In the 1868 campaign, Democrats argued that it would grant the franchise, as a “horrible hypothetical.” In Cumberland, Maryland, the Alleghanian breathlessly reported:¹¹²

This clause, it will be observed, makes Negroes CITIZENS! Now mark what follows: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” One of the privileges of citizens of the United States is the RIGHT TO VOTE. Hence this amendment first makes Negroes CITIZENS and then prohibits any State from making or enforcing any law which shall abridge the privileges of such Negro citizens, including the RIGHT OF SUFFRAGE!

Republicans facing close races denied this, arguing that there was a distinction between natural rights and political rights, the 14th Amendment guaranteed the former but not the latter.¹¹³ Every citizen could had a right to freedom of speech

¹⁰⁹ 83 U.S. 36 (1873). The *Slaughterhouse Cases* was the narrower of the two, refusing to incorporate an unenumerated right to engage in any lawful occupation. The Court did suggest that privileges or immunities included rights “which owe their existence to the Federal government, its national character, its Constitution, or its laws,” and mentioned rights to assembly, petition, and habeas corpus as examples. 83 U.S. at 79. It was *Cruikshank* that dealt the death blow to the privileges or immunities clause, holding that it only protected rights *created* by the U.S. Constitution, and not any natural, pre-existing right such as freedom of assembly and petition (unless petitioning the Congress), or a right to arms.

¹¹⁰ 94 U.S. 542 (1875).

¹¹¹ See notes ____ and accompanying text, *supra*.

¹¹² *The Radical Platform*, Sept. 19, 1868, at 3 col. 3.

¹¹³ See generally AKHIL REED AMAR, note ____ *supra*, at 216-217 & n.

and religion, but not every one could vote -- women and underage citizens were excluded.

Interestingly, in Atlanta the Constitution wound up reporting both sides of the debate. Before ratification, it editorialized that one of the effects of the privileges or immunities clause would be to force “force negro suffrage” upon the States, and urged the legislature to refuse ratification.¹¹⁴

After the legislature (under Congressional pressure) ratified the Amendment, the State house promptly moved to expel all black members. The newspaper now reported floor speeches arguing that holding office was not a privilege or immunity of citizenship, since (1) the 14th Amendment, in reducing Federal representation as a penalty for disqualifying voters, implied that the right to vote and presumably to hold office could be restricted; (2) the 15th Amendment only protected the freedmen’s voting rights, not their holding office; and (3) not every citizen is allowed to vote or run for office, so those rights must not be privileges or immunities of citizenship.¹¹⁵

Under *Slaughterhouse/Cruikshank*, voting for *Federal* candidates or holding *Federal* office could be seen as a privilege or immunity of national citizenship, and thus protected. Voting for or holding State office could not so be seen. But it is noteworthy that neither side in the popular debate ever used this rationale. Arguments that the Amendment did extend the electoral franchise to the freedmen presupposed that it protected a broad swathe of rights, beyond the Bill of Rights. Claims to the contrary assumed that the Amendment at least protected all nonpolitical rights.

Conclusion

In 1866-68, the American public had before it extensive discussions of the meaning of the Amendment it was called upon to ratify. It was the political topic of the day: “Everybody asks everybody,” a New York Times reporter wrote, “‘What do you think of the Constitutional Amendment?’ almost before he says ‘How d’ye do?’”¹¹⁶ We are thus able to document original public understanding in a way that is quite impossible in relation to the events of 1787-88.

¹¹⁴ *Shall We Ratify the Amendment*, June 25, 1868, at 2 col. 2.

¹¹⁵ *House of Representatives*, [Atlanta] CONSTITUTION, Sept. 4, 1868 at 2, col. 4.

¹¹⁶ *Situation in Georgia*, NEW YORK TIMES, Nov. 10 1866 at 8 col. 1.

Of the most critical events, Representative John Bingham's speech describing the Fourteenth Amendment as applying the Bill of Rights to the States received extensive play in the popular press. Senator Jacob Howard's floor speech to the same effect received *exceptional* coverage and constitutes the most significant contribution to the public understanding of the Amendment's effect. Attempts to write Howard's description off as "casually tucked away in a long speech,"¹¹⁷ must deal with the fact that his description made the front pages of the New York Times and the New York Herald, was carried in the Philadelphia Inquirer, and was covered by many smaller papers.¹¹⁸ The position taken long ago by Professor Fairman, that the "one statement in Howard's speech [*i.e.*, his reference to the Bill of Rights] that looms so large in our present inquiry seems at the time to have sunk without leaving a trace in the public discussion,"¹¹⁹ is no longer tenable.

Conversely, the narrow reading given the Amendment in the *Slaughterhouse Cases* and *United States v. Cruikshank* appears to have had no place whatsoever in original public understanding. Even advocates whose positions would have benefited from narrowing the Amendment failed to use the reasoning employed in those decisions.

¹¹⁷ RAOUL BERGER, GOVERNMENT BY JUDICIARY 148 (1997).

¹¹⁸ See notes _____ and accompanying text, *supra*.

¹¹⁹ Charles E. Fairman, note __ *supra*, at 69.