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Enforcing the Bill of Rights against the states: the history and the future

"And when you ask them 'How much should we give?'
Ooh, they only answer More! More! More!..."[1]

Richard L. Aynes*

The question of whether the Bill of Rights—the first eight amendments to the U.S. Constitution—should be applied to and enforced against the states has a long, and in some sense, complex history. Though, as this symposium will demonstrate, there is a difference between unanimity and consensus, Professor Randy Barnett has concluded:

> "There is now a scholarly consensus that the original meaning of 'privileges or immunities' includes the Bill of Rights." [2]

A similar conclusion has been reached by Professor Calvin Massey:

> "[M]ost of the substantive guarantees of the Bill of Rights have been . . . . made applicable to the state" and "this debate is now over for all practical purposes." [3]

As our keynote speaker, Michael Kent Curtis, noted, over the last decade the strength of the evidence supporting the enforcement of the Bill of Rights against the states has increased as more and more information has been uncovered. [4]

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[1] Creedence Online, *Creedence Lyrics: Fortunate Son*, http://www.creedence-online.net/lyrics/fortunate_son.php (last visited Mar. 18, 2009).
[2] RANDY E. BARNETT, CONSTITUTIONAL LAW, CASES IN CONTEXT 292 (2008) (emphasis added).
[3] CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 445-47 (2d. ed. 2005).
[4] "The more one looks, the more one finds." Michael Kent Curtis, 18 J. CONTEMP. LEGAL ISSUES ___ (2009). As Professor Wildenthal has pointed out, there are some problems with the use of the term "incorporation." Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the*

The purpose of the article is to paint—in broad strokes—the ebb and flow of the debate in order to try to identify where we are and what the next frontiers of fourteenth amendment scholarship might be.

I.

Prior to the Fourteenth Amendment

There have always been citizens, lawyers, and judges who believed that the Bill of Rights had application to the states. This is not surprising since those rights are part of our common law heritage. As early as 1819 Justice William Johnson, a Jeffersonian appointee to the Court, "obliquely suggested" [5] that the seventh amendment guarantee of civil jury trials was applicable to the states. [6] A year later, in *Houston v. Moore*, [7] Justice Johnson wrote that the provision against double-jeopardy "operates equally upon both" the state and the federal governments. [8]

In 1829 one of America's leading lawyers, William Rawle,[9] published one of the first treatises on the American Constitution in which he utilized a textual analysis that concluded that only the First Amendment was limited to the federal government. Because the other amendments

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Fourteenth Amendment in 1867-73, 18 J. CONTEMP. LEGAL ISSUES ____ n.2 (2009). Though the term "incorporate by reference" is a common legal term, one of the early, if not the first, uses of the term "incorporation" in the context of applying the Bill of Rights to the states is found in *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942). This was not a term that any of the framers or ratifiers used. I agree that "nationalizing" the Bill of Rights is a better use of terminology and, yet, prefer "enforcing" the Bill of Rights against the states or "applying" the Bill of Rights protections to the states. For further thoughts on the problems with the term "incorporation" see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES ___, (2009) **(Draft at 1)** (". . . it is time to abandon the metaphor of incorporation altogether . . . Our search is for the public understanding of texts added to the Constitution in *1868*.").

A further problem is that though the application of the Bill of Rights against the state is commonly held to be part of "substantive due process," this only goes to establish the poverty of the terminology. It can hardly be said that the right to receive notice of the charges against one or the right to a speedy trial is a "substantive" right rather than a procedural right. It should be noted that the distinction between substantive and procedural due process is an anachronism when applied to the Fourteenth Amendment. *See* STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA (2005). I am grateful to Assistant Law Librarian Annette Souare and her staff who determined that the first time the term "substantive due process" was used by the Supreme court was in *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting), and the first time the terms "substantive due process" and "procedural due process" were used in the same decision was in *Shaughnessy v. United State ex rel. Mezei*, 345 U.S. 206, 222-27 (1953) (Justice Jackson, dissenting).

[5] AKHIL REED AMAR, THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION 145 (1998).

[6] Bank of Columbia v. Okely, 17 U.S. 235, 240-42 (1819).

[7] 18 U.S. 1, 33-34 (1820) (separate opinion).

[8] *Id.* Akhil Amar notes that "even here his statement was not free from ambiguity." AMAR, *supra* note 5, at 145.

[9] Rawle had been George Washington's first choice for U.S. Attorney General and when Rawle turned the position down, Washington appointed him U.S. District Attorney for Philadelphia. For biographical information on Rawle and his prominence, see Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI-KENT L. REV. 1197, 1247 (1995).

were written in general terms, Rawle concluded that they all were enforceable against the states. [10]

Fuller accounts including more state and federal court examples of these pre-*Barron* opinions are found in many works, including those of William W. Crosskey[11] and Akhil Amar. [12] Crosskey argued that *Barron* was wrongly decided, [13] but Professor Amar collectively refers to people holding these views as "The Barron Contrarians." [14]

One might imagine that claims that the Bill of Rights applied to the states would have ceased after Chief Justice Marshall's decision in *Barron v. Baltimore*.[15] This would seem to be especially warranted by the fact that *Barron* was followed by at least eleven Supreme Court cases between 1840 and 1866. [16]

But such was not the case and post-*Barron* instances are also documented by Crosskey[17] and Amar. [18] Though there are undoubtedly many reasons for this, at least one of them is that the people of that generation were not as court-centric as many scholars and judges are today. Further, in some instances, lawyers and judges were simply unaware of the decision in *Barron*.[19] In some instances, lawyers and judges thought that *Barron* was wrongly decided.[20] In yet other instances, the Courts may not have found the Bill of Rights to be binding, but nevertheless concluded that they were declaratory of general principles of constitutional law and common law that applied to the states as constitutional principles. [21]

II.

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[10] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 125, 127, 135 (1829 2d. ed.) (1970 reprint).
[11] William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional limitations on State Authority*, 22 U. CHI. L. REV. 1, 125-131 (1954).
[12] AMAR, *supra* note 5, at 145-162.
[13] Crosskey, *supra* note 11, at 119.
[14] AMAR, *supra* note 5, at 145.
[15] 32 U.S. 243 (1833).
[16] Citations to these cases, involving the First, Fourth, Fifth, Seventh, and Eighth Amendments, are found in AMAR, *supra* note 5, at 354 n.41.
[17] Crosskey, *supra* note 11, at 141-43.
[18] AMAR, *supra* note 5, at 149-155.
[19] For example, in the debates over the Fourteenth Amendment Congressman Robert S. Hale (R-NY), a New York State Court judge from 1856-1864, was unaware of the holding of *Barron* and thought the Bill of Rights was already enforceable against the states. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (Feb. 27, 1866). For Bingham's reply to Hale see CONG. GLOBE, 39th Cong., 1st Sess. 1064 (Feb. 27, 1866). For other examples involving members of the constitutional convention in Nevada and the Supreme Court of Illinois, see Aynes, *supra* note 9. CHI-KENT L. REV. at 1247 n.326.
[20] AMAR, *supra* note 5, at 153 (citing the example of former New Hampshire Governor C. P. Van Ness arguing to the U.S. Supreme Court that "an error was committed by the Court . . . " in *Holmes v. Jennison*, 39 U.S. 540, 555 (1840)).
[21] Nunn v. Georgia, 1 Ga. 243, 250 (1846). *See* AMAR, *supra* note 5, at 149-155 (collecting and quoting cases).

In the 39th Congress

Citizens who believed they had, or should have, protection against the states under the Bill of Rights included an overwhelming majority of the 39th Congress. [22] Indeed, though they differed on the question of whether the Congress has the power to enforce the Bill of Rights against the states, almost to a person the Republican members of Congress believed that the Bill of Rights was applicable to the states. The account of a series of Congressional actions designed to implement that belief begins with the Freedman's Bureau.

The account of how the Freedman's Bureau, the "Bureau for the Relief of Freedmen and Referees and other persons," legislated the protection of rights contained in the Bill of Rights begins in the chronological middle. The legislation of July 16, 1866 continued the prior March 3, 1865 legislation for two additional years.[23] Its 14th clause provided that "all citizens" would enjoy a number of rights necessary to engage in life in 19th century society as a free person.[24] But immediately after listing a number of specific rights, the legislation continued "to have the full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and the disposition of estate, real and personal, including the constitutional right to bear arms . . . ." [25]

This provision is revealing on at least three levels. First, the terms "full and equal" tell us that there was both a substantive and equality guarantee. If this were only an equality provision, there would be no need for the use of the term "full." [26] As we think about what "proceedings" would guarantee "personal liberty and personal security," we immediately think about those which follow due process and the rights guaranteed against the federal government in the second, fourth, fifth, sixth, seventh and eight amendments, or, more commonly (most) of the Bill of Rights. This normal and natural reading of Section 14 is confirmed by the last clause quoted which says that

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[22] For a tentative account of the workings of the 39th Congress see Richard L. Aynes, *The 39th Congress (1865-1867) and the Fourteenth Amendment: Some Preliminary Perpsectives*, 42 AKRON L. REV. (forthcoming 2009).

[23] 14 Stat. 173 (1866).

[24] ". . . 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. . ." *Id.* at 176. Senator Trumbull (R-Ill.) based Congress' power to enact the Freedman's Bureau upon the Thirteenth Amendment, the Article IV Privileges and Immunities Clause, and the authority over naturalization. CONG. GLOBE, 39th Cong., 1st Sess. 504 (Jan. 30, 1866). House Judiciary Chairman James Wilson (R-Iowa), indicated that the Committee had changed the description of the beneficiaries from "inhabitants of" to "citizens of the United States in . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1292 (Mar. 9, 1866). This new terminology was consistent with Bingham's reading of the ellipses in Article IV and was likely the result of trying to conform the statute to Article IV, which protected citizens.

[25] *Id.*

[26] This plain meaning of the statute is also articulated in AKHIL REED AMAR THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION 178-179 (1998) and other sources which Professor Amar cites.

these "full and equal" rights "include . . . .the constitutional right to bear arms." The clause could have said "and the constitutional right to bear arms." But the use of the word "include" makes it clear that the normal reading is correct: it is not limited to the right to bear arms but includes other similar rights such as those protected by other constitutional amendments.[27]

We know that this is the case, in part, because its author, Senator Lyman Trumbull (R-Ill.), Chair of the Senate Judiciary Committee and a former Illinois Supreme Court Justice, indicated that the addition of this explicit protection to the original 1865 act made no change in the substance of the statute. [28] Moreover, Michael Kent Curtis has documented that this language had often been used in the past to include the protections of the Bill of Rights.[29]

From that provision, we can return to the beginning, with the 1865 Freedman's Bureau statute whose language read, in relevant part: "to have the full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition , enjoyment, and the disposition of estate, real and personal . . . ." From the plain reading of this provision, the confirmation by Trumbull that this provided the same rights as the 1866 amendment, and the history of these terms as recounted by Professor Curtis, we know that this 1865 version also enforced the Bill of Rights against the states. [30]

Further, we know that the issue of the enforcement of the rights contained in the Bill of Rights was a major issue of discussion in the debates over the 1866 Civil Rights Act.
The cornerstone of anti-slavery theory and anti-slavery judicial decisions from at least 1834 until such litigation became unnecessary in 1865, was a normal textual analysis of Article IV, which demonstrated that except for the full faith and credit clause of Section 1, there was no power for

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[27] Professor Curtis has reached a similar conclusion and documented past legal practices in equating the terms "personal security and liberty" with many of the rights guaranteed by the Bill of Rights. Michael Kent Curtis, *The Fourteenth Amendment: Recalling what the Court Forgot*, 56 DRAKE L. REV. 911, 936 (2008).

[28] CONG. GLOBE, 39th CONG., 1st Sess. 743 (Feb. 8, 1866) ("I think that does not alter the meaning."). I am grateful to Professor Curtis for calling this statement to my attention. The relationship between the Bureau and the Amendment, both of which were considered simultaneously in 1866, is shown in Speaker Schuyler Colfax's ruling, in a debate on a vote to override President Johnson's veto of the Freedman's Bureau Act. Congressman Bingham (R-Ohio) asked to have placed in the record a newspaper article about the veto causing "rejoicing by the people of the South." CONG. GLOBE, 39th CONG., 1st Sess. 1092 (Feb. 28, 1866). When the Democrats objected on relevancy grounds, Speaker Colfax ruled it was relevant because of the pending Constitutional amendment. He indicated that the Bureau act was "in regard to the right of certain persons" and that it may be "within the province of Congress to pass a constitutional amendment to secure those rights and the rights of others generally . . . ." *Id.*

[29] *See* Curtis, *supra* note 27, at 923 and n.47 (providing references and authorities to the use of these terms as a "shorthand summary of Bill of Rights liberties").

[30] As Bryan Wildenthal has noted, the Fourteenth Amendment was also intended to "placed the constitutionality of the Freedman's Bureau . . . beyond doubt." Wildenthal, *supra* note 4, at ___ **{JCLI at 133 and n. 456}**; *See also* JACOBUS TENBROEK, EQUAL UNDER LAW 201 (1965 ed.). I had highlighted this in my copy of the book, but had forgotten about it until reminded by Professor Wildenthal article.

the federal government to enforce Article IV. This being the case, Congress could not enact the fugitive slave acts and, for purposes of consistency, this theory combined with *Barron* meant that Congress also could not enforce the Bill of Rights under Article IV against the states. [31]

Just as it had in the Freedmen's Bureau Act, the leadership of the House was determined to provide enforcement for the Bill of Rights against the states through the Civil Rights Act. But this presented a dilemma for those who fought so long against slavery. Should they support their prior position and be consistent or should they be pragmatic, adopt a pro-slavery theory, and use it to support the Bill of Rights?

Congressman John Bingham (R-Ohio), former Chairman of the Judiciary Committee, Chairman of the House Committee on Reconstruction, and one of the senior members of the House, maintained the view of the idealists. [32] On March 9, 1866, Bingham stated that the "enforcement of the bill of rights is the want of the Republic." [33] Bingham noted that he wanted the Bill of Rights "enforced everywhere" and then expressed his view—the long-established antislavery view—that this could not be done under the 1866 Civil Rights Act, but could only be done with a constitutional amendment. [34] Bingham made it clear that he wanted an amendment "which would arm Congress with the power to compel obedience to the oath [to obey the constitution], and punish all violations by State officers of the bill of rights . . ." [35]

The Supreme Court, of course, had rejected this antislavery theory and held in *Prigg v. Pennsylvania*,[36] that the power to enforce Section IV could be implied and did so in upholding the fugitive slave acts. In Wilson's colorful phrase, he argued that the Congress should "turn the artillery of slavery upon itself" and use the *Prigg* precedent to support the cause of freedom by passing the Civil Rights Act and enforcing the Bill of Rights against the states. [37]

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[31] For a summary of this well known anti-slavery doctrine see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 74-78 (1993) (examining the theory and tracing the cases in which this theory was utilized— both successfully and unsuccessfully—from 1836 until right before the war in 1860).

[32] Bingham was 51, having been born in 1815. He had served in Congress from 1855 through 1862 and 1865-1866, for a total of nine years as of the time of the proposal of the Amendment. James F. Wilson was only 38, having been born in 1828. He had served in Congress, as of the date of the proposal of the Amendment for only five years (1861-1866). Biographical Directory of the United States Congress, 1774-Present, *available at* http://bioguide.congress.gov/biosearch/biosearch.asp.

[33] CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866) (emphasis added).

[34] *Id.*

[35] *Id.* This speech was re-published in a pamphlet for mass distribution, Hon. John A. Bingham, of Ohio, Remarks on the Civil Rights Bill, Delivered in the House of Representatives, (Mar. 9, 1866). (OhioLink search).

[36] 41 U.S. 539 (1842). *Contra*, *Dennison v. Kentucky*, 65 U.S. 66 (1861) *overruled* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

[37] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (Mar. 1, 1866).

Bingham's desire to have the Bill of Rights enforced against the states was not a secret. Rather, the speech was summarized in the *New York Times*[38] where the Bill of Rights goal was spelled out. According to Congressman William Lawrence (R-Ohio), this March 9th speech of Bingham's was "extensively published."[39] It was also printed as a pamphlet for mass distribution.[40] Of course, since it was in the *Globe*, the Senate knew that Bingham had expressed the view that the Bill of Rights should be enforced against the States. [41] As Wilson made clear:

> I find in the bill of rights which the gentlemen [Bingham] wishes 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 those constitute the civil rights belonging to the citizen in connection with those which are necessary for the maintenance and perfect enjoyment of the rights thus specially named . . . . [42]

Further, Wilson concluded 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." [43]

The House agreed with Wilson and, with Bingham voting in the negative, passed the Civil Rights Act, 111-38[44] and passed it again, over President Johnson's veto, 122-41. [45] Even Conservative Republican Senator James Dixon (R-Conn.), who would defect to the Democrats in 1868, thought that the Civil Rights Act protected constitutional rights:

> "Congress has given us, in the Civil Rights Act, a guarantee for free speech in every part of the Union." [46]

Thus, between 1865 and 1866 the Congress passed three sequential acts enforcing the Bill of Rights against the states. Further, these same ideas were also expressed in debate over the preliminary version of the Fourteenth Amendment in February 1866 and the final version introduced on May 2, 1866. Moreover, once the Fourteenth Amendment was adopted the Congress re-enacted the Civil Rights Act of 1866, making this the fourth statute they had passed that included enforcement of the Bill of Rights against the states. Given the oft-repeated view

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[38] *The Civil Rights Bill*, N.Y. TIMES, Mar. 9, 1866 at 1.
[39] CONG. GLOBE, 39th Cong., 1st Sess. 1837 (Apr. 7, 1866).
[40] Hon. John A. Bingham of Ohio, On the civil rights bill: delivered in the House of Representatives (1866). (OhioLink search, July 9, 2008).
[41] AMAR, *supra* note 5, at 1238 n. 200. On the Senate knowing of Bingham's role in authoring the amendment, see Aynes, *supra* note 31, at 81 n.14 (Senator and future Vice President Henry Wilson (R-Mass.)).
[42] CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Mar. 9, 1866).
[43] *Id.* (emphasis added).
[44] CONG. GLOBE, 39th Cong., 1st Sess. H.P. 1367 (Mar. 15, 1866).
[45] Bingham was one of twenty-one abstentions. CONG. GLOBE, 39th Cong., 1st Sess. 1861 (April 9, 1866).
[46] Curtis, *supra* note 4, (citing CONG. GLOBE, 39th Cong., 1st Sess. 2332 (May 2, 1866)).

that the Amendment would in some way consitutitonalize the 1866 Act, this provided double protection for the enforcement of the first eight amendments against the states.

In his speech upon an early version of the Fourteenth Amendment, Bingham noted that it was needed because previously "this immortal bill of rights embodied in the Constitution, rested for its execution and endorsement hitherto on the fidelity of the states."[47] The long pre-war struggle, the war itself, the "Black Codes" that made the Civil Rights Act of 1866 necessary, and massacres by white police and former Confederate soldiers at Memphis and New Orleans made it clear that the southern states were untrustworthy and federal enforcement was an absolute necessity. [48]

The *New York Times* reported the content of the speech: "This was simply a proposition to arm the Congress of the United States . . . with power to enforce the Bill of Rights as it stood in the Constitution." [49] This speech was also put into a pamphlet form. The title page of the pamphlet listed Bingham's name, the fact that the speech was made in the House of Representatives, the date, and then indicated it was"[i]n support of the proposed amendment to enforce the Bill of Rights."[50]

On at least six occasions, Bingham specifically said that the Fourteenth Amendment would enforce the Bill of Rights against the states. [51] He specifically stated that the amendment would overturn the practical effect of *Barron v. Baltimore*,[52] the Fifth Amendment case where John Marshall first held for a unanimous Supreme Court that the Bill of Rights did not apply against the states. Further, he indicated it would overturn *Livingston v. Moore*,[53] a Seventh Amendment case which followed *Barron.* At various times in the debates he indicated that the

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[47] CONG. GLOBE, 39th Cong., 1st Sess. 1089 (Feb. 28, 1866) (emphasis added).

[48] The underlying facts of these events are, in some instances, discussed below. For a summary of this era of our history see JAMES MCPHERSON, BATTLE CRY OF FREEDOM 1-233 (1988), ERIC FONER, RECONSTRUCTION (1988), and ERIC FONER, FOREVER FREE, THE STORY OF EMANCIPATION AND RECONSTRUCTION (2005).

[49] *Washington News*, N.Y. TIMES, Mar. 1, 1866 at 5.

[50] AMAR, *supra* note 5, inside of book cover (emphasis added by underlining). Though this speech related to the earlier version of the Amendment, Bingham's speeches make it clear this was a consistent goal. Also, he viewed the ultimate version of the amendment stronger than the first because it more explicitly limited the states and also provided enforcement power to Congress. Curtis, *supra* note 27, at 948 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. App. 83 (1871)).

[51] *See* CONG. GLOBE, 42nd Cong.., 1st Sess. App. at 84 (Mar. 31, 1871); CONG. GLOBE, 39TH CONG., 2d Sess. 811 (Jan. 28, 1867); CONG. GLOBE, 39th Cong., 1st Sess. 2541-42 (May 10, 1866); *Id.* at 1291-92 (Mar. 9, 1866); *Id.* at 1089-90 (Feb. 28, 1866); *Id.* at 1034 (Feb. 26, 1866).

[52] 32 U.S. 243 (1833). As Professor Curtis has pointed out, Senator Howard also described the effects of *Barron*, without mentioning it by name, and indicated that the Fourteenth Amendment would produce a different result. Curtis, *supra* note 4, at ___. {**JCLI Draft p. 30 n. 128**(citing CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 28, 1866)). *Accord* Wildenthal, *supra* note 4, at ___ **{JCLI 128}.**

[53] 32 U.S. 469 (1833).

amendment would prevent future violations of the first, second, fourth, fifth, seventh and eight amendments.[54]

All seem to agree that Senator Jacob Howard's speech in the Senate indicated that one of the purposes of the Amendment was to enforce the Bill of Rights against the states. [55]

There is support for the statements of floor leaders Bingham and Howard in the ratification process, showing how the public understood it. The message of Ohio Governor and former Union General, Jacob Cox, transmitting the proposed Amendment to the Ohio legislature with his endorsement is well known. Cox described Section 1 as authorizing the national government "to protect the citizens of the whole country in their legal privileges and immunities" against the States. According to Cox, this provision was necessary "long before the war, when it was notorious that <u>any attempt to exercise freedom of discussion</u> in regard to the system which was then hurrying on the rebellion was not tolerated." Further, Governor Cox indicated that the necessity of having "a reserved right to protect the freedom of the slaves whom the war emancipated is too palpable for argument." [56]

Indeed, one of the key beliefs of Union leaders was that the suppression of free speech had lead directly to the failure to abolish slavery, the rebellion, and deception to support the rebellion. In his July 4, 1861 message to Congress, Lincoln indicated that "[t]here is reason to believe" that, except for South Carolina, a majority of men in every state were for the union and opposed to secession. [57] After the war, President Andrew Johnson insisted that thousands of people who

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[54] *See* Aynes, *supra* note 31, at 70 n.72 for citations to specific speeches identifying specific constitutional provisions.

[55] CONG. GLOBE, 39th Cong., 1st Sess. 2764-667 (May 23, 1866). Some writers have tried to diminish the importance of Howard's speech or draw unsupported inferences from it. I treat those claims below. *See infra* Section VII, B.

[56] Ohio Executive Documents, 57th Gen. Assembly 281-282 (1867) (emphasis added). Professor Thomas quotes portions of this document, Thomas, *supra* note ____, at **{Draft 38. Still in his paper?}.** But he then attempts to minimize its importance by saying that enforcing the Bill of Rights "was a knife that cuts both ways . . . ." *Id.* He next cites Democratic concerns about lack of free speech in the south by former Confederates to criticize the reconstruction.

There are two answers to this. The Fourteenth Amendment would have no effect upon federal institutions such as the U.S. Army and the Freedmen's Bureau that were working the south or in areas where the writ of habeas corpus has been suspended. Further, if he is correct, then this should have led the elitist white former slaveholders to support the Fourteenth Amendment. We know from the actions of Democratic leaders like Senator Reverdy Johnson (D-Md.) and Senator Thomas A. Hendricks (D-Ind.), that this was not the case. *See infra* note 292**.** Second, Bingham made it clear that even traitors were "persons" who would benefit from the protection of the fourteenth amendment equal protection clause, though he did note that in his opinion "[t]hey ought to thank God they are permitted to live anywhere on this side of the deepest hell." AYNES THE HISTORY OF OHIO LAW 390 (Michael Les Benedict and John F. Winkler eds.. year) (quoting Bingham's 1866 speech at Bowerston, Ohio).

[57] Special Message to Congress, July 4, 1861, ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865 (Don E. Fehrenbacher, ed. 1984).

were involved in the rebellion were "deluded, [and] deceived" by a small group of instigators." [58] As late as 1871 Congressman Bingham told voters that he knew that "hundreds of thousands of the Southern people" had been loyalists and gave support to the rebellion only after resistance to it was impossible. [59]

Not surprisingly, these same views were expressed on the campaign trail and recorded in newspapers during the 1866 Congressional elections. On August 6, 1866 the "eloquent" speech of Bingham was reported in the *Cincinnati Gazette* and a number of other papers.[60] In this speech Bingham's discussion of the privilege and immunities clause indicated that "[f]reedom of conscience is one of the privileges of the citizen and [of] the United States" and that "men are not to be put to torture, sent to the dungeons or made to walk the narrow steps of the scaffold for teaching their children the holy precepts of our Lord and Master." [61] Further, Bingham invoked antiestablishment clause principles, affirming that "we do not ally the church and the State . . . ."[62]

Another newspaper account of an 1866 Congressional campaign speech by Bingham was his August 24, 1866 speech in Bowerstown, Ohio. This speech was published in the *Cincinnati Commercial* and republished in its book *Speeches of the Campaign of 1861 in Ohio, Indiana, and Kentucky*.[63] The headline in the *Commercial* was "The Constitutional Amendment Discussed by its Author." In his discussion of the Amendment Bingham indicated that it "imposed a limitation on the States to correct their abuses of power" and was "essential to the nation's life." Bingham

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[58] Aynes, *supra* note 56, at 373.

[59] One of the ways in which this makes sense is that even Unionists—or maybe especially Unionists—were drafted into the Confederate Army. A common strategy was to assign them to some unit away from the home to prevent them from deserting and denying them support from their families. Examples of this are provided A.W. BISHOP, LOYALTY ON THE FRONTIER OR SKETCHES OF UNION MEN IN THE SOUTHWEST 128-131 (1863) (one example involved the arrest of 77 Unionists who were marched in chains to Little Rock and given the choice of being hung or serving in the rebel army; only ten were still living by the time of the Battle of Shiloh and these men were all placed in the front lines because they were considered unreliable; all but two were killed during the battle and one of those who survived was wounded; he eventually was able to escape into Union lines and enlisted in the First Arkansas Cavalry, a Union Regiment). Over 100,000 white Union soldiers came from southern states. RICHARD N. CURRENT, LINCOLN'S LOYALISTS 218 (1992) (giving an account of prior estimates and how he arrived at this figure).

[60] Cadiz (Ohio) *Republican*, Aug.16, 1866, indicating that the original speech was reported in the Cincinnati *Gazette* and was being reprinted in the *Republican*. *See also Cincinnati Daily Commercial*, Aug. 10, 1866 at 1 quoted in Gerald N. Magliocca, *Indians and Invaders; The Citizenship Clause and Illegal Aliens*, 10 J. OF CONSTITUTIONAL LAW 499, 518 n.92 (2008) which seems to be quoting this same speech.

[61] *Id.*

[62] *Id.*

[63] [hereinafter CAMPAIGN SPEECHES]. The book was published by the *Cincinnati Commercial* in 1866. It was obviously published after the election because the last portion of the book gives the results of the election. But this means that the book may still have played a role in the ratification of the Amendment. Of course, the original articles played a role in the Congressional elections of 1866.

declared the adoption of the Amendment "essential" to the peace and safety of the Republican. In part of his discussion he indicated that the state would no longer be able to "take away freedom of speech" or imprison people for "teaching their fellow man that there is a hereafter, and a reward for those who learn to do well." [64] After discussing other portions of the Amendment, Bingham closed by asking not just his constituents, but the "American people" to "place in the Constitution of the country that covenant of equal and exact justice . . . which will make the Republic perpetual." [65]

Bingham was not the only Congressman to speak to the electorate about the meaning of the Amendment. On August 28, 1866 Congressman Columbus Delano (R-Ohio) gave an extended speech at Coshocton, Ohio.[66] In a section of the news report titled "The Amendment—Clause First," Delano noted that it defined citizenship, which "provides that the privileges and immunities" of citizens "shall not be destroyed or impaired" by the states, and provided for due process of law. [67]

In explaining what this meant Delano proceeded:

> I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the '*chivalry*' of the Southern slaveholders. I know that you remember when an able lawyer from Massachusetts was expelled from South Carolina by a Southern mob. And I know that we determined <u>these</u> privileges and immunities of citizenship by this amendment of the Constitution ought to be protected, and I know you have lost your reason,

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[64] The latter statement is undoubtedly, as Professor Gerald N. Magliocca has suggested, a reference to Georgia's draconian statutes that applied to Missionaries to the Cherokee Indians before their removal from Georgia. Magliocca, *supra* note 60, at 518. A slightly different version urged Tennessee to ratify the fourteenth amendment and every southern state to follow suit: "Then, hereafter, in Georgia, men shall not be imprisoned, as in the past, for teaching the lowly to read in the New Testament of another and a better life." *Id.* at fn. 92. Again, one must ask, how could this be prevented without the enforcement of the Bill of Rights against Georgia?

[65] CAMPAIGN SPEECHES, *supra* note 63, at 19 **(**Bingham: Bowerstown speech**)**.

[66] CAMPAIGN SPEECHES, *supra* note 63, at 23. This speech was reported by a correspondent of the *Cincinnati Commercial* and no doubt published originally in the *Commercial*. It seems probable that the speech was re-published at least in the newspapers of Delano's own 13th Congressional District. Delano served as a Whig (1845-1847) and Republican (1865-69) in Congress and as the U.S. Secretary of the Interior (1870-1875).

[67] Delano made no mention of the equal protection clause. *Id.*

every man of you, who denies the propriety of their protection. [Applause.]"[68]

Delano's clear statement that the amendment would protect "citizens of the South and of the North going South" demonstrates that he did not view the amendment as a mere "equality" or "non-discrimination" provision, but rather one that provided substantive rights. Read fairly, this speech indicates that there was to be a substantive right of free discussion for all in the South and that mobbing and banishment was to be prevented.

General Rutherford B. Hayes, war hero,[69] Congressman and future President of the United States, made a public speech at the Cincinnati City Hall on September 7, 1866. [70] Hayes began his speech by noting there were only two plans of reconstruction: The Union Plan, which followed the policy of Lincoln, and the "rebel plan." [71] As Hayes outlined it, "the Union men of the country" had beliefs which included that African Americans were entitled to "*freedom, and protection in the full enjoyment of the inalienable rights of man.*" [72]

Hayes summarized the "rebel" plan as follows:

> Loyal white men and loyal [Black] men are to be protected alone in those States by State laws, executed **{?}** by State authorities, as if they were loyal States. [73] { ? = same as on p. 11} I was not able to verify this quote with the copy of Campaign Speeches I found. It did not include page 28.

Hayes insisted that such a plan was "wrong in principle, wrong in its details, and finally wrong as a precedent and example for the future." [74] He insisted that only the constitutional amendment could protect the loyalists of the south. Hayes said that "no Union man" can object to the Amendment because the terms are "few in number, easily understood, and manifestly just." [75]

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[68] *Id.* at col. 3. The italicized emphasis was in the original. The underlined emphasis was added by the author.

[69] Hayes commanded soldiers in mostly what were considered smaller battles but did so with success. He was wounded twice and injured a third time when his horse what shot out from under him. Though he acceded in his nomination to Congress, he refused to leave the battlefield until the fighting was over. *See* HANS L. TREFOUSSE, RUTHERFORD B. HAYES 21-38 (2002). Grant noted in his memoirs that Hayes' "conduct on the field was marked by conspicuous gallantry as well as the display of qualities of a higher order than that of mere personal daring." ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT 480 (2001 reprint).

[70] "The Questions of the Day," CAMPAIGN SPEECHES, *supra* note 63, at 28.

[71] *Id.* at col. 1.

[72] *Id.*

[73] *Id.* (emphasis added).

[74] In this regard, Congressman Hayes' views seem to be consistent with Madison's idea of "double security." *See infra* note 202. This concern about the unreliability of the state is articulated by Bingham's view that one reason for the need for the Fourteenth Amendment was to put the guarantee of rights into the Constitution "thus placing [them] above the power of South Carolina to repeal [them]." Curtis, *supra* note 27, at 925 (citing CONG. GLOBE, 39th Cong., 1st Sess. 123 (Dec. 21, 1866)).

[75] *Id.* One of the goals that Hayes indicated the Amendment was designed to achieve was to remove "every relic of slavery from the Federal Constitution and from the constitutions and laws of all the States." *Id.*

Judiciary Chair James Wilson's (R-Iowa) articulated the need for Fourteenth Amendment protection of citizens in a campaign speech in September 1866:

> We must still guarantee . . . the liberty of going into any part of the United States and causing their type to speak as freely as when our Army was there. . . . [The boys who fought the war] must have the same liberty of speech in any part of the South as they always have had in the North . . . . [76]

These views are very similar to those of the "call" for the Convention of Southern loyalists that took place in Philadelphia which Professor Curtis has documented. [77] Curtis indicates that the "call" for the convention was circulated in writing and then again read at the Convention when it met in September of 1866:

> 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 right of the citizens must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe.' [78]

According to Curtis:

> the loyalists' Appeal of the Loyal Men of the South to Their Fellow Citizens was widely reprinted in the Republican press. It reflected the loyalists' understanding that free speech rights were among the rights of citizens of the United States that states must respect. It said that 'seeds of oligarchy [were] planted in the constitution by its slavery feature' and had produced monstrous results . . . . Statute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition for redress of grievances; it proscribed democratic literature as incendiary; it nullified constitutional guarantees of

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[76] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 253 (1986) (citing *Burlington* (Iowa) *Hawk Eye*, Sept. 13, 1866, at 1, col. 2). In this same speech Wilson argues that the former slaveholders should not be compensated for the loss of slaves.

[77] 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, 1134-35 (2000).

[78] *Id.* (emphasis added).

> freedom of free speech and a free press; it deprived citizens of the other States of their privileges and immunities in the States . . . . [79]

On August 30, 1866 the *North American* (Pa.) responded to the question of what constituted one's privileges or immunities under the amendment:

> The privileges and immunities . . . are those of not having your private letters opened and read by emissaries of the oligarchy . . . ; of not having your political sentiments regulated by the same absolute authority; of not being beaten, maimed, murdered or driven away from exercising freedom of speech or the press; of holding meetings or conversations for lawful purposes; the privilege of looking after your property in your own way; of collecting your debts by lawful means. . . ; of organizing your political party and voting your own ticket without intimidation or molestation." [80]

There were other public speeches that corroborate the nationalization of protection. General, Congressman, and future President James A. Garfield (R-Ohio) spoke at the convention in Toledo that re-nominated Congressman Ashley (R-Ohio) for his fifth term in Congress. Among other matters, Garfield affirmed that the amendment would protect "individual rights." [81] Garfield indicated Congress passed the Civil Rights Act because "the courts of the South do not recognize these men as having any civil rights . . . ." [82] In rejecting President Johnson's claim that "the great law of supply and demand" would protect African Americans, Garfield made it clear that the type of protection in which he, Garfield, was advocating and what would be provided by the Fourteenth Amendment was the protection of "personal liberty" and "individual rights." [83]

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[79] *Id.*

[80] *North American* (Pa.) Aug. 30, 1866, at 2, col. 3 quoted in Curtis, *supra* note 76, at 144, who in turn quoted from James Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania,"* 18 AKRON L. REV. 435 (1985). Professor Curtis indicates that Bond concluded that this provision supports "selective incorporation." The fallacy of Bond's logic is discussed below in section VIII.

[81] This is consistent with and reinforced by knowledge of Garfield's speech upon the floor of Congress where he indicated that personal rights and liberties must be "in the keeping of the nation" and that rights relating to life, liberty and property could "no longer [be] left to the caprice of mobs or the contingencies of local legislation." Curtis, *supra* note 27, at 945 (quoting CONG. GLOBE, 39th Cong.,1st Sess. 1757 (April 4, 1866)) . Only by invoking federal authority, could one prevent the evils against which the amendment was designed. Indeed, Garfield's position is the same as that articulated by John N. Pomeroy in 1868. *See infra* notes 230-243 and accompanying text.

[82] *Id.*

[83] *Id.* General George W. Morgan, the unsuccessful Democratic candidate for Ohio Governor in 1865, endorsed President Johnson's plan and paraphrased it as "[l]et [the Freedman] rely on himself *and his former master for protection.*" CAMPAIGN SPEECHES, *supra* note 63, at 16, col. 3 (emphasis added).

In reference to Section 4, Garfield indicated that if the Democrats won control of the government they would repudiate the federal war debt. [84] In the remaining portion of that sentence Garfield said: "[N]ot only so, but all that has been gained substantially in the war would be lost. Let that party triumph this fall, and Union men can not stay any longer in the South." [85] According to Garfield, the "scenes of the New Orleans" massacre would be "re-enacted in every city of south. Our friends who were once soldiers, and who are now settled there, are already being told to leave . . . ." [86]

Garfield expressed regret that the audience could not hear from "that able man who has suffered in the South, Governor [Andrew Jackson] Hamilton" about whom Michael Kent Curtis had written for so long. [87] "[Hamilton] said that he could not live in Texas but for the great Union party at the North . . . ." [88]

Garfield noted that President Johnson argued that the white slaveholder had to be admitted to Congress because the U.S. did not believe in taxation without representation, to which Garfield replied:

> Then, why do you refuse representation to four millions of [N]egroes? Yet you and your party deny their right to representation but claim your right to tax them to the very utmost. [Loud applause.] [89]

In other ways Garfield met the racial issue head on:

> I had ten thousand times rather take by the hand a [B]lack man who is loyal than the whitest-skinned man on earth who is a traitor to my country. [Loud applause.] [90]

Ashley was renominated by acclamation and the platform adopted made it clear that the convention endorsed the Amendment. [91] The platform also made it clear that the spirit of slavery was not dead and that new protections were necessary:

> *Resolved*, That in the recent butchery of loyal Union citizens of the United States, throughout the South, and especially in New Orleans, we recognize the same old spirit of despotism, cruelty and injustice, . . . and we believe, if these horrible massacres of peaceful and unoffending citizens, by rebels, are

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[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*. Professor Curtis first called our attention to Governor Hamilton in 1986. Curtis, *supra* note 76, at 133-134 and 137.
[88] *Id*.
[89] *Id*.
[90] *Id*. Garfield stated that the Democrats "hate" the Black man not because of the color of his skin, but because he was loyal while they were disloyal.
[91] *Id*. at col. 2.

continued, that another civil war is inevitable. [92]

In addition, Congressman, Senator and future Secretary of Treasury, John Sherman (R-Ohio), stated that the nation was "bound by every obligation . . . to protect [African Americans] in all their natural rights." [93] To this, the reporter indicated the audience responded with "tremendous applause." [94] Sherman further indicated that Congress "demanded protection to every loyal man . . . ."

Professor Thomas expressed surprise to find racist articles in Maryland,[95] and in his final paper broadens this to other northern states. [96] But it is well known that Democratic efforts in the

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[92] *Id.* (emphasis in original).
[93] CINCINNATI COMMERCIAL, Sept. 29, 1866 at 39.
[94] *Id.*
[95] Professor Thomas quotes the vituperative language of the 1868 Democratic Platform, without much pause over the fact that the Democrats lost that race, by over 300,000 votes, with the Republican receiving 52.7% of the popular vote. The Democrats only carried eight of the thirty-three states: Delaware, Georgia, Kentucky, Louisiana, Maryland, New Jersey, New York, and Oregon. Five of the eight states were slave states until the adoption of the Thirteenth Amendment in 1865. They lost the electoral vote overwhelmingly: 214-80. By utilizing the popular vote and ignoring the distribution that produced the electoral vote, he concludes that the Democratic campaign "was not a colossal failure." Thomas, *supra* note ___, at ___ **{JCLI Draft p. 25}**. But this anachronistic. The Democrats did not see it that way. Indeed, though the Horace Greely debacle of 1872 produced the lowest percentage vote for a Democratic candidate (43%) between 1860 –1892, WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 71 (1979), Seymour's 1868 percentage of 47% was not significantly above it. Gillette termed both the 1868 and the 1872 elections "catastrophic." *Id.*; *see also* FONER, *supra* note 48, at 267 (referring to the 1866 Congressional elections as "a disastrous defeat"). [more than one Foner source is cited at fn. 48].

The losses in the Congressional elections of 1866 and the Presidential election of 1868 were so devastating that some Democrats realized if they held to that platform they would never again prevail in a national election. This caused them to abandon their 1868 platform and announce what was termed the "New Departure." ERIC FONER, RECONSTRUCTION **1863-1877** 412 **(1988)** ("The advocates of a New Departure argued that their party could only return to power by putting the issues of Civil War and Reconstruction behind them.").

While there is no dispute that the Democrats who used a racist approach to campaigning existed in all states, it should be noted that they were in the minority in four of the seven so-called "sympathetic border states" named , Thomas *supra* note __, at ____ {**JCLI Draft p. 23.}**, with Indiana, Missouri, Ohio, and Kansas having voted Republican in the 1868 election.

This misperception about the extent of the influence of the racists within the Democratic party and the party's minority status is illustrative of the context that is missing from much of the article. Without intending to be exclusive, four more examples stand out:

1. There is a continuing reference to "Radical Republicans" Thomas, *supra* note ___, at __ **{JCLI Draft at . 23, 25, 44, 45)**, as if they controlled Congress and/or wrote the Fourteenth Amendment when, in fact, Congress and the content of the Amendment were controlled by the moderates and not the radicals. Even the conservative *New York Times* considered the Amendment to be a moderate proposal which would unite all elements of the Republican majority. FONER, *supra* note __, at 260; Aynes, *supra* note 56, at 385-386 and sources cited therein; and Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L. J. 1509, 1559 (2007) (on support of Johnson's veto of the Civil Rights Act).
2. Professor Thomas refers to "[t]he South" having "rejected the Fourteenth Amendment."

election of 1866 included the "most vicious race baiting in all of American History." [97] They "employed mean-spirited and vicious rhetoric to appeal to voters' basest prejudices and fears."[98] Northern Democrats as well as Southern ones thought—as they had in past elections—that the society was so racist that the Democrats would win running against African Americans. They were wrong. They pursued that strategy and lost overwhelmingly, reversing the trend where the majority party loses "off-year" elections.[99] *The Nation* concluded that the Republican victory was "the most decisive and emphatic victory ever seen in American politics." [100]

One example of the losing Democratic approach is found in the speech of former anti-war Congressman Clement L. Vallandigham (D-Ohio). [101] A key claim of Vallandigham was that the Civil Rights Bill could not rightly be enacted by either Congress or a state legislature and that its "fixed purpose" was to "obliterate all distinctions on account of color and thus literally to prepare the way for making this not a white man's government, but a government of [N]egroes, or a mixed government." Under the title "The Constitutional amendment" Vallandigham focused upon the citizenship clause, the privileges or immunities clause, and the enforcement clause.

The articulated concern was that, when combined, these constitutional clauses would overcome the state constitution of Ohio, which limited the right to vote to white citizens.[102]

Thomas, *supra* note ____, at ___ **{JCLI draft at 23}**. Though he does not clearly state this, what he is referring to is the Andrew Johnson all-white minority governments (replacing the loyal Lincoln governments) which followed Johnson's lead in rejecting the Amendment.
As soon as the Congress organized more democratic governments that allowed the majority of males to vote in Southern States, those more democratic governments ratified the Amendment. In this context Thomas is defining "South" to count only the former slaveholders, the prior oligarchy, and those formerly in rebellion, Thomas excludes from the term "southerner" the over 100,000 white southern soldiers who fought for the Union Army, the over 200,000 African Americans soldiers who fought for the Union, and many others who were loyal but did not engage in the war. Functionally, he defines "the South" as the white anti-Republican *minority* and excludes all others no matter where they were born, resided or held citizenship.

3. There is no demonstration of familiarly with the anti-slavery legal theory (1834-1865) and Republican ideology that would place some of the articles he discounts into context. In many instances, this familiarity would change the conclusion reached about the meaning of the newspaper articles.
4. The claim that the equal protection clause "was probably understood" to mean that "a prosecutor could not use peremptory challenges to exclude [B]lacks from jury service," Thomas, *supra* note ___, at ___**{JCLI 30}**, seems particularly anachronistic.

[96] Thomas, *supra* note __, at 28.
[97] ROBERT D. SAWREY, DUBIOUS VICTORY 4 (1992).
[98] *Id.* at 6.
[99] FONER, *supra* note ___, at 267. [Foner is cited more than once, each referring to different sources. I cannot tell which Foner cite fn. 99 and 100 refer to. See fn. 48.]
[100] FONER, *supra* note ___, at 268 (citing *Nation*, Nov.15, 1866).
[101] CAMPAIGN SPEECHES, *supra* note 63, at 42 col. 2.
[102] *Id.* Though Vallandigham does not explicitly equate voting with citizenship and, indeed, by the discussion of Section 2 later may not be making that claim, the speech is imprecise enough that one cannot tell whether the objection is to African American citizenship or voting or both. He does claim that the

Claiming that the state constitutions of Indiana, Illinois, and "nearly" every Northwestern state contained provisions "against [N]egro suffrage, against [N]egro equality,"[103] Vallandigham argued that the enforcement clause was designed so that "no State shall be allowed to enforce the provisions of its own Constitutions."[104]

Immediately after the quoted section, Vallandigham quoted, verbatim, the privileges, or immunities, clause of the Amendment and then stated this conclusion:

> So, henceforward, it is not to belong to the State authorities to determine any question that shall, in the judgment of Congress, or the courts of the United States, abridge the immunities or privileges of the [African American] population, not of the South only, but of the Northwest also.[105]

A speaker who spoke against Congressman Delano (R-Ohio) was the unsuccessful Democratic candidate for Governor of Ohio, General George W. Morgan. Morgan had a mixed war record, having resigned from the Army in June 1863 because he was not viewed well by his commander, General William T. Sherman, and because Morgan opposed the abolition of slavery.[106] Morgan's key concern with the Amendment was that because it defined citizenship and took away from the states the right to determine who would be citizens, it was "another bold stride toward a central despotism." [107] Morgan concluded that if the federal government had the right to define who were citizens, "it would be at once claimed that [the Federal Government] also had the right to define the rights of such citizens . . . ." [108] The problem with that, according to Morgan, was "we should soon have [N]egro jurors, voters, judges, and legislators in Ohio, by virtue of laws of Congress." [109]

After quoting a portion of Section 2, Morgan indicated that "[t]he object of the amendment, then, is to create [N]egro judges, jurors and legislators, and, if you refuse to make [N]egros your

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Amendment's definition of state citizenship was a violation of "a fundamental principle of our Federal system" that the state defined citizenship. *Id.* Of course, prior to the war the Democrats denied that the state had the right to define state citizenship to include African Americans.

[103] *Id.*

[104] *Id.*

[105] *Id.* This view would, of course, be consistent with enforcing the Bill of Rights against the states. Keeping his focus upon race, Vallandigham proceeded to object to Section 2 which might result in African-American voting rights. One might wonder why this speaker or any Democratic speaker would talk about something as politically insignificant or complicated as the grand jury or the right against self-incrimination, when they thought they could win with a straightforward racist appeal?

[106] STEWART SIFAKIS, WHO WAS WHO IN HE CIVIL WAR 456 (1988). He also supported McClellan against Lincoln in the 1864 Presidential election. *Id.*

[107] CAMPAIGN SPEECHES, *supra* note 63, at 16, col. 1.

[108] *Id.*

[109] *Id.*

political equals, then you are to be partially disfranchised. [Applause.]" At that point, Morgan invited the people in the audience who favored this to vote for Delano "and if elected he will aid you in placing yourselves, your wives, sons and daughters, on a level with the [N]egroes."[110]

Morgan also campaigned against "Negro Suffrage" in the District of Columbia, the wool tariff, domination ("vassalage") by New England,[111] and, to the soldiers, claimed that "you languished in prison because [Secretary of War] Edwin M. Stanton thought more of the [N]egro than he did of you . . . ." [112]

Continuing his appeal to irrational racism, Morgan pounded Delano's record:

> Columbus Delano voted to establish [N]egro equality at the National Capital [by voting for suffrage]. Nor is this all. He voted for a similar bill to establish [N]egro suffrage in the Territories [and] voted for the Civil Rights Bill, thereby creating the right of [N]egroes to sit on juries, even in violation of the Constitution and laws of any, or every State. [113]

The core of his views was:

> These men, who claim to be your leaders, assert that the [N]egro is the equal of the white man. . . . Can you then, consistently with your own self-respect, support the men who have sought to betray—yes, and degrade you? [Applause.] [114]

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[110] *Id.* Note the focus upon female relatives and the avoidance of any mention of male relatives.

[111] *Id.* Morgan claimed Ohio was "ruled by New England!" He said that Senators—he meant all members of Congress—who were originally from New England brought those ideas to other states and included Columbus Delano (R-Ohio), Thaddeus Stevens (R-Pa.), Benjamin Wade (R-Ohio), and Judge Trumbull (R-Ill.). He urged the men of Ohio to "break the shackles which the schemers of New England have thrown around us." *Id.*

[112] The policy of refusing to exchange prisoners of war unless the Confederate states included African American Union Soldiers was a policy of U.S. Grant. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM, THE CIVIL WAR ERA 793 (1988) ("No distinction whatever will be made in the exchange between white and [Black] prisoners."). Morgan lacked the courage to name him because he was so popular and named Secretary of War Stanton, instead. Of course, the real fault was with the Confederate States who refused to treat African Americans as soldiers.

[113] *Id.* at col. 3.

[114] *Id.* Morgan tried to link his view to that of Henry Clay, Daniel Webster, and Abraham Lincoln. Professor Thomas takes the Democratic Platform of 1868 at its modern word when it claimed in 1868 it wants to right to avoid "centralization" and "consolidated government." Thomas, *supra* note ___ **{JCLI at 25.** }.

In summarizing the 1868 Democratic Convention a leading historian of the times says: "[I]t was abusive in tone, intolerant in feeling, imprudent in its reconstruction plank, contradictory in economic policy, and impolitic in its nominations. The party thus guaranteed that it would be unsatisfactory to the moderate conservative voter, would alienate unionist Democrats, and would antagonize Republicans." WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 14 (1979). The 1866 speeches of former Congressman Vallandigham and General Morgan show what Democrats wanted was the "state's right" to continue to completely control the emancipated slave and the unionist in the borders of their states. They wanted to be able to deal with the almost 1,000 murders that General Sheridan said took place in Texas in the usual way:

However, while these racist appeals may have increased the Democratic vote, they were ultimately unsuccessful in winning the Congressional elections of 1866 or the Presidential election of 1868.

Once the amendment was ratified in 1868, until approximately 1873, there was near universal agreement that the Bill of Rights could be enforced against the states. We see this in the work of Robert Kaczorowski who documents that this was the view of the prosecutors who brought cases for violations of the enforcement statutes under the Fourteenth Amendment. [115] Indeed, as *Cruikshank* illustrates, we see this in the view of heroic prosecutors at least up until 1876. [116] This agreement was also shown in many of the early cases decided under the Fourteenth Amendment in the lower Courts before 1873 and in the positions taken by various Justices of the Supreme Court on the Circuit or in private correspondence. [117]

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to prosecute no one for the murder of a unionists or African American. They wanted to deal with the African Americans by the "Black codes" which made African Americans virtual slaves of the state. They wanted to deal with the terrorist assaults upon white and Black Republicans, like those of Memphis and New Orleans, as they had always done: give them tacit approval, refuse to protect the victims, and to refuse to prosecute the terrorists. So the terrorists and their political allies were indignant. Why does that surprise anyone and why do we care?

[115] This was also the view of the U.S. Attorneys' office and key decisions of the lower federal courts. ROBERT J. KACZOROWKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N. Y. U. L. REV. 863 (1986); U.S. v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); U.S. v. Mall, 26 F.Cas. 1147 (S.D. Ala. 1871) (No. 15,712). It is unclear whether Hall and Mall are the same case or two separate cases. *See* Aynes, *supra* note 31, at 98 n.262.

In his decision upon the Circuit in the *Slaughterhouse Cases*, Justice Joseph Bradley indicated that police regulations "cannot [interfere with liberty of conscience, or with the entire equality of all creeds and religions before the law. Nor can they] . . . interfere with the fundamental privileges and immunities of American citizens." Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408). Further, in his dissent in the Supreme Court, Bradley specifically listed trial by jury, free exercise of religious worship, free speech, free press, the right of assembly, the prohibition against unreasonable searches and seizures, and due process as privileges and immunities. The Slaughter-House Cases, 83 U.S. 36, 118 (1873) (Bradley, J., dissenting); Aynes, *supra* note 9, at 1257 n.397. The privileges and immunities were not limited to the Bill of Rights. Earl Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L. J. 934, 966-67, 970 (1984).

[116] United States v. Cruikshank, 92 U.S. 542 (1875).

[117] *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627, 671 (1994). (quoting a letter in which Field indicated that the amendment approved by Congress "appears to me to be just what we needed."); I THE SALMON P. CHASE PAPERS, JOURNALS, 1829-1872 (John Nevin ed., 1993) (Diary entry of Justice Chase about his conversation with southern leaders urging them to make support of the Fourteenth Amendment the platform for the 1866 elections; entries of Wednesday, Sept. 5, 1866 at 632 and Monday, Sept. 24, 1866 at 640).

In addition, this was the unanimous view of the only three legal treatises published between 1866 and 1868 which also commented upon the effect of the pending amendment. [118] In addition,

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[118] JUDGE TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1867); JUDGE GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED (1868); DEAN JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1868).
For an analysis of the text of these works and the status of their authors, see Aynes, *supra* note 31, at 83-94. There were at least four other treatises published in 1867 or 1868 which did not acknowledge the pending amendment or comment upon its effect if adopted. Those treatises were WILLIAM WEDGEWOOD, THE GOVERNMENT AND LAWS OF THE UNITED STATES(1867); GEORGE COMSTOCK, COMMENTARIES ON AMERICAN LAW BY JAMES KENT (11th ed. 1867); WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES (1868); and THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

Professor Wildenthal and Professor Dripps would add an examination of treatises by JOEL E. BISHOP, CRIMINAL PROCEDURE (1866) and FRANCIS WHARTON, CRIMINAL LAW (1868). When I first started examining treatises, I was focused upon those that addressed Constitutional Law and would not have looked either of these treatises. That is not a reason to disqualify them, simply an explanation of my own past research. We can examine treatises in the ratification period for multiple purposes, but I will have to defer that pleasure to the future.

There is some dispute over the importance of Cooley in determining the meaning of the amendment. Professor Wildenthal agrees with my conclusion that Cooley's 1868 treatise did not mention the Fourteenth Amendment and that therefore it cannot help us in knowing what, if any, contemporaneous opinions Cooley may have had about the adoption of the amendment or its goals. He does suggest that I have mis-read Cooley's 1871 treatise. Wildenthal, *supra* note 4, at **{Pre. Conference draft at 20 }**. I will try to return to this point in the future. But for now I would suggest that given the need to look at c*ontemporaneous* (pre-ratification) statements the only reason to look at the 1871 treatise is because Charles Fairman cited it (along with the 1868 and 1873 treatises) for the "want of knowledge" of incorporation by Cooley. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 116 (1939). Though I may not have articulated this clearly in 1993, sixteen years later it appears to me that an examination of the 1871 treatise is important for two reasons. First, it helps test Fairman's scholarship. Second, if, as I think is the case, Cooley's 1871 has some ambiguity in it, it helps to understand that he went from silence in 1868 to ambiguity in 1871 to clarity in 1873.

In addition to reading his article, Professor Rosenthal and I have exchanged some views about the importance of Cooley over the last year. Where it appears we disagree, is on the time in which Cooley's views would be relevant for determining the intent, meaning, or public understanding of the Amendment. Though I may well return to this issue for a fuller discussion at some time in the future, for now, my views and questions are:

1. The relevant time for Cooley to express his views on the effect of the Fourteenth Amendment generally ends with its adoption in July 1868. As far as I can tell, Cooley expressed no opinion prior to that time.
2. Do we know, from any source, what Cooley's personal view was on whether the Amendment should be adopted or not? Did he support the adoption of the amendment like Chief Justice Salmon P. Chase and Justice Stephen Field? Did he endorse the anti-fourteenth amendment sponsored by President Johnson like Justice Miller? Or did he stay silent in 1866-1867?
3. Cooley was a Republican when elected to the Michigan Supreme Court in 1864. By 1887 he had become a Democrat. When did he abandon the Republican party and why?
4. At some point Cooley became a person with a national reputation within the legal profession. Based upon some preliminary research, my own hypothesis is that Cooley was not well known in 1866-1868 and that he attained the national reputation attributed to him only in the 1880s. Is there any evidence to the contrary?

at least by the early 1870s, the application of the Bill of Rights to the state was accepted by the Democrats.[119]

III.

The need for contemporaneous statements on understanding/intent: Pre-1866-1868

The relevant period of inquiry is primarily the events leading up to the proposal of the amendment (the relevant history and the evils against which it was thought to cure), and the public debates both before and during ratification. With rare exception, post-ratification statements are of little or no weight and Professor Wildenthal has outlined some of the reasons that post-ratification events are to be taken with some caution. Those cautions apply with much stronger force to the Fourteenth Amendment because of the "reactionary" movement that took place after the adoption of the amendment. The analysis below explains some of the reasons for the significant changes in public opinion and how those changes should be taken into account.

A.

Changes wrought by politics and economics

A detailed examination of the Reconstruction era is beyond the scope of this article, but everyone who has studied the period recognizes that a profound change took place. [120] We know that we can document changes in leading political leaders, and indeed, the country, as early as 1871. [121] Indeed, by September of 1871 Horace Greeley, one of the national leaders of the Republican Party, was publicly opposed to the re-nomination of Ulysses S. Grant as President. Then in May of 1872, Greeley accepted the nomination of the Liberal Republicans and the Democrats for President. [122] Among the noted Republicans deserting their Party and joining with their former enemies was Charles Sumner (R- Mass.)[123] and Lyman Trumbull (R-Ill.).[124] Further,

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The above discussion upon treatises is also applicable to the comments Professor Dripps made on treatises. *See* Dripps, *supra* note ___, at ___ **{Draft – pages are not numbered}**.

[119] *See* Bryan Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–73*, 18 J. CONTEMP. LEGAL ISSUES___ (2009).

[120] An analogous shift in public opinion may be comparing the attitudes toward slavery after the Revolution with those of the more repressive 1830s, or attitudes of the 1960s with those of the 1990s.

[121] *See generally* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION, RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901, 93 and 101 (2001). Others in the list included prominent Republican and former Union General Carl Schurz who had campaigned for both John Fremont and Abraham Lincoln; Murat Halstead of the *Cincinnati Commercial*; Horace White of the *Chicago Tribune;* William Cullen Bryan of the *New York Evening Post*; and Edwin L. Godkin of the *Nation*. *Id.* at 243 and 102.

[122] *Id.*

[123] RICHARDSON, *supra* note 121 at 103.

[124] Lyman Trumbull, http://www.encyclopedida.com/doc/1E1-TrumbullL.html (last visited Mar 10, 2009). Trumbull was one of the counsel for Democratic candidate Tilden in the contested 1876 Presidential election.

by 1872 the Republican Party had "a transformed identity." [125] According to Gillette, "[w]artime idealism was beginning to wear thin, especially as the old ranks of Republican leaders and supporters were being decimated by death. New issues demanded attention." [126]

Though Grant won re-election, there were long-term consequences. The dissidents "popularized the idea that most freemen were determined to rise without work, and legitimated in Republican thought the Democratic idea that [B]lack voting inherently threatened to corrupt the government." [127] Then in December of 1872, with the impeachment of Louisiana Republican Governor William Kellogg, Lieutenant Governor P. B. S. Pinchback, a prominent African American Republican, became Governor. [128] The mere fact that a Black leader was Governor "confirmed the worst fears of [many] anxious Northerners." [129]

The Colfax Massacre—"the bloodiest single" incident in the Reconstruction era that included execution style killings of individuals who had surrendered—was a "horrific white massacre of African-Americans."[130] Yet, the press described it as white action "taken in self-defense against pillaging ex-slaves" who were "disaffected workers" who were "trying to control" the local government. [131] By the end of 1873 the *Boston Evening Transcript* claimed that "the divisional lines of the Republican and Democratic parties are now . . . indistinct." [132]

These major political shifts were magnified by an international recession that began with the crash of the Vienna (Austria) Stock Exchange on May 9, 1873.[133] In the United States, the week of September 13, 1873 saw the suspension of payments by several banking firms. [134] The bankruptcy of financier Jay Cooke on September 18, 1873, ushered in what is commonly known as the Panic of 1873. By Saturday, September 20th, "a full-fledged panic . . . developed" and the New York Stock exchanged closed for ten days. [135]

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[125] GILLETTE, *supra* note 95, at 52.
[126] *Id.*
[127] RICHARDSON, *supra* note 121, at 104. For my views on the strengths and weaknesses of this work see Richard L. Aynes, *Book Review*, 65 AM. J. OF LEGAL HISTORY 98-99 (2001).
[128] *Id.* at 105.
[129] *Id.*
[130] Richardson, *supra* note ___, at 107. For more on *United States v. Cruikshank*, 92 U.S. 542 (1876) see CHARLES LANE, THE DAY FREEDOM DIED, THE COLFAZ MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 116-117 (2008). For more on the Colfax Massacre see NICHOLAS LEMANN, REDEMPTION, THE LAST BATTLE OF THE CIVIL WAR 12-30 and 163 (2006).
[131] Richardson, *supra* note 121, at 107.
[132] *Id.* at 110.
[133] Samuel Rezneck, *Distress, Relief, and Discontent in the United States During the Depression of 1873-78*, 58 J. OF POL. ECON. 494, 495 (1950).
[134] *Id.* at 494.
[135] *Id.*

In the midst of our own contemporary economic problems, it is sobering to realize that this severe Depression—known as "the long Depression" —lasted for at least five years until 1878. [136] This recession was "especially significant" because the nation was "still recovering from the effects of civil war and in the process of building a great industrial and urban superstructure upon an agrarian foundation. Both the foundation and the superstructure were shaken by [the] depression . . . ." [137]

With the exception of agriculture, the railroad industry was the largest employer in the nation and the Depression caused not only bank failures but the bankruptcy of more than a fourth of the nation's railroads. The index of stock prices for railroads declined by almost 60%. [138] Bank clearings between 1873 and 1878 fell by 32%—second only to the 55% decline during the 20th Century Depression between 1929 and 1932. [139] Commodity prices are estimated to have fallen 30%. [140] Similarly, retail prices, which had already gone down after the Civil War, were estimated to have declined by approximately 20% between 1873 and 1877. [141] Yearly bankruptcies increased by almost 100% between 1873 and 1878. [142]

Though most of the data available relates to urban dwellers, the nation was still overwhelmingly rural. [143] But the effect upon rural people was shown by the fact that while the estimated decline in prices was 1.7% a year, the wholesale prices for agricultural and other commodities "fell at a greater rate" and were estimated to have declined by 3.0% per year by one source. [144] The effect was even greater than one might suspect, because "farmers are generally net monetary debtors and, as such, are harmed by a fall in prices, which raises the real value of their debt . . . ." [145]

Other businesses failed, and it is reported that in 1876 national unemployment was 14 percent.[146] American history—and perhaps world history—has repeatedly shown that when people fear they cannot feed their families, they will demand a change. Meetings and protests

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[136] *Id.* at 495. There are suggestions that after a brief upturn in 1879-1880, the recession "even extended into the 1880's . . . ." *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 405-06.
[141] *Id.* at 496.
[142] *Id.* at 496-97.
[143] According to on-line records of the U.S. Census, in 1860 80.2% of the population lived in a rural area and in 1870 the percentage was 74.3%. http://www.census.gov/population/www/censusdata/files/table-4.pdf.
[144] Milton Friedman, *The Crime of 1873*, 98 JOURNAL OF POLITICAL ECONOMY 1159, 1171 (1990).
[145] *Id.*
[146] In New York City it was estimated that one-third of the workers were unemployed in 1873-74 and that other eastern cities experienced like amounts of joblessness. Rezneck, *supra* note 133, at 498.

took place across the nation. One of these in New York City, known as the Tompkins Square Riot, caused "great alarm" and led to a report that it was caused by "well-known Communists, Internationalism, and Free-thinkers, with a sprinkling of sympathizing natives." [147]

Congressional hearings were held on the condition of the economy in 1878 and 1879.[148] Because the Bankruptcy Act of 1867 aggravated the crisis by allowing a single creditor to force a debtor into bankruptcy, President Grant recommended its repeal. [149] The Supreme Court itself helped aggravate the problem by declaring as unconstitutional the "familiar stay laws for the protection of debtors' assets" that had been used in such depression before. [150]

The question of using paper money and backing it with gold and/or silver resulted in a "bitter controversy" during the depression.[151] There is debate among economists whether the U.S. Coinage Act of 1873[152] ultimately helped or hurt the economy,[153] but the data seems to confirm that one of its results was to bring about deflation which, in the short run, aggravated the depression of 1873-1878.[154] According to economist Milton Friedman, "[f]or the next twenty-seven years the silver question bedeviled the politics and the finances of the United States." [155]

It was during these times that new—and often radical—ideas were advanced. As one might expect, the depression caused a refocus of political efforts and political realignments based upon economic issues. In 1876 the National Greenback Labor Party was formed and in 1878 it not only polled over one million votes but also won fourteen seats in Congress.[156] The Knights of Labor, previously a local organization in Philadelphia, held its first "General Assembly" in

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[147] *Id.* This is taken from the New York Society for the Improvement of the Condition of the Poor report. One historian has stated that the Panic of 1873 "hurt small farmers and small towns profoundly; prosperity would be found hereafter in larger towns with far more diversified economies." LORLE PORTER, A PEOPLE SET APART: SCOTCH-IRISH IN EASTERN OHIO 830 (1998).

[148] Friedman, *supra* note 144, at 502. [I don't believe this is the right page number because the article starts on page 1159. Is this referring to Rezneck, *supra* note 113, at 502?]

[149] *Id.* at 505. Congress amended the act to require the agreement of one-fourth of the creditors representing at least one half of the claimed debts. *Id.* The Act was finally repealed in 1878 and a new bankrupt act was not adopted until 1898.

[150] *Id.* at 505. Edwards v. Kearzey, 95 U.S. 595 (1878) (infringement of contracts contrary to Art. I, Section 10). Justice Harlan dissented without opinion. *Id.*

[151] *Id.* at 504; *see also* Milton Friedman, *The Crime of 1873*, 98 JOURNAL OF POLITICAL ECONOMY 1159 (1990).

[152] 17 Stat. 424 (Feb. 12, 1873) (eliminating silver coin and allowing only gold coin to be legal tender).

[153] See Friedman, *supra* note 144 (noting that the consensus is that it helped the economy, though arguing that this was actually "a mistake that had highly adverse consequences.").

[154] Though there had been "sharper" deflation after the Civil War, the rate of deflation in the U.S. between 1875 and 1896 has been estimated at 1.7% per year. Friedman, *supra* note 144, at 1170.

[155] *Id.* at 1167.

[156] *Id.* at 508. Friedman attributes the deflationary trend to the creation of this party. Friedman, *supra* note 144, at 1170.

Reading, Pennsylvania in 1878. [157] In 1876 a Philadelphia Congress founded a "Workingmen's Party" which, in 1877, became the Socialist Labor Party. [158]

These political developments were exacerbated by strikes and violence:

> The combination of depression, labor unrest, and socialistic agitation provided a lurid setting of the great railroad strike in July, 1877, which stirred up passions and created an unprecedented panic of public opinion." [159]

As a result:

> The labor disturbances of 1877 … constituted the climatic event of the depression and precipitated a violent burst of alarm and threat that reflected a growing fear of class conflict and the 'red specter of communism.'" [160]

With the help of the political re-alignment and, especially, the depression, the Democrats captured the House of Representatives in 1874.[161] They won the popular vote and almost captured the presidency in 1876. It is therefore, perhaps, not surprising that support for the Fourteenth Amendment no longer remained the focus of most peoples' concern and indeed, probably was at low ebb.

B.

Confirmation: Post-Slaughter-House Literature (1873-1949)

The political and economic changes that occurred in the early 1870s are reflected in the literature that post-dated the adoption of the Fourteenth Amendment. Justice Miller wrote about the "pressure of all the excited feeling growing out of the war", but concluded that "our statesmen have still believed [in] the existence of the States . . . . [162] Further, he claimed that the Court ignored the "fluctuations" of "public opinion." [163] Yet, others provided a different account, and in his private writings Miller seemed to have just the opposite attitude of what he stated publicly.[164] Though a more comprehensive account has previously been published, [165] in this

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 510. [Again, does this refer to Rezneck? See comments fn. 148]
[161] FONER, *supra* note 48 , at 523 (" . . . only the depression can explain the electoral tidal wave that swept over the North in 1874."). [Which Foner source are you referring to?]
[162] Slaughter House Cases, 83 U.S. 36, 82 (1872).
[163] *Id.*
[164] Aynes, *supra* note 117, at 553-665 (quoting letters from Miller and assessments by Fairman about Miller's low opinion of Congress and his view that Congress was "bent on wrecking" an independent Judiciary and Executive). Of course, Miller also opposed the adoption of the Fourteenth Amendment. *Id.* at 660.

section three examples will illustrate the views of those who celebrated the failure to properly interpret the Amendment.

Congressman Samuel Shellabarger (R-Ohio) was considered a key "Radical theoretician." [166] Yet as early as 1871 Shellabarger did not "want the full idea of the Fourteenth Amendment interpreted by the old rules of construction." [167] In 1888, at the memorial services for Chief Justice Waite, Shellabarger acknowledged that *Cruikshank* was contrary to the intent of the Fourteenth amendment.[168] But Shellabarger concluded that Waite would be well thought of by history because "the lapse of years had matured men's views and cooled their feeling regarding the results of the late war."[169]

Similarly, University of Missouri Law Professor Christopher G. Tiedman indicated that the Court in the *Slaughter-House Cases* had worked "a successful modification of the rule found in the fourteenth amendment."[170] He thought this was justified because the Court was keeping the "amendment within the limits which [the majority of the court] felt assured would have been imposed by the people, <u>if their judgment has not been blinded with passion, and which in their cooler moments they would ratify.</u>" [171] According to Tiedman:

> Feeling assured that the people in their cooler moments would not have sanctioned the far-reaching effects of their action; that they lost sight of the general effect in their eager pursue of a special end, the court dared to withstand the popular will as expressed in the letter of this amendment . . . . [172]

The third selected example is from the *American Law Review*:

> Never was the court truer to itself, and truer to the constitution, than when it passed upon the momentous question involved in the Slaughter-House Cases. A literal interpretation of the fourteenth amendment would have destroyed local self-government, reduced the

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[165] *Id.* at 678-686.
[166] WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 164 (1972).
[167] HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, 471 (1982) (quoting portions of the letter). Professor Curtis points out that in 1871 Shellabarger was a leader in advocating legislation against the Ku Klux Klan and utilized the Fourteenth Amendment as the basis for that legislation. E-mail from M. K. Curtis to R. L. Aynes, Jan. 11, 2009 (on file with author). I am not sure there is any inevitable inconsistency between the two positions, and yet it raises questions about the Congressman's actual position over time. Shellabarger would be a good subject for a biography or biographical article.
[168] *In Memoriam: Morrison Remick Waite, L.L.D.* 126 U.S. App. 585, 600-01 (1888).
[169] *Id.*
[170] CHRISTOPHER G. TIEDMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 108 (1890).
[171] *Id.* (emphasis added).
[172] *Id.* at 102-03.

> States to the condition of mere provinces, and swept away that Federal fabric which our fathers had builded [sic] with such painful and loving care. That such a result was contemplated by the political leaders who secured the adoption of the fourteenth amendment is certain. But the high patriotism of the Supreme Court led it to construe this amendment in accordance with the traditions and true spirit of our constitution, and to preserve to our people the inestimable advantages of local self-government.[173]

These views help reinforce the reasons why one must look to the period before ratification to determine the public understanding of the Amendment.

Guidance from the 19th and 21st Amendments

What is the appropriate **C.**

response when public attitudes make major changes such as occurred between 1868 and the 1870s? The answer is found in example of the Eighteenth Amendment enacting prohibition which was declared ratified on January 29, 1919.[174] Ultimately, it was ratified by forty-five of the then forty-eight states.

The transformation of public opinion on prohibition illustrates the process in which one should be engaged when vast shifts of opinion occur after the ratification of a Constitutional Amendment. One has to ask oneself, what was the status of the Eighteenth Amendment while ratification of the 21st Amendment was pending and it appeared to be evident that the public had repudiated that Amendment, but before it was actually repealed? No one would argue that the change in public support meant that the Eighteenth Amendment was no longer in effect. No one would advise clients that the statutes prohibiting the manufacture and transportation of alcohol adopted pursuant to the Eighteenth Amendment were no longer enforceable prior to its formal repeal. No one would expect to successfully defend one's clients against criminal charges in the

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[173] Kenneth Katkin, "*Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB, L. REV. 397, 403 n.25 (2005) (citations omitted and emphasis added) (quoting Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 206 (1893)).

[174] U.S. CONST. art. XVIII. The Amendment was overwhelmingly adopted, with thirty-six of the forty-eight states having ratified it on January16, 1919. Subsequent to the declaration that the Amendment had been adopted, it was ratified by nine additional states. This made the total number of ratifying states to be forty-five out of the forty-eight states. The only state that explicitly rejected the Amendment was Rhode Island. Two other states took no action. In spite of this overwhelming "super-majority," just fourteen years later, effective December 5, 1933, the 21st Amendment was ratified repealing the Eighteenth Amendment. Thirty-six of the forty-eight states had ratified the repeal by December 5, 1933. The Amendment was subsequently ratified by two additional states and rejected by South Carolina. This meant that the final total was 38 states in favor of repeal, one state opposed, and nine states not taking any action.

Federal Courts based on the shift in public opinion with respect to the Eighteenth Amendment prior to its repeal.

What was the legal status of the Eighteenth Amendment while the Twenty-first Amendment was pending and appeared to be likely to be adopted? This example parallels—but only to a point—what has happened with the Fourteenth Amendment. The Republicans had won "the super majority" in the 1866 elections and the Fourteenth Amendment was viewed as a moderate response to the intransigence of the defeated Confederates and the terrorists who were committing violence against African-Americans and Unionists. But, what frequently goes unrecognized is that there was a shift in public sentiment which assuredly took place as early as 1871 and continued well into the 1880s. Even the time spans are relatively the same. It was roughly fifteen years from the proposal of the Eighteenth Amendment until its repeal, which was completed on December 5, 1933. It was somewhere between seven and thirteen years between the proposal and the Fourteenth Amendment and the demise of public support for the enforcement of that Amendment.

It is important to note that trying to judge the intentions or public understanding of the Fourteenth Amendment in 1866 by actions and statements the people took after 1871 (or 1879) is as inappropriate as trying to judge people's feelings about the Eighteenth Amendment's original intention by their action in passing the Twenty-First Amendment or visa versa. What is different, and I submit of Constitutional significance, is that the Eighteenth Amendment was formally repealed by the Twenty-First Amendment while certain provisions of the Fourteenth Amendment were nullified and are currently sought to be kept in a suspended state today based on the actions of judges and policy reasons without any formal amendment process.

V.

Round-up the usual suspects: *Slaughter-House, Cruikshank, Hurtado,* and *Twining*

Since I first wrote about *Slaughter-House*[175] in 1994, [176] much work has been done in the field of applying the Bill of Rights to the states, and also upon the pre-*Adamson* cases of the U.S. Supreme Court. [177]

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[175] 83 U.S. 36 (1873).

[176] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI-KENT L. J. 627 (1994).

[177] A recent symposium at the University Akron School of Law commemorated the 140th Anniversary of the ratification of the Fourteenth Amendment. Among the topics on which articles will be forthcoming are *Slaughter-House*, *Bradwell v. Illinois*, and *United States v. Cruikshank*. *See generally* 42 AKRON L. REV. (forthcoming 2009).

Scholars sometimes write loosely about *Slaughter-House* as a case in which the central issue was the inability of the local butchers to pursue a lawful trade or the creation of a monopoly of that trade. This might be a fair reading of the inferences one could draw from Justice Field's dissent. But a close reading of the facts of the case and Justice Miller's opinion indicates that the issue was much narrower than that. All were free to pursue the occupation of a butcher and the monopoly related not to the profession, but rather to the location of the place in which the butchering could take place. [178]

Indeed, the state's interest in sanitation was great and the ultimate decision was one which Justice Hunt had previously decided in his role as a Justice of the New York Court of Appeals in *Metropolitan Board of Health* v. *Heister* in 1868.[179] This was also a health issue that Justice Miller knew about as a citizen and former physician with health concerns based on his experience with the stockyards in Iowa. [180] Had the opinions been limited to those issues, there would be little or no controversy about the case.

Two important books have come to the forefront since 2000 that reinforce these views. Professors Ronald M. Labbe and Jonathan Laurie, in *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment*,[181] explore the health and sanitation issues in detail and provide the documentation for one's instinct that there was overwhelming justification for the Court's ultimate conclusion to sustain the legislation as an appropriate health measure.

Michael A. Ross' 2003 biography of Justice Miller[182] is a welcomed improvement to Charles Fairman's 1939 biography.[183] Professor Ross' work compliments the work of Laurie and Labbte on the propriety of the health regulations. Further, Ross provides insight to critical matters that had not heretofore come to light. [184]

The problem with the majority opinion in *Slaughter-House* is, as it has always been, with its dicta. Courts and scholars have read that dicta to preclude a number of reasonable interpretations

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[178] Aynes, *supra* note 176, at 634.
[179] 37 N.Y. 661 (1868).
[180] MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS, SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 43-44, 168 (2003).
[181] (2003).
[182] ROSS, *supra* note 180. Though I am not prepared to embrace Professor Ross's view of Justice Miller, his well-done biography convinces me that Miller was more of a Republican than I once thought.
[183] CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939). Professor Fairman's biography still has value because it reprints large portions of Justice Miller's correspondence.
[184] For example, Ross points to the monopoly that was previously held by the white butchers of New Orleans. As to the occupation of a butcher, Ross demonstrates that the legislation of Louisiana's Republican government actually removed that monopoly and made it possible for others, including African Americans, to enter the profession. Equally important, Ross chronicles the efforts of the defeated aristocracy to withhold tax money from the Republican government in order to cause its collapse and the financial terms under which the Slaughter-House would produce revenue for the government to counter that illegal scheme. ROSS, *supra* note 180, at 189-210.

of the Fourteenth Amendment, including the enforcement of the Bill of Rights against the states.[185] Numerous scholars have traced the virtual elimination of the privilege or immunities clause back to the dicta of this decision and this appears to be the view of the overwhelming number of scholars who have examined the case.[186]

In the last twenty-five years a minority view has risen that argues that the *Slaughter-House Cases* actually recognized that the Bill of Rights would apply to the states. The basis for this has been Justice Miller's quotation of some language from the First Amendment (without referencing the amendment) right of assembly and petition,[187] which led some to conclude that this was one of the privileges or immunities of U.S. citizenship. [188] I remain skeptical of these approaches for reasons I have already articulated. [189] We may care deeply about these questions as scholars and historians, but for lawyers and would be litigators, it hardly matters. Virtually everyone agrees that the Court took a wrong turn somewhere. The key issue is not when that took place, but what does one do about it.

Dicta is dicta. Justice Miller's opinion itself identified the fact that a portion of the opinion is dicta. Justice Miller's opinion talks about being "excused from defining the privileges and immunities of citizens of the United States . . . until some case . . . may make it necessary to do

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[185] *See* Aynes, *supra* note 176, at 627 n.4.

[186] *Id.*

[187] "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizens guaranteed in the Federal Constitution." Slaughter-House Cases, 83 U.S. 36, 79 (1873). Part of the issue to consider is whether the quoted provision refers only to the federal government or also applies to the states. David Bogen concludes that the "reaction of the dissenters demonstrated that Miller did not intend to use the privileges or immunities clause to create a whole new set of federal rights." David Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L. J. 333 (2003).

[188] Robert Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment,* 1984 U. ILL. L. REV. 739, 743 (1984); Kevin C. Newsome**,** *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases,* 109 YALE L. J. 643, 683 (2000). A variation on this theme was recently advanced by Professor David Bogen. Bogen argues that this is a question of whether the glass is one half full or one half empty, and that one should look at what issues *Slaughter-House* left open. David Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights,* 42 AKRON L. REV. (forthcoming 2009).

[189] *See generally* Aynes, *supra* note 176.
If Justice Miller intended to enforce the Bill of Rights against the states, then how does one explain his failure to join Justice Harland's dissent in *Hurtado v. California*, 110 U.S. 516 (1884)? It seems that one has to either conclude that between 1873 and 1884 Miller changed his mind or that he never had that intention in the first place. Further, in spite of the fine work of Laurie, Labbet, and Ross, none of them has a satisfactory answer to the question of why Miller misquoted the language of Article IV and Justice Bushrod Washington's correct quotation of Article IV, in a way that made his textual argument stronger. Aynes, *supra* note 176, at 647. Palmer has suggested that Miller was simply "updating" the constitution to reflect the Court's decisions. Palmer, *supra* note 188, at 754. But, frankly, that seems unsatisfactory. In what other case has the Court ever done this? It would be one thing to properly quote the language and then explain how the court's cases change the language. But it is quite another to misquote language without giving any explanation.

so." [190] He then, instead of ending the opinion, went on to give some examples. [191] It is true that Miller's dicta—whether correctly or incorrectly interpreted—has been relied upon by later courts even within the last year. [192] Yet, it seems to me that we ought to follow the lead of the Lincoln Republicans who treated *Dred Scott* as only binding for the case between the parties and ignored what they considered dicta in the case. [193]

As scholars and legal historians, it is perfectly appropriate that we continue to analyze and debate the meaning and effect of Justice Miller's opinion in *Slaughter-House*. As matters of public policy in the national arena for purposes of litigation or legislation, I would suggest that we need to emulate the approach of President Lincoln and the Republicans: note the *Slaughter-House* dicta for what is (dicta) and move on to find a proper interpretation of the Fourteenth Amendment.

United States v. Cruikshank [194] has become a matter of interest in the last few years and at least three books have been published on the Colfax Massacre that underlies that case. [195] Given

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[190] Slaughter-House Cases, 83 U.S. 36, 79 (1873). Similarly, in a discussion about the new articles of amendment Miller wrote:

> [W]e now propose to announce the judgments of those articles, so far as we have found them necessary to the decision of the cases before us, and *beyond that we have neither the inclination nor the right to go.* 83 U.S. at 67 (emphasis added).

[191] Though this is speculation, one wonders whether an earlier draft stopped there and it was the dissents that prompted him to go further?

[192] *E.g.* National Rifle Ass'n of America, Inc. v. Chicago, 567 F.3d 856 (7th Cir. 2009) *petition for cert.filed*, 77 U.S.L.W. 3679 (U.S. Jun. 03, 2009) (No. 08-1497) *and petition for cert. filed*, 77 U.S.L.W. 3691 (Jun. 09, 2009)(No. 08-1521);
Merrifield v. Lockyer , 547 F.3d 978 (9th Cir. 2008).

[193] Speech on [the] Dred Scott Decision at Springfield, Illinois, June 16, 1857 in LINCOLN, SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN DOUGLAS DEBATES 392 (Don E. Fehrenbacher ed., 1989). I have analyzed many of the rejections of the Taney's opinion in Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What they tell us about its interpretation*, 39 AKRON L. REV. 289, 292-297 (2006). At a minimum they include:

* Attorney General Bates's opinion that African Americans could be U.S. citizens, 10 Op. Att'y Gen. 382 (1862);
* Congress's definition of citizenship in the 1866 Civil Rights Act;
* The action of Congress, signed by President Lincoln , abolishing slavery in the territories; and
* The action of Congress, signed by President Lincoln, abolishing slavery in the District of Columbia.

- The seating of Senator Hiram Revels (R-Miss.) in the U.S. Senate even though <u>if</u> Dred Scott had been good law, Senator Revels could not have met the durational citizenship requirements of Art. I Section 3 (requiring citizenship for nine years).

[194] 92 U.S. 542 (1875).

[195] CHARLES LANE, THE DAY FREEDOM DIED, THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); NICHOLAS LEMAN, REDEMPTION, THE LAST BATTLE OF THE CIVIL WAR 12-29, 163 (2006) (*Cruikshank* "dealt a heavy blow to Reconstruction . . ."); LEE ANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR AND THE DEATH OF RECONSTRUCTION (2008).

the U.S. Supreme Court's decision in *Heller v. District of Columbia,*[196] *Cruickshank* will be the likely subject of some future Supreme Court consideration of the question of whether *Heller* should be extended to apply to the states. If *Heller* is extended to the states, it is probable that *Cruikshank* will be overruled. [197]

In contrast to *Slaughter-House* and *Cruikshank*, *Hurtado v. California* [198] and *Twining v. New Jersey*[199] have not received significant scholarly attention. *Hurtado* is of interest today because of Justice Harlan's dissent and because of the failure of Justice Miller to join Harlan's dissent.

Twining, in spite of the dissent of the then aged Harlan, 75 years old at the time, was decided without the knowledge—let alone the fervor—of reconstruction. Justice Moody, who wrote the majority opinion, was only fifteen years old when the Fourteenth Amendment adopted.[200]

One of the critical mistakes, illustrated by *Cruikshank* and by the *Slaughter-House* dicta, is the idea that rights protected by the state could not also be protected by the federal government. As set forth above, the states had already proven time and time again they could not be trusted to provide even basic rights, let alone those rights to which Unionists believed all citizens were entitled. [201] When James Madison originally proposed an amendment that would have enforced a limited set of rights against the states, he said that it did not matter if these rights were already protected by a state constitution because it would provide "double security." [202] This was the same concept the Unionists were pursuing in adopting the Fourteenth Amendment.

But the citizenship clause indicates a change: that instead of national citizenship being derivative from state citizenship, and state citizenship being primary, the framers made national citizenship primary. [203] To use a common example, the "problem" was not with the lack of

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[196] 423 U.S. 840, 128 S. Ct. 2783, (2008).

[197] *Cruikshank* still lives, having been cited with approval by the Chief Justice Rehnquist in his decision in *United States v. Morrison*, 529 U.S. 598, 622 (2000). If the Court decides to take a fourteenth amendment case based on *Heller*, it would also have to consider its prior language in *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("The second amendment is a limitation only upon the power of Congress . . . and not upon . . . the state.").

[198] 110 U.S. 516, 534-35 (1884) (the due process clause of the Fourteenth Amendment does not include the right to a grand jury indictment and that right, included in the Fifth Amendment, is not enforceable against the states).

[199] 211 U.S. 78, 99 (1908) (Fifth Amendment right against self-incrimination cannot be enforced against the states).

[200] CONCISE DICTIONARY OF AMERICAN BIOGRAPHY 690 (Joseph G. E. Hopkin ed., 1964.)

[201] *See supra* Section II .

[202] 1 Annals of Congress 458 (June 8, 1789).

[203] Prior to the amendment it was thought that state citizenship, *ipso facto*, created national citizenship. See the dissenting opinion of Justice Swayne in the *Slaughter-House Cases*. 83 U.S. 36, 126 (1872). As my colleague Wilson R. Huhn has noted, the Amendment made "state citizenship secondary to national

existence of a right like "free speech" in the southern states. It was guaranteed by their constitutions, their statutes, and their case law. The problem was, like the problem with the anti-slavery theory of the enforcement of Article IV, in the "enforcement" of that right. Though other examples exist, the disputes over free speech were so strong and so far ranging that they offer a good illustration. The debates over free speech at both the national and state level were spirited, public debates in which no citizen interested in the future of the nation between 1830 and 1868 could have been ignorant.

They included disputes about the meaning and interpretation of the national protections like the right of petition under the "gag rule" in which millions of signatures were gathered in a nationwide campaign eventually lead by former President and Representative John Q. Adams. They included the controversy over the actions of President Jackson's Postmaster General in "seizing" anti-slavery literature from the mail. [204] They also included resistance against the Fugitive Slave laws, and especially the Act of 1850, because of its lack of jury trial and other due process procedures to protect free African Americans from being kidnapped and sent to slavery when, in fact, they were free people.[205] But that struggle also included many state and local attempts to suppress free speech and even to suppress the Republican Party itself.

Prior portions of this paper have used free speech issues as an example of the evil against which the Amendment was directed.[206] A modern analysis of the free speech issues is set forth in Michael Kent Curtis's *Free Speech, 'The People's Darling Privilege:' Struggles for Freedom of Expression in American History*.[207] Republicans, who had grown from a minority to a majority party controlling state and national governments, attributed this growth to free speech and

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citizenship." Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell, and Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. (forthcoming 2009). In speaking of the *Slaughter-House Cases* Professor Huhn concluded: "The majority of the Court turned that unmistakable hierarchy on its head, and as a result they consigned the fundamental freedoms that Americans rightfully regard as their birthright to the dubious protection of the States." *Id.* Further, Professor Huhn concluded that "[i]n placing state citizenship over national citizenship the *Slaughterhouse* Court reflected the view of John C. Calhoun. *Id.* In 1833 Calhoun had equated the idea of citizens of the United States to "a citizen of the world . . . a perfect nondescript" and stated that our rights depend upon being citizens of a State or territory." *Id.* See also the Supreme Court's indication that after the Fourteenth Amendment national citizenship was "paramount and dominant instead of being subordinate and derivative . . . ." Arver v. United States, 245 U.S. 366, 389 (1918).

[204] JON MEACHAM, AMERICAN LION, ANDREW JACKSON IN THE WHITE HOUSE 304-306 (2008).

[205] The kidnapping of free African Americans had always been a problem and even a young Roger Taney had supported a statute in Maryland to prohibit such conduct. JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY 9 (2006).

[206] *See supra* notes 46, 56-94 and accompanying text.

[207] (2000). For other works on these same issues see CLEMENT EATON, THE FREEDOM OF THOUGHT STRUGGLE IN THE OLD SOUTH (1949); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860 (1964); and ERIC FONER, FREE SOIL, FREE LABOR, AND FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY (1970).

fervently believed that it was necessary for the future safety of the country. In other words, this was a "national security issue." [208]

This can be examined in the issues of *Harper's Weekly*. In 1865 *Harper's Weekly* claimed to have had a circulation of more than 100,000 per week. [209] It was called by a rival, "one of the most powerful organs of public opinion." [210]

On July 20, 1861 *Harper's* stated that the government was protecting the "rights of man" and "[i]ts army, therefore, marches to defend those rights, and among others that of free speech." [211] Further, *Harper's* declared that "[t]he right of the freest speech and of petition are the birth-right of every American citizen."[212] In speaking of the newspapers of the rebellious states and their attempt to "annihilate[e] free speech," *Harper's* concluded with a statement about federal enforcement: "They will be protected in the exercise of that right [free speech] by the same Government of all the people, which will frustrate the end they [rebels] seek." [213]
In its August 17, 1861 issue, *Harper's Weekly* stated that the majority of Americans "after conquering this rebellion, means to have guarantees for its rights." *Harper's* continued: "Those rights are the constitutional privilege of every American citizen; his right to go freely everywhere in the country; and of freely expressing his opinion." [214]

On the same page of the same issue, the editors printed an item with the title "Good Citizenship" in which they indicated that the Union was waging a war for "free popular institutions" that were based upon the "rights of men" and that "the most absolute freedom of discussion is one of the chief of those rights." The effect of the protection of these rights was predicted to result in the "reconstruction of the entire frame-work of Southern society." [215] One might ponder how freedom of speech could be protected and the white, slaveholding society reconstructed without some mechanism for national enforcement of free speech and other rights.

That there was to be a change is seen as the assertion that though the rebellion of "Jeff Davis . . . does not destroy the Union, it does destroy the old despotism which nullified the Constitution

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[208] 83 U.S. at 122 (Bradley, J., dissenting) (". . . it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of citizens.").
[209] RRICHARDSON, *supra* note 121 at xii.
[210] *Id.* It has been referred to as "the leading national magazine . . ." DOUGLAS L. WILSON, LINCOLN'S SWORD, THE PRESIDENT AND THE POWER OF WORDS 144 (2008).
[211] *Of Liberty of Speech*, HARPER'S WEEKLY, July 20, 1861, at 451.
[212] *Id.*; *see also A Word to Bostonian*, HARPER'S WEEKLY, Jan. 4, 1862 p. 3 (circulation of "a hundred and twenty thousand copies").
[213] HARPER'S WEEKLY, *supra* note 211.
[214] *Id.*
[215] *The Union – in the Future*, HARPER'S WEEKLY, June 15, 1861, 370; *Good Citizenship*, HARPER'S WEEKLY , Aug. 17, 1861, at 514, 706.

and used the Union as-it-was for its tool." [216] Still later in the war, in 1864, a *Harper's* editorial summarized the theory that it was important—to avoid a future war— that there be free speech[217]:

> It was the knowledge 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, which made Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years.[218]

Similarly, *Harper's* editorialized that:

> The slave-drivers and their political allies at the North knew equally well that if the constitutional right of discussion were allowed, the horrors of the system would be known, and the outraged decency and humanity of the American people would sweep away the inquiry in a flood of wrath.[219]

The Republicans believed that had free speech been allowed to flourish, slavery would have been abolished and the war averted. For example, noting that a Democratic Judge has charged a Grand Jury that "the right of free discussion is a cardinal condition of a republic, " *Harper's* stated that this charge "contains several wholesome truths which, had they not been

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[216] *The Thing to Be Done*, HARPER'S WEEKLY, Nov. 14, 1863, at 722; *see also Knowing What you Want, but Not How to Get It*, HARPER'S WEEKLY, Nov. 14, 1863. "Its misfortune is that it ruled by virtue of its alliances with a system which permanently paralyzed the Constitution, and is now seeking to destroy it." *Id.*

[217] *Id.* This same theme was explored in "The Union-as-it-was", an article focusing upon the speeches of Texan Unionist and slaveholder Andrew Jackson Hamilton. Hamilton supported the constitution as written, but not "as-it-was" in Texas before the war because the constitution "as-it-is" written "was constantly trampled under foot, and the very object of the Union despised and outraged." He said that if he quoted certain beliefs of Washington and Jefferson in Texas he would have been "stigmatized as a traitor, and meet a traitor's death." But Hamilton said: "If I can enjoy the right of speech, the great and inestimable right intended to be secured to me by the Constitution, then I can bless the Union." According to *Harper's*
the "most sacred provisions [of the Constitution] were outraged in every State now rebellious." Moreover: "No man's life was safe below Mason Dixon's line <u>who exercised the right, guaranteed to him by the Constitution, of saying what he thought upon public affairs."</u> (emphasis added). Later the same article referred to the right of "free expression" as a "guaranteed right of the people of this country under the Constitution . . ." It also made reference to the incident in South Carolina involving Judge Hoar and to Yancy's ability to have free speech in the North but the inability to Mr. Phillips to have free speech in the South. HARPER'S WEEKLY, Oct. 18, 1862, at 658.

[218] "The Truth Confessed," HARPER'S WEEKLY, Jan. 16, 1864, at 34. After the war there was talk of another war by both Republicans and Democrats. *See* CAMPAIGN SPEECHES, *supra* note 63, at 16 col. 2 ("Another War"—discussed the alleged movement of armaments to the northern states); Republican Party Platform at the re-nomination of Congressman Ashley (if violence against Unionists continues there will be a civil war), *supra* note 92.

[219] *Slave Children*, HARPER'S WEEKLY**,** Jan. 23, 1864, at 66. (As a result "these gentry hung, and burned, and tarred and feathered, and mobbed every citizen who chose to speak or was suspected of wishing to speak . . . .").

hitherto uniformly despised and outraged by the political allies of the Judge, would have saved us from the war." [220]

In a June 6, 1863 column *Harper's Weekly* noted that anti-war Democrats had held a mass meeting calling for "free speech and personal rights" even though they have and want to continue to deny these rights to others. [221] The implications of this for the future were made clear in a column on August 6, 1864:

> The people of the United States, therefore, in their Constitution have forbidden Congress to abridge either of these rights [freedom of press and freedom of speech]; and what they would not suffer their supreme legislature to do, they will not permit to to any local assembly. [222]

The stakes on this issue were very high because according to *Harper's*, "[w]ithout freedom of speech and of the press a free popular government is impossible." [223] Speaking of the Union Army as "an immense mass meeting," *Harper's* assured the anti-war Democrats that this "meeting" was "in perpetual session" and would not adjourn until:

> the flag of the United States shall secure the undisputed exercise of every constitutional right upon every inch of the United States soil; until Mr. Wendell Phillips shall be protected in his freedom of saying in Charleston that slavery is a blunder and a crime, precisely as Mr. Fernando Wood is protected in New York in saying that the colored race is a servile people and ought to be enslaved; and until the personal rights of man . . . are fully recognized in Georgia as they are in Maine. [224]

Nor was this just a passing theme. Rather, free speech was a continuing source of comment during the war years. [225] Further, these concerns were not limited to free speech and

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[220] *Judge Barnard's Charges*, HARPER'S WEEKLY, Apr. 23, 1864, at 258 (emphasis added).
[221] *Mass Meeting*, HARPER'S WEEKLY, June 6, 1863, at 354. One of the many important contributions that Professor Curtis has made to the history of these issues is his recognition that Democrats, as well as Republicans, were concerned about free speech and they often raised these issues during the war against the policy of some Republications, including, on occasion, President Lincoln. *See generally* Curtis, *supra* note 77, at 1121-1124 and 1131.
[222] *Id.* (emphasis added).
[223] *Id.* The article summarizes statutes limiting freedom of speech in Louisiana and Virginia and then rhetorically asks: ". . . but are they compatible with the Constitution of the United States, and with the necessary conditions of any free popular government whatever?"
[224] *Id.* (emphasis added).
[225] Due to space constraints, I eliminated from this footnote citation to thirteen articles from *Harper's Weekly* involving constitutional rights that were violated or claimed. These were mainly free speech issues, but included free press, freedom of assembly, free elections, personal liberty, and search and seizure. Many

press—even though those rights are often said to be the source of the protection of all rights—but included others rights such as prohibition of illegal seizures, legal process before imprisonment, the right to test disputed issues in court, and the right to be protected from mobs. [226]

This theme was developed by Justice Bradley after the war. In his dissent in the *Slaughter-House Cases*, he wrote that the "mischief to be remedied" was not only slavery, but "that intolerance of free speech and free discussion which often rendered life and property insecure . . . . [227] The goal of the Fourteenth Amendment was to create conditions under which "American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of <u>every right and privilege belonging to a freeman</u>, without fear of violence or molestation." [228]

No one doubts that a proslavery person like slave-trader Nathan B. Forrest or a secessionist like Jefferson Davis was able to speak his mind in the south. But that right of free expression did not extend to those of opposite views, and this lack of enforcement was the problem. [229] Indeed, given the free speech problems the nation had experienced, Congress and the people knew first hand that they could not trust the state governments to enforce the right. If it was to be guaranteed, it had to be able to be enforced by the federal government.

In a treatise published in 1868, while the Fourteenth Amendment was pending, but had not yet been adopted, John Norton Pomeroy, Dean of the Law School and Chair of Political Science at New York University, illustrated the problem with the right of protection by the "due

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of them assert that the rights already apply to the state and were violated by the slave states. If anyone would like to receive a list of citations to the articles, I will be happy to provide it. raynes@uakron.edu.

[226] *The Arch Rebel*, HARPER'S WEEKLY, Aug. 13, 1864, at 514 (indicating that slavery "would destroy the national rights of citizens of the United States . . . because of their color or for the exercise of privileges secured by the national Constitution"; giving the mobbing of Judge Hoar and his daughter as an example).

[227] Slaughter-House Cases, 83 U.S. 36, 123 (1873). Justice Bradley's analysis indicates that there is a link between the free speech rights under the first amendment and the rights to life and property which are protected by other amendments.

[228] *Id.* (emphasis added).

[229] This example illustrates a common problem among scholars. If we were in the position of the anti-slavery person denied the right to speak our views as Davis and Forrest were, we *could* characterize this as an equal protection/discrimination violation. But as a practical matter, people do not speak or think that way. They would claim a First Amendment violation. The same approach is true of other claims— a right to bear arms, search and seizure, cruel and unusual punishment and similar rights. They could all be couched in equal protection terms, but we think about think and act upon them as rights in and of themselves and not limited to a right of equality or non-discrimination. This was true in the 19th Century as well.

It is perhaps coincidental, but all those who use such a non-discrimination provision only view of the Amendment also want to narrowly construe the Fourteenth Amendment.

process" clause which existed in both the state constitutions and the federal construction. [230] Because of *Barron*, Pomeroy noted:

> But in a case arising under the clause in a state constitution which forbids a person to be deprive of life, liberty, or property without due process of law, the Supreme Court of the United States cannot pass directly and independently upon the question whether a given state statute, or a given act done under the authority of the state, is opposed to this clause, but must defer to, and be controlled by, the judgments of the courts of the same commonwealth which have settled the construction given their own organic law. [231]

Though the import of Pomeroy's thinking is relatively clear from the above reference to the due process clause and related state provisions, he left nothing to chance and explicitly stated:

> Here is plainly a vast field open for injustice and oppression by individual states, which the nation has now no means of preventing. [232]

In light of this situation, Pomeroy proposed two hypotheticals ("let it be supposed . . ."[233]). The hypotheticals involved state constitutional clauses "securing to the people the right of keeping and bearing arms" and also protection under a state due process clause.[234] Thus, while the people reading this would be only concerned with the actual rights (keeping and bearing arms and due process), the lawyers would be aware he was talking of state analogs to the Second and Fifth Amendments. The "hypothetical" continues with the legislature passing two types of statutes.[235] One requires "certain classes of inhabitants—say [N]egroes" to "surrender their arms" and

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[230] Professor Rosenthal provides a different reading of Pomeroy that, I respectfully suggest, is unique among scholars. *Compare* Rosenthal, *supra* note ___, at ___ **{Draft at 22}** with the scholars cited in Wildenthal, *supra* note 4 **{Draft at 69}**. Pomeroy wrote about the "rule of interpretation" of *Barron v. Baltimore*. Pomeroy indicated that while it is "firmly established" that "the rule itself is certainly an unfortunate one." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTION OF THE UNITED STATES 149 (1868). See a fuller quotation and discussion of this section in *infra* note 240. *Barron* was the problem to which Pomeroy indicated the Fourteenth Amendment provided a solution. Further, both Paschal and Farrar were men of national reputation in 1866-68 and the fact that one may disagree with the manner through they arrived at or support their conclusions is not a grounds for ignoring or attempting to diminish their conclusion as to the meaning of the Amendment. *See* Aynes, *supra* note 31, at 83-94.

Professor Rosenthal also relies upon Cooley, but see *supra* note 118 (asking questions about Cooley's views to which there is as of yet no answer).

[231] POMEROY, *supra* note 230, at 150.

[232] *Id.*

[233] *Id.*

[234] *Id.* In his hypothetical, Pomeroy's due process clause is paraphrased as "declaring that no person shall be deprived of life, liberty, and property without due process of law." *Id.*

[235] While Pomeroy presents the facts as a hypothetical ("let us say that . . ."), instances of both the statutes in question are undoubtedly drawn from real actions taken by the white elite who controlled the Johnson state governments.

forbids them "to keep and bear them under certain penalties . . . ." [236] A second statute would require the same class to "be hired out and to labor in a certain prescribed manner" or be "declared vagrants, and liable to be seized, and by a summary proceeding bound out to service for a term of years." [237]

Pomeroy then hypothesized an "individual of the class" suffering some or all of the penalties and the individual "insists that the statutes in question are opposed to the Bill of Rights in the state constitution. . . ." [238] Pomeroy next assumed that the "local courts settle the law against him" and hold the statutes complied with the state constitution, leaving the national courts bound by the decisions of the "local judiciary." [239]

Pomeroy found this "result" to be "dismaying, that a "remedy is needed", that one is "easy and the question of its adoption is now pending before the people," and then referred to section one of the Fourteenth Amendment by name.[240]

Given the use of the term "class" and what looks to us like class-based discrimination, one might mistakenly believe that Pomeroy was talking about an equal protection violation. But in setting up his hypothetical, Pomeroy did not write about a state equal protection clause, only the state constitutional provisions of the right to bear arms and due process. Also his hypothetical on surrendering one's arms is coupled with the right to bear arms, and the labor regulations/summary proceeding issue is coupled with the due process clause. Thus, there is no reason to believe Pomeroy was making an equal protection claim and every reason to believe that he was writing about the Fourteenth Amendment preventing the violation of the right to bear arms and due process.

In writing about the abuses that could occur with state courts enforcing only state created rights, Pomeroy wrote of this as a "vast field open for injustice and oppression by individual states, which the nation has now no means of preventing." [241] Then on the very next page,

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[236] *Id.* at 150.
[237] *Id.*
[238] *Id.* (emphasis added).
[239] *Id.* at 151.
[240] *Id.* at 149, 151. In talking about the "rule of interpretation" of *Barron v. Baltimore*, Pomeroy indicated that while it is "firmly established" that "the rule itself is certainly an unfortunate one. The United States, as the sovereign, as supreme over all state governments, should be able to afford complete protection to its citizens. It is not enough that this protection should be extended to citizens while abroad; it should be as power at home. The citizen should be guarded in the enjoyment of his civil rights of life, liberty, limb, and property, against the unequal and oppressive legislation of the states. The Rule under consideration . . . effectively prevents the national courts from maintaining the rights of citizens against the encroachment of the states, as far as those rights are affected by positive restrictions." *Id.* at 149. (emphasis added).
[241] *Id.* at 150.

Pomeroy again spoke of "injustice and oppression" [242] indicating that "the proposed fourteenth amendment" would provide the "nation with complete power to protect its citizens against local injustice and oppression . . . which beyond all doubt, should be conferred upon [the nation]."[243]

Thus, like others who endorsed the Amendment, Pomeroy saw it was a means of providing double security for the rights of citizens—once by the state and a second time by the nation.

V.

Fairman, Frankfurter, Black; Berger and Curtis

In a prior work I have documented the overwhelming consensus that until 1949, the *Slaughter-House Cases* and, in some instances, *Cruikshank*, were wrongly decided. [244] Some scholars praised that result and some condemned it, but there was at least a consensus on the result. [245] Justice Hugo Black's dissent in *Adamson v. California*, [246] broke with the celebration of the nullification the Fourteenth Amendment.

It was Charles Fairman's work in 1949, with the help of Justice Frankfurter and Justice Jackson, that turned the tide of scholarship and developed a theoretical and claimed historical basis for what the Court did in *Adamson* and its prior decisions. Ironically, at the same time Fairman was making such in-roads in the academic world, Justice Black was winning the battle in the Supreme Court for applying the Bill of Rights to the states.

In his article for this symposium, Professor Curtis accurately explains the hegemony that Professor Fairman and, later, his classmate and fellow Frankfurter student, Raoul Berger, exercised on this topic from 1949 until the mid-1980s. [247] As Professor Kurt Lash has indicated, Michael Kent Curtis' *No State Shall Abridge* "brought together the historical evidence in the most comprehensive and most persuasive way that had ever been done and pretty much put to rest much of the serious discussion about whether the Bill of Rights should ever be incorporated. He had enormous impact" in academia. [248] In the words of Professor Randy Barnett, Curtis "proved that the established conventional wisdom among academics was just wrong" [249] and Curtis became "a hero in the subject." [250] Professor Curtis' account of his involvement in research in this area and its evolution is contained in the first portion of his article in this symposium issue.

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[242] *Id.* at 151.
[243] *Id.*
[244] *See also* Section IV of this article for illustrative quotations to support that view.
[245] Aynes, *supra* note 9, at 681-686.
[246] 332 U.S. 46, 68 (1947).
[247] Curtis, *supra* note ____, at ___. **{JCLI at 2-7}** Raoul Berger's primary work was his book RAOUL BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOUREENTH AMEMDENT (1977). He published many articles on the subject and published a second edition of this book in 1997.
[248] *Discussion,* 56 DRAKE L. REV. 1009 (2008).
[249] *Id.* at 1010.
[250] *Id.*

[251] There have, of course, been other important scholarly contributions to the development of our understanding in this area. [252]

VII.

George Thomas and Bryan Wildenthal

The discussion between George C. Thomas III and Bryan Wildenthal in many ways represents academia at its best. Unlike Charles Fairman, who identified W. W. Crosskey at an AALS Annual Meeting by his name tag, but purposely avoided having any conversation with him, [253] their writings in the *Ohio State Law Journal*[254] , e-mail exchanges, and interaction at the conference in San Diego, have involved polite and congenial exchanges by people of good will who nevertheless make clear their points of disagreement. This is heartening.

Professor Thomas' pursuit of the many on-line newspapers from the 19th Century is a step in the right direction. Indeed, at the University of Akron School of Law Constitutional Law Center —one of four such centers created by the U.S. Congress in commemoration of the bi-centennial of the U.S. Constitution in 1987— we have begun "The 39th Congress Project." This project is designed to produce more biographical information about the many members of the 39th Congress and locate their out-of-Congress speeches on the Fourteenth Amendment and other relevant issues. [255] The hope is that over time, law students will utilize the rich on-line resources to help create biographical sketches that will help enrich our understanding of what these Congressmen were doing and thinking. Professor Thomas has graciously agreed to participate in this project and I would welcome others who would be willing to do so. [256] I applaud Professor Thomas for

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[251] Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, __-___ **{JCLI 1-5}.**

[252] This includes, of course, the individuals I have cited and many others too numerous to mention.

[253] Aynes, *supra* note 9, at 1249-1250 ; *see also* the less than temperate remarks exchanged between Fairman and Crosskey in print. *Id.* at 1255 and n.386.

[254] Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L. J. 1509 (2007); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L. J. 1727 (2007).

[255] The web site, http://www.uakron.edu/law/constitutionallaw/39thcongressproject.php, currently contains the paper for Robin Lau (J.D. May 2009) on Congressman James M. Ashley (R-Ohio). A request to post an additional paper on Thaddeus Stevens (R-Pa.) has been made. Papers are currently being written on Rufus Spalding (R-Ohio), John Bingham's (R-Ohio) role in the creation of West Virginia, and James A. Garfield (R-Ohio).

[256] The approach is to try to obtain "support" from "participating" law faculty members who might offer advanced seminars in constitutional law, legal history or some related area. If we had only 100 participating professors and they gave their students the option of writing a paper on some member of the 39th Congress that would be a great start. If even one student in the classes of a one-fourth of the 100 participating professors wrote an article each year, that would produce 25 new biographical sketches that could be added to the Center's web site for use by all scholars. Others who would like to participate in this project can contact me at raynes@uakron.edu.

his important effort at beginning the discovery of relevant newspaper articles which would help everyone who has an interest in the area.

At the same time, in my view is Professor Thomas' pioneering efforts are only a tentative first step and have not yet matured to the point where one can draw conclusions from his effort. Though they cannot be exhaustive, set forth below are three reasons for this conclusion.

A.

Better than Newspapers

To be sure, newspaper accounts would be one way in which politically active people who were elected to the legislature would obtain their information. [257] But this is not the only, or even the primary, source.

Personal contact would be the best. Over the years Congressmen worked closely with local members of the state legislature and other local officials. For an individual who had to run for re-election, personal contact with local officials was crucial. Such contact might include not only face-to-face meetings, but letters and other mailings from Washington. Moreover, all Congressmen had a motive to keep in close contact with their allies in the legislature to be re-elected and because the legislature itself elected the U.S. Senators.

In addition, the voters would have ample opportunity to hear the views of the Congressmen by listening to their speeches. For example, we are told that Congressman James Garfield made over fifty speeches during the 1860 presidential campaign. [258] The account of the adoption of the original Constitution is no doubt applicable to the Amendment as well: "There were hundreds, perhaps thousands, of local elections for which there are probably no extant records." [259]

Further, we know that during this era many people had their own subscription to the *Congressional Globe* and followed the debates of Congress through the *Globe*, thus giving them knowledge independent of the newspapers.[260] The Congressmen themselves were provided with not only their own copy of the *Globe*, but with twenty-four extra copies [261] which they apparently gave to political allies. Thus, with a Congress of 235 members, there were 5,640 copies of the

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[257] Professor Thomas believes that "busy" members of the legislature would not follow the debates in Congress. But I want to suggest just the opposite. The position of a state legislator was not considered a full-time job and the legislative sessions were much shorter than today.

[258] THEODORE CLARKE SMITH, THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD 150-152 (1925).

[259] Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L. J. 723, 742 (1991).

[260] Two individuals who followed the actions of Congress with particular care were Justice Miller and Chief Justice Chase. Aynes, *supra* note 176 at 660-661 (examples of Miller following Congress closely); I SALMON P. CHASE PAPERS 610 (John Niven ed., 1993) (example of his knowing of a "great speech" that Bingham gave that very day).

[261] TREFOUSSE, *supra* note 69, at 39.

Globe that could be distributed to their political allies. This is more than enough copies for each member of Congress to distribute to the state legislative members whose districts overlapped with his own. Thus the entire legislature could have been covered, if they so desired. [262]

We know that as early as the 1780s, pamphlets, newspaper reporters, speeches, and letters "bombarded the voters." [263] We also know that thousands of "reprints" of the speeches of Congressmen were sent to constituents and others, by the speaker, by other congressmen, and by political parties. During General William T. Sherman's Atlanta campaign, as the 1864 Presidential election approached, "[p]amphlets of political speeches flooded the camp . . . ." [264]

The use of pamphlets was a critical part of political communication during the Civil War and Reconstruction area. In speaking of Secretary of War Edwin Stanton, historian T. Harry Williams pointed out the importance of this form of communication and tied it to the ability of government officials, including Congressmen, to "frank" the documents to key political players:

> Pamphlet writers formed an essential part of Stanton's propaganda machine. He knew the efficiency of this medium of dissemination <u>in an America which read avidly all the political documents franked out of Washington</u>. [265]

An example of this practice is found in a letter from James G. Blaine (R-Maine) to Israel Washburn (R-Ill.) reporting in 1856 that Blaine was present when "five or six bushels" of franked reports from T. J. D. Fuller (D-Maine) were brought into the post office. [266] These pamphlets were often circulated in large numbers. For example, after President Johnson vetoed the Freedman's Bureau bill, Congressman John Lynch (R-Maine) indicated that 100,000 copies of Senator Trumbull's (R-Ill.) reply would be "sent to the Country." [267] When the Report of the Joint Committee on Reconstruction was completed, 150,000 copies were distributed across the nation. This was a larger number than the subscriptions to most newspapers. [268] During this era,

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[262] Professor Thomas also claims that the "average state legislator" would not have read the speeches of Bingham and, assumptively, of other Congressmen like Howard. Thomas, *supra* note ___, at 41. Again, this is the application of 21st century views to 19th century reality. In this age before electricity and all the technology which occupies our time, the people of the 19th century focused upon politics, court proceedings, and religious activities. This was the "entertainment" of that era.

[263] Burger, *supra* note 259, at 742.

[264] LORLE PORTER, A PEOPLE SET APART: SCOTCH-IRISH IN EASTERN OHIO 693 (1998).

[265] T. HARRY WILLIAMS, LINCOLN AND THE RADICALS 235 (1965) (emphasis added).

[266] James G. Blaine to Israel Washburn, August 2, 1856 quoted in GAILLARD HUNT , ISRAEL, ELIHU, AND CADWEALLADER WASHBURN 49 (1925) (reprint 1969) (speculating that these were copies of Stephen A. Douglas' report on Kansas).

[267] HUNT, *supra* note 266, at 119 (quoting John Lynch to Israel Washburn, Feb. 21, 1866).

[268] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 264-65 (1914).

it was common for individuals to correspond about having received and read such pamphlets[269] or for people to write a speaker and request copies of a speech. [270]

One such pamphlet that received widespread circulation was Bingham's Fourteenth Amendment speech of February 25, 1866 with the title "In support of the proposed amendment to enforce the Bill of Rights."[271] Sometimes the speeches of multiple speakers were re-printed together. [272] Again, these reached the hands of common voters and politically active people like members of the legislature and other office-holders. Indeed, by its private printing and mailing, newspaper accounts, and printing in pamphlet form by various organizations, it is estimated that President Lincoln's letter to Erastus Corning on the military arrest of former Congressman Clement Vallandigham "at least 500,000 copies" of the letter "were read by 10,000,000 people." [273]

This was also a day in which leaders could influence others privately. According to historian Harold Hyman, Chief Justice Salmon P. Chase believed that both the Thirteenth and the Fourteenth Amendments enforced the Bill of Rights against the states. [274] In Chase's diary entry of May 10, 1866, he made reference to Bingham's "great speech" of that afternoon. [275] Later, Chase indicated that he urged white southern leaders to make the adoption of the Fourteenth

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[269] *E.g.*, Rev. Amory Battles to Israel Washburn, Feb. 8, 1859 quoted in HUNT, *supra* note 266 at 62.

[270] *E.g.*, J. N. Stearns & Co. to Israel Washburn, Mar.13, 1858 quoted in HUNT, *supra* note 266 at 56 (asking for copies of speeches, though understanding he could not "neglect" his own constituents"); J.D. Andrews to Israel Washburn, (referring to his "great speech" and asking him to "[s]end me some copies here, when printed . . . ."). *Id.* at 61.

[271] See inside cover of AKHIL AMAR, *supra* note 5, where this pamphlet with its title is partially reprinted. (emphasis added by underlining). *See also* OhioLink Search.

[272] *E.g.* "Reconstruction." Remarks of Hon. J. A. Bingham, of Ohio, and Hon. T. Stevens, of Pennsylvania (Congressional Globe Office, Washington D.C., 1867); "Reconstruction: speeches of Hon. S. W. Scofield, of Penn., and Hon. John A. Bingham, of Ohio," delivered in the United States House of Representatives (Jan. 20, 1868); Two per cent. Claims of Ohio, Indiana, and Illinois: report of the Judiciary Committee on the two per cent. Fund: with remarks on the same subject by Hon. Jeremiah M. Wilson of Indiana, Hon. Michael Kerr of Indiana, Hon. John B. Hawley of Illinois, Hon. John Bingham of Ohio.

[273] DOUGLAS L. WILSON, LINCOLN'S SWORD, THE PRESIDENT AND THE POWER OF WORDS 178 (2008).

[274] Harold M. Hyman, *Salmon Portland Chase*, *in* THE OXFORD COMPANION TO THE U.S. SUPREME COURT 136 (Kermit Hall ed., 1992); *see also* Curtis, *supra* note 76 at 48 ("Republicans believed that the Thirteenth Amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens.").

[275] I THE SALMON P. CHASE PAPERS 610 (John Niven ed., 1993). Chase's beliefs on the application of the Bill of Rights to the states – something that should not be surprising given Chase's civil rights activity and the fact that we know he followed Bingham's speeches in the Congress – it is doubtful he would join the opinion in Twitchell if the Fourteenth Amendment issue had been fairly before the Court. This confirms the analysis of Professor Amar and others that the matter was not properly presented. AMAR, *supra* note 5, at 206-07. Further, one should note that it would be inconsistent to accept the application of technical pleading requirements in a case like *Cruikshank* and then say they do not apply in a case like *Twitchell.*

Amendment the platform for the 1866 campaign and the "true policy" for the south. [276] This is just one example of how the speeches that might not be published in southern papers, might nevertheless have influence upon southern representatives.

Thus, while we can appreciate the importance of newspapers, we ought not to forget that there were other and, at times, more effective ways for members of state legislatures to receive information about the views of Congress on the Fourteenth Amendment. None of these other options are considered in Professor Thomas' article.

B.

The Importance of Context

When sociologist Pamela Brandwein examined the debate by Fairman and Crosskey over the Fourteenth Amendment and the Bill of Rights, she concluded that the "lens" or "frame" from which Fairman viewed the debates hindered Fairman's ability "to bracket (or historicize) the orthodoxy his own era produced" and produced misconceptions about what he read.[277] This same phenomena is illustrated in Professor Thomas puzzlement on his allegation that Senator Howard's "speech was ignored in the Senate chamber . . . ." [278] In fact, exactly the opposite was true, and Professor Wildenthal is correct that the lack of any meaningful response is a testimony to the acceptance and impact of the speech.[279]

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[276] CHASE, *supra* note 275, at 632 (Sept. 5, 1866, including Governor Hamilton of Texas and Louisiana Republican Durant) and 640 (Sept. 25, 1866, former U.S. and Confederate Congressman William W. Boyce of South Carolina and Dr. Duperioer, who I have not been able to identify).

[277] PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION, THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 128 (1999).

[278] Thomas, *supra* note ___, at 9. In my view, some of the newspaper articles are read in a modern context and without the context of the 19th Century through which its original readers would have lived. However, I will defer discussion of these until the project moves further along and use the treatment of Senator Howard as an illustration.

[279] Instead of disputing the statements Howard made on behalf of the Joint Committee, those who oppose the enforcement of the Bill of Rights against the states often attempt to discredit Howard in some way. Because Howard was a "radical", for that reason alone Berger thought that Howard unworthy of belief. As an example of his untrustworthiness Berger noted that Howard (like Lincoln) advocated that at least some African Americans should be allowed to vote. Berger, *supra* note 247, at 147. George Thomas says that Howard's "remarks were very late in the process and no one picked up the incorporation banter, either to embrace or criticize it." Thomas, *supra* note ___, at **{pre-conference draft. 6.}**.

Yet, Howard's speech was the very first to be given on the Amendment in the Senate. CONG. GLOBE, 39th Cong., 1st Sess. 2764 (May 23, 1866). One must respectfully wonder how any speech in the Senate could have "come too late", let alone the opening speech by the person designated as the floor manager. The debate in the Senate was not concluded until 15 days later, on June 8, 1866. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5, 135 (1949). The first state to

Fessenden and Howard were long-time colleagues, having served together as Whig members of the House of Representatives together in 1840-41.[280] One of the joint projects on which Fessenden and Howard worked in 1841 was the Joint Committee of Congress to commemorate the death of President William Henry Harrison.[281] Howard was personally chosen by Senator Fessenden to make the presentation on the floor of the Senate and, contrary to claims by some who would undermine Howard's speech, Fessenden was actually in the Senate listening to Howard's presentation. [282]

Further, when Jacob M. Howard spoke on the Fourteenth Amendment, he was not speaking as an individual member of the Senate, no matter how influential. Rather, he was a

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ratify the Amendment was Connecticut in June 1866 and the Amendment was not declared ratified until Congress' resolution July 21, 1868 and Secretary of State Sewart's proclamation of July 28, 1868. It is not self-evident why a speech on the meaning of an amendment that was not ratified until over two years later was or could be "too late."

Indeed, Chairman Fessenden obviously reached the opposite conclusion of Professor Thomas, because in an exchange with Senator Sumner right before Howard's speech, Fessenden indicated that after the House had passed the proposal "I thought it well. . . [that it] should lie upon the table for awhile in order to give the gentlemen ample opportunity to consider it . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

[280] Biographical Directory of the United States Congress, 1774-Present, *available at* bioguide.congress.gov/biosearch/biosearch.asp.

[281] BANGOR DAILY WHIG & COURIER, (Bangor, Maine), Jan. 3, 1866, col. C.

[282] FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICE OF WILLIAM PITT FESSENDEN 61-62 (1907) ("…Mr. Fessenden . . . gave the amendment to the charge of Senator Howard.") ("Mr. Fessenden was in his seat and participated in the debate, explaining why some of the amendments were thought necessary."). Of course, Fessenden could have chosen from the Joint Committee Senator James Grimes (R-Iowa), George W. Williams (R-Or.), Justin Morrill (R-Vt.) or Ira Harris (R-N.Y.) to make the presentation, but did not do so.

On Fessenden's presence in the Senate during the debates see also CONG. GLOBE, 39th Cong., 1st Sess. 2761 (casting a vote on an amendment to a bill to authorize the building of a railroad bridge between Wisconsin and Minnesota), 2762 (asking Senator Henderson two questions on two different occasions about the same bill) and 2763 (noting his disagreement with Senator Sumner about the propriety of taking up the discussion on the Fourteenth Amendment and making a statement on the process which fills two columns of the Globe) (May 23,1866). It should be noted that the two-column statement of Senator Fessenden is only approximately two columns before Senator Howard began his speech. *Id.* at 2764. Further, Chairman Fessenden indicated that he might take part in the debate, but that it would "depend on circumstances not entirely within my control." CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

We all make mistakes. While I do not doubt that the inference that Fessenden was not present in the Senate, drawn from Howard's speech, and the oversight in not reading the portion of the *Globe* just two columns before Howard's speech showing that Fessenden was present in the Senate were mistakes made in complete good faith, I do think they show the hazards of selectively reading the *Globe* and of relying upon inferences without checking to see whether there are facts which confirm or refute the inference.

member of the Joint Committee of Fifteen on Reconstruction and speaking on behalf of the Joint Committee. War hero, General, Congressman and future President James A. Garfield called the people on the Joint Committee "the truest and best men in Congress. . . ." [283]

Howard's role as spokesman for the Committee is confirmed by the content of the speech itself. Even a cursory look at the Journal of the Joint Committee reveals that while Howard ultimately supported reporting the entire Amendment to the Congress, in the behind-the-scenes struggle over its content he was not a champion of Section 1 and, in fact, frequently voted against it. This was Bingham's proposal and the fact that Howard's discussion is supportive of and consistent with Bingham's account in the House is evidence that Howard was being faithful to what was discussed and agreed upon in the Joint Committee.

In support of Howard's accuracy and honesty, it should be noted that he was a "respected" member of the Senate [284] and that he openly pointed out on the floor his disappointment at not being able obtain at least some limited provision for voting by African American males. [285] Howard's standing in the Senate is also shown by the amendment of the Amendment in the Senate. Rather than moving into obscurity, one of the first things that happened after Howard's speech was that the Republicans chose him for another leadership role regarding the Fourteenth Amendment. After various Republican caucuses in which the Amendment was discussed, Howard, Fessenden, and James W. Grimes (R-Iowa) were designated as a committee of three to prepare the proposals based upon the discussion in the caucus. [286] It was caucus leader Benjamin Wade (R-Ohio) who made the initial motion to add a citizenship clause. [287] But Howard (R-Mich.) had a different view and it was Howard's view that prevailed over the leader of the Republican caucus. [288] Fessenden also took an active role, obtaining the addition of the words "or naturalized" to the citizenship clause. [289]

These post-caucus proceedings show Howard's standing in the Senate, and equally as important, Fessenden's willingness to intervene if he disagreed with Howard. Yet, there was no

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[283] "Speech of the Hon. J. A. Garfield, of Ohio", CAMPAIGN SPEECHES, *supra* note 63, at 18 (Toledo, Aug. 22, 1866). He was probably referring only to the Republican members.
[284] MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 184 (1974).
[285] CONG. GLOBE, 39th Cong.,1st Sess. 2265 (May 23, 1866).
[286] **BENEDICT***supra* note 284, at 184-85.
[287] *Id.* at 185-187. An account of the views that the citizenship clause was merely declaratory of what the law was and the role and view of various Senators in amending the Amendment is found in Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment in* UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 110-140 (David E. Kyvig ed., 2000). For an updated version see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What they tell us about its interpretation*, 39 AKRON L. REV. 289, 290-300 (2006).
[288] CONG. GLOBE, 39th Cong., 1st Sess. 2764-65 (May 23, 1866).
[289] CONG. GLOBE, 39th Cong., 1st Sess. 3040 (June 8, 1866).

intervention by Fessenden on Howard's description of the meaning of the privileges or immunities clause. If this was a matter of discussion in the Republican caucus, it must have been satisfactory because there were no post-caucus discussions, no clarification or disavowal of Howard's speech and no proposed amendment with respect to the privileges or immunities clause, like there was with other portions of proposed Amendment.[290] Because the Amendment avoided all radical proposals and was the product of the moderates, it became the basis upon which all members of the Party could rally around. [291] Except for the portions amended in the Senate, there was simply nothing controversial in the proposal and no reason for extended discussion.

Professor Thomas also claims there was no response to Howard's views. In this claim Professor Thomas has inadvertently fallen into error because Howard's views were disputed by at least two Senators, Reverdy Johnson (D-Md.) and Senator Thomas A. Hendricks (D-Ind.). [292] I will focus upon Senator Reverdy Johnson (D-Md.) who had represented the slaveholder in *Dred Scott*, and in the Joint Committee voted against reporting out the

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[290] Professor Thomas appears to look for a chorus of Senator who will stand up and say "me too" to Howard's speech. Thomas, *supra* note ___, at ___ **{JCLI 16}**(Howard's speech "dropped into the pond . . . without leaving a ripple."). But this is not how the legislative process worked. Howard spoke for the entire Join Committee, including its Chairman Senator Fessenden and four other members of the Senate, excluding Senator Johnson (D-Md.). Their unanimous support for the Amendment in the Joint Committee needed no further statements beyond their votes in the Senate which were also unanimous. The votes of the entire Senate was also overwhelming, 33-11, with five Senators absent. Of those absent, only one was a Republican.

[291] Aynes, *supra* note 56, at 385.

[292] Professor Rosenthal cites speeches from three Democratic opponents of the amendment (without indicating that they were Democrats), Senator Johnson (D-Md.), Senator Thomas A. Hendricks (D-Ind.), and Representative William W. Boyer (D-Pa.) citing. as authority George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L, J. 1627, 1633, 1646 (2007). In the revision made between the conference and the final article Professor Thomas tries to make his statements consistent by asserting that there was a difference between Senator Johnson and Senator Hendricks claiming they did not "understand" the meaning of the Amendment and "responding to Howard's theory." Thomas, supra note ___ at ___. {**JCLI at 14 of the draft.**}

While this is an interesting approach, it is flawed for on at least fourth separate grounds.

First, as set forth in the text to follow, this was not the "theory" of Senator Howard, but rather the understating of the meaning of the privileges or immunities clause by the Republican members of the Joint committee – the leaders and most influential members of the Senate and the House.

Second, as developed in the text, there is substantial pre and post amendment evidence to suggest that Johnson did understand the meaning of the amendment in the same way that Howard articulated it and Johnson was simply being untruthful in his statements on the Senate floor.

Third, Johnson's claim is clearly inconsistent with the explanation given by Howard. If Thomas' view of the legislative process were true, then anyone opposed to an amendment could help defeat its avowed

Amendment. [293] In a June 8, 1866 speech Senator Johnson professed support for the citizenship clause and the due process clause. [294] He made no mention of the equal protection clause, but he opposed the privileges or immunities clause upon the claimed ground that "I do not understand what will be the effect of that." [295] As Professor Wildenthal documents, Senator Johnson moved to strike the clause from the Amendment and his views were not even considered worthy of debate or a roll-call vote in rejecting the motion. [296]

This is particularly interesting for multiple reasons. First, like President Johnson who helped to sponsor, along with some of his appointed Provisional Governors, a short-lived conservative counter-Fourteenth Amendment whose primary changes were to the privileges or immunities clause, Senator Johnson apparently had a real fear of that clause. Thus, we see a convergence between leading opponents (President Johnson, Senator Johnson, leading anti-war Democrat Vallandigham, as well as the Provisional Governors under President Johnson) of the privileges and immunities clause and the proponents of the clause in Congress who <u>all</u> saw it as an important portion of Section 1. [297] How much sense does it make to ignore and treat as a nullity the key provision of the Amendment?

Second, we have to take Johnson's claim to "not understand" its effect with a large amount of skepticism. In part, this is because he not only heard Howard's speech but he undoubtedly heard Bingham and others discuss the effect in the Joint Committee. Further, because Johnson argued *Dred Scott* he knew of the Chief Justice's conclusion that if African Americans were U.S. Citizens, their privilege and immunities under Article IV 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

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intent by simply arguing against the amendment without specifically recognizing the arguments for the amendment. This is contrary to common usage and common sense.

Fourth. Johnson clearly did not speak for the Joint Committee on Reconstruction. He was in the distinct minority that voted against reporting out the amendment. He clearly did not speak for the Senate, because he was in the distinct minority that voted against the Amendment and his weak attempt to amendthe Amendment by deleting the privileges and immunities clause was an utter failure, not even warranting debate or a roll call vote. In contrast, Howard spoke for the Joint Committee. Professor Thomas is willing to embrace the view of Johnson – even though no one else in the Senate mentioned Johnson by name or did an analysis his speech. Yet, he argues that in spite of his leadership position, Howard's views were ignored because no one said "amen" to Howard's speech. One would think that an even-handed approach, at the very least, would be that Howard and Johnson would be treated equally and, more logically, that Howard's leadership position as the floor manager with Fessenden's blessing should count for more than Johnson's isolated views.

[293] KENDRICK, *supra* note 268, at 114.
[294] CONG. GLOBE, 39th Cong., 1st Sess. 3041 (June 8, 1866).
[295] *Id*.
[296] Wildenthal, *supra* note 4, at ____. **{JCLI at 143 and n. 486}**
[297] Professor Thomas thinks this is true as well. Thomas, *supra* note ___, at ___. **{manuscript at 30}**

public meetings upon political affairs, and to keep and carry arms wherever they went."[298] This is confirmed by Senator Johnson's post-ratification action when he frequently represented KKK terrorists and Democrats opposed to Republicans and republican governments; he conceded that the privileges and immunities clause included the right to bear arms. [299]

C.

Significant Methodology problems

Professor Thomas has appropriately indicated that we really cannot evaluate the newspaper articles until we have read the actual article. [300] Yet, he is candid in his indication: "I am not sure how accurate the search engines are. On occasion, I would get a different number of hits when running the very same search." [301]

Inaccurate search engines are not an overwhelming obstacle if one is simply looking for relevant articles. Even if one misses a few articles or has to do the search multiple times, important findings can still be made. Indeed, Professor Thomas has already identified and summarized some articles in which many people working in the Fourteenth Amendment area will have an interest. This is significant contribution.

However, there is a difference between finding articles of interest and trying to prove a negative by indicating that there are no (or few) relevant newspaper stories. In order to do the latter, the search— like a scientific experiment— must be capable of replication by others. If Professor Thomas himself cannot always replicate his own study, it seems unlikely that others can do so.

Of even greater importance, Professor Thomas has misapprehended the nature of the data base he is searching. [302] Professor Thomas indicates that the data base he used contained 3,306 newspapers. [303] He believes the number of newspapers searched is important (as it is), because he mentions, a second time, that he searched a data base that has "over 3,000 newspapers."[304] A

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[298] Dred Scott v. Sanford, 60 U.S. 393, 417 (1857).

[299] Aynes, *supra* note 31, at 98 n.263. It is possible, of course, that Senator Johnson was referring to not knowing the meaning and effect of the non-Bill of Rights privileges and immunities. But, if so, that does not support Professor Thomas's analysis.

[300] Thomas, *supra* note __, at __. **[JCLI 3]** I have invited Professor Thomas to send me copies of the newspapers he uses so that, if there are no copyright issues, they can be scanned and placed upon the "39th Congress Project" web site for all to use.

[301] Thomas, *supra* note ___, at 6. **{January 22' 2009 paper}** In the conference presented at the University of San Diego, the most questions for the panel on which Professor Thomas, Professor Wildenthal and I participated, were about Professor Thomas's search technique. But I set those to one side given the nascent nature of the project and assume if there is any concern, it will be addressed in the future.

[302] This is newspaperarchieve.com

[303] Thomas, *supra* note ___, at **(1/22/09 version at 6)**.

[304] Thomas, *supra* note ___, at ___ **{1/22/09 version at 33}**

history of newspapers indicates that there were 3,000 newspapers in the U.S. in 1860 and 4,500 in 1870.[305] This might lead one to unthinkingly conclude that the data base utilized contained almost 74% of all the available newspapers in 1870 or 110% in 1860. [306] The latter impossibility should be a warning to alert everyone to the fact that there are significant methodological problems.

The methodological problems begin with the fact that the data base does not limit its journals to the key times of 1866–1868 or even the Civil War and Reconstruction era. Rather the data base covers two hundred fifty years (1759 to 2009) and it includes newspapers from eight foreign countries. [307] We do not know how many of those newspapers were in existence in the key time-period for us (whichever time period we choose[308]). This is the profile with which I was provided:

*They claim to have at least one publication from 3315 newspapers (spanning 1759-2009);
*They have at least one publication for 161 U.S. newspapers in 1860;
*They have at least one publication for 84 U.S. newspapers in 1868; and
*They have at least one publication for 260 U.S. newspapers in 1900.

If we take the number of newspapers in the data base for 1860 and use the papers estimated to exist in 1860, Professor Thomas has only searched 5.4% of the newspapers.[309] If we use the number of newspapers in the data base for 1868 and the number of newspapers in existence in

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[305] Mitchell Stephens, *History of Newspapers* (for Collier's Encyclopedia) http://www.nyu.edu/classes/stephens/Collier%27s%20page.htm (last observed June 5, 2009). Crosskey, *supra* note 11, at 101, indicates that there were 4,967 newspapers in 1870, citing HUDSON, JOURNALISM IN THE UNITED STATES 771 (1873).

[306] We know, of course, this is impossible.

[307] I appreciate the work of Assistant Law Librarian Annette Souare and her assistants in conducting this research. At the time they did the search the number of newspapers had increased to 3,315. The good news appears to be that this data base appears to continue to grow. A printout made on March 6, 2009 indicates that there are nine newspapers from Canada, one from Denmark, one from Ireland, eight from Jamaica, one from South Africa, ten from the United Kingdom, and one from the Virgin Islands.

[308] I would, of course, choose 1866-1868. *See supra* note 296 **{This is not the correct fn. in the version sent to me and may have been changed by my changes in this new version.}**. I realize others may choose different time period. But the question is the same for each time period: what is the universe of newspapers in the data base for that time period?

[309] I realize that the number of newspapers could change over a period of years. For example, if I read Professor Thomas' paper correctly, he has cited newspapers for a five year period: 1865-1869. We do not know how many total newspapers were available in the data base during that period. We cannot simply multiply the 1868 number by five, because new newspapers were founded and old newspapers went out of business. Multiplying the 1868 number would probably inflate the number of relevant newspapers Professor Thomas has consulted. For example, if 50 of those 68 papers were in existence for all five years Professor Thomas surveyed, to multiply the 68 papers times 5 would count the same fifty papers as if they were 250 papers. In any event, since this is his study, the task of identifying the total number of relevant time-period newspapers he has surveyed is his task, given that he wants to use them to prove the absence of coverage.

1870, he has only searched 1.9% of the newspapers. [310] In fact, however, we do not know and it appears that Professor Thomas does not know how many *relevant* newspapers he has been actually searching. This explains why he is not finding articles which have been found through normal research or articles in important papers that we know exist. It also means that we cannot rely upon the absence of documents in his search to support his claim.

In sum, while this is an interesting first effort, it is still in its nascent stage and until more comprehensive searches can be conducted, the searches can be replicated, and the methodology issues can be resolved, it is premature to place any reliance on the current results.

VII.

Professor Donald Dripps and the Grand Jury

Professor Dripps tells an interesting tale about the "first criminal law revolution" and there is no doubt that at the core, this is an important part of our legal history.[311] And yet, it hardly seems to support the weight he would put upon it.

He combines in this "first revolution" three components: the grand jury ("an anachronism"), the privilege against self-incrimination, and the party incapacity rule. [312] But if one thinks about this "revolution" one must conclude that it was a pretty *feeble* one. Yes, the party incapacity rule was abolished in the federal courts as well as the state courts. But the grand jury requirement and the right against self-incrimination are still safely protected by the Fifth Amendment to the U.S. Constitution. Thus, "the anachronism" still lives on more than two hundred years after the Fifth Amendment was adopted and more than one hundred forty years after the Fourteenth Amendment was ratified. At the very least, we know this was *not* a successful national revolution. Nor was any movement against the right against self-incrimination successful. According to Professor Kenneth Katkin:

> Since the earliest days of the Republic, the constitutions of all but two states also have always expressly protected the right of individuals against compelled

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[310] If we use the number of newspapers identified by Crosskey, 4,967 in 1870, and compare it to the number of newspapers for 1868 in the database used by Professor Thomas, then the percentage of newspapers at which he has searched falls to 1.3%.

[311] Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES___ (2009).

[312] Dripps, *supra* note 311, at 5. He claims, in part, that the "[p]olice assumed the investigative functions of the jp, and public prosecutors took over the charging process from the grand jury." *Id.* This is said to have been caused by increasing urbanization. Yet the census records for 1870 indicate the rural population of the U.S. was 74.3% . Without more information, the overwhelming rural population suggests that urbanization cannot have been the cause of any change or the change was very small. *See* U. S. Census, Table 4, Population: 1790-1990, *available at* http://www.census.gov/population/www/censusdata/files/table-4.pdf.

> self-incriminations. Moreover, both of the states that lack express constitution provisions [Iowa and New Jersey] also have protected the right against self-incrimination continuously since before the Civil War. [313]

No doubt articles will continue to be written about the need to abolish or reform the grand jury. But the issue does not seem to have "caught fire." Where is the national movement to abolish the federal grand jury provisions? Was this even mentioned in the 2008 elections?

Further, if we look to the relevant time period (1866-68), it is clear that the number of states interested in avoiding the grand jury was a distinct and slender minority. According to Dripps, the "first victory for Bentham reformers" seeking to dispense with the grand jury came in Michigan when a statute to that effect was adopted in 1859.[314] If I read Professor Dripp's paper correctly, while some others may have removed their Grand Jury requirement, no other state authorized proceeding without a grand jury until 1868 when Kansas passed a statute permitting prosecutors to proceed by information.[315] Thus, at best, this mini-revolution was engaged in by only two of the thirty-seven[316] states at the time.

Even that has to be qualified, because Senator Howard, the former Attorney General of Michigan (1856-1861), supported the enforcement of the Bill of Rights against the states, even though he must have known of Michigan's alternative procedure. This is consistent with Bryan Wildenthal's point that treatise writers who did not like the grand jury would nevertheless support incorporation because having a grand jury was clearly a much lesser evil than not passing the Fourteenth Amendment. [317] For example, in Ohio, even though the voters had previously rejected a complicated provision which would have given the right to vote to African American males, its Congressional delegation joined in proposing the Fifteenth Amendment and the Ohio Legislature

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[313] Kenneth Katkin, *Fourteenth Amendment "Incorporation" of the Criminal Procedure Amendments: The View From the States,* 84 NEB. L. REV. 397, 431-32 (2005). As Professor Dripps points out, because of the prevalence of the incapacity rule, there was no comment upon silence issue. But the "revolution" seems to have suffered a serious set back in 1878—when it was supposed to be going strong— by the adoption of a no comment rule by the Congress. *See id.* at 435 n.187 (citing 20 Stat. 30, Ch 37 (1878)). Further, at the time *Malloy v. Hogan*, 378 U.S. 1 (1964) (overruling *Adamson v. California*, 332 U.S. 46 (1947)), was decided, states had the approval of the Supreme Court to comment upon an individual's invocation of the right, but forty-four states prohibited this and only six states allowed it. *Id.* at 435.

[314] Dripps, *supra* note 311, at 7.

[315] Dripps, *supra* note 311, at 11 n.52. Kansas ratified the Fourteenth Amendment on January 11, 1867. Thus, the 1868 statute was passed after Kansas has ratified, but we do not know if the statute was passed before the amendment was actually adopted by the requisite number of states. While Dripps includes other states with later adoptions, it should be noted that California did not ratify the Fourteenth Amendment until 1959.

[316] I have included in the total number of states —Texas, Mississippi and Virginia—which were not represented in Congress during the 1868 Presidential Election.

[317] Wildenthal, *supra* note 4, at ____. **{JCLI at 47-51, 63, 78-79, and 83-84 }**

ratified that Amendment in 1870. Senator Howard was apparently willing to do the same with respect to the grand jury. Unlike the "revolution" against the prohibition amendment and the "revolution" against the party incapacity rule, the "revolution" against the protection against self-incrimination and the use of the grand jury was largely quashed.

I realize that many care deeply about the grand jury (or grand jury abuse) and I would assume most of the attendees at the conference would prefer that it not exist because it is commonly viewed as an unfair tool of the prosecutor. Nevertheless, I want to gently suggest that compared to the avoiding another war in which 620,000 lives were lost, allowing the former rebels to combine with Democrats to secure the fruits of the war, risking monetary claims of $1.6-2 billion by former rebels for emancipated slaves,[318] risking the taxation of loyal Southern Unionists to help pay a rebel debt of $ 3 billion, [319] and a host of other matters covered by the Fourteenth Amendment, the question of whether one has a grand jury or not is a minor and even unimportant matter, which pales into insignificance.[320]

Indeed, if one thinks about this for a while, it should be clear that the grand jury was never an important issue in the minds of the voters. The average adult voter will be called for jury duty, even if they do not ultimately serve. But the average adult can live his/her whole life without having any contact with the grand jury. The average adult will tell one (perhaps incorrectly) that a jury is composed of twelve individuals. But even very good lawyers may not know how many people serve on a grand jury and probably will never have any contact with a grand jury.

The Fourteenth Amendment was viewed as a "peace treaty" to end the Civil War,[321] to provide security against a future war,[322] and to "secure the fruits of victory."[323] A key point is that the First Congress proposed twelve amendments, only ten of which were contemporaneously

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[318] Aynes, *supra* note 193, at 318-319.
[319] *Id*. at 317.
[320] The question of whether the Fourteenth Amendment, as a whole or in its parts, could reasonably be thought to be less important than the existence of the grand jury and civil jury trial was explored in great detail in Aynes, *supra* note 193, at 309-321 (considering the paradox that the framers may have intended results that some of the ratifiers may not have desired, but felt they had no choice given the greater evil of not adopting the amendment).
[321] Curtis, *supra* note 27, at 1003.
[322] *The Nomination of Ashley in the Tenth District. The Platform Adopted, and His Speech,* CAMPAIGN SPEECHES, *supra* note 63, at 18, col. 2 (". . . demanding some pledge of security for the future . . ." and endorsing the Amendment "requiring guarantees, believing the future peace and prosperity of the country require them . . ."). After the Civil War there was talk among both Republicans and Democrats of a new war. *See supra* note 218.
[323] Aynes, *supra* note 56, at 374, 386, 391 and sources cited therein; Curtis, *supra* note 27, at 956 ("The prospect of winning the war and losing the peace was unacceptable to virtually all Republicans.").

ratified.[324] Had the Fourteenth Amendment framers followed the precedent of the proponents of the Bill of Rights, they would have submitted at least four separate amendments, each having its own enforcement clause. This would have allowed the ratifiers to pick and choose among the various proposals. The framers of the Fourteenth Amendment obviously made a reasoned choice to link these disparate amendments together. We can only surmise that the Congressmen did this for the usual legislative reason: they thought they had a greater success of having these provisions all passed collectively than if they were submitted individually. Thus understood, the framers wanted to use the popular provisions of the Amendment to secure passage of its more controversial provisions. This means that some of the consequences anticipated by the framers may not have been intended or desired by all of the ratifiers.

As David Kyvig has written in his book, which received the Bancoft Prize, "to combine a number of proposals into a single measure subtly but perceptibly shifted critical decision-making from the ratifiers to the initial adopters of an amendment resolution. Unlike the 1790s experience, states would confront a take-it-or-leave it, all-or-nothing choice." [325] Thus, unlike other constitutional amendments, in which the concerns of the ratifiers may be paramount, the framers have a large role to play in the Fourteenth Amendment. This insight may help unravel why states would vote to ratify the Fourteenth Amendment and then not conform their state constitution to comply with its provisions. While the full picture should include the view of both the framers and the ratifiers, Professor Kyvig's insight is still critically important.

Even when examined in its parts, no loyal person from 1866 to 1868 would vote against any section of the "peace treaty" simply because of an aversion to grand jury requirements. This applied, with even greater force, to the entire amendment combined. The stakes were too high: what the Fourteenth Amendment promised was too important and what the grand jury provision provided were too trivial by comparison.

With respect to the criminal procedure matters, there are at least three other observations of note. First, Bingham himself was served as a highly regarded defense counsel in criminal cases and was the prosecutor for Tuscarawas County, Ohio. [326] As it does today, at the time Bingham was practicing criminal law, the Ohio Constitution required that indictments be made by grand

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[324] Beginning at this point in the article and continuing until approximately footnote 322, this section is an updated version of a portion of the text that was first published in Richard L. Aynes, "Unintended Consequences of the Fourteenth Amendment" Chapter 4, p. 110 *in* UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT (David E. Kyvig ed., 2000) and reprinted, as updated, in Aynes, *supra* note 193.

[325] DAVID E. KYVIG, UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 166-67 (2000).

[326] Richard L. Aynes, *John Armor Bingham in* 2 AMERICAN NATIONAL BIOGRAPHY 792 (1999).

juries. [327] There is nothing to suggest that when Bingham said the fourteenth amendment would include enforcement of the Bill of Rights, he thought there was an exception for the grand jury clause. Indeed, when Bingham recalled the framing of the amendment in 1871 and read the first eight amendments to the House of Representatives, his reading of the Fifth Amendment included both the right of indictment before a grand jury and the right against self-incrimination.[328]

A similar point can be made with respect to Senator Howard. When Howard indicated to the Senate that the Amendment would enforce "the first eight amendments" against the states, there is no indication that he made any exceptions for the grand jury or any other provision. [329] Professor Dripps indicates that in his "famous speech," Senator Howard "mentions many Bill-of-Right particulars, but not grand jury indictment" as if that in some way undermined Howard's claim that "the first eight amendments" were privileges or immunities under the Fourteenth Amendment. [330] Professor Thomas makes substantially the same argument. [331] But a fuller examination of Howard's speech belies this claim.

In his discussion of the Article IV Privileges and Immunities clause, Howard quoted forty-seven lines of text in the *Congressional Globe* from Justice Bushrod Washington's opinion in *Corfield v. Coryell*. [332] While that opinion lists certain privileges and immunities, a portion of *Corfield*, also quoted by Senator Howard, stated Washington's opinion that: "These, and many others which might be mentioned [but were not], are, strictly, privileges and immunities" to be enjoyed under the provision. [333] Senator Howard indicated that the privileges and immunities of U.S. citizens "cannot be fully defined in their entire extent and precise nature . . . ." [334] Nevertheless, referring to all of the Fourteenth Amendment rights outlined in *Corfield*, Howard indicated that "to these must be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; . . . ." [335]

Howard did not say the first eight amendments— excepting the two parts of the Fifth Amendment to which Professor Dripps objects—are the privileges or immunities of U.S. citizenship. Rather, Howard said "the first eight amendments." Immediately after the semicolon

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[327] OHIO CONST. art. I, § 10.
[328] CONG. GLOBE, 42nd Cong., 1st Sess. 84 (Mar. 31, 1871).
[329] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866).
[330] Dripps, *supra* note ___, at ___ (**the page with III and n. 17 in the last manuscript: there are no page #s**).
[331] Thomas, *supra* note ___, at ____. **{JCLI at 14-15}**
[332] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866).
[333] *Id.* (emphasis added).
[334] *Id.*
[335] *Id.* (emphasis added).

shown above, Howard proceeded to say "such as" and then he paraphrased[336] most, but not all of the amendments. It is true that in his paraphrasing of the examples ("such as"), Howard does not include the right to a grand jury indictment. But the term "such as" gives clear notice that other matters are included. Further, Howard does clearly say "secured by the first eight amendments to the Constitution" and he puts the listener/reader on notice three times that his list is not exhaustive: once when he quoted from *Corfield*; once when he said that all the privileges and immunities cannot be outlined; and once when he used the terms "such as." [337] Given this context, one cannot reasonably draw an inference from the omission of an example that Howard did not mean what he said: that "the first eight amendments" were to be enforced.

Bryan Wildenthal is surely correct when he writes:

> Given the political imperatives for Republicans supporting ratification of the Fourteenth Amendment, it is doubtful whether anyone considered or cared much about the relatively minor particulars in which some states were not already in conformity with the Bill of Rights. That could have been worked out by litigation or legislation. [338]

VIII.

Conclusion

A.

Summary

Together, Representative John A. Bingham and Senator Jacob M. Howard authored the whole of Section 1 of the Fourteenth Amendment. Bingham was the floor manager in the House and Senator Howard was the floor manger in the Senate. Both Bingham and Howard stated that among the privileges and immunities of the Amendment were the rights protected under the Federal Bill of Rights and these were to be enforced against the states. When they spoke, they spoke not for themselves, but for the Joint Committee and, as the results show, for the overwhelming majority of the Congress. The amendment passed by significant majorities in the House (120-32) and the Senate (33-11).

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[336] While Bingham's pre-ratification speeches often involved a paraphrase of the amendments, his 1871 speech listed them all word-for-word and would suggest that he was reading the amendments. The fact that Howard did not include the Fifth Amendment grand jury provision in his list of illustrations is probably the result of his paraphrasing from memory and/or the fact that violations of the fifth amendment were not high on the list of abuses against which the Republicans complained.

[337] *Id.*

[338] Wildenthal, *supra* note 95, at 1478.

The Amendment itself was the central issue of the Congressional elections of 1866, and both the Republicans and the Amendment won by overwhelming majorities. This election was a "disastrous defeat" for President Johnson and his Democratic allies.[339] Former Union General and Republican Senator (R-Mo.) and later U.S. Secretary of the Interior (1877-81), Carl Schurz had nothing but scorn for the Democratic claims of state rights, stating: "In the name of liberty [they] asserted the right of one man, under State law, to deprive another man of his freedom" and "they will tell you now that they are no longer true freemen in their States because . . . [they] can no longer deprive other men of their rights."[340] The "state rights" for which the Democrats campaigned was the "right" to exclude native born Blacks from citizenship and the rights to "do wrong" to Blacks and other Unionists. In spite of the opposition of the most racist President in U.S. history and of the Democratic party, which chose to campaign almost exclusively upon race, the Amendment was ratified, often with approval by overwhelming majorities in the individual state legislatures. [341] Yet, sometime between five and eight years later it was a virtually nullity. Indeed, it had been "nullified" in the spirit of John C. Calhoun and suffered a fate not unlike the Fifteenth Amendment was soon to suffer.

In the quest to determine the meaning of the privilege and immunities clause, others have documented its long lineage and noted that the terms have been used in North America for over two hundred fifty years before their use in the Fourteenth Amendment.[342] Though it is no doubt true that the two words once served distinctive purposes, at least by the time of Justice Miller's decision in the *Slaughter-House Cases*, the entire Court used the word "rights" as a synonym of privileges and immunities. [343] Thus, the question of the meaning of this clause is: what are the "rights of U.S. citizens"?

To answer that question we should begin with the text and interpret it in a way that is both reasonable and designed to apply principles of freedom, and not those of states rights and slavery. Such an interpretation begins with the recognition that the text was thought by contemporaries to be "clear."

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[339] FONER, *supra* note __ at 267. [which Foner source?]

[340] JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 150 (1990).

[341] In Ohio, for example, the vote for ratification in the Senate was 21-12 and in the House it was 54-25. Aynes, *supra* note 56, at 393. **{Benedict chapter}** In Connecticut, the first state to ratify the Amendment, the vote was 11-6 in the Senate and 107-84 in the House. *See* JOSEPH B. GILLETTE, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 13 (1984). South Carolina, the last of the states to ratify which Secretary of State Sewart considered necessary to complete ratification, passed the proposal by a vote 23-5 in the Senate and 108-12 in the House. Gillette appears to give vote totals for each state.

[342] Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 J. CONST. LAW (forthcoming 2009).

[343] *Id.*

On the campaign trail in 1866, General and future President Garfield told the people that the terms of the Fourteenth Amendment were "few in number, easily understood . . . ." [344] The conservative Republican Governor of Ohio, a former Major General in the Union Army, told the legislature that "a single statement of these propositions is their complete justification . . . ." [345] Professor Rosenthal notes that an editorial in the *New York Times* termed Howard's speech "clear and cogent." [346] Further, Professor Thomas notes that "[q]uite a few newspapers" simply quoted the amendment, acting as if the "meaning was clear enough." [347] On May 27, 1866, only two days after Senator Howard's speech, the *New York Tribune*, probably the most influential newspaper in the country at the time, indicated that debate would be short because the subject was "already thoroughly discussed and understood . . . ." [348]

Justice Swayne indicated that with respect to Section 1:

> No searching analysis is necessary . . . . Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established significance. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out." [349]

Contrary to what has been implied, there is absolutely nothing to suggest that the public at large and the members of the legislatures who ratified the Amendment did not share the common understandings of the framers in Congress. In spite of the attempts of the executive branch to prosecute those who violated various provisions of the Bill of Rights, no scrap of evidence has ever been presented to suggest that it was alleged that the framers committed "fraud" upon any legislature by asking them to ratify an amendment they did not understand. No scholar who lived through the ratification period claimed that either Bingham or Howard's views

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[344] CAMPAIGN SPEECHES, *supra* note 63, at ___ (emphasis added). **(prior fn.)**

[345] 1 Ohio Executive Documents 282 (1867), cited and quoted *in* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 162 (1984). Though Cox attended Oberlin College and was said to have been an abolitionist who helped form the Ohio Republican Party, by his term in office Cox opposed voting by African Americans and advocated "forced segregation." SIFAKIS, *supra* note 106, at 148.

[346] Rosenthal, *supra* note ___, at ___. **{JCLI 16}** While Professor Rosenthal cites this editorial to make a different point, it is obvious that the writer of the editorial had read the whole speech.

[347] Professor Thomas used the words "indulge in an assumption that its meaning was clear enough." Thomas *supra* note __, at ___. **{JCLI 42}** (footnote omitted). If the contemporaries of the amendment thought its meaning clear, then one might accept their judgment and try to figure out what they thought the meaning was.

[348] *May 27 dispatch*, N.Y. TRIBUNE, June 1, 1866, quoted *in* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, PART I 1295-96 (1971) (emphasis added). For the flaws in Farman's own analysis of the amendment see Brandwein, *supra* note 277, at 76 to 131 and Aynes, *supra* note 9. Without reviewing the whole article, it is difficult to know for sure what the Tribune meant by "thoroughly discussed." But there are at least two possibilities. First, they may have been writing about all the discussion of these issues that had been taking place over many years. Second, they may have been referring to the debates in the House and the Senate, including the speeches of Congressman Bingham and Senator Howard.

[349] Slaughter-House Cases, 83 U.S. 36, 126 (1873) (Swayne, J., dissenting).

were unknown to the public. Knowing what we know about the politics of that era, there is no reason to disbelieve, and every reason to believe, that the members of the legislature either knew of the debates in Congress and/or shared the common understanding of the privileges of immunities with members of Congress. [350]

Part of the reason for this is because the people of this generation lived through shared experiences that allowed them to have shared understandings. For example there is a famous incident where Massachusetts tried to vindicate the rights of its African American citizens under the Article IV privilege or immunities clause by sending Judge Hoar to South Carolina to meet with authorities and, perhaps, to even initiate litigation. In 1866 Representative Delano (R-Ohio) called all of this to his listeners' minds with a single sentence: "I know that you remember when an able lawyer from Massachusetts was expelled from South Carolina by a Southern mob." [351] To a modern day reader this would not mean much. But to his audience it conveyed a whole story without even the mention of the able lawyer's name or his mission. It was shared knowledge of events like this which this generation had lived through that allowed the Republican majority to share common goals and common understandings.

We see this same phenomena when we read Professor Tiedman's remarks on why he thought the Supreme Court was justified in "amending" the Fourteenth Amendment. Tiedman did not claim that his view or the action of the Court vindicated the will of the people (or their state legislatures) against a rogue Congress. Rather he was focused upon "the people" themselves, who he thought had been "blinded by passion." It was "the popular will" that the Court—though not the Congress—"dared to withstand . . . ." [352] The problem was not that the ratifiers misunderstood the framers, but that they both understood the will of the people and acted accordingly. [353] From 1868 until 1949 no prominent scholar disputed the clearness of the purpose of the Amendment or that its purpose had been nullified. While some people lamented this fact,

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[350] *See* Section VII, A *supra* on the variety of ways in which individuals would receive information about the actions of Congress if that were necessary to supplement their own plain reading of the text. The single exception to this claim are the post-ratification statements and action which I submit cannot be accepted for all the reasons previously outlined.

[351] CAMPAIGN SPEECHES, *supra* note 63, at 23.

[352] Tiedman, *supra* note 170, at 102-03 and 108.

[353] In the area of criminal law and criminal procedure we apply the general maxim that all people are presumed to know the law. We hold this to be true even though the law may have enacted without any publicity, may be buried in a complex and lengthy criminal code, and the average citizen would not actually know the law. Yet, these "unknowing" individuals would be sent to jail without any concern. It would seem reasonable, by analogy, to look to the "public understanding" of the words in the Fourteenth Amendment with much less detailed information than Professor Thomas has insisted upon.

the opponents "manfully" (they were all men) admitted that the Amendment was being nullified and celebrated that fact. [354] [355]

Speaking of the U.S. Constitution, Senator Timothy Howe (R-Wisc.) said that "we have formerly taken the Constitution in a solution of the spirit of States rights. Let us now take it as it is sublimed and crystallized in the flames of the most gigantic war in history."[356] Professor Curtis connects to that the statement of conservative Congressman George Anderson (R-Missouri) that "we are today interpreting the Constitution from a freedom and not a slavery standpoint." [357] Neither the framers nor the ratifiers intended to continue to interpret the Constitution or the Amendment from the slavery or states' rights points of view. [358]

If we look to the Amendment from a "freedom standpoint" this is what we find:
If we look at the plain language of Section 1 and ask "What are the rights of U.S. citizens?", the most natural meaning is the Bill of Rights and other provisions of the Construction such as habeas corpus. We might have a vibrant discussion about whether the privilege or immunities (rights of U.S. citizens) include a "right to family life" [359] or the Jacksonian Democrats' anti-monopoly views. But at the core, there should be no dispute that they include the Bill of Rights. If one asked what are the rights of U.S. citizens, the average person today and in the 19th century would answer the Bill of Rights.[360]

To be sure, private or secret understandings cannot be indulged and can have no effect. But public statements of the framers made in public fora are certainly strong evidence of the public understanding of the terms used in the Amendment. Moreover, given Dr. Kyvig's insight

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[354] *See* Section III.B of this article and also Aynes, *supra* note 176, at 681-686 for more examples. Of course people did oppose that result – but they too thought the meaning was clear.
[355] Aynes, *supra* note 9, at 1218. Even in the twentieth century Justice Frankfurter said that he wished the Amendment had never been adopted. (In 1924 Frankfurter said that the due process clauses of both the Fifth and Fourteenth Amendments "ought to go." In 1928 he referred to the reconstruction amendments as "drastic" limitations on the states. In 1954 he reported to Learned Hand that he had once told Justice Cardozo that he, Frankfurter, "favored the repeal" of the Fourteenth Amendment and wished it has never been adopted).
[356] Curtis, *supra* note 27, at 921-222.
[357] *Id.*
[358] Professor Thomas wants to use "state rights" as the touchstone for the test of the amendment. Thomas, *supra* note ___, at ____. **{JCLI ___}** Professor Thomas is concerned about the authority a proper interpretation of the Amendment would give to the Congress and federal judiciary on the "rights" of the states. Specifically addressing the states rights' defense against Congress and federal judges, the editors of the *New York Herald***,** among others, responded to such objections by stating that they "reflect the 'old Southern theory' regarding our federal system that was demolished at Petersburg and surrendered at Appomattox Court House with Lee's Army." John E. Nowak , *Essay on the Bill of Rights: The "Sixty Something" Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445, 468 (1992).
[359] *See* Aynes, *supra* note 342.
[360] *E.g.*, Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 540 (1891).

about the affect of combining multiple provisions into one amendment, and the binary choice that imposed upon the ratifiers, good faith requires that we make efforts to harmonize the views of the framers and the ratifiers where we can reasonably do so. In this vein, we should not hold the privileges or immunities clause to a higher standard of proof than we do other constitutional provisions. Rather, whether we rely upon the new pronouncements of Justice Scalia in *Heller*[361] or the somewhat dated statements of Justice Holmes, [362] the result is the same. If the record in *Heller* supports an individual right to bear arms under the Second Amendment, then it applies *a fortiori* that the record of the Fourteenth Amendment supports enforcing the principles of the Bill of Rights against the states.

Howard specifically stated that among the privileges or immunities are the rights contained in the "first eight amendments"; Bingham stated that they will protect the "Bill of Rights" (at least 7 times including his statements in the discussion of the Civil Rights Act), and that House Judiciary Chairman Wilson stated the Civil Rights Act will protect the "Bill of Rights" and that the Bill of Rights need to be enforced. Professor Thomas suggests that Bingham's legal analysis was too complex for "the public" to understand.[363] But all of these public statements—"the bill of rights" and "the first eight amendments"—were terms "the people" could understand. [364]

Corroborating this view, if we look to the discussion of the abuses against which the Amendment was to correct, we find claims of violations or of the need for protections such as: "inalienable rights,"[365] "individual rights,"[366] "personal liberty,"[367] "every right and privilege

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[361] District of Columbia v. Heller, __ U.S.__, 128 S. Ct. 2783 (2008).

[362] "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used , and it is to the end of answering this last question that we let in evidence as to what the circumstances were." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

[363] Thomas, *supra* note ____, at ___. **{JCLI 20}**

[364] The same could be said about the terms used by the convention of Southern Loyalists, "the rights of the citizen enumerated in the Constitution". *See supra* note ___. [which note?] Those who want to campaign against the Bill of Rights try to create a catch-22: if the legal analysis is good then it is claimed it is too complicated for the people to understand; if it is simple enough for the people to understand, then they claim it does not have all the nuances about provisions that elites care about.

[365] Hayes, *supra* note 69.

[366] Garfield, *supra* note 86, 90. [I think fn 366-67 changed because we eliminated a citation to Garfield early on see note 74]

[367] Garfield, *supra* note 90.

belonging to a freeman,"[368] "rights of man," [369] "every constitutional right upon every inch of U.S. soil,"[370] and "natural rights." [371] With the exception of "natural rights,"[372] these terms are generally broad enough to encompass the rights protected by the Bill of Rights. Even when only one example—often free speech—is given, it is often made clear that this is only the "chief" right of the "rights of man" or other general rights about which they were talking. [373] These terms are terms that "the people" could understand at their core, even if there are disagreements at the margins. These general claims can all be harmonized with the framers' actions in the Congress.

Professor Amar has asked: "Who wants to campaign against the Bill of Rights?" [374] While he was writing about the political campaigns in 1866, there are people today who are "campaigning" against the Bill of Rights. In briefly sketching the history of this campaign, it is proper to recur to statements of Senator Howe and Congressman Anderson in order to consider how the constitution has been interpreted in a slavery/states rights "standpoint." Essentially, it involved protecting slavery at all costs and being willing to use both states rights and national power to do so. It included indulging in every possible interpretation against freedom and embracing every possible interpretation in favor of slavery.

The attempts to defeat the Amendment are rather reminiscence of Confederate General Joseph E. Johnston's "masterful delaying" defense of Atlanta.[375] It is said that while he fought one battle against General Sherman, he had a series of trenches prepared for his troops to retreat to for the next several battles. At first, we find opponents of the Bill of Rights fighting in the open. Contemporaries, except for the Democrats in Congress who wanted the amendment to fail,

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[368] Slaughter-House Cases, 83 U.S. 36, 123 (1872) (Bradley, J., dissenting).
[369] HARPER'S WEEKLY, *supra* note 211("among others that of free speech . . .").
[370] HARPER'S WEEKLY, June 6, 1863.
[371] Sherman, *supra* note 100. [I cannot find an earlier reference to Sherman.]
[372] Some of the provisions of the Bill of Rights were not considered natural rights.
[373] HARPER'S WEEKLY, June 15, 1861 – around p. 34, n. 211 **{change to supra note 215.**
[374] AMAR, *supra* note 5, at 205.
[375] SIFAKIS, *supra* note 106, at 347.

thought the language was "clear."[376] Historian James McPherson indicates that Americans of the revolution and later generations considered "liberty" to be the "birthright" of Americans of European descent and that it "usually meant" "the rights of states and localities, the freedom of the press, of speech, of assembly, of religion, the right to security in person and home against unreasonable search and seizure, the right to bear arms, the right to a trial by jury, the sanctity of property, and the writ of habeas corpus."[377]

Once the times had changed so that the defeat of the Amendment's purpose could no longer be celebrated,[378] the opponents of the Bill of Rights adopted a different strategy and retreated to the next line of trenches. Those who want to "campaign" against the Bill of Rights take a variety of approaches, but they all result in a narrower interpretation wrought by using a

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[376] *See* views of opponents in text and *supra* notes 83-114.

[377] MCPHERSON, *supra* note 340, at 47.

[378] In the era when "full citizenship" was denied to African Americans and dissident whites this might not be a very important question. As it was in the times of slavery, the oligarchy in the South (and elsewhere) had its rights protected and others suffered without remedy. Yet, the famous debates over the rights of citizens in *Adamson v. California*, 332 U.S. 46 (1947) came at a critical time in American history. It coincided with the end of World War II and returning Black veterans claiming "their rights" as U.S. citizens who had risked their lives for their country. It also coincided with the celebration of the defeat of race-based Nazism. It was contemporaneous with President Harry Truman's creation of the 1946 Committee on Civil Rights and move to desegregate the armed forces. It should be noted that the march of enforcement of the Bill of Rights also coincided with the rise of the "Second Reconstruction" and the modern Civil Rights movement. Moreover, it has not gone unnoticed that most of the "incorporation" cases which modern opponents oppose involved the protection of the rights of Black citizens. It should not be surprising to anyone that those who joined together to create the Second Reconstruction utilized the tools fashioned by the First Reconstruction – especially the Fourteenth Amendment.

In the interest of clarity, I should emphasize that I am not suggesting that all of those who opposed incorporation were opposed to Black rights. To the contrary, Charles Fairman was in favor of de-segregation and Justice Jackson and Justice Frankfurter participated in the unanimous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). I am suggesting that the state governments overstepping its proper boundaries and oppressing people before and after the Civil War caused the 39th Congress to enact, among other provisions, the Fourteenth Amendment. By the same token, it was the states' abdication of their duties to their citizens and the overstepping of their proper boundaries to oppress citizens before and after World War II that caused the Court to begin to implement the true meaning of the Amendment. Those who oppose the application of the Bill of Rights to the state need to ponder this history and the effect their views would have had if adopted by the Court in the 1950s and 1960s and the effect it could have in the future, looking not only to the amendments affecting the criminal procedure, but also to other rights such as those protected by the first amendment.

different standard than that used for other amendments[379] and other portions of the Fourteenth Amendment.

Next, opponents used *ad hominine* attacks upon Bingham and Howard claiming both were confused. [380] As the falsity of those claims were uncovered, the opponent claimed that Howard's speech was not reported to the public. [381] Yet Professor Curtis established that it had been reported in at least three major newspapers[382] and Professor Thomas has added two more to the list. [383] A different approach is to try to claim that the Amendment only guaranteed equal protection and/or nondiscrimination. But that argument fails because nondiscrimination and equality were <u>one</u> of the privileges or immunities of U.S. citizenship. <u>If</u> it were the only one, then there would be no need to use both terms ("privileges" and "immunities"), and they would be singular and not plural. A current approach is to look at the Amendment with the proverbial jaundiced eye and resolve all possible interpretative issues against its ordinary reading and against being consistent with the explanation of the framers. Any speech, newspaper article, or other evidence cannot be held to be supportive of harmonizing the view of the framers and the ratifiers unless it is impossible to *imagine* some possible ambiguity or inconsistency.

A famous Judge claims that the amendment is only an "inkblot" that he cannot understand. [384] Yet, as Justice Robert Jackson, no friend to an expansive reading of the Amendment, recognized that standards were begin applied to the Fourteenth Amendment that had not been applied to other provisions of the Constitution:

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[379] We do not find this searching test for the meaning of the ratifiers in other provisions of the Reconstruction amendments. Indeed, there is no definition of "slavery" or "involuntary servitude" in the Thirteenth Amendment, yet no one insists upon definitions being in the newspapers before we conclude what this amendment meant to the adopters. Similarly, no one seeks to ferret out the meaning of the other undefined terms of the Fourteenth Amendment such as citizens, due process, or even equal protection. In all of these examples, we may have disagreements at the margins, but we know what they mean at the core. One possible exception to this claim is the treatment to the 9th Amendment.

[380] Fairman, *supra* note __, at ___. **{I'm still working on fns. 380-381-382. I've just e-mailed Prof. Curtis asking for his advice. I thought they came from his book NO STATE SHALL, but I could not find it there. I am now thinking this is from Prof. Curtis' paper and/or Prof. Thomas' paper for the symposium. I'll try tocheck the lastest versions I have of their papers over the weekend and get back to you on this. If I can't locate, I'll try to rewrite the text so we can eliminate one or more of these.}**

[381] Berger, *supra* note ___, at ___.

[382] Curtis, *supra* note ___, at ___.

[383] I realize that Professor Thomas believes that more newspapers would be needed to show that the members of the state legislature understood the Amendment's purpose. I think it is fair to believe that the people, including the members of the state legislatures, knew what actions the Congress was taking with respect to the Constitutional Amendment based upon the sources of information previously noted and what we generally know about political interaction at this time in our history.

[384] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990). This book has been characterized as a work which "strongly sought to justify originalism while scarcely citing nay works of history." Martin S. Flaherty, *Post-Originalism*, 68 U. OF CHIC. L. REV. 1089, 1111 (2001).

> This Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process,' 'general welfare,' 'equal protection,' or even 'commerce among the several States.' [385]

Another trench into which opponents retreat is the one that holds that unless a statement explicitly states all of the provisions of all of the first eight amendments, it must be supportive of only "selective incorporation." [386] Of course, this ignores the fact that the clause includes non-Bill of Rights provisions like habeas corpus, right to access to the courts, and other matters. Further, this is certainly an ungenerous reading of the Amendment and fails any attempt to try to reconcile the views of the framers with those of the ratifiers. Moreover, it must be recalled that the very idea of "selective incorporation" was not mentioned in any court case until 1947.[387] No one has produced any citation to any contemporaneous court decision or speaker that suggests one could divide the Bill of Rights and apply some to the state and not others. To the contrary, the theories of the time would seem to be more consistent with the second Justice Harlan's assertion, first called to my attention by Professor Thomas: either Section 1 incorporates all of these rights or it incorporated none." [388]

This would suggest that advocating the enforcement of any one of the eight amendments would support the claim of the floor managers that all are to be enforced. Even if one took a narrower view than the second Justice Harlan, unless the statement said "only" a certain provision of the Bill of Rights, it is just as likely to corroborate the framer's views as to dispute them. Any such ambiguities should be resolved in favor of harmonizing the views of the framers and the ratifiers.

But the continued effort to avoid the enforcement of the Bill of Rights against the states, the retreat from one trench into the next, reminds one of the refrain of a popular song in the 1970's by Credence Clearwater Revival in the *Fortunate Son* lines about the tax collector coming to the house:

> And when you ask them 'How much should we give?'
> Ooh, they only answer More! More! More!"[389]

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[385] Edwards v. California, 314 U.S. 160, 183 (1941). Of course, the current Court as a whole has rejected Judge Bork's view in *Saenz v. Roe*, 526 U.S. 489 (1999).

[386] Thomas, *supra* note ___. **{Draft at 32}** We are told it involves the right free speech and the "secure in their personal property." One objection to "counting" this for purposes of applying the Bill of Rights against the states is that only one of the part of the Bill of Rights is mentioned, free speech.

[387] Adamson v. California, 332 U.S. 46, 60, 65 (1947) (Frankfurter, J. concurring).

[388] Thomas, *supra* note ___ **{Draft at 2}** (citing Duncan v. Louisiana, 391 U.S. 145, 181 (Harlan, J. dissenting) (1968)).

[389] Creedence Online, *Creedence Lyrics: Fortunate Son*, http://www.creedence-online.net/lyrics/fortunate_son.php (last visited Mar. 18, 2009).

It seems that no matter how much evidence is produced, how much additional support is provided for the understanding of both the framers and the ratifiers, or how many false-facts are exposed, those individuals who oppose the enforcement of the Bill of Rights against the states always ask for "more." I have no doubt that new research will continue to provide new information on whether or not the enforcement of the Bill of Rights against the states was understood by the framers and the ratifiers. But even if it supports such enforcement, I have doubts that it will ever satisfy those who, for policy reasons, oppose the application of the Bill of Rights against the states. They will always want "more."

Yet, if we use the star of freedom to guide our interpretation, then we have to fairly credit the ratifiers and the framers as having adopted the Amendment with the understanding that it would enforce Bingham's "Bill of Rights" and Howards "first eight amendments" against the states.

B.

The Future

The reconstruction era, the actions of the Congress, and actions of the Courts are inherently interesting to a number of people both from a historical and a legal standpoint. Consequently, I would assume that these questions will be with us for the long-term and that at least a small number of people will continue to research, make new discoveries, develop new ideas, and analyze these times and the meaning of the Amendment. Though this is only a surmise, I suspect that the enhanced interest in the area and the increase in the number of scholars writing in the area today has something to do with the *Heller* case and the question of whether it will be enforced against the states. As I have previously noted, this prospect inspires hope for some and fear for others.[390] Further, people who fear the grand jury abuse, no doubt have concerns that if the second amendment is enforced against the states, then the grand jury provisions may be as well.

Whether the future of scholarship on the enforcement of the Bill of Rights against the states will continue at an enhanced volume or will return to prior levels, depends, in large part, upon the actions of the Supreme Court. If the Court quickly grants review and either rejects the enforcement of the Second Amendment against the states or accepts it based upon due process, then I suspect that the scholarship on the enforcement issue will return to "normal" levels. On the other hand, if the Court takes the approach it took prior to *Batson v. Kentucky*[391] and allows the

[390] Richard Aynes, *Self-Defense, The 2nd Amendment, and the U.S. Supreme Court*, 2 AKRON LAW 2-3, 7 (2008).
[391] 476 U.S. 79 (1986).

matter to "percolate" in the lower courts for a number of years, then I suspect scholarship will continue at an intense pace.[392] Similarly, if the Court were to decide to enforce the Bill of Rights against the states based upon the privileges or immunities clause, then this might signal the potential for a realignment of the Supreme Court's decisions which had previously been based upon due process and would probably produce a torrent of scholarship.

While we wait to see what the Court will do, I would suggest that we need to acknowledge that while not everyone agrees, there is nevertheless the "scholarly consensus" of which Professor Barnett speaks. We need to turn our attention from the old "incorporation" debate (and the use of the approach Professor Lash advocates) and look to the question of what would be an invigorated privileges or immunities clause due beyond the Bill of Rights. This process has, of course, been individually pursued by a number of scholars. Moreover, it was the subject of a major conference at the University of Pennsylvania this past November,[393] and will be the focus of at least one panel at the Law & Society conference in May 2009.

Lincoln said that at the time of the Declaration of Independence's proclamation that all men were created equal, it "was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after time might seek to turn a free people back to into the hateful paths of despotism." [394]

Like the Declaration, Section 1 of the Fourteenth Amendment outlines the rights of U.S. citizens and citizenship in broad terms which can inspire not only leaders and office-holders, but the people themselves. As my colleague Elizabeth Reilly has noted, Section 1 contains "stunning opening phrases" that include "sweeping evocations of individual rights" including the privileges or immunities clause. [395] And the Fourteenth Amendment brings "hope" to all who read it.[396] But, unlike the Declaration, the Fourteenth Amendment had a very practical purpose. It was designed to offer federal protection to the most precious rights of American citizens that pre- and post-Civil War events demonstrated were so essential. Those who oppose this application of the Bill of Rights to the states may be acting in good faith, but the effect of their view would be to

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[392] McCray v. New York, 461 U.S. 961 (1983) (three justices concurred in denying certiorari, while two Justices dissented, arguing that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.").

[393] The "Second Founding" Conference on November 13-14, 2008 at the University of Pennsylvania School of Law and co-sponsored by the American Constitution Society for Law and Policy and the Constitutional Accountability Center.

[394]Fehrenbacher, *supra* note 193, at 398-99 (citing Speech on [the] Dred Scott Decision, June 26, 1857). [I think fn 193 is the right note]

[395] *See* Elizabeth A. Reilly, *Infinite Hope: Introduction to the Fourteenth Amendment; the 140th Anniversary Symposium*, 42 AKRON L. REV. (forthcoming 2009).

[396] *Id.*

turn the protection of the most important rights over to the states which have shown time and time again that they are not equal to the task. To fail to provide that protection was, in the past, and would be in our future, in the words of General, Congressman, and President Hayes, "wrong in principle, wrong in its details, and finally wrong as a precedent and example for the future."[397]

SanDiego July 10, 2009

[397] *See supra* note 74 and accompanying text.