

**Chapman University Dale E. Fowler School of Law**

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# The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation

Lawrence Rosenthal



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# CHAPMAN UNIVERSITY SCHOOL OF LAW



## LEGAL STUDIES RESEARCH PAPER SERIES

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### THE NEW ORIGINALISM MEETS THE FOURTEENTH AMENDMENT: ORIGINAL PUBLIC MEANING AND THE PROBLEM OF INCORPORATION

Lawrence Rosenthal

# The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation

LAWRENCE ROSENTHAL\*

## TABLE OF CONTENTS

I.	THE PRE-RATIFICATION PUBLIC UNDERSTANDING OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP .....	365
	A. <i>The Contested Understanding of the Privileges and Immunities of Citizenship Prior to Ratification</i> .....	367
	B. <i>The Advantages of Ambiguity</i> .....	377
II.	THE PUBIC UNDERSTANDING OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP IN THE WAKE OF RATIFICATION.....	385
	A. <i>Ratification</i> .....	386
	B. <i>Judicial Interpretations in the Wake of Ratification</i> .....	391
	C. <i>Framing-Era Commentary</i> .....	395
III.	AMBIGUITY AND THE NEW ORIGINALISM .....	401

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\* Professor of Law, Chapman University School of Law. As someone who has always benefited greatly from the comments of those who do not share my own perspectives, I am particularly grateful to Richard Aynes, Randy Barnett, Michael Kent Curtis, Kurt Lash, Lawrence Solum and Bryan Wildenthal for enormously helpful comments, and to Saul Cornell, whose thinking more closely parallels my own. I also owe thanks to Anastasia Sohrakoff, Amy Song, and Isa Lang and the staff of Chapman University's Rinker Law Library for highly capable research assistance. An equally great debt is owed to Donald Dripps and the University of San Diego's Institute for Constitutional Originalism for organizing and funding the symposium that gave life to this paper, and kindly inviting my participation.

To the untrained eye, the only reference in the Fourteenth Amendment to the iconic list of rights found in the Constitution's first eight amendments is section one's guarantee of due process of law, also found in the Fifth Amendment.<sup>1</sup> No other of the first eight amendments seems to make an appearance in the Fourteenth. Nevertheless, the Supreme Court has incorporated a number of the protections of the Bill of Rights within the Fourteenth Amendment's guarantee of due process of law by labeling them as "fundamental,"<sup>2</sup> or "implicit in the concept of ordered liberty."<sup>3</sup>

Among legal scholars, the case for due process incorporation is not taken terribly seriously; instead, incorporationists principally rely on evidence that the framers of the Fourteenth Amendment intended its command that "[n]o State shall abridge the privileges and immunities of any citizen of the United States,"<sup>4</sup> to secure the protections of the first eight amendments against the states.<sup>5</sup> This originalist case for incorporation of the Bill of Rights within the Fourteenth Amendment's Privileges or Immunities Clause, however, has encountered a change in thinking about the role of historical evidence in constitutional interpretation.<sup>6</sup>

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1. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

2. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Washington v. Texas*, 388 U.S. 14, 17 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

3. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968); *Mapp v. Ohio*, 367 U.S. 643, 650 (1961); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *overruled on other grounds by Mapp*; *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

4. U.S. CONST. amend. IV, § 1.

5. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163-230 (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 57-91, 215-20 (1986); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1089-95 (1953). The primary obstacle to incorporation under the Due Process Clause is textual. If the Fourteenth Amendment's Due Process Clause incorporated the first eight amendments, it would create a redundancy with the Fifth Amendment's Due Process Clause. See *Adamson v. California*, 332 U.S. 46, 63-66 (1947) (Frankfurter, J., concurring). For my own effort to assess the original meaning of due process, see Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 28-47 (2007).

6. For present purposes, it will suffice to define originalism as determining the meaning of an enactment by reference to the manner in which it was "understood at the time of the law's enactment." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE*

At one time, the prevailing view among those who believed that the original meaning of constitutional text should guide constitutional interpretation was that the Constitution should be construed by reference to the intentions of the framers.<sup>7</sup> This approach met with powerful objections: It was argued that one cannot practicably ascertain the collective intentions of those involved in framing and ratifying constitutional provisions;<sup>8</sup> and that constitutional interpretation based on framers' or ratifiers' intentions was at odds with a framing-era understanding that a legal text should not be construed by reference to the intentions of its makers.<sup>9</sup> By the 1990s, most leading originalists had acknowledged the force of these objections and embraced the view that the Constitution should be construed in light of the generally understood meaning of its text at the time of ratification rather than the intentions of the drafters.<sup>10</sup>

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POLITICAL SEDUCTION OF THE LAW 144 (1990). To be sure, there are many variants of originalism. For a helpful typology, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1811-15 (1996).

7. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13-21 (Jack N. Rakove ed., 1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988).

8. See, e.g., DANIEL A. FARBER & SUSANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 14-25 (2002); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 284-398 (1988); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456-74 (1984); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 30-36 (1995); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-22 (1980); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997); Marc V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

9. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 340-65 (1996); Hans W. Baade, "*Original Intent*" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006-62 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

10. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92-117 (2004); BORK, *supra* note 6, at 143-51; MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 28-53 (1994); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 160-212 (1999); Baade, *supra* note 9, at 1103-07; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-307 (2007); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the*

Called by one of its leading advocates “the New Originalism,”<sup>11</sup> this approach seems recently to have prevailed in the United States Supreme Court; considering the proper interpretation of the Second Amendment in *District of Columbia v. Heller*,<sup>12</sup> the Court wrote: “In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’ Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”<sup>13</sup> The Court additionally rejected the use of “statements of those who drafted or voted for the law that are made after its enactment” in favor of “examination of a variety of legal and other sources to determine the *public understanding* of a legal text . . . .”<sup>14</sup>

This article explores the historical case for incorporation in light of the original public meaning of the Fourteenth Amendment. It seeks to demonstrate that the New Originalism poses special problems for incorporation because the prevailing public understanding of the privileges and immunities of citizenship prior to the framing of the Fourteenth Amendment did not include any privilege or immunity with respect to state laws inconsistent with the first eight amendments. Although many who crafted the Fourteenth Amendment had a different

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*Laws*, 104 YALE L.J. 541, 550-60 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1186-259 (1987); Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 756-60 (1987); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 229-36 (1988); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1127-48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529 (1998) (reviewing RAKOVE, *supra* note 9); Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123 (2007).

11. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

12. 128 S. Ct. 2783 (2008). The Second Amendment provides: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II.

13. *Heller*, 128 S. Ct. at 2788 (citation omitted) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (brackets in original)).

14. *Id.* at 2805 (emphasis in original). Cass Sunstein has described *Heller* as “the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.” Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246 (2008) (footnote omitted).

view of the privileges and immunities of citizenship, the evidence is thin that the drafters succeeded in altering the general understanding of the privileges and immunities of citizenship. Viewed through the lens of original public meaning, the historical case for incorporation is therefore problematic.

The article proceeds in three steps. Part I demonstrates that at the time the Fourteenth Amendment was drafted, the prevailing understanding of the privileges and immunities of citizenship did not include the rights enumerated in the Constitution's first eight amendments. Part II examines the evidence from the framing era to determine whether the process of drafting and ratification altered the meaning of the privileges and immunities of citizenship sufficiently to accommodate incorporation, and finds that evidence wanting. Part III concludes that a nonoriginalist approach is a better way to tackle the incorporation problem.

#### I. THE PRE-RATIFICATION PUBLIC UNDERSTANDING OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP

There is little doubt that many of the key players in the crafting of the Fourteenth Amendment believed that its Privileges or Immunities Clause protected those rights enumerated in the first eight amendments to the Constitution against state abridgement. Consider the remarks of Senator Jacob Howard as he introduced what would become the Fourteenth Amendment on the floor of the Senate. Referring to a leading case construing the Privileges and Immunities Clause in Article IV of the existing Constitution,<sup>15</sup> Howard said:

It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States . . . . [W]e may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington . . . . It is the case of *Corfield vs. Coryell* . . . .

. . . .

“The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult

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15. “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.” U.S. CONST. art. IV, § 2, cl. 1.

to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised . . . .”

Such is the character of the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot fully be defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution . . . .<sup>16</sup>

Similarly, Rep. John Bingham, a principal player in the crafting of the Fourteenth Amendment,<sup>17</sup> in debate over an earlier proposal that would have granted Congress “power to enact all laws which shall be necessary and proper to assure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property,”<sup>18</sup> repeatedly stated that the proposal would permit enforcement of the first eight amendments against the States.<sup>19</sup> While no other Member of Congress was quite that explicit, many members stated that the proposal would facilitate enforcement of the existing provisions of the Constitution against the states.<sup>20</sup>

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16. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (quoting *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)).

17. On the role of Bingham, see, for example, EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 52-60, 79-92 (1990).

18. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

19. See, e.g., *id.* at 1034, 1088, 1089, 1090. During the debate over the final version, Bingham was not as expansive, but mentioned in passing that the proposed amendment would authorize a remedy against “cruel and unusual punishments” in violation of the Eighth Amendment. *Id.* at 2542. In the debates over what would become the Civil Rights Act of 1871, in contrast, Bingham was the epitome of clarity, forcefully restating his view that the privileges and immunities of citizens included the first eight amendments, and even reading them into the record. See CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871).

20. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 586 (proposed amendment “provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution”) (Rep. Donnelly), 1054 (proposal would “give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality”) (Rep. Higby), 1057 (proposal protected rights “already to be found in the Constitution”) (Rep. Kelley), 1066 (proposal would protect

Evidence of the intentions of key drafters of the Fourteenth Amendment is important, but the New Originalism demands evidence of the public's understanding of the meaning of the Fourteenth Amendment, or at least the understanding of those members of the public familiar with the generally accepted meaning of legal terms. On that score, the case for incorporation is more difficult to make.

*A. The Contested Understanding of the Privileges and Immunities of Citizenship Prior to Ratification*

The threshold problem with the view that the privileges and immunities of citizens included the right to be free from state abridgements of the first eight amendments is that the Supreme Court had denied that citizens had a privilege or immunity to be free from state laws inconsistent with the first eight amendments. In *Barron v. City of Baltimore*,<sup>21</sup> Chief Justice Marshall's opinion could not have been plainer:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.<sup>22</sup>

*Barron* produced the prevailing understanding of the “privileges and immunities” conferred by the first eight amendments at the time of the

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“freedom of speech from state suppression”) (Rep. Price), 1088 (proposal protected “those privileges and immunities which are guaranteed . . . under the Constitution”) (Rep. Woodbridge), 1263 (characterizing “the right of speech” “the writ of habeas corpus, and the right of petition” as “the rights and immunities of citizens”) (Rep. Broomall), 1294 (referring to proposal as a “bill of rights”) (Rep. Wilson), 2459 (proposal’s protections “all are asserted, in some form or another, in our . . . organic law”) (Rep. Stevens), 2555-56 appendix (proposal is “more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power”) (Rep. Baker), 2961 (proposal would enable enforcement of “all the provisions of the Constitution”) (Sen. Poland) (1866).

21. 32 U.S. (7 Pet.) 243, 247-50 (1833).

22. *Id.* at 247. The Court quickly reaffirmed this holding. See *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833).

Fourteenth Amendment's ratification. The leading framing-era treatises, for example, explained that *Barron* had settled that the Bill of Rights had no application to the States,<sup>23</sup> making untenable an argument that the privileges and immunities of citizenship included protection against state laws inconsistent with the Bill of Rights, at least as a matter of then-extant public meaning. Thus, at the time of the Fourteenth Amendment's drafting, the case that the public meaning of the privileges and immunities of citizenship included freedom from state legislation inconsistent with the Bill of Rights is basically a loser.

Given *Barron*, it is fair to ask how Bingham, Howard, and other incorporation advocates could have thought that the "privileges and immunities" formulation could have secured the Bill of Rights against the states. The answer, it turns out, is that they had an unconventional view of the privileges and immunities of citizenship. There was a school of thought that understood *Barron* to mean only that the federal government lacked power to enforce the Bill of Rights against the states, while still believing that the Bill of Rights limited the constitutional authority of the states.<sup>24</sup> In the debate over the admission of Oregon to the Union, for example, Bingham denied "that the States are not limited by the Constitution of the United States, in respect of the personal or political rights of citizens of the United States," adding that "whenever the Constitution guarantees its citizens a right, either natural or conventional, such guarantee is itself a limitation upon the States."<sup>25</sup> He endeavored to reconcile this view with *Barron* in the debate on his original proposal for a Privileges and Immunities Clause thusly:

[A]lthough as ruled [in *Barron*] the existing amendments are not applicable to and do not bind the States, they are nevertheless to be enforced and observed by the states by the grand utterance of that immortal man, who, while he lived, stood along in intellectual power among the living men of his country, and now that he is dead, sleeps alone in his honored tomb by the sounding sea. I refer to that grand argument never yet answered, and never to be answered while human language shall be spoken by living man, wherein Mr. Webster says:

". . . . [I]n the Constitution it is the people who speak, and not the States." . . . .  
"They address themselves to the States and in the Legislatures of States in the language of injunction and prohibition, by authority of the people . . . . It incapacitates any man to sit in the Legislature of a State who shall not first have

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23. See, e.g., THOMAS W. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 19 (1868) (Da Capo Press 1972); 1 JAMES W. KENT, COMMENTARIES ON AMERICAN LAW 456 (O.W. Holmes rev. 1873).

24. See AMAR, *supra* note 5, at 181-87; CURTIS, *supra* note 5, at 37-41, 49-54, 59-91, 112.

25. CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859).

taken his solemn oath to support the Constitution of the United States. From the obligation of this no State power can discharge him.” 3 *Webster’s Works*, p. 471.<sup>26</sup>

I am happy to confess that I find Bingham’s effort to square his position with *Barron* something less than a fully persuasive account of the holding of *Barron*. But whatever one thinks of Bingham’s account of *Barron*, it is plain that his view did not represent the prevailing understanding in the framing era. The Supreme Court had authoritatively ruled that citizens had not privilege or immunity to be free from state laws inconsistent with the first eight amendments, as the mainstream commentators of the day acknowledged. Under *Barron*, the first eight amendments were not “enforced and observed by the states,” Bingham’s protestations to the contrary notwithstanding.

Nevertheless, as Michael Kent Curtis has demonstrated, views consistent with Bingham’s were expressed with some frequency in the Thirty-Eighth and Thirty-Ninth Congresses.<sup>27</sup> But, as Professor Curtis admits, these views did not represent an accurate account of the existing privileges and immunities of citizenship: “[S]uch claims were made even though the Supreme Court had ruled in 1833 [in *Barron*] that the guarantees of the federal Bill of Rights did not impose limits on the states.”<sup>28</sup> Another advocate of incorporation, Bryan Wildenthal, has similarly conceded that “the *Barron* contrarian view was and remains unorthodox and incorrect.”<sup>29</sup> From the standpoint of the New Originalism, these concessions create enormous problems for incorporation. Though there were some who refused to reconcile themselves to the rather plain import of *Barron*, this was a minority view. The framing-era public meaning of the privileges and immunities of citizens did not include a right to resist state laws thought to be violative of the first eight amendments.<sup>30</sup> To be sure, Professor Curtis has marshaled powerful evidence that in the framing

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26. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

27. Professor Curtis has identified some 30 examples in the Thirty-Eighth and Thirty-Ninth Congresses in which Members reflected the view that the “privileges or immunities” of citizens included the Bill of Rights. See CURTIS, *supra* note 5, at 112.

28. Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1010-11 (2000) (footnote omitted).

29. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1543 (2007).

30. For a similar argument, albeit not framed in terms of the New Originalism, see Donald A. Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again”*, 74 N.C. L. REV. 1554, 1576-79 (1996).

era, the phrase “privileges and immunities” was used as a synonym for rights, including constitutional rights.<sup>31</sup> This evidence, however, does not establish that the privileges and immunities of citizenship were thought to extend to state laws inconsistent with the first eight amendments; there simply was no such legally cognizable right.

Consider, for example, *Dred Scott v. Sandford*,<sup>32</sup> one of the cases that Professor Curtis features, both in his earlier article and in this symposium, as support for his view that the framing-era meaning of the privileges and immunities of citizenship encompassed the rights described in the first eight amendments.<sup>33</sup> On its way to holding that Congress lacked authority to prohibit slavery in federal territories, the Court wrote that “[t]he powers of the Government and the rights and privileges of the citizen are regulated and clearly defined by the Constitution itself.”<sup>34</sup> Of the first eight amendments, the Court wrote:

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers.<sup>35</sup>

Thus, in the Court’s view, the rights and “privileges” conferred by the first eight amendments ran against the federal government, but not the states. *Dred Scott* did not hold that the rights of citizens included the right to hold slaves in states that had prohibited slavery; to the contrary, the Court agreed that when Scott was taken by his owner to Illinois, which prohibited slavery, he was legally free.<sup>36</sup> *Dred Scott* described the first eight amendments as “rights and privileges” running against the federal government, but it was equally clear that they conferred no rights, privileges, or immunities with respect to state law.

In this fashion, the great bulk of the evidence amassed by Professor Curtis can be put aside; it demonstrates that the Bill of Rights was often described in terms of the privileges and immunities of citizenship, but

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31. See Curtis, *supra* note 28, at 1094-1136.

32. 60 U.S. (19 How.) 393 (1856).

33. See Curtis, *supra* note 28, at 1128-29; Michael Kent Curtis, *The Bill of Rights and the States: An Overview From One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 41 (2009).

34. 60 U.S. (19 How.) at 449.

35. *Id.* at 450-51 (emphasis supplied).

36. *Id.* at 452-54.

these privileges and immunities ran only against the federal government.<sup>37</sup> The more meager evidence that Professor Curtis identified to support the view that the privileges and immunities of citizens were understood to include a right to be free from state legislation inconsistent with the Bill of Rights is limited to the views of those who believed, despite *Barron*, that the first eight amendments applied to the states.<sup>38</sup> For example, to establish that the privileges and immunities of citizenship were not understood exclusively in terms of the limitations on federal power, Professor Curtis notes on the decisions of a handful of state courts that expressly rejected *Barron*.<sup>39</sup> He also notes the treatise of abolitionist Joel Tiffany, while acknowledging that “he expressed what was then the view of a minority.”<sup>40</sup>

Professors Curtis and Wildenthal attempt to deal with *Barron* by claiming that the privileges and immunities of citizenship always included the Bill of Rights; the Fourteenth Amendment merely provided a “security device” that protected these rights against the states.<sup>41</sup> Even the most casual reading of *Barron*, however, thoroughly undermines that account. As we have seen, *Barron* construed the Bill of Rights to preserve state authority to act in ways inconsistent with the Bill of Rights.<sup>42</sup> In light of the Tenth Amendment’s reservation of state power, it is not going too far to say that the Constitution granted states a right—that is, a “privilege or immunity”—to act inconsistently with the first eight amendments.<sup>43</sup> Given *Barron*’s gloss on the Bill of Rights, it makes no sense to say that first eight amendments were understood as individual rights lacking only a device to secure them against the states; these rights were understood to preserve state authority against federal interference, not as potential limitations on state powers. If anything, the privileges and immunities of citizenship included the right to enjoy the benefits of a state-law legal

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37. See Curtis, *supra* note 28, at 1098-111, 1127-32.

38. See *id.* at 1111-21, 1132-37.

39. See *id.* at 1118-21.

40. *Id.* at 1116.

41. See Curtis, *supra* note 33, at 35-36; Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen’s Paper*, 66 GEO. WASH. L. REV. 1269, 1272-75 (1998); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-73*, 18 J. CONTEMP. LEGAL ISSUES 153, 283-84 (2009).

42. See *supra* text at note 22.

43. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X (emphasis supplied).

regime not subject to the restrictions of the first eight amendments. The antebellum conception of federalism, in short, understood the first eight amendments as protections for states' rights by limiting the powers of the federal government, rather than free-floating rights in need only of a "security device" to facilitate their enforcement against the states.

In this symposium, Professor Wildenthal presses the point, arguing that the Fourteenth Amendment's Privileges or Immunities Clause, by utilizing the "No state shall abridge" formulation, necessarily created the requisite "security device" that protected all citizens against state laws inconsistent with the first eight amendments.<sup>44</sup> This may be an accurate account of the intentions of at least some of the drafters, but as we have seen, the focus of the New Originalism is on the extant public meaning of the text, not the intentions of the drafters. Even though the drafters utilized the "No State shall abridge" formulation, the rest of the Privileges or Immunities clause did not purport to alter any of the preexisting privileges and immunities of citizenship, or to create new ones. And, since the first eight amendments, under *Barron*, were not understood to afford privileges and immunities against state laws inconsistent with the Bill of Rights, nothing in the text of the Fourteenth Amendment could change the meaning of the "privileges and immunities" of citizenship, which went unaltered by Fourteenth Amendment.<sup>45</sup>

Thus, reading the Fourteenth Amendment's Privileges or Immunities Clause in light of the settled understanding of the first eight amendments under *Barron*, the Privileges or Immunities Clause meant something along the lines of, "No State shall abridge any of the rights that citizens enjoy with respect to the federal government." As it happens, that is pretty much the position later taken by the Supreme Court in *The Slaughter-House Cases*,<sup>46</sup> in which the Court held that the Fourteenth Amendment's Privileges or Immunities Clause prohibited state interference with only those rights that inhered in the citizen's relationship with the federal government, such as the rights to engage in interstate travel, to

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44. See Wildenthal, *supra* note 41, at 283-84.

45. Professor Wildenthal argues that my position necessarily rests "on an unexpressed premise that a security device originally connected with a right cannot be divorced from a right itself." *Id.* at 281. I confess I find considerable merit in this "unexpressed premise"; it is difficult to talk about a "right" except to the extent that an effective remedy is available, and for that reason Professors Curtis and Wildenthal may well be guilty of the error that Daryl Levinson has labeled "rights essentialism." See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). The position taken here, however, is more modest. I submit only that given prevailing antebellum conceptions of federalism, the notion that the privileges and immunities of citizenship could include legal attacks on state laws thought inconsistent with the first eight amendments was essentially a non sequitur in terms of contemporary public meaning.

46. 83 U.S. (16 Wall.) 36 (1872).

use navigable waters, to the protection of treaties, and to petition the federal government for redress of grievances.<sup>47</sup> As a matter of original intent, there is not much to be said for *Slaughter-House*—there is a paucity of evidence that anyone involved in drafting or ratification intended that the Privileges or Immunities Clause be read in this fashion. But, in terms of the framing-era public meaning of the privileges and immunities of citizenship, *Slaughter-House* fares somewhat better. Precisely because the Constitution, under *Barron*, did not grant citizens any rights or immunities with respect to state laws inconsistent with the first eight amendments, the privileges and immunities of citizenship included only those rights citizens enjoyed against the federal government. Therefore, one semantically plausible reading of the Fourteenth Amendment is that it forbids states from interfering with the rights that citizens may assert against the federal government, but offers nothing to those whose only complaint is that a state has acted inconsistently with the Bill of Rights.

Still, in light of the absence of evidence that anyone during the process of drafting or ratification understood the Privileges or Immunities Clause to operate as described in *Slaughter-House*, there is reason to doubt whether that opinion correctly ascertained the original public meaning of the Fourteenth Amendment. And, putting *Slaughter-House* aside, if there were no other plausible account of original meaning other than that provided by Professors Curtis and Wildenthal, perhaps incorporation should carry the day. There is, however, another account of the privileges and immunities of citizenship during the framing era that has substantial support as a matter of original public meaning, and which does not encounter the obstacles that *Barron* poses for an incorporationist account of the privileges and immunities of citizenship.

Constitutional text addressed to the privileges and immunities of citizenship was not new; the antebellum Constitution provided that the citizens of each state were entitled to “all privileges and immunities of citizens of the several states,”<sup>48</sup> a formulation close enough to the Fourteenth Amendment’s that both Bingham and Howard referenced the Article IV provision as providing insight into the current proposal.<sup>49</sup> Moreover, as we have seen, to describe the privileges and immunities of

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47. *Id.* at 96-111.

48. U.S. CONST. art. IV, § 2, cl. 1.

49. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (Rep. Bingham), 1089 (Rep. Bingham) 2765 (Sen. Howard) (1866). To similar effect, see *id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

citizenship, Howard invoked Justice Washington's opinion addressing the Article IV Privileges and Immunities Clause in *Corfield v. Coryell* as providing the best indication of the meaning of the "privileges or immunities" of citizenship, yet that decision did not identify the Bill of Rights as among the privileges and immunities of citizens.<sup>50</sup> The Article IV conception, in short, suggests that the contemporary public meaning of the privileges and immunities of citizenship did not include the first eight amendments.

Howard was correct to afford special significance to *Corfield*; the leading treatises cited it as authoritative and, following its lead, explained the Privileges or Immunities Clause as a prohibition on a state discriminating against citizens of other states with respect to state and common-law rights thought to be fundamental, without any reference to the first eight amendments.<sup>51</sup> Indeed, Howard knew that he needed to supplement the definition in *Corfield* in order to accomplish incorporation; he segued from *Corfield*'s definition of privileges and immunities to the first eight amendments: "To these privileges and immunities, whatever they may be—for they are not and cannot fully be defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments."<sup>52</sup> Nevertheless, Howard's assertion that *Corfield* had incompletely defined the privileges and immunities of citizenship is slender evidence of the extant public meaning, uncorroborated as it was by leading precedent, treatises, or other powerful evidence of prevailing public understanding.

Only months after the ratification of the Fourteenth Amendment,<sup>53</sup> the Supreme Court had occasion to consider Article IV's Privileges or Immunities Clause; it construed the Clause as a nondiscrimination obligation with respect to state-law rights.<sup>54</sup> This is surely potent evidence

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50. See *supra* text at note 16.

51. See COOLEY, *supra* note 23, at 15-16; 2 KENT, *supra* note 23, at 84-85; GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED 226 (1868); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1806 at 582 & n.4 (1832) (Melville M. Bigelow rev. 1891). For a helpful discussion of the state of the law on the Article IV concept of privileges and immunities, see EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 28-32 (2003).

52. CONG GLOBE, 39th Cong., 1st Sess. 2765 (1866). In this connection, Professor Wildenthal runs off the rails by claiming that I have placed less weight on the views of the framers than "those expressed by a single Supreme Court justice riding circuit in 1825!" Wildenthal, *supra* note 41, at 305 (footnote omitted). From the standpoint of the New Originalism, the views of the framers are less important than contemporary public meaning; and, as we have seen, Justice Washington's opinion in *Corfield* had a powerful impact on the framing-era understanding of the privileges and immunities of citizenship.

53. See Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868).

54. See *Paul v. Virginia*, 75 U.S. (6 Wall.) 168, 179-83 (1868).

that Howard's understanding of the privileges and immunities of citizenship was dubious as a matter of contemporary public understanding.<sup>55</sup> What is more, precisely because the Fourteenth Amendment could be read to provide an avenue for enforcing the nondiscrimination requirement in Article IV against the states, the statements in the congressional record indicating that the proposed amendment would render provisions in the existing constitution enforceable are ambiguous. These statements might reflect an intention to permit enforcement of the first eight amendments against the states; but at least some of them could reflect no more than an intention to grant Congress the power to enforce the Article IV obligation of nondiscrimination against the states.<sup>56</sup> Indeed, some eminent scholars have argued that the Fourteenth Amendment's Privileges or Immunities Clause should be understood as an antidiscrimination provision, enabling Congress to enforce the Article IV nondiscrimination obligation previously beyond the scope of federal legislative power, with the Fourteenth Amendment's Equal Protection Clause functioning to provide specific protection of the right to nondiscriminatory protection from private lawbreakers.<sup>57</sup>

In light of the multiple meanings of the concept of "privileges and immunities," it is perhaps unsurprising that after Howard's speech, two other senators denied that there was any settled meaning of "privileges or immunities."<sup>58</sup> In the debate in the House, similarly, Rep. Boyer argued that section one was "open to ambiguity and admitting of conflicting constructions."<sup>59</sup> Professor Wildenthal nevertheless argues that we must

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55. In this symposium, Professor Wildenthal makes the remarkable claim that in the framing era, "it would seem very likely that Article IV 'privileges and immunities' would, at the very least, include rights and liberties like those in the Bill of Rights." Wildenthal, *supra* note 41, at 195. *Corfield*, the leading treatises, and the framing-era decision of the Supreme Court on this point provide no support for this speculation. As we have seen, none describes the privileges and immunities of citizenship with reference to any of the first eight amendments.

56. For a detailed argument that many of the seemingly incorporationist statements in Congress may reflect no more than the view that the Fourteenth Amendment would enable congressional enforcement of Article IV's antidiscrimination requirement, see Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEG. HIST. 41, 50-61 (1996).

57. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1397-1432 (1992).

58. See CONG. GLOBE, 39th Cong., 1st Sess. 3039 (Sen. Hendricks), 3041 (Sen. Johnson) (1866).

59. *Id.* at 2467.

discount the statements in Congress expressing doubt about the meaning of the proposed Privileges or Immunities Clause because they were made by opponents of the amendment who had an incentive to exaggerate or distort its meaning.<sup>60</sup> Yet, when it suits his purposes, Professor Wildenthal is happy to press the views of the Fourteenth Amendment's opponents; he heavily relies on an 1867 essay of Kentucky jurist Samuel Smith Nicholas that, at least arguably, reads the proposed Fourteenth Amendment to make the Bill of Rights applicable to the states,<sup>61</sup> despite his admission that Nicholas "was a defender of slavery and an ardent White-supremacist, his extreme anti-Republicanism matched by deep sympathy for the South," who "vehemently opposed the Thirteenth and Fourteenth Amendments."<sup>62</sup>

On this point, we should attend to what Professor Wildenthal does, not what he says. Opponents of any proposal have an incentive to exaggerate or distort its meaning, but at least the shrewder ones also have an incentive to make effective arguments. On that score, Earl Maltz, though an advocate of incorporation, called one of the senators who questioned the meaning of the proposed Privileges or Immunities Clause, Reverdy Johnson, "the most brilliant opposition theoretician . . ."<sup>63</sup> Alexander Bickel called Johnson "one of the great lawyers of his time."<sup>64</sup> If the meaning of the proposed Privileges or Immunities Clause had been clear, disputing the point would have been an ineffectual tactic; something like a contemporary politician opposing a proposed civil rights law on the ground that meaning of the term "discrimination" was unclear.<sup>65</sup> We can have some confidence that Johnson forwarded only those arguments that had a measure of credibility. The views of one of the era's leading legal minds—even if opposed to the Fourteenth Amendment—should not be so quickly discounted.

In this connection, it is worth recalling the ready riposte that Bingham had for those who questioned the meaning of due process: "[T]he courts have settled that matter long ago, and the gentleman can go read their decisions."<sup>66</sup> The fact that no similar retort was available to Bingham on the meaning of the proposed Privileges or Immunities Clause is telling.

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60. See Wildenthal, *supra* note 1, at 297-301.

61. See *id.* at 239-50.

62. *Id.* at 241.

63. MALTZ, *supra* note 17, at 101.

64. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 15 (1955).

65. For an argument along the same lines, see George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1633, 1646 (2007).

66. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

Indeed, in this symposium, Professor Curtis acknowledges that the “privileges and immunities of citizens” was not unambiguously incorporationist; he agrees that “[t]he evidence does not show that the words ‘privileges’ or ‘immunities’ were never used in other ways. They were.”<sup>67</sup> In a prior article, while demonstrating that in the framing era, “common usage often referred to the Bill of Rights liberties as ‘privileges’ ‘immunities,’ or ‘rights’ of Americans or citizens,” Professor Curtis refrained from claiming that this usage was the only, or even the most common understanding of the privileges and immunities of citizenship: “It is far easier to say that one reconstruction of a past usage is a reasonable one than to say it is the most reasonable.”<sup>68</sup> In fact, to my knowledge, no scholar has yet claimed that the concept of the privileges and immunities of citizenship was unambiguous at the time of the Fourteenth Amendment’s framing and ratification. It is this very ambiguity, however, that sows doubt about the original public meaning of the Fourteenth Amendment from the standpoint of the New Originalism.

### *B. The Advantages of Ambiguity*

To the preceding account, one might object that if it is agreed that the key drafters of the Fourteenth Amendment sought incorporation, they would have been unlikely to select a text that also had a nonincorporationist meaning. One answer, of course, is that Bingham and the others had persuaded themselves that their views on *Barron* were correct, and therefore failed to appreciate the extent to which their positions varied from generally understood public meaning. But another explanation is that Bingham, Howard, and the other drafters were politicians, and political realities pushed them toward the Article IV Privileges and Immunities formulation, even though it was less than an ideal vehicle for incorporation.

The most difficult political problem facing the Thirty-Ninth Congress was the question of suffrage for freedmen, a question on which northern public opinion was divided, but which, if left unaddressed, would result in southern congressional delegations elected by entirely by whites hostile to Reconstruction and its advocates.<sup>69</sup> Suffrage, however, was

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67. Curtis, *supra* note 33, at 14.

68. Curtis, *supra* note 28, at 1089.

69. See, e.g., MALTZ, *supra* note 17, at 36-37; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 4-20, 91-96 (1965).

not the only political hot potato. In the wake of the Civil War, northern public opinion was inflamed by reports of widespread violence against and oppression of the newly freed slaves and Union sympathizers in the southern states, producing public demands for a response.<sup>70</sup> At the same time, the extent to which state prerogatives should be limited by a conception of federally-protected rights was one on which opinion was sharply divided.<sup>71</sup> If there had been any doubt about the strength of the states' rights faction in Congress, it was eliminated in the debate over Bingham's first proposed Privileges and Immunities Clause, which was barraged by attacks from opponents who claimed that it undermined state prerogatives.<sup>72</sup> The House ultimately voted to postpone consideration of the proposal, with Bingham and other advocates of the proposal voting in favor of delay, presumably understanding that they lacked the requisite supermajority support.<sup>73</sup> Thus, the states' rights lobby was a potent obstacle to the passage of a constitutional amendment that restricted state prerogatives.

For this reason, there was considerable political virtue in utilizing a formulation that tracked Article IV's Privileges and Immunities Clause. Because that provision was already in the Constitution, its advocates could claim that they were merely enabling Congress to enforce an existing constitutional guarantee. Indeed, the claim that the proposed Fourteenth Amendment simply facilitated enforcement of the existing constitutional regime was frequently made by the proposal's advocates.<sup>74</sup> Moreover, because the existing Privileges and Immunities Clause was widely understood as an antidiscrimination requirement, those whose primary concern was the oppressive conditions in the south could argue that the proposal created only a nondiscrimination obligation, preserving the states' authority to determine what substantive rights would be recognized in their laws.

At some points in his contribution to this symposium, Professor Wildenthal seems to accept this account, agreeing that incorporation

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70. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 224-27 (1988); JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 55-56 (1961); JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 51-52 (1956); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 42-44 (1988); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 73-81 (1965).

71. *See, e.g.*, HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 68-69 (1908); MALTZ, *supra* note 17, at 29-36.

72. *See, e.g.*, CONG GLOBE, 39th Cong., 1st Sess. 1064, 1065 (Rep. Hale), 1082 (Sen. Stewart), 1085-87 (Rep. Davis), App. 133-36 (Rep. Rogers) (1866).

73. *See id.* at 1095.

74. *See, e.g., id.* at 2459 (Rep. Stevens), 2542 (Rep. Bingham), 2765-66 (Sen. Howard), app. 256 (Rep. Baker).

“may have been an important, first-order goal . . . for only a few advocates of the [Fourteenth] Amendment.”<sup>75</sup> Elsewhere, however, he argues that incorporation had more political appeal than antidiscrimination, given the uncontroversial character of the Bill of Rights and the racist attitudes of the times, even in the North.<sup>76</sup> It may fairly be doubted, however, that incorporation would have been uncontroversial in the North. As Charles Fairman demonstrated, at the time of ratification, there were numerous inconsistencies between the laws in the ratifying states—even those outside the south—and the first eight amendments.<sup>77</sup> For that reason, incorporation would require states that had never left the Union to alter their own laws, an outcome that the amendment’s advocates might not have wanted to highlight. Similarly, if we are to treat Nicholas something other than an idiosyncratic crank, then we should conclude that he reflected the views of many who found application of the Bill of Rights to the states an unwarranted invasion of state prerogatives. Conversely, given the inflamed public reaction outside the south to its treatment of the newly freed slaves, selling the Fourteenth Amendment as an antidiscrimination remedy for southern outrages would have been a politically appealing course. All this, however, is just speculation. Twenty-first-century law professors are unlikely to understand the politics of the framing era as well as the nineteenth-century politicians who secured the Fourteenth Amendment’s ratification. Their statements make plain the political appeal of the antidiscrimination argument for the Fourteenth Amendment.

As we have seen, Howard, and to a lesser extent Bingham, featured incorporation as a central argument in favor of the proposed Fourteenth Amendment. No other advocate of the amendment, however, gave the matter much prominence. Even Professor Wildenthal admits that when it comes to incorporation, the most prominent feature of the historical record is silence—the matter simply did not come up very often during the debate over the Fourteenth Amendment.<sup>78</sup> In contrast, antidiscrimination was a prominent feature in the arguments of many Fourteenth Amendment advocates. During the debate on Bingham’s original proposal, for

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75. Wildenthal, *supra* note 41, at 168.

76. *Id.* at 292-94.

77. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 84-85, 86-87, 88, 97-98, 98-100, 101, 102-03, 106, 110-11, 115-16, 123 (1949).

78. See Wildenthal, *supra* note 41, at 294, 297.

example, Thaddeus Stevens, a radical Republican and a member of the committee that drafted the Fourteenth Amendment,<sup>79</sup> in the face of a claim that the proposal would mean that “all state legislation . . . may be overridden, may be repealed or otherwise abolished, and the laws of Congress established instead,”<sup>80</sup> Stevens said:

Does the gentleman mean to say that, under this provision, Congress could interfere in any case where legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the law between different classes of individuals, Congress shall have the power to correct such discrimination and inequality? Does the proposition mean anything more than that?<sup>81</sup>

With respect to the final version, Stevens similarly observed: “This amendment . . . allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all.”<sup>82</sup> Senator Luke Poland thought that the proposal “secures nothing beyond what was intended” by Article IV’s Privileges and Immunities Clause,<sup>83</sup> which, as we have seen, was understood as a nondiscrimination provision.<sup>84</sup> Even Bingham, when pressed, retreated to Article IV’s antidiscrimination requirement as an answer to the states’ rights attack:

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79. For a useful discussion of the dynamics of the drafting process and Stevens’ role, see MALTZ, *supra* note 17, at 79-92.

80. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (Rep. Hale).

81. *Id.*

82. *Id.* at 2459. Professor Wildenthal protests that Stevens’ statements do not preclude the possibility that he had an incorporationist understanding of the proposal; after all, he notes, Stevens also stated that the amendment would enable enforcement of existing constitutional guarantees. See Wildenthal, *supra* note 41, at 291-93 n.459. See also *supra* note 20. Yet, as we have seen, such statements are ambiguous; they could refer only permitted enforcement of the Article IV antidiscrimination provision. See *supra* text at note 56. The more important point, however, is not Stevens’ own view on incorporation, but rather that the public discussion of this proposal highlighted its antidiscrimination aspects. Even Professor Wildenthal accepts that point. See *id.* at 292 n.45, 293. It is the prominence of antidiscrimination in the public discussion that creates difficulties for incorporation in terms of original public meaning.

83. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) at 2961. Senator Garrett Davis similarly referred to the Privileges or Immunities Clause as tracking its Article IV analogue. *Id.* at App. 240.

84. See *supra* text at notes 48-57. Professor Wildenthal finds my reference to Poland “confusing[.]” noting that I have elsewhere listed him as among those who stated that the Fourteenth Amendment would facilitate enforcement of existing constitutional rights. See Wildenthal, *supra* note 41, at 302. The contradiction is illusory; Poland did describe the proposal as enabling enforcement of existing constitutional guarantees; but as we have seen, it is unclear whether he was referring to enforcement of the first eight amendments or the Article IV nondiscrimination requirement. As I note above, this ambiguity is found in any number of the statements of the amendment’s congressional supporters. See text at note 56, *supra*.

Who ever before heard that any state had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen . . . any of the privileges of a citizen of the United States, or impose upon him, from whatever state he may have come, any burden contrary to that provision of the Constitution which declares that citizens shall be entitled in the several states to all the immunities of a citizen in the United States?

What does the word immunity in your Constitution mean? Immunity from unequal burdens . . . . If a state has not the right to deny equal protection to any human being under the Constitution of this country in the rights of life, liberty, and property, how can state rights be impaired by penal prohibitions of such denial as proposed?<sup>85</sup>

These references to antidiscrimination in the legislative history of the Fourteenth Amendment were hardly isolated. The single most frequently expressed understanding of the proposed amendment was that it constitutionalized the Civil Rights Act of 1866.<sup>86</sup> It was no accident that the advocates of the Fourteenth Amendment claimed that their proposal echoed the Civil Rights Act; it had been enacted over President Johnson's veto, and accordingly had demonstrated that it had the requisite supermajority support in Congress.<sup>87</sup> The Civil Rights Act, however, was an antidiscrimination provision that did not embrace the first eight amendments:

“[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens . . . .”<sup>88</sup>

Thus, the Civil Rights Act did not identify the Bill of Rights as among the privileges and immunities of citizenship; indeed, even as to the rights it listed, it imposed no more than a nondiscrimination obligation. The

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85. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). *See also id.* at 2542 (“No State ever had the right . . . to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic . . .”).

86. *See, e.g., id.* at 2462 (Rep. Garfield), 2465 (Rep. Thayer), 2501 (Rep. Raymond), 2549 (Rep. Stevens), 2462 (Rep. Garfield), 2467 (Rep. Boyer), 2468 (Rep. Kelley), 2498 (Rep. Broomall), 2501 (Rep. Raymond), 2509 (Rep. Spaulding), 2511 (Rep. Eliot), 2534 (Rep. Eckley), 2538 (Rep. Rogers), 2539 (Rep. Farnsworth), 2883 (Rep. Latham), 2961 (Sen. Poland), 3031 (Sen. Henderson), 3069 (Rep. Van Aernam) (1866).

87. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).

88. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

Act cannot be read to grant any substantive entitlements without rendering its guarantee of the “same” rights surplusage; such a reading also does not account for the final clause, which protects minorities only with respect to rights enjoyed by white citizens.

To be sure, a number of eminent scholars have argued that the Act’s reference to the “full and equal benefit of all laws and proceedings for security of person or property” was a reference to the Bill of Rights, although they do not claim that any of its drafters expressed such an understanding of that phrase when presenting the legislation to Congress.<sup>89</sup> Moreover, an incorporationist understanding of the Civil Rights Act accommodates neither the equality language in the Act nor the reality that under *Barron*—which all agree remained good law at the time of the Civil Rights Act’s enactment—citizens had no legal right to claim the protections of the first eight amendments against state laws. But, if the Civil Rights Act had an incorporationist meaning, that would actually cut against an incorporationist understanding of the Fourteenth Amendment. Had the phrase “laws and proceedings for the security of person and property” been understood to refer to the Bill of Rights, then surely incorporationists would have used it again, in the Fourteenth Amendment, to ensure a consistent, incorporationist interpretation of the two enactments.<sup>90</sup> That the Civil Rights Act and the Fourteenth Amendment employed different textual formulations powerfully suggests that both could not have been understood as incorporationist in character.

Similarly, the Freedmen’s Bureau Act is sometimes thought to reflect the Thirty-Ninth Congress’s incorporationist intent because it offered

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89. See, e.g., Michael Kent Curtis, *Resurrecting the Privileges and Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 51-55 (1996); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 931-35 (1986); Wildenthal, *supra* note 41, at 166-67. The closest anyone came to claiming that the Civil Rights Act incorporated the Bill of Rights is the House manager’s statement: “I find in the bill of rights which the gentlemen [Bingham] wishes to have enforced by an amendment to the Constitution that 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 specifically named, and these are the rights to which this bill relates . . . .” CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Rep. Wilson). This statement, at best, seems to identify the Act with the Due Process Clause, not the entirety of the Bill of Rights. The Senate manager, in contrast, characterized the Act as a nondiscrimination provision granting no substantive rights. See *id.* at 474-76, 1760 (Sen. Trumbull).

90. In fact, as originally drafted, the Civil Rights Act prohibited discrimination with respect to “civil rights and immunities,” but this provision was removed in the wake of objections that its scope was uncertain. See Bickel, *supra* note 64, at 11-29.

federal protection for the Second Amendment's right to bear arms.<sup>91</sup> Like the Civil Rights Act, however, the Freedmen's Bureau Act had an equality limitation; it secured

the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real, and personal, including the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district *without respect to race or color, or previous condition of slavery.*<sup>92</sup>

If the Act were read to guarantee a substantive right, the italicized portion would be surplusage.

It becomes even more apparent that the Freedmen's Bureau Act was not intended to create a substantive right to bear arms in light of contemporaneous congressional efforts to disarm southern militias. Only months before it passed the Freedmen's Bureau Act and approved the Fourteenth Amendment, the Thirty-Ninth Congress abolished the militia in most southern states and prohibited any effort to arm militias in those states.<sup>93</sup> The sponsor explained it was necessary to "suppress and prevent military organizations in the rebel States . . . . Great abuses have grown out of it, and in that country under present circumstances . . . there should be no military organizations allowed until matters are settled."<sup>94</sup> This measure makes it entirely clear that the Freedman Bureau's Act prohibited only discrimination—if it had granted substantive protection

91. See, e.g., Stephen P. Hallbrook, *The Freedmen Bureau's Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. KY. L. REV. 683 (2002).

92. Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis supplied).

93. See Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866) ("[A]ll militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forthwith disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited under any circumstances whatever, until the same shall be authorized by Congress.").

94. CONG. GLOBE, 39th Cong., 1st Sess. 1848 (1866) (Sen. Wilson). See also, e.g., *id.* at 914 (Sen. Wilson) (quoting reports that Southern Militias "were engaged in disarming the negroes" as reasons to disband such militias), 915 (Sen. Wilson) (reporting that ex-Confederates were "searching houses, disarming people, committing outrages of every kind and description"), 941 (Sen. Trumbull) (noting reports of the "abusive conduct of [a Mississippi] militia" which would "hang some freedman or search negro houses for arms"); *id.* at 39, 40 (1865) (Sen. Wilson) (noting reports that in Mississippi "rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country").

to the right to bear arms, it would have been squarely inconsistent with the prohibition on arming southern militias—and there is no indication that the Freedman Bureau’s Act was intended to repeal this newly enacted prohibition. To the contrary, it is entirely clear that Congress did not think that it had repealed its militia prohibition in the Freedmen’s Bureau Act because it repealed that prohibition in the next Congress<sup>95</sup>—a repeal that would have been unnecessary had the Freedmen’s Bureau Act already worked a repeal by granting a substantive right to bear arms.

In any event, the Freedmen’s Bureau Act provides little insight into the original meaning of the Fourteenth Amendment, since it predated that amendment, and was enacted on the strength of Congress’s war power and its power to enforce the Thirteenth Amendment’s prohibition on slavery.<sup>96</sup> For that reason, the Act cannot be thought to be a congressional effort to identify the privileges and immunities of citizenship; it was, rather, a response to what were seen as emergency conditions in a postwar south where, as we have seen, oppression of freedmen had become widespread.

Most important for present purposes, however, is the tactical virtue of associating the proposed Fourteenth Amendment with the Civil Rights Act. If the amendment were characterized as tracking the Civil Rights Act, its advocates could answer the charge that they were seeking a radical expansion of federal power with the claim that they were not going beyond a measure that had already become law, with supermajority support. There plainly were enormous political advantages in such an approach.<sup>97</sup> Thus, the ambiguity of the proposal—some would understand it to accomplish incorporation, while others would identify it with the antidiscrimination features of the Civil Rights Act—could surely have been expected to aid in building the requisite supermajority support.

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95. The prohibition on southern militias was repealed by the Fortieth Congress as it related to Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina. *See* Act of March 3, 1869, 15 Stat. 337 (1869). The sponsors argued that events had made clear that with the reduction in the size of the occupying force in the south, these reconstructed southern states required militias in order to suppress violent elements in their midst. *See* CONG. GLOBE, 40th Cong., 2d Sess. 81, 82 (Sen. Fessenden), 83 (Sens. Rice & Sawyer), 84 (Sen. Wilson) (1868). For a discussion of the events surrounding the enactment and repeal of the militia prohibition, see OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* 4-9 (1957).

96. *See* CONG. GLOBE, 39th Cong., 1st Sess. 319, 322, 420, 936, 939-40 (Sen. Trumbull), 340 (Sen. Wilson), 365 (Sen. Fessenden), 2773 (Rep. Eliot) (1866).

97. *See* NELSON, *supra* note 70, at 114-24.

## II. THE PUBLIC UNDERSTAKNDING OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP IN THE WAKE OF RATIFICATION

Whatever the reason, the drafters of the Fourteenth Amendment selected a formulation that echoed Article IV—as we have seen, even Bingham and Howard, the most vocal incorporationists in the congressional debates, expressly invoked Article IV as a key for understanding the new Privileges or Immunities Clause.<sup>98</sup> Yet, the evidence provided by the leading precedents and treatises of the day make plain that the public meaning of Article IV did not accommodate incorporation. For this reason, the New Originalism poses serious obstacles for the historical case for incorporation.

Professor Wildenthal has undertaken the only effort of which I am aware to square incorporation with the original public meaning of the Fourteenth Amendment.<sup>99</sup> Even so, he has not claimed that at the time of the Fourteenth Amendment’s drafting, the “privileges or immunities” of citizenship had a well-understood and unambiguous meaning that included the Bill of Rights. Instead, he has relied on the framers’ incorporationist views, while acknowledging that he can square this position with the New Originalism only “if Congress’s understanding is clearly, publicly, and candidly conveyed to the country . . . .”<sup>100</sup> Thus, the historical case for incorporation necessarily requires evidence that the congressional debates over the Fourteenth Amendment succeeded in changing the public’s understanding of the concept of privileges and immunities of citizenship from one animated by *Barron* and Article IV to one that contemplated incorporation.

Of course, precisely because the privileges and immunities of citizenship had previously been understood in light of *Barron* and Article IV, the incorporationist case necessarily requires evidence that the process of proposing and ratifying the Fourteenth Amendment

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98. See *supra* text at notes 16, 49, 85.

99. Professor Wildenthal, perhaps too modestly, claims that he has only echoed the views of Professor Curtis. See Wildenthal, *supra* note 41, at 282-83. Yet, in the article that Professor Wildenthal cites, Professor Curtis makes only the limited claim that “[t]he words ‘privileges and immunities’ were often used to describe fundamental rights and liberties such as the Federal Bill of Rights.” Curtis, *supra* note 28, at 1090. In this symposium, Professor Curtis is careful to disclaim the view that historical argument alone can carry the day for incorporation, and instead engages a variety of modalities of constitutional argument. See Curtis, *supra* note 33, at 14-16, 63-68.

100. Wildenthal, *supra* note 29, at 1612.

changed the public's understanding of the privileges and immunities of citizenship. On this point, however, the evidence derived from the congressional debates is not encouraging for the incorporationists; as we have seen, some members of Congress adverted to incorporation, but others stressed nondiscrimination and the Civil Rights Act. To be sure, many of the statements in the congressional debates are imprecise; the frequent references to antidiscrimination, for example, could have merely been references to the proposed Equal Protection Clause, and the frequent efforts to equate the proposed amendment with the Civil Rights Act overlook, at a minimum, the Due Process Clause. Still, the fact that so many legislators stressed the antidiscrimination aspects of the proposal and paid little attention to the question of incorporation surely raises doubts about whether Congress could have created an incorporationist public meaning for the proposed Fourteenth Amendment.

Still, the congressional debates are not the best source of evidence of the public understanding of the Fourteenth Amendment. The New Originalism focuses on how the public understood the proposed amendment, not on the intent of the framers. For evidence of the public's understanding of the new amendment, we must scrutinize the evidence of the public's understanding of the ratification process, as well as the judicial interpretations and leading analyses of the meaning of the new amendment that appeared in the wake of ratification.<sup>101</sup>

#### A. Ratification

If Congress had succeeded in conveying to the public that the proposed amendment repudiated the conception of the privileges and immunities of citizenship found in *Barron* and Article IV, one would expect an indication to that effect in the ratification debates in the states. There is, however, little evidence along these lines in the ratification process.

The threshold problem is that not much evidence of the ratifiers' understanding is available. As Professor Curtis has explained, “[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it sheds little light on their understanding of its meaning. Messages by governors are available, but most are quite general . . . .”<sup>102</sup> Professor

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101. As it explicated original public meaning as the proper approach to originalist constitutional interpretation in *Heller*, the Court relied on both framing-era judicial interpretations and scholarly commentary during the decades following framing and ratification as appropriate evidence of original meaning. See 128 S. Ct. at 2804-09.

102. CURTIS, *supra* note 5, at 145. To similar effect, see JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH

Wildenthal has added that “the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights.”<sup>103</sup> Although there are a few isolated references to incorporation in the available materials,<sup>104</sup> there is no less evidence that characterized the proposal as a nondiscrimination period along the same lines the Civil Rights Act.<sup>105</sup> Among the most thorough studies on this point is James Bond’s analysis of the debates surrounding ratification in Illinois, Ohio, and Pennsylvania, where the weight of the evidence indicates that proposed amendment was understood to embody the Civil Rights Act, with virtually no discussion of the effect of the amendment on the enforceability of the Bill of Rights.<sup>106</sup> His study of the ratification debate in the former confederate states similarly found no hint of an incorporationist understanding, although he unearthed considerable evidence that the amendment was understood as an antidiscrimination rule.<sup>107</sup>

More than anything else, however, the surviving evidence from the ratification debates is simply unedifying on the subject of incorporation; if nothing else, what is evident from Professor Fairman’s review of the evidence is how little attention was paid to the question of incorporation in the course of ratification.<sup>108</sup> This point, of course, cuts against

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AMENDMENT 8-9 (1997). For a summary of the rather generic discussions during ratification, see CURTIS, *supra* note 5, at 131-54. Even Bingham spoke in generic platitudes during ratification, leading Saul Cornell to speculate that the framers were on the defensive during the ratification process and therefore limited their claims about the impact of the proposed amendment. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 173-75* (2000).

103. Wildenthal, *supra* note 29, at 1601.

104. For example, the governor of Ohio “described the amendment as necessary to protect ‘immunities’ such as freedom of speech.” CURTIS, *supra* note 5, at 147. Similarly, “Representative M’Camant of Blair County [Pennsylvania] insisted that the amendment was ‘necessary to secure . . . that freedom of speech which before the war was denied and even now is denied to every man who has not been a rebel or a rebel sympathizer, a secessionist, or a traitor.’” *Id.* at 148-49 (footnote omitted).

105. See, e.g., *id.* at 147 (“Some speakers [in the Pennsylvania debates] noted a correspondence between section 1 and the Civil Rights bill.”).

106. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 445-54 (1985).

107. See BOND, *supra* note 102, at 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111, 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55. See also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89, 112-16 (1984).

108. See Fairman, *supra* note 77, at 84-126. To similar effect, see BOND, *supra* note 102, at 8-9.

incorporation, at least under the New Originalism. If the public paid little attention to incorporation during ratification, then ratification could hardly conveyed to the public the framers' understanding of the privileges and immunities of citizenship.

In an effort to establish that the incorporationalist understanding was communicated to the public during the process of framing and ratification, Professor Wildenthal observed that much of Howard's key speech was reprinted in major newspapers, although none of these accounts made any special mention of incorporation or the Bill of Rights,<sup>109</sup> and the speech itself addressed a great many matters beyond incorporation.<sup>110</sup> For an indication that someone afforded particular significance to Howard's speech, Wildenthal pointed to an editorial in the *New York Times* that called Howard's speech "clear and cogent,"<sup>111</sup> although the editorial made no reference to the Bill of Rights but rather, as George Thomas observes in this symposium, "mostly concerned the politics of ratification."<sup>112</sup> Moreover, as Professor Wildenthal acknowledged, although the *Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no mention of incorporation."<sup>113</sup> In fact, the advocates of incorporation cannot identify any widely read newspaper or other popular account that drew to the public's attention the proposed incorporation of the Bill of Rights during the process of framing and ratification.<sup>114</sup> For his part,

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109. See Wildenthal, *supra* note 29, at 1564. To similar effect, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 117-18 (2d ed. 1994).

110. See CONG. GLOBE, 39th Cong., 1st Sess. 2764-68 (1866).

111. Wildenthal, *supra* note 29, at 1577 (quoting Editorial, *The Reconstruction Committee's Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4).

112. George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know about Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323, 332 (2009) (footnote omitted).

113. Wildenthal, *supra* note 29, at 1595. He also points to the *Times*' coverage of Bingham's statements in support of his original and failed proposal, *see id.* at 1559, but the probative force of this coverage for the public's understanding of the final version of the amendment is uncertain; after all, these speeches were made about an unsuccessful effort at a constitutional amendment.

114. As one of the first scholars to examine this issue observed:

The declarations and statements of newspapers, writers and speakers . . . show very clearly, it seems, the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not . . . .

FLACK, *supra* note 71, at 153-54. If this is an overstatement, it is only to the extent that newspapers reprinted Howard's speech, albeit without any special mention of incorporation. Yet another recent survey of the popular literature of the day similarly trumpets the newspaper coverage of Howard's speech, as well as Bingham's remarks on

Professor Wildenthal features the Nicholas essay, published in 1867, in which Nicholas denounced “the recent attempt in Congress to treat” the Bill of Rights as “guaranties against the State governments.”<sup>115</sup> Nevertheless, as Professor Wildenthal acknowledged, it is unclear whether Nicholas was referring to the proposed Fourteenth Amendment or the Civil Rights Act, and Professor Wildenthal makes no claim that the book was widely read.<sup>116</sup>

In his contribution to this symposium, Professor Wildenthal points to an editorial in *The Nation* expressing an incorporationist understanding of the Fourteenth Amendment only days before the Fourteenth Amendment was proclaimed ratified, and a subsequent 1871 article, again in *The Nation*, reiterating that view.<sup>117</sup> Given the timing, these articles surely did not influence the ratification debate, but they could provide some evidence of contemporary public understanding. Still, Professor Wildenthal acknowledges that “[a]side from *The Nation* . . . there seems to have been little or any focus on the incorporation issue, pro or con, in the general press during these years.”<sup>118</sup> He also acknowledges that *The Nation* appears to have embraced “the *Barron*-contrarian views of Bingham and other Republicans—that the Bill of Rights had always, in principle, applied to the states.”<sup>119</sup> As we have seen, there is reason to doubt that the *Barron*-contrarian view, rejecting as it did the orthodox understanding of the privileges and immunities of citizenship, was an accurate reflection of framing-era public understanding.

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incorporation in support of his unsuccessful proposal, and is similarly unable to find any indication that anyone made anything of the references to incorporation in these speeches. See David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-68*, 30 WHITTIER L. REV. 695, 710-17 (2009). The closest this survey comes to such evidence is to note a pair of letters to the editor appearing in the *New York Times*, although these letters make only passing references to a few of the protections in the first eight amendments. See *id.* at 717-19. George Thomas’s contribution to this symposium sheds considerable new light on this problem, demonstrating as it does that there were, at most, a tiny handful of newspaper articles that could be thought to have drawn the public’s attention to the potential for incorporation. See Thomas, *supra* note 112, at 347-59.

115. Wildenthal, *supra* note 29, at 1592 (quoting 3 S.S. NICHOLAS, CONSERVATIVE ESSAYS, LEGAL AND POLITICAL (Bradley & Gilbert 1867)). To similar effect, see Wildenthal, *supra* note 41, at 244-46.

116. Wildenthal, *supra* note 29, at 1592-95.

117. See Wildenthal, *supra* note 41, at 220-22, 224. See also See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 82-83, 90 (1993).

118. Wildenthal, *supra* note 41, at 228.

119. *Id.* at 226 (footnote omitted).

Thus, *The Nation* may have been an unreliable tribune of contemporary public meaning.

For his part, Professor Curtis has noted that during the congressional campaign of 1866, a convention of southern loyalists issued a manifesto, widely reprinted in the Republican press, calling for protection of the “constitutional rights” of citizens, including the right of free speech, and a number of Republican candidates made similar calls, yet neither the manifesto nor the candidates’ speeches identify the Fourteenth Amendment, already proposed by Congress and before the states, as the vehicle to achieve this end.<sup>120</sup> Thus, the evidence from the campaign offers some support for an incorporationist public understanding of the Fourteenth Amendment, but the lack of similar evidence in the ratification debates leave the matter in considerable doubt.

Most important, however, is that this evidence does little to address the account I have advanced of the problems with incorporation from the standpoint of the New Originalism. Howard, Bingham, Nicholas, *The Nation*, and the other evidence of an incorporationist meaning establishes that the Fourteenth Amendment was *capable* of an incorporationist meaning; Part I.A above cheerfully concedes just that. The key point made above, however, is that is that Fourteenth Amendment was also *capable* of a nonincorporationist meaning. On that point, the evidence from Howard, Bingham, Nicholas, and *The Nation* proves little.

Indeed, it seems plain that the process of ratification produced something less than an unambiguous incorporationist public understanding of the new amendment. After all, if the ratifying states had understood that the Fourteenth Amendment placed them under an obligation to bring their laws into conformity with the Bill of Rights, one might expect some movement along those lines in the wake of ratification. Nevertheless, as we have seen, the laws of the ratifying states frequently fell far short of the standards of the first eight amendments, and ratification produced no effort to bring those laws into conformity with the Bill of Rights.<sup>121</sup> There were similar flaws in the constitutions of the many of the southern states later readmitted to Congress, despite the fact that Congress approved each state’s constitution.<sup>122</sup> Even more important, as George

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120. See Curtis, *supra* note 28, at 1134-36. He has also called attention to a statement of the Republican National Committee in support of the proposed Fourteenth Amendment, also widely reported in the Republican press, describing the proposed amendment as preventing states from violating the constitutional rights of citizens. See CURTIS, *supra* note 5, at 131, 251 n.1. This statement, however, suffers from the same ambiguity as many of the arguably incorporationist statements in the Thirty-Ninth Congress; it could mean no more than that the proposal would permit congressional enforcement of the Article IV Privileges and Immunities Clause.

121. See Fairman, *supra* note 77, at 82-84.

122. See *id.* at 127-32.

Thomas has noted, in the wake of ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause.<sup>123</sup> This is not what one would expect had there been a general public understanding that upon the Fourteenth Amendment's ratification, the first eight amendments had become binding on the states. The evidence from ratification of an incorporationist public understanding, in short, is not encouraging.

### *B. Judicial Interpretations in the Wake of Ratification*

If a new understanding of the privileges and immunities of citizenship inconsistent with the antebellum regime of *Barron* and Article IV had emerged in the process of framing and ratifying the Fourteenth Amendment, one might expect to some seem evidence of that understanding in the judicial decisions that followed ratification. The evidence of such an understanding, however, is quite thin.

Months after ratification of the Fourteenth Amendment, in *Twitchell v. Pennsylvania*,<sup>124</sup> the Supreme Court unanimously rejected a claim that a state indictment was inconsistent with the Fifth and Sixth Amendments, citing *Barron* and its progeny as controlling.<sup>125</sup> Akhil Amar, a leading incorporationist, attributes this to Twitchell's counsel, who made no argument based on the newly-minted Fourteenth Amendment.<sup>126</sup> Still, if the process of ratification had produced a widespread public understanding that the Fourteenth Amendment had overturned *Barron*, one might expect the Court to at least note that fact, and rest its decision on Twitchell's failure to press the point.<sup>127</sup>

The Court's first discussion of the Fourteenth Amendment's Privileges or Immunities Clause came in *The Slaughter-House Cases*, in

123. See Thomas, *supra* note 65, at 1654-55. Donald Dripps' contribution to this symposium makes even more evident the lack of an incorporationist understanding of the Grand Jury Clause. See Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469 (2009).

124. 74 U.S. (7 Wall.) 321 (1868).

125. *Id.* at 325-26.

126. See AMAR, *supra* note 5, at 206-07.

127. Similarly, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 169 (1871), the Court again acted as if *Barron* remained good law, rejecting an effort to apply the Fifth Amendment's prohibition on uncompensated taking of private property on the ground that "though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States." *Id.* at 176-77.

which, as we have seen, the Court described the privileges and immunities of citizenship in terms of the rights citizens held with respect to the federal government. In dissent, Justice Bradley, joined by Justice Swaine, understood the privileges and immunities of citizenship to include all fundamental rights, including those in the first eight amendments,<sup>128</sup> but Justice Field's dissent characterized the new Privileges or Immunities clause as a nondiscrimination obligation.<sup>129</sup> Thus, only two Justices understood the Privileges or Immunities Clause to accomplish incorporation.

*Slaughter-House*, however, may not be an authoritative rejection of incorporation. The case involved a claim that the Louisiana legislature's creation of a single slaughterhouse in New Orleans denied potential competitors the "privilege and immunity" of pursuing their chosen trade.<sup>130</sup> This constitutional attack on a state-created monopoly was based on no specific provision of the Bill of Rights; for that reason, incorporation of the first eight amendments within the Fourteenth Amendment's Privileges or Immunities Clause was not strictly at issue. Moreover, the Court mentioned among the privileges and immunities of citizenship "[t]he right to peaceably assemble and petition for redress of grievances, [and] the privilege of habeas corpus,"<sup>131</sup> which could be examples of the right of citizens to invoke the aid of the federal government, but could also suggest some form of incorporation. For these reasons, *Slaughter-House* could be regarded as inconclusive on the issue of incorporation, as some have argued.<sup>132</sup> Even so, incorporation was squarely at issue in *Edwards*

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128. 83 U.S. (16 Wall.) at 112-19. There was also a published framing-era lower court decision that embraced incorporation. See *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282). Two other decisions at about the same time, however, rejected incorporation. See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.S.C. Ala. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

129. 83 U.S. (16 Wall.) at 96-101. Professor Wildenthal notes that Justice Field's dissent never expressly denied that the Fourteenth Amendment secured the first eight amendments against the states, see Wildenthal, *supra* note 41, at 313; but incorporation is never mentioned in Justice Field's *Slaughter-House* account of the Fourteenth Amendment. The notion that Justice Field was a closet incorporationist in *Slaughter-House* seems quite unlikely since, as we will see, he joined all of the ensuing framing-era opinions that rejected incorporation. To be sure, decades later, Justice Field changed his view on incorporation, see *O'Neil v. Vermont*, 144 U.S. 323, 360-64 (1892) (dissenting opinion), but even then, he made no claim that he had always held this view; indeed, he identified his current view as the product of an argument advanced in *Spies v. Illinois*, 123 U.S. 131 (1887), that he had joined a unanimous Court in rejecting, only to later reconsider its merit. See *O'Neil*, 144 U.S. at 361.

130. 83 U.S. (16 Wall.) at 50-54.

131. *Id.* at 79.

132. See Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughterhouse Cases*, 109 YALE L.J. 643, 666-87 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 744-56; Bryan A. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress On*

v. *Elliott*,<sup>133</sup> in which the Court considered an argument that a state statute abridged a privilege and immunity of citizenship by denying the Seventh Amendment's right to trial by jury in civil cases.<sup>134</sup> The Court unanimously rejected the claim: "Two answers may be made to that objection, either of which is decisive: (1.) That [the Seventh Amendment] does not apply to trials in the State courts. (2.) That no such error was assigned in the [New Jersey] Court of Errors, and that the question was not presented to, nor was it decided by, the Court of Errors."<sup>135</sup> Professor Wildenthal has argued that little attention was paid to the incorporation issue by the parties or the Court,<sup>136</sup> but surely if there were a general public understanding that incorporation had been accomplished by the Fourteenth Amendment, one would not expect every Member of the Court to have forgotten what the public at large presumably knew.<sup>137</sup>

Then there was *United States v. Cruikshank*.<sup>138</sup> At issue was the sufficiency of an indictment brought under the Enforcement Act of 1870, which prohibited conspiracies to "hinder . . . free exercise of any right or privilege . . . secured by the constitution or laws of the United States."<sup>139</sup> The Court rejected counts alleging that the defendants deprived the victims of their First Amendment rights, citing, among other cases, *Barron*, *Twitchell*, and *Edwards*,<sup>140</sup> and followed *Slaughter-House* in treating as protected only "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the power or duties of the national government . . . ."<sup>141</sup> As for the counts alleging a violation of the right to bear arms protected by the Second Amendment, the Court wrote: "The second amendment declares that it shall not be infringed; but this, as we have seen, means no more than that it shall not be infringed

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*Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1095-1115 (2000).

133. 88 U.S. (21 Wall.) 532 (1874).

134. *Id.* at 544.

135. *Id.* at 557-58.

136. See Wildenthal, *supra* note 132, at 1135-37.

137. The following year the Court again rejected application of the Seventh Amendment to the states unanimously. See *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 92-93 (1875).

138. 92 U.S. (2 Otto) 542 (1875).

139. *Id.* at 548 (quoting Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (1870)).

140. *Id.* at 552.

141. *Id.*

by Congress.”<sup>142</sup> *Cruikshank*, moreover, called nondiscrimination the animating principle of the Fourteenth Amendment: “The equality of the rights of citizens is a principle of republicanism . . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.”<sup>143</sup> Only Justice Clifford failed to join the Court’s opinion; and he confined his own opinion to the question whether the indictment was fatally vague.<sup>144</sup>

If there had been a public understanding that the Fourteenth Amendment had accomplished incorporation, it is surely strange that the Supreme Court’s framing-era opinions contain so little evidence of that understanding. On this point, incorporation advocates usually claim that the Court remained committed to antebellum concepts of states’ rights,<sup>145</sup> and *Cruikshank* in particular is said to be a consequence of disillusionment with Reconstruction.<sup>146</sup> Yet, little evidence supports these theories. It is far from clear why there should have been excessive concern with antebellum conceptions of states’ rights on a court on which eight of the nine Justices had been appointed by Presidents Lincoln or Grant,<sup>147</sup> and a court no longer concerned with the plight of African-Americans in the south would have had no reason to stress the constitutional obligation of nondiscrimination in *Cruikshank*,<sup>148</sup> nor would it have been likely to hold, within only a few years, that the exclusion of African-Americans

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142. *Id.* at 553.

143. 92 U.S. (2 Otto) at 555.

144. *Id.* at 565-69 (dissenting opinion).

145. *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 77-81 (1999); MALTZ, *supra* note 17, at 92-96, 100-02; Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655-70 (1994); Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 2 N. KY. L. REV. 151, 174-89 (1993); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 133-34 (1994); Walter F. Murphy, *Slaughterhouse, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 5-9 (1987).

146. *See, e.g.*, BRANDWEIN, *supra* note 145, at 81-84; CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 205-14 (2008); Michael Anthony Lawrence, *Second Amendment Incorporation through the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment*, 72 MO. L. REV. 1, 38-39 (2007).

147. *See* DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 12 tbls. 1.2 & 1.3 (2003).

148. Indeed, it is striking how careful the Court was to preserve federal authority not only in cases in which states themselves discriminated, but even when they failed to protect African-Americans from discrimination. *See, e.g.*, Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 66-79; Leslie Friedman Goldstein, *The Second Amendment, The Slaughter-House Cases (1873), and United States v. Cruikshank*, 1 ALB. GOV’T L. REV. 365, 397-408 (2008).

from state juries violated the Fourteenth Amendment.<sup>149</sup> On balance, the framing-era judicial interpretations are a surely a problem for the historical case for incorporation, especially under the standards of the New Originalism.

### *C. Framing-Era Commentary*

One prominent advocate of incorporation, Richard Aynes, argued that of the four important treatises on constitutional law that appeared in the framing era, three understood the Fourteenth Amendment to achieve incorporation.<sup>150</sup> From the perspective of the New Originalism, however, this evidence is shaky.

In his 1868 treatise, George Paschal wrote that the rights secured by section one of the Fourteenth Amendment “ha[ve] already been guaranteed in the second and fourth sections of the fourth article, and in the thirteen amendments. The new feature is that the general principles, which had been construed to apply only to the national government, are thus imposed on the States.”<sup>151</sup> Paschal’s conclusion is clear, but he provides rather unreliable evidence of the prevailing public meaning. For one thing, his understanding of the Fourteenth Amendment was highly idiosyncratic. No one involved in framing or ratification thought that the Fourteenth Amendment incorporated the Ninth, Tenth, Eleventh, or Twelfth Amendments against the States; the Tenth and Eleventh Amendments expressly limit federal and not state power, and the Twelfth Amendment involves only the manner by which the President and Vice-President are elected.<sup>152</sup> The Ninth Amendment presents some additional complexities, but it is worth noting that even Howard did not contend that it described a privilege or immunity of citizenship;<sup>153</sup> nor does it appear that any serious jurist or scholar has ever made such a

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149. See *Strauder v. West Virginia*, 100 U.S. 303 (1879). This holding was no foregone conclusion. As Professor Wildenthal acknowledges, in the parlance of the day, jury service was considered a political and not a civil right, and many understood the Fourteenth Amendment to guarantee equality only with respect to the latter. See Wildenthal, *supra* note 41, at 267-68.

150. See Aynes, *supra*, note 117, at 83-94.

151. PASCHAL, *supra* note 51, at 290.

152. See U.S. CONST. amends. X-XII.

153. See *supra* text at note 16.

claim.<sup>154</sup> Paschal seems a rather unreliable indicator of contemporary public meaning.<sup>155</sup>

Timothy Farrar, in the third edition of his treatise, published in 1872, after acknowledging *Barron* and its progeny, added, without elaboration, that these precedents “are entirely swept away by the 14th Amendment.”<sup>156</sup> But again, Farrar is not a reliable indicator of contemporaneous public meaning. In his first edition, Farrar claimed that under the antebellum Constitution, the Bill of Rights applied to the States,<sup>157</sup> a view that was quite wrong as a matter of contemporary public meaning, as we have seen.

John Norton Pomeroy’s 1868 treatise, written when the proposed Fourteenth Amendment was before the States, acknowledged that the States were not bound by the Bill of Rights yet vigorously criticized that state of affairs.<sup>158</sup> Pomeroy then added:

[A] remedy is easy, and the question of its adoption is before the people. The first section of the proposed fourteenth amendment to the United States Constitution is in these words: “No state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.” I consider this amendment to be more important than any which has been adopted since the organization of the government, except alone the one abolishing the institution of slavery. It would give the nation complete power to protect its citizens against local injustice and oppression; a power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it. Nor would this amendment interfere with any of the rights, privileges, and functions which properly belong to the individual states. When the Constitution has from the beginning contained prohibitions upon the power of the states to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, it is strange that a provision forbidding acts which deprive a person of life, liberty, or property, without due process of law, was not also inserted at the outset; it is more than strange that any objections can be urged against the proposal now to remedy the defect.<sup>159</sup>

It is unclear, however, whether Pomeroy’s “remedy” is incorporation through the Privileges or Immunities Clause, or merely extending the

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154. See, e.g., Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 876-77 (2007).

155. Professor Wildenthal protests that this point is “a tendentious basis on which to try to marginalize Paschal’s views.” Wildenthal, *supra* note 41, at 306. Yet, he can identify no other framers or contemporary commentator who characterized the privileges and immunities of citizenship in Paschal’s fashion.

156. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 546 (3d ed. 1872).

157. See TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 58-59, 395-97 (1867).

158. See JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* §§ 232-36 (1868).

159. *Id.* at § 237 at 151.

guarantee of due process to the states. After all, the only “remedy” that Pomeroy expressly identifies in the proposed amendment is its Due Process Clause. To be sure, that view might be consistent with incorporation because, as Professor Wildenthal has acknowledged, many in the framing era believed that due process included at least some of the protections of the first eight amendments.<sup>160</sup> Yet, if this was Pomeroy’s view, it is itself a questionable account of the original meaning of due process, at least in the federal constitution, since that document dealt with due process the other amendments separately.<sup>161</sup> Indeed, we have seen that contemporary scholars make little effort to justify due process incorporation, which seems textually indefensible.

In this symposium, Professor Wildenthal argues that Pomeroy understood the Privileges or Immunities Clause to accomplish incorporation, noting that the passage set out above must be read in light of Pomeroy’s preceding condemnation of *Barron*.<sup>162</sup> To be sure, it is plain that Pomeroy disapproved of *Barron*, and the passage above is surely capable of an incorporationist meaning. Yet, it is striking that Pomeroy never straightforwardly states that the Privileges or Immunities Clause is the remedy to which he refers.<sup>163</sup> Nevertheless, if the 1868 treatise stood alone, it would probably tilt toward incorporation. The matter becomes more complicated, however, in light of Pomeroy’s 1875 edition, in which added a passage describing constitutionally protected “privileges

160. See Wildenthal, *supra* note 29, at 1605-06, 1607.

161. See Rosenthal, *supra* note 5, at 34 n.135.

162. See Wildenthal, *supra* note 41, at 193-94, 310, 312-13. It is, however, rather misleading to claim that Pomeroy is believed that the Fourteenth Amendment “would provide the remedy . . . needed” for the *Barron* doctrine” because “he referred (on the same page) to [t]he constitutional guaranties contained in the first eight amendments.” *Id.* at 196 (internal quotations omitted). The two passages to which Professor Wildenthal refers appear on the same page, but in different sections of the treatise. See POMEROY, *supra* note 158, at §§ 237-238. In context, the second passage plainly has no incorporationist meaning: “The constitutional guaranties contained in the first eight amendments, being thus solely intended as barriers against any encroachments of the general government upon the liberties of the citizen, are binding with equal force upon the legislature, upon the executive, and upon the judiciary.” *Id.* at § 238 at 151-52.

163. It is striking as well that *The Nation*’s review of Pomeroy’s 1868 treatise, trumpeted by Professor Wildenthal because it refers to the anticipated “national bill of rights,” see Wildenthal, *supra* note 41, at 221 & n.192, also fails to state straightforwardly that the Privileges or Immunities Clause will accomplish incorporation. It too seems to focus on the Due Process Clause, noting that “[u]nless the Fourteenth Amendment is adopted, life, liberty, and property are dependent . . . upon the unlimited will of the States, without appeal to national authority.” *Id.* (quoting *Pomeroy’s Constitutional Law*, THE NATION, July 16, 1868, at 54)).

or immunities” without reference to the first eight amendments, and in terms echoing *Corfield*:

All the rights which inhere in national citizenship as such, are fully protected against hostile state legislation. The negative clauses of the XIVth Amendment, executing themselves in the same manner as the clauses forbidding *ex post facto* laws and the like, invalidate every state statute which is opposed to their inhibitions. The rights thus protected are all civil in their nature, and not political, and embrace the fundamental capacities and right to pass through the States at will, to enter and dwell in any one at will, to acquire, hold, and transmit personal and real property, to enter into contracts, to engage in and pursue all lawful trades and avocations, to obtain redress in the courts, and to be equal before the laws. Such civil rights make up the privileges and immunities of citizens of the United States.<sup>164</sup>

Professor Wildenthal acknowledges “there are ambiguities” in Pomeroy’s 1875 edition.<sup>165</sup> Just so. I do not claim Pomeroy as an opponent of incorporation, but I doubt he can be claimed as much in the way of evidence on the other side either. Most important, the ease with which even Pomeroy lapsed into a *Corfield*-like description of the privileges and immunities of citizenship in 1875 demonstrates how ingrained the *Corfield* formulation had become as a matter of contemporary public meaning, even after the Fourteenth Amendment’s ratification, and even in the mind of an avowed enemy of *Barron*. Yet *Corfield*, as we have seen, did not describe the privileges and immunities of citizenship in terms of the first eight amendments, and was understood to impose a nondiscrimination rather than a substantive obligation.

Then, there is Thomas Cooley’s treatise, which the Supreme Court in *Heller* accurately described as “massively popular.”<sup>166</sup> The first edition

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164. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 767, at 532 (3d ed. 1875). One might think that Pomeroy’s third edition had been influenced by *Slaughter-House*, but as we have seen, the opinion contained only dicta on incorporation. In fact, Pomeroy appeared to read *Slaughter-House* narrowly. His third edition states that *Slaughter-House* “can hardly be regarded as final in giving a construction of the XIVth Amendment.” *Id.* at 530.

165. Wildenthal, *supra* note 42, at 314. He stresses, for example, that Pomeroy endorsed the dissenting position in *Slaughter-House*, but concedes one cannot tell whether this is the incorporationist view of Justice Bradley or the antidiscrimination view of Justice Field. *See id.* at 313-14.

166. 128 S. Ct. at 2811. As Professor Curtis acknowledged, of the four most significant works on constitutional law to appear in this period, Cooley’s was “the most eminent treatise of the four.” MICHAEL KENT CURTIS, FREE SPEECH: “THE PEOPLE’S DARLING PRIVILEGE” 365 (2000). On the influence of Cooley’s treatise, see, for example, EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 116-18 (1948); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 628-29 (2d ed. 1985); CLYDE E. JACOBS, LAW WRITERS AND THE COURTS, THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON ON AMERICAN CONSTITUTIONAL LAW 27-32 (1954); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 18-41 (1942).

of the treatise, appearing in the same year that the Fourteenth Amendment was ratified, restated the rule of *Barron* without giving any suggestion that it was about to be altered.<sup>167</sup> In the second edition, Professor Aynes discerned some ambiguity, observing that Cooley wrote that it was “doubtful” whether the Privileges or Immunities Clause “surround the citizen with any protections additional to those before possessed under the State Constitutions . . . but a principle of State constitutional law has now been made part of the Constitution of the United States.”<sup>168</sup> In context, however, this statement appears to suggest no more than that Article IV’s Privileges or Immunities Clause was now enforceable against the states. In the same discussion, citing *Corfield*, Cooley wrote:

Although the precise meaning of “privileges and immunities” is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property; and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.<sup>169</sup>

This passage is an awfully strange way of describing incorporation of the Bill of Rights; it seems instead to read the privileges and immunities of citizenship in terms of the discussion in *Corfield*.<sup>170</sup>

In any event, whatever ambiguity there was in Cooley’s 1871 edition disappeared when Cooley published a revision of Story’s treatise in 1873. The revision defined the Privileges or Immunities Clause as an antidiscrimination provision, citing both *Corfield* and the Civil Rights Act.<sup>171</sup>

167. See COOLEY, *supra* note 23, at 19. Indeed, as Professor Wildenthal acknowledges, the preface to the treatise was dated after ratification. See Wildenthal, *supra* note 41, at 172 n.43.

168. Aynes, *supra* note 117, at 92 (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES \*294 (2d ed. 1871)).

169. COOLEY, *supra* note 168, at \*397 (footnote omitted).

170. Professor Wildenthal agrees that the 1871 edition provides little support for incorporation, noting that Cooley described the Seventh Amendment’s right to a jury trial as binding only the federal government. See Wildenthal, *supra* note 41, at 172-75 & n.48 (citing COOLEY, *supra* note 168 at \*19 & n.1).

171. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873). The next year, Cooley published a new edition of his treatise, and cited the previous year’s revision of Story on

The question of incorporation was also addressed in the June 18, 1874 issue of the *Central Law Journal*, which, citing *Barron*, stated that the Second Amendment had no application to the states.<sup>172</sup> The *Review* was edited by John Forrest Dillon, “one of the most accomplished legal figures in America.”<sup>173</sup> New editions of the leading criminal law treatises of the day, those of Joel Prentiss Bishop and Francis Wharton, appeared in the wake of the Fourteenth Amendment, and both failed to discern any applicability of the first eight amendments to the states, describing these amendments as restrictions on only the federal government.<sup>174</sup> In this symposium, Professor Wildenthal, though an incorporation advocate, acknowledges Bishop and Wharton as “[t]wo other prestigious legal scholars and treatise-writers during this period . . .”<sup>175</sup> Again, if the process of framing and ratification had informed the public that the first eight amendments were to bind the states, it is odd that these commentators missed the news.<sup>176</sup> The evidence of public meaning that emerges from the framing era, in short, is deeply mixed.<sup>177</sup>

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the character of the Fourteenth Amendment’s Privileges or Immunities Clause. See THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES \* 12, \*573 n.3 (3d ed. 1874).

172. See *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L.J. 295 (John F. Dillon ed., 1874).

173. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL’Y REV. 571, 593 (2006). On the influence of Dillon, see, for example, JACOBS, *supra* note 166 at 111-14.

174. See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE §§ 99, 145, 891-92, 946, 981 (5th ed. 1872); 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: PRINCIPLES, PLEADING AND EVIDENCE §§ 213, 573 (7th ed. 1874); 3 *id.* § 3405. The only pertinent qualification is that Bishop believes the Second Amendment applied to the states, but this view predated the Fourteenth Amendment, and appears to have been a form of limited *Barron* contrarianism. See Wildenthal, *supra* note 41, at 179-80.

175. Wildenthal, *supra* note 42, at 177.

176. For a similar discussion of the understanding of framing-era lawyers and commentators, see DONALD A DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 30-34 (2003).

177. In this symposium, Richard Aynes argues that post-ratification statements should be ignored because they may reflect the public’s disillusionment with Reconstruction. See Richard L. Aynes, *Enforcing the Bill of Rights against the States: Where Do We Stand on Incorporation and What Is Next?*, 18 J. CONTEMP. LEGAL ISSUES 77, 100-07 (2009). There is no rule barring consideration of post-ratification evidence of original meaning, however; in *Heller* the Court consulted sources the post-dated the Second Amendment’s ratification by many decades, see 118 S. Ct. at 2804-09, and it is doubtful that the Fourteenth Amendment should be treated differently. First, the assumption that the public turned against vigorous enforcement of the Fourteenth Amendment by the time of ratification is doubtful. In fact, incorporationist sentiment may have increased in the years following ratification; as one leading historian of Reconstruction has argued: “It was not until the Ku Klux Klan violence of 1868 through 1872 that Republicans began to realize that superficially equal laws did not guarantee full protection of rights.” Benedict, *supra* note 148, at 50. Indeed, it is widely accepted that Klan violence

## III. AMBIGUITY AND THE NEW ORIGINALISM

Given both *Barron* and the prevailing understanding of Article IV at the time of the Fourteenth Amendment's ratification, the prevailing pre-ratification understanding of the privileges and immunities of citizenship contained no right to be free from state laws inconsistent with the first eight amendments. On the basis of the conflicting evidence throughout the historical record, it is tempting to conclude that the advocates of incorporation cannot establish that Congress had created a new public understanding of the privileges and immunities of citizenship through the process of drafting and ratifying the Fourteenth Amendment. To be sure, it is possible, in Professor Wildenthal's words, that "the Fourteenth Amendment may have overturned a prevailing (though disputed) legal doctrine with which Bingham and other Republicans disagreed,"<sup>178</sup> but surely the burden of proof should be on the advocates of incorporation to establish that the process of framing and ratification established a new public meaning for the privileges and immunities of citizenship. And, in light of the conflicting evidence about original public meaning, one might conclude that the advocates of incorporation cannot sustain that burden.

One might hesitate, however, before reaching this conclusion. For one thing, reading the Privileges or Immunities Clause as an antidiscrimination provision threatens to make the Equal Protection Clause redundant. Even if the Equal Protection Clause is thought to be limited to a right to nondiscriminatory protection from private lawbreaking, that right was also secured by the framing-era conception of the privileges and immunities of citizenship as well; *Corfield* described the privileges and immunities protected by Article IV as including the right to "protection by government,"<sup>179</sup> and there is ample evidence that the framing-era understanding of the Article IV concept of privileges and immunities included the right to nondiscriminatory protection from private

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increased during this period and was the critical factor behind the enactment of new civil rights legislation in 1870 and 1871. See, e.g., FONER, *supra* note 70, at 425-56. Second, it is quite unclear that any of the commentators canvassed above had any agenda other than accurately assessing contemporary public meaning. Politicians are likely to be influenced by shifting public sentiments; but it is far from clear that the same can be said of the respected scholars whose views are canvassed above.

178. Wildenthal, *supra* note 41, at 281.

179. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

lawbreakers.<sup>180</sup> Thus, the Equal Protection Clause would reach nothing not also protected by the Privileges or Immunities Clause. To be sure, the Equal Protection Clause extends its guarantee to all persons, while the Privileges or Immunities Clause's protections can be claimed only by citizens, but the degree of overlap between the two clauses could trouble the dedicated textualist. Similarly, the lack of framing-era evidence that the Equal Protection Clause was understood to do nothing more than extend the nondiscrimination obligation of the Privileges or Immunities Clause to noncitizens should not comfort the dedicated New Originalist.<sup>181</sup>

In this connection, the textual difference between Article IV's Privileges and Immunities Clause and its Fourteenth Amendment analogue bears noting. The former naturally reads like an antidiscrimination provision requiring that the states provide equal treatment to their own citizens and the citizens of other states: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."<sup>182</sup> Indeed, as we have seen, the Article IV provision was understood in just this fashion. The Fourteenth Amendment, in contrast, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States;"<sup>183</sup> a formulation that introduces the concept of the privileges and immunities of national citizenship, and edges closer to some sort of substantive protection.<sup>184</sup>

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180. See Steven J. Heymann, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 555-57 (1991).

181. This is not to say that the framers were unconcerned with the rights of noncitizens; Bingham, for example, noted that the proposed Equal Protection Clause would prevent what he called "the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates." CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). There is, however, no evidence that the Equal Protection Clause was understood to have no function other than to offer noncitizens nondiscriminatory protection against private lawbreaking.

182. U.S. CONST. art. IV, § 2, cl. 1.

183. U.S. CONST. amend. XIV, § 1.

184. In a recent paper, Kurt Lash argues that antebellum law and political commentary distinguished the national rights of citizenship from the "privileges and immunities" of Article IV, with the former describing rights conferred by the federal Constitution, and the latter providing citizens of each state with protection against discrimination by other states with respect to a limited set of state-conferred rights regarded as sufficiently fundamental to fall within the scope of Article IV's protections. See Kurt T. Lash, *The Origins of the Privileges and Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art 16-52*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1457360](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457360). The paper does not discuss whether this distinction was part of the public meaning of the privileges and immunities of national citizenship at the time of the Fourteenth Amendment's framing, a subject to be addressed in a future paper. See *id.* at 55. Professor Lash convincingly demonstrates that some antebellum sources suggest a distinction between the privileges and immunities of national and state citizenship with the former referring to rights protected by federal law; indeed, this view was central to the *Barron* contrarians. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham) (Section one creates "the power in the people, the whole people of the United

To be sure, as we have seen, the advocates of the Fourteenth Amendment frequently turned to Article IV for guidance; thus, the textual change could be understood to mean simply that the Article IV nondiscrimination principle was to be expanded—Article IV protected only citizens of a state while visiting another, while the Fourteenth Amendment was to provide blanket protection to all citizens from discrimination with respect to “privileges and immunities.”<sup>185</sup> Still, the text is not perfectly clear on this point—the public could have thought that the Fourteenth Amendment’s Privileges or Immunities offered more substantive protections, especially those members of the public that had paid especially close attention to the speeches of Howard and Bingham.

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States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do . . . to protect by national law the privileges and immunities of all citizens of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridge or denied by the unconstitutional acts of any States . . . . No State ever had the right, under the forms of law or otherwise, to deny any freeman the equal protection of the law or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy”). Nevertheless, Professor Lash does not claim that this distinction was sufficiently widely understood to be a part of the original public meaning of the Fourteenth Amendment. As we have seen, there was a widespread tendency to utilize Article IV concepts to explain the Fourteenth Amendment, with figures as diverse as Howard, Pomeroy, and Cooley relying on *Corfield*-style conceptions to explicate the Fourteenth Amendment’s Privileges or Immunities Clause. *See supra* text at notes 50, 164, 169. Bingham, for example, regarded both versions of the Fourteenth Amendment that he advanced as incorporationist, yet the first tracked Article IV, *see supra* text at notes 17-19. Thus, even if Professor Lash is correct that Bingham eventually realized that the first proposal should be redrafted to ensure that it was not linked to state-law rights, his original draft suggests that the distinction between Article IV and an incorporationist approach to privileges and immunities was far from apparent. And, the distinction between Article IV and the Fourteenth Amendment seems to have altogether eluded Senator Howard, whose speech to the Senate expressly invoked Article IV as the basis for understanding the successful proposal. Moreover, as we have also seen, it is far from clear that the framing-era public meaning of the privileges and immunities of national citizenship included a right to be free from state laws inconsistent with the first eight amendments. *Dred Scott*, for example, characterized the first eight amendments as among the privileges of national citizenship, while being clear that these privileges run only against the federal government. *See supra* text at notes 32-36. In short, the fact that some antebellum sources suggest a difference between the privileges and immunities protected by Article IV and the privileges and immunities of national citizenship does not establish that this understanding was sufficiently widely held to render the original public meaning of the Fourteenth Amendment incorporationist.

185. As we have seen, Article IV was generally understood to impose a nondiscrimination obligation on states with respect to citizens of other states. *See supra* text at note 51. It therefore had no obvious application with respect to a state’s discrimination with respect to its own citizens.

On this point, Professor Wildenthal argues that the public was “more likely [to] reflect or follow the views of their elected political leaders[.]”<sup>186</sup> Yet, as we have seen, there is little evidence that the press called the public’s attention to the incorporation issue. How many members of the public can we expect to have to read through Bingham and Howard’s speeches and realized their incorporationist import—especially when the nondiscrimination aspects of the proposed amendment received the lion’s share of attention, not only of the public but of the political leadership? Even Professor Wildenthal concedes that what he calls “equality issues” “appear to have drowned out attention to the Bill of Rights as such, as the amendment went before the states.”<sup>187</sup> There is surely a paucity of evidence that it acquired a generally understood public meaning distinct from the Article IV conception, incorporationist or otherwise; if it had, that public meaning have been unlikely to escape the notice of the Supreme Court and so many of the leading commentators. But, that is precisely what happened.

Still, the textual differences between the Article IV and Fourteenth Amendment Privileges and Immunities Clauses, coupled with the incorporationist meaning that many gave to the privileges and immunities of citizenship, introduce an ambiguity—in light of the difference in text, it is unclear whether the public would have understood it as an antidiscrimination provision like its Article IV predecessor, or something more substantive. Even if substantive, there is additional uncertainty whether the new clause should be read to protect only the rights identified in *Corfield*, or the first eight amendments as well. In the face of such uncertainty, one might refuse to enforce a constitutional text that lacks a reasonably ascertainable original meaning, as Robert Bork once suggested.<sup>188</sup> It is, however, an odd textualism that refuses to give enacted text any force—surely the one understanding that the ratifiers have with respect to any constitutional text is that it will be given *some* effect.

An originalist might insist that the competing historical evidence, however closely balanced, must be weighed and a winning interpretation declared. One problem originalists rarely seem to consider, however, is the reliability of the available evidence. As we have seen, much of the evidence from ratification is fragmentary or nonexistent; historical judgments about original meaning based on this partial record are therefore fraught with peril. Equally important, much of the problem confronting the advocates of incorporation is that the debates that have survived do not spend much time discussing the Privileges or Immunities Clause one

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186. Wildenthal, *supra* note 41, at 304 (footnote omitted).

187. *Id.* at 269.

188. *See* BORK, *supra* note 6, at 166.

way or another; much of the discussion that survives concerns the antidiscrimination objective of the Fourteenth Amendment, but it is unclear whether this is a characterization of the whole of section one or the Equal Protection Clause alone.

Indeed, the failure of the public to focus on the new Privileges or Immunities Clause suggests not so much that it had the same public meaning as its Article IV predecessor as that it failed to acquire any generally accepted public meaning, in large part because the public debate over the Fourteenth Amendment focused on other, more incendiary issues, such as African-American suffrage. One point on which Professor Wildenthal and I can agree is that “it is very hazardous to infer too much from mere silence.”<sup>189</sup> Thus, not only is the historical evidence conflicting, but the available evidence is itself of limited reliability.<sup>190</sup>

The Supreme Court has been willing to set historical evidence of original meaning aside when it offers no satisfactory basis for decision; when it assessed the constitutionality of segregation under the Fourteenth Amendment in *Brown v. Board of Education*,<sup>191</sup> for example, the Court famously characterized the historical evidence as “inconclusive.”<sup>192</sup> When the available evidence is near equipoise, and is itself of dubious reliability, it is far from clear that adjudication must be made on the basis of a perilous inquiry into original meaning.<sup>193</sup>

Perhaps more important, an approach that insists on an exclusive inquiry into historical evidence of original public meaning is itself inconsistent with the premises of the New Originalism. By the framing and ratification of the Fourteenth Amendment, the public would have understood that the methods by which textual ambiguities and conflicting

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189. Wildenthal, *supra* note 41, at 297.

190. For an elaboration on the difficulties in ascertaining the original meaning of the Fourteenth Amendment, see Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009).

191. 347 U.S. 483 (1954).

192. *Id.* at 489.

193. Professor Wildenthal rather misses the point when he claims, with reference to my recent article concerning incorporation of the Second Amendment, that I am concerned with the risk of error in originalist adjudication only when the outcome favors incorporation. See Wildenthal, *supra* note 41, at 322 n.560. My position in the Second Amendment article, as here, is that the risk of error will sometimes justify turning to nonoriginalist methods of adjudication, rather than simply rejecting (or accepting) a claim of incorporation. See Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 75-78 (2009).

evidence about original meaning would be addressed would not be confined to historical evidence of original meaning. No later than the Supreme Court's epochal decision sustaining congressional power to create a national bank in *M'Culloch v. Maryland*,<sup>194</sup> it had become evident that the Court would not confine itself to historical evidence of original meaning in constitutional adjudication, but would instead consider all of the modalities of constitutional argument famously identified by Philip Bobbitt,<sup>195</sup> including arguments based on text, constitutional theory and structure, prudential considerations, precedent, and national ethos.<sup>196</sup> An approach to constitutional interpretation that rejected historical evidence of the public's original understanding as the only relevant consideration to constitutional adjudication had been taken as recently *Dred Scott v. Sanford*,<sup>197</sup> in which the Court has read an ambiguous Due Process Clause to invalidate federal legislation prohibiting slavery based in the territories without any inquiry into the original meaning of due process.<sup>198</sup>

Thus, by the time of the Fourteenth Amendment's framing and ratification, it had been settled that original meaning was not the sole method for construing ambiguous constitutional text. That, in turn, goes a long way toward explaining why the advocates of incorporation could have embraced a text that had never been authoritatively construed to accomplish incorporation. As we have seen, the privileges and immunities formulation offered political advantages in building the requisite supermajority support. At the same time, the privileges and immunities formulation was capable of an incorporationist meaning, and therefore offered incorporationists the hope that a sympathetic court might one day resolve the ambiguity in favor of incorporation. Indeed, the most sophisticated advocates of the New Originalism acknowledge that original meaning is sometimes vague or ambiguous, and therefore a court must sometimes engage in constitutional construction—ascertaining meaning through methods other than an

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194. 17 U.S. (4 Wheat.) 316 (1819).

195. See PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-103 (1982); PHILIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* 11-22 (1991).

196. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 53-59 (5th ed. 2006).

197. 60 U.S. (19 How.) 393 (1856).

198. *Id.* at 450. Indeed, the majority appeared indifferent to the extensive historical evidence marshaled in dissent that the public had understood due process to permit federal regulation of slavery in the territories in the framing era. *Id.* at 534-40 (McLean, J., dissenting). For additional discussion of the historical evidence on this point, see, for example, DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 74-187 (1978); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 115-53 (2006).

interpretation of text in light of its original meaning.<sup>199</sup> And, given the methods of constitutional construction that had been embraced by 1868, the public's understanding of the Fourteenth Amendment necessarily included an expectation that its scope and effect would not be determined solely by reference to historical evidence of original public meaning. On this view, the New Originalism offers support for incorporation not as a manner of original public meaning, but because the ratification of an ambiguous text constituted the ratifiers' assent to subsequent judicial construction of that text by nonoriginalist means.<sup>200</sup>

The nonoriginalist approach to incorporation that the Supreme Court has taken, of course, has not resulted in the total incorporation of the Bill of Rights that some of the drafters may have desired. Still, the nonoriginalist arguments for total incorporation turn out to be pretty weak. Take the Grand Jury Clause.<sup>201</sup> The Court has been persuaded that a neutral magistrate's finding of probable cause after a preliminary examination conducted provides protections at least as meaningful as those offered by a grand jury, and on that basis has rejected incorporation of the Grand Jury Clause.<sup>202</sup> Considered in terms of constitutional structure, prudence, and national ethos, this conclusion seems unexceptionable.<sup>203</sup> In contrast,

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199. See, e.g., BARNETT, *supra* note 10, at 118-30; WHITTINGTON, *supra* note 10, at 5-14.

200. The seeming paradox of an originalism that calls for nonoriginalist methods for ascertaining the meaning of constitutional text disappears if fidelity to the public's original understanding also requires use of the same methods for constitutional interpretation and discussion in use in the framing era, a rather logical consequence of the New Originalism, as John McGinnis and Michael Rappaport have argued. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U.L. REV. 751, 761-72 (2009). Given that nonoriginalist methods of construction had been adopted by 1868, it follows that nonoriginalism is part of the framing-era understanding of the manner in which ambiguous constitutional text would be applied. To be sure, Professors McGinnis and Rappaport write that they are unaware of any evidence that nonoriginalist methods of interpretation were part of the original understanding, but they confine their inquiry to the eighteenth-century interpretive methods in use at the time of the framing of the original constitution and appear to have given no consideration to the appearance of nonoriginalist methods in constitutional law prior to the adoption of the Fourteenth Amendment. See *id.* at 786-802.

201. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V, cl. 1.

202. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994); *Hurtado v. California*, 110 U.S. 516, 534-38 (1884).

203. Similar considerations have led the Court to reject incorporation of the Seventh Amendment's right to a civil jury trial. See *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968).

given the centrality of the First Amendment's protection for speech and the press<sup>204</sup> to the republican form of government that Congress is constitutionally obligated to secure in the states,<sup>205</sup> the arguments for incorporation of the First Amendment's Speech and Press Clauses based on constitutional theory, structure and national ethos are enormously strong.<sup>206</sup> It is on this nonoriginalist terrain that the incorporation debate belongs.

Thus, even considered in terms of the New Originalism, the meaning of the Fourteenth Amendment is not to be determined exclusively by historical argument. The original meaning of the Fourteenth Amendment included the background understanding that its ambiguities would be resolved by judicial construction that would go beyond an historical inquiry into original meaning. To those who say that historical argument alone can resolve the incorporation debate, my response is simple—the claim that original public meaning is the exclusive means for determining the scope of the Fourteenth Amendment is itself inconsistent with the original understanding of the Fourteenth Amendment. Even New Originalists are condemned to live in a world of nonoriginalist constitutional interpretation.

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204. “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

205. See U.S. CONST. art. IV, § 4, cl.1.

206. For classic judicial statements of the role of these First Amendment protections in republican government, see, for example, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964); and *Stromberg v. California*, 283 U.S. 359, 369 (1931). For classic scholarly statements along these lines, see, for example, JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-16 (1980); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 1-27 (Lawbook Exchange 2000) (1948); and Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521, 526-65.