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Volume 78 | Number 4

Article 4

4-1-2000

Historical Linguistics, Inkblots, and Life after Death: The Privileges Or Immunities of Citizens of the United States

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HISTORICAL LINGUISTICS, INKBLOTS, AND LIFE AFTER DEATH: THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES

MICHAEL KENT CURTIS*

The recent Supreme Court decision of Saenz v. Roe suggests that the Privileges or Immunities Clause of the Fourteenth Amendment may have a new lease on life. In this Article, Professor Curtis examines the Clause using a method advocated by Justice Felix Frankfurter and many others: interpreting a constitutional amendment based on the common understanding of the words of the amendment at the time it was proposed and debated. Application of this method provides substantial support for the view that the words “privileges and immunities of citizens of the United States” include the rights of American citizens listed in the Constitution, especially those in the Bill of Rights. This Article looks at usage of “privileges” and “immunities” from the colonial period through Reconstruction and uncovers many examples in which people used the words to refer to basic protections in the federal Bill of Rights. The search also shows that these rights, privileges, and immunities were viewed as belonging to citizens of the United States or to all American citizens. More recent court opinions and a presidential proclamation also illustrate the use of “privileges or immunities” to describe Bill of Rights protections. Finally, the Article reflects on the problems that lie behind the apparent superficial simplicity of appeals to original meaning.

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INTRODUCTION

On May 17, 1999, an almost unprecedented event occurred in American constitutional law—the United States Supreme Court held that a state statute violated the Privileges or Immunities Clause of the

Fourteenth Amendment to the U.S. Constitution.¹ In *Saenz v. Roe*, the Court ruled that the right to travel is a privilege protected by the clause.² An aspect of that privilege was the right of people from out of state to establish residence in a new state and to enjoy basic equality with other state residents.³ Accordingly, the Court struck down California's statute limiting, for one year, new state residents to the amount of welfare payments they had received in the state from which they had emigrated.⁴

It is not astonishing that the Court struck down an act of a state legislature. The Court has done that quite often before. Nor is it remarkable that an effort to limit the welfare benefits of migrants was struck down. The Court also has done that before.⁵ What is remarkable is that *Saenz* relied on the Privileges or Immunities Clause of the Fourteenth Amendment. Before May 17, 1999, the Privileges or Immunities Clause, the "[l]ost [c]lause" as Akhil Reed Amar aptly named it,⁶ had seemed to be defunct. After it was eviscerated by the 1873 *Slaughter-House Cases*⁷ and in two cases decided in 1876,⁸ the clause had shown few signs of life, and these were almost exclusively in dissenting or concurring opinions.⁹ As

1. See *Saenz v. Roe*, 536 U.S. 489, 502–03 (1999).

2. See *id.*

3. See *id.* at 502–04.

4. See *id.* at 504–11.

5. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 622, 641–41 (1969) (holding that a total one-year denial of welfare to migrants violates the Equal Protection Clause), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

6. Akhil Reed Amar, *Lost Clause*, NEW REPUBLIC, June 14, 1999, at 14, 14.

7. 83 U.S. (16 Wall.) 36, 80 (1873) (stating that the rights claimed by the plaintiffs were not privileges and immunities within the meaning of that clause).

8. See *United States v. Cruikshank*, 92 U.S. 542, 551–56 (1876) (suggesting that none of the guarantees of the Bill of Rights limited the states, including the rights to assemble and bear arms); *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1876) (holding that the Seventh Amendment right to a civil jury trial does not limit the states under the Fourteenth Amendment).

9. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974) (Douglas, J., dissenting); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 290 (1974) (Douglas, J., concurring in the result); *Duncan v. Louisiana*, 391 U.S. 145, 165–66 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 77, 85 (1947) (Black, J., dissenting), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964); *Patterson v. Colorado*, 205 U.S. 454, 464–65 (1907) (Harlan, J., dissenting); *Maxwell v. Dow*, 176 U.S. 581, 612, 617 (1900) (Harlan, J., dissenting), *abrogated* by *Williams v. Florida*, 398 U.S. 78 (1970); *O'Neil v. Vermont*, 144 U.S. 323, 361–66 (1892) (Field, J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 116, 118 (dicta) (Bradley, J., dissenting). In *Adamson*, Justice Douglas joined Justice Black's dissent. *Adamson*, 332 U.S. at 92 (Black, J., dissenting). Justice Murphy, joined by Justice Rutledge, dissented separately. See *id.* at 123 (Murphy, J., dissenting). Justice Murphy noted that he was in "substantial agreement" with Black, but added "one reservation and one addition." *Id.* (Murphy, J., dissenting).

Chief Justice Rehnquist wrote in his *Saenz* dissent, "The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, *Colgate v. Harvey* . . . overruled five years later by *Madden v. Kentucky* . . ." ¹⁰ Some scholars had sought to drive nails in the coffin. In 1990, Robert Bork announced that the Privileges or Immunities Clause was indecipherable, like a provision obliterated beyond recovery by an inkblot: "That clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter." ¹¹

In the 1873 *Slaughter-House Cases*, the Court deprived the clause of virtually all meaning, but—as the opinion in *Saenz* shows—not quite all. In *Saenz*, the Court cited dicta from the *Slaughter-House Cases* to support its conclusion. As the *Saenz* Court noted, the majority in the *Slaughter-House Cases* had explained that "one of the privileges conferred by this Clause 'is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.'" ¹² The *Slaughter-House* opinion listed other privileges of the citizens of the United States—protection on the high seas and in foreign lands, the right to use navigable waters, to travel to Washington, D.C., and to visit sub-treasuries. ¹³ The *Slaughter-House* majority also mentioned the right to assemble and petition the government, ¹⁴ though the Court soon restricted its dicta to the right to petition the national government. ¹⁵ The *Slaughter-House Cases*'

10. *Saenz v. Roe*, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting).

11. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

12. *Saenz*, 526 U.S. at 503 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 80).

13. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

14. See *id.*

15. See *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1876) (limiting the right to assemble and petition to national matters). In an illuminating article, Bryan H. Wildenthal argues that the majority opinion in *Slaughter-House* did not clearly reject incorporation and that the rejection occurred later, in 1875. See Bryan H. Wildenthal, *The Lost Compromise: A Reassessment of the 19th Century Debate on Incorporation of the Bill of Rights in the Fourteenth Amendment* (Feb. 21, 2000) (unpublished manuscript on file with the *North Carolina Law Review*) (setting out a very fine account of the early Supreme Court cases dealing with the question of application of the Bill of Rights to the states). For a case interpreting the Privileges or Immunities Clause to protect the rights set out in the Bill of Rights against state, federal, or private invasion, see *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282), presenting a view consistent with that of Justice Bradley at the time. See Letter from Justice Bradley to Judge Woods (Mar. 12, 1871), Bradley Papers, New Jersey Historical Society (on file with the *North Carolina Law Review*).

limited catalogue of privileges was an unlikely reading of the clause. In contrast to suppressions of free speech, press, religion, and other civil liberties in order to protect slavery from criticism in the years 1830 to 1860, state interference with use of navigable waters, visits to the sub-treasuries, and the protection of citizens on the high seas and in foreign lands were not matters of significant national controversy in the years before the Fourteenth Amendment was ratified.¹⁶

The Court's recent resurrection of the Privileges or Immunities Clause naturally has heightened interest in it. Will the "lost clause," whose life was cut short by the Supreme Court, have a new and significant career in American constitutional law? If so, what will the Court decide the clause means? And how will the Court decide? The *Slaughter-House* dicta has been pretty much exhausted. We are unlikely, anytime soon, to see a case in which a state has denied a citizen the right to visit a sub-treasury or has interfered with the right to protection on the high seas. If the "lost clause" is to have other new and important meanings, the meanings will have to be found outside most of the dicta in the *Slaughter-House Cases*.

In this Article, I review the last major battle over the Privileges or Immunities Clause—the Black-Frankfurter debate over application of the provisions of the Bill of Rights to the states. The Black-Frankfurter debate includes a debate over interpretation that will shape this article. Then, as Justice Frankfurter advocated, I explore the original meaning of the words of the Privileges or Immunities Clause to the ordinary reader at the time that the Fourteenth Amendment was proposed and ratified. Application of this method to the Privileges or Immunities Clause (a clause that Frankfurter largely ignored) actually supports the positive result advocated by Justices Black, Douglas, Murphy, and Rutledge—application of the Bill of Rights guarantees to the states. Finally, I reflect on the complex and difficult questions that lie only slightly below the surface appeal of the idea of original meaning.

16. See Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 *passim* (1997) [hereinafter Curtis, *Lovejoy*]; Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113 *passim* (1993) [hereinafter Curtis, *Crisis over Helper's Book*]; Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785 *passim* (1995) [hereinafter Curtis, *Curious History*].

I. ADAMSON V. CALIFORNIA, THE FOURTEENTH AMENDMENT, THE BILL OF RIGHTS, AND ORIGINAL MEANING

A. *Original Meaning in Constitutional Analysis*

Before Justice Frankfurter,¹⁷ original meaning had been advocated by Justice Holmes,¹⁸ and recently this approach has been supported by Justices Scalia¹⁹ and Thomas.²⁰ Each of these Justices advocates focusing on the historic meaning of the words used in the constitutional text to determine their legal effect. The effort to discover original meaning is worthwhile if one believes that original meaning is at least one tool to be used in the search for constitutional meaning. I think it is, but only one.²¹ Other factors that should be considered include constitutional structure, precedent, broader history, and ethical aspirations. In this Article, however, I focus on history and original meaning. Courts should examine original constitutional meaning by means of a rich and broad historical inquiry that goes beyond focusing simply on the usage of words.²² Since all

17. See *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (stating that an ordinary reading of the Fourteenth Amendment leads to the conclusion that it does not include the provisions of the first eight amendments (citing *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting))), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

18. See *Macomber*, 252 U.S. at 220 (Holmes, J., dissenting).

19. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997) (explaining and defending originalism).

20. See *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment) (advocating adherence to the original meaning of the Free Speech and Press Clauses of the First Amendment).

21. Justice Holmes advocated considering what words would mean "in the mouth of a normal speaker of English, using them in the circumstances in which they were used." William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations of State Authority*, 22 U. CHI. L. REV. 1, 4 (1954) (quoting OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 203, 204 (1921)).

22. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION: 1863-1869* (1974); JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) [hereinafter CURTIS, *NO STATE SHALL ABRIDGE*]; ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877* (1988); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); ; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996) [hereinafter Curtis, *Resurrecting the Privileges or*

meaning is contextual, the larger historical context is crucial.

Difficult questions of method lurk below the superficial simplicity of the idea of original meaning. The idea seems to assume that words have a single, clear, universally accepted meaning. Sometimes words in the Constitution have such meanings. For example, the Constitution requires that each state shall have *two* senators.²³ Other phrases, however, have a range of possible meanings, and it is dubious that a single original understanding ever existed. Such phrases include, for example, the power to regulate commerce among the several states,²⁴ the prohibition on denying liberty without due process, and the command that no state shall deny to any person equal protection of the laws.²⁵ Often, however, it may be possible to identify what were *probably* more common and less common original understandings and to say that some meanings are within the range of reasonable probability and that some are not. That is so in the case of the Privileges or Immunities Clause of the Fourteenth Amendment.

Applying Justice Frankfurter's method provides significant insight into one core meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. The effort also highlights the difficulty of applying the method. Because the Black-Frankfurter debate arose in the case of *Adamson v. California*,²⁶ I now turn to that case and the debate that it engendered.

B. *The Black-Frankfurter Debate in Adamson v. California*

The last time it seemed that the Privileges or Immunities Clause might soon be revived was in *Adamson v. California*, thanks in part to the efforts of Justice Hugo Black.²⁷ In his now-famous dissenting opinion, Justice Black convinced three other members of the Court that Section 1 of the Fourteenth Amendment requires states to obey all guarantees of the Bill of Rights, but the crucial fifth vote eluded him. To support application of the Bill of Rights to the states, Justice Black relied both on the text of the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment and on the congressional legislative history of the Fourteenth Amendment.

Immunities Clause]; Curtis, *Lovejoy*, *supra* note 16, at 1147–50; Curtis, *Crisis over Helper's Book*, *supra* note 16, at 1137–59; Curtis, *Curious History*, *supra* note 16, at 866–70.

23. See U.S. CONST. art. I, § 3, cl. 1.

24. See *id.* § 8, cl. 3.

25. See *id.* amend. XIV, § 1; *id.* amend. V.

26. 332 U.S. 46 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

27. See *id.* at 77, 85 (Black, J., dissenting).

Admiral Dewey Adamson had been charged with murder in the State of California. In earlier years, Adamson had been convicted of burglary, larceny, and robbery. If he took the stand in his own defense, the prosecutor could have cross-examined him about his prior offenses.²⁸ Although the jury would be told to consider Adamson's prior crimes only as they related to his credibility as a witness when he claimed to be innocent and not his guilt, most lawyers think jurors have difficulty making the distinction.

On the other hand, if Adamson failed to take the stand, the judge and prosecutor could tell the jury that his failure to refute the charges against him could justify a negative inference against him on the issue of guilt. Faced with this dilemma, Adamson elected not to testify. The prosecutor and judge commented that his failure could be considered by the jury in reaching its verdict.²⁹ Adamson was convicted and sentenced to death.

In federal court, such comments seemed to violate the Fifth Amendment, which prohibits compelling any person to be a witness against himself in a criminal case.³⁰ The Supreme Court, however, had held that the privilege against self-incrimination, together with a number of other protections of the national Bill of Rights, did not limit the states.³¹ Only those Bill of Rights guarantees implicit in the concept of ordered liberty limited the states under the Due Process Clause of the Fourteenth Amendment. The privilege against self-incrimination was, as the Court saw it, not implicit in the concept of ordered liberty;³² and the Court upheld Adamson's conviction. In

28. See *id.* at 68 (Black, J., dissenting); RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES* 140-41 (1981). Adamson's holding that the privilege against self-incrimination did not limit the states was rejected in *Malloy v. Hogan*, 378 U.S. 1, 2-3 (1964). States were required to provide criminal juries for serious offenses in *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968).

29. See *Adamson*, 332 U.S. at 48-49.

30. See *id.* at 61 (Frankfurter, J., concurring) (discussing U.S. CONST. amend. V).

31. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (holding that the privilege against self-incrimination does not limit the states under the Fourteenth Amendment), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964); *Patterson v. Colorado*, 205 U.S. 454, 459-62 (1907) (expressing doubt about the incorporation of the guarantee of freedom of the press under the Fourteenth Amendment); *Maxwell v. Dow*, 176 U.S. 581, 604 (1900) (holding that the right to a criminal jury trial does not limit the states under the Fourteenth Amendment), *abrogated by Williams v. Florida*, 398 U.S. 78 (1970); *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876) (holding that the Seventh Amendment right to a civil jury trial does not limit the states under the Fourteenth Amendment); see also CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, at 171-211 (describing Supreme Court cases on the application of the Bill of Rights to the states).

32. See *Adamson*, 332 U.S. at 53-54.

addition to his due process claim, Adamson claimed that the “privileges or immunities of citizens of the United States,” which the Fourteenth Amendment said no state could abridge, included Bill of Rights protections such as the privilege against self incrimination.³³ The Court also rejected Adamson’s claim under the Privileges or Immunities Clause.³⁴

The Fourteenth Amendment provides that all persons born in the United States and subject to its jurisdiction are citizens of the United States. The Amendment also provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”³⁵ Based on text and precedent in 1868, one might have thought citizens such as Mr. Adamson had a *double* protection against state imposed self-incrimination. The Due Process Clause would have protected Adamson as a person, and the Privileges or Immunities Clause would have protected him as a citizen. But the Court had rejected application on either theory.³⁶

The Fifth Amendment privilege against self-incrimination is a process or criminal procedure guarantee. Prior to the framing of the Fourteenth Amendment, the Court had suggested that to determine at least part of the content of the Fifth Amendment’s Due Process Clause one could look to the procedures required by the Constitution.³⁷ From that decision one might have concluded that the process required by the Due Process Clause of the Fourteenth Amendment would include, for example, those *procedures* for jury trial and against compelled self-incrimination provided in the original Bill of Rights.³⁸ By this theory, the Fourteenth Amendment’s Due Process Clause would extend procedural protections of the Bill of Rights to all “persons” within state jurisdiction.

33. See Appellant’s Brief at 21, *Adamson v. California*, 332 U.S. 46, 77, 85 (1947) (No. 102), reprinted in 45 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 535, 558 (Philip B. Kurland & Gerhard Casper eds., 1975).

34. See *Adamson*, 332 U.S. at 51–53.

35. U.S. CONST. amend. XIV, § 1.

36. See *Adamson*, 332 U.S. at 50–54 (citing *Palko v. Connecticut*, 302 U.S. 319, 328 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969); *Twining*, 211 U.S. at 91–98).

37. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855); AMAR, *supra* note 22, at 173; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 166; Crosskey, *supra* note 21, at 6–7.

38. See *Murray’s Lessee*, 59 U.S. (18 How.) at 276–77; AMAR, *supra* note 22, at 173; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 166; Crosskey, *supra* note 21, at 6–7.

Because Adamson was also a citizen, the plain meaning of the text of the Privileges or Immunities Clause suggests that the privilege against self-incrimination was one of those Bill of Rights privileges of citizens of the United States that states could no longer abridge. A modern dictionary, for example, defines a privilege as "a right, immunity, or benefit enjoyed by a particular person or a restricted group of persons" (one restricted group is citizens of the United States); as "the principle or condition of enjoying special rights or immunities;" and as "any of the rights common to all citizens under a modern constitutional government."³⁹

The Supreme Court, of course, had seen things differently. In 1937, ten years before *Adamson*, in *Palko v. Connecticut*,⁴⁰ the Court gave a fairly elaborate explanation of why certain Bill of Rights provisions did not limit the states.⁴¹ By the time *Palko* was decided, some liberties in the Bill of Rights, such as free speech and free press, had been held to limit the states.⁴² Other liberties, such as jury trial, the privilege against self-incrimination, and the immunity from double jeopardy, had not.⁴³ Justice Cardozo attempted to explain why some, but not all, Bill of Rights liberties were protected from state action under the Due Process Clause of the Fourteenth Amendment. In doing so, he described all the rights in the Bill of Rights collectively as privileges and immunities:

The exclusion of these *immunities and privileges* [jury trial, the privilege against self-incrimination, etc.] from the *privileges and immunities* [e.g., freedom of speech and press] protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of

39. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1036 (2d ed. 1997). These are three of nine definitions.

40. 302 U.S. 319 (1937), *overruled* by *Benton v. Maryland*, 395 U.S. 784 (1969).

41. *See id.* at 323-26. *Palko* upheld another death sentence, this time against a double jeopardy claim. *See id.* at 322.

42. *See* *Near v. Minnesota*, 284 U.S. 697, 707 (1931) (holding that liberty of the press is protected by the Fourteenth Amendment); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (holding that the right of free speech is protected by the Fourteenth Amendment).

43. *See, e.g., Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (holding that the privilege against self-incrimination does not limit the states under the Fourteenth Amendment), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964); *Maxwell v. Dow*, 176 U.S. 581, 604 (1900) (holding that the right to a criminal jury trial does not limit the states under the Fourteenth Amendment), *abrogated* by *Williams v. Florida*, 398 U.S. 78 (1970); *Palko*, 302 U.S. at 322 (holding that immunity from double jeopardy does not limit the states under the Fourteenth Amendment); *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876) (holding that Seventh Amendment right to civil jury trial does not limit the states under the Fourteenth Amendment).

liberty itself.

We reach a different plane of social and moral values when we pass to the *privileges and immunities* that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech.⁴⁴

So, in 1947, when the Supreme Court held the privilege against self-incrimination did not protect Adamson, it was following well-established precedent. Justice Black sought to reverse a host of earlier decisions and to apply all the guarantees of the Bill of Rights to the states, but he faced a tenacious opponent in Justice Felix Frankfurter. Justice Frankfurter wrote a concurring opinion in *Adamson* aimed directly at Black's dissent.

Justices Black and Frankfurter differed on the application of the Bill of Rights to the states in at least three major ways. Justice Frankfurter had a rather low opinion of some of the guarantees of the Bill of Rights and a higher regard for decisions holding that not all those rights limit the states. He explained that "[s]ome of these [guarantees of the Bill of Rights] are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts."⁴⁵

Justice Black, on the other hand, had an almost religious reverence for the Bill of Rights and a correspondingly lower opinion of precedent refusing to apply the guarantees to the states. Justice Black wrote:

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

44. *Palko*, 302 U.S. at 325-26 (emphasis added) (citations omitted). *Palko* was overruled in *Benton*, 395 U.S. at 794.

45. *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964).

judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes.⁴⁶

Justices Black and Frankfurter also disagreed about the Fourteenth Amendment's history. Justice Black thought, correctly in my view, that the history of the adoption of the Fourteenth Amendment supported application of the guarantees of the Bill of Rights to the states.⁴⁷ He pointed to remarks by Representative John Bingham, the primary author of Section 1 of the Fourteenth Amendment, and Senator Jacob Howard, who presented the Amendment to the Senate on behalf of the committee that wrote it.⁴⁸ Both Bingham and Howard had explained that the Privileges or Immunities Clause of the Fourteenth Amendment required states to obey the guarantees of the Bill of Rights.⁴⁹ Justice Frankfurter, on the other hand, thought contemporary judicial opinions were a better historical guide. Frankfurter wrote that the idea that the Fourteenth Amendment imposes the dictates of the Bill of Rights on the states "was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution."⁵⁰

Justices Black and Frankfurter also differed about method. Frankfurter said that remarks of particular senators and representatives were not conclusive evidence of the Amendment's meaning. What counted instead were the words of the proposal, not the words in congressional speeches about it. "After all," Frankfurter explained "an amendment to the Constitution should be read in a

46. *Id.* at 89 (Black, J., dissenting).

47. For support for the Black view, see, for example, HENRY ABRAHAM, *FREEDOM AND THE COURT* 45-46 (1977) (providing substantial, but not unqualified, support for Justice Black); CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, *passim*; Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 25-26 (1968); Aynes, *supra* note 22, at 63-66; Crosskey, *supra* note 21, at 2-119; see also AMAR, *supra* note 22, at 215-94 (providing substantial, but not unqualified, support for Justice Black).

48. See *Adamson*, 332 U.S. at 68, app. at 93, 98, 100-102, 106-07 (Black, J., dissenting).

49. See CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Bingham).

50. *Adamson*, 332 U.S. at 63-64 (Frankfurter, J., concurring).

“sense most obvious to the common understanding at the time of its adoption.” . . . For it was for public adoption that it was proposed.’⁵¹

C. *Applying Justice Frankfurter’s Method to the Privileges or Immunities Clause*

Frankfurter insisted that the language of the Due Process Clause would hardly have been commonly understood by the general public as including “all the rights” in the Bill of Rights. According to Frankfurter, the language of the Due Process Clause would be an “extraordinarily strange” way of saying that “every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars.”⁵²

In arguing that it was bizarre to find the procedural guarantees of the Bill of Rights encompassed in the Due Process Clause, Justice Frankfurter was mistaken. After all, the privilege against self-incrimination was a process guarantee; prior precedent had suggested that the procedures required by the Constitution were at least part of what the Due Process Clause required,⁵³ and state courts had sometimes interpreted due process or the analogous law-of-the-land clauses of their states’ constitutions to require procedures, such as grand jury indictment, that were also enshrined in the Bill of Rights.⁵⁴ In addition, Sir Edward Coke’s great book on the Magna Carta had considered its law-of-the-land clause,⁵⁵ the predecessor of our Due Process Clause, to require a grand jury indictment. William Penn, John Adams, and Massachusetts’ Chief Justice Lemuel Shaw took the same position.⁵⁶ In addition, William Blackstone said that the law-of-

51. *Id.* at 63 (Frankfurter, J., concurring) (quoting *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting) (quoting *Bishop v. State*, 48 N.E. 1038, 1040 (Ind. 1898))).

52. *Id.* (Frankfurter, J., concurring).

53. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855); AMAR, *supra* note 22, at 173; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 166; Crosskey, *supra* note 21, at 6–7.

54. See, e.g., *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857).

55. Chapter 39 of the Magna Carta provides: “No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land.” MAGNA CARTA ch. 39 (1215), reprinted in 1 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 8, 12 (Bernard Schwartz ed., 1971) [hereinafter DOCUMENTARY HISTORY]. The law-of-the-land clause was interpreted to require due process before deprivation of life or liberty.

56. For a discussion of Sir Edward Coke, John Adams, Chief Justice Shaw, and William Penn on the law-of-the-land clause and the right to a grand jury, see CURTIS, NO

the-land clause required a criminal jury trial.⁵⁷ As Akhil Amar has noted, James Kent, the great commentator on American law; Supreme Court Justice Joseph Story in his *Commentaries on the Constitution*; and abolitionist Alvin Stewart also insisted that due process or the law of the land—the two were regarded as equivalent—required grand juries.⁵⁸ On the other hand, as Frankfurter noted, a number of states did not specifically require grand-jury indictment at the time the Fourteenth Amendment was adopted, and some states held that it was not required under their state constitutions.⁵⁹

Although Justice Frankfurter may have been mistaken about the lack of historic support for finding the procedural guarantees of the Bill of Rights in the Due Process Clause of the Fourteenth Amendment, his larger point about method was an important one. In a government based on popular sovereignty, the general understanding of the people at the time of ratification of a constitutional provision is a more important factor in determining constitutional meaning than the views of the provision's framers. Because the Constitution is legitimated by its enactment by "We the People" through our representatives, the understanding of the people is what counts. Those who ratify constitutional amendments, by this theory, are analogous to agents or representatives of the sovereign people. Ratification based on recondite meanings not understood by people at large, as Frankfurter suggested, would be illegitimate.

Of course, remarks of Senators and Representatives are some evidence not only of original intent of the legislators who proposed an amendment, but also of popular original understanding of the meaning of the words. (Intent and popular understanding might or might not coincide.) In the case of the Fourteenth Amendment, for instance, many would read and be influenced by remarks of leading framers such as John Bingham and Jacob Howard, as reported in the press and in the *Congressional Globe*.⁶⁰ In addition, Bingham and

STATE SHALL ABRIDGE, *supra* note 22, at 181.

57. For Blackstone on the criminal trial jury as required by the law-of-the-land clause of the Magna Carta, see 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *379.

58. See AMAR, *supra* note 22, at 201.

59. See *Adamson v. California*, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964); see also Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 768-83 (1965) (providing examples of state constitutional provisions).

60. See, e.g., Crosskey, *supra* note 21, at 102-03 (reporting that the *New York Times*

Howard's understanding of the words "privileges or immunities" is some evidence of how the words were generally used.

Justice Frankfurter's textual argument about the Due Process Clause dealt with only one of the two clauses that had been invoked to justify application of the Bill of Rights (and specifically the *privilege* against self-incrimination) to the states. How did he deal with the Privileges or Immunities Clause? Significantly, he did not claim that the phrase "privileges or immunities of citizens of the United States" would be a very odd way to describe the guarantees of the Federal Bill of Rights. Instead, Justice Frankfurter said he was "concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment . . . put[ting] to one side the Privileges or Immunities Clause of that Amendment" because of the "mischievous uses to which that clause would lend itself."⁶¹ Here again, Frankfurter had a legitimate concern. Courts had struck down minimum wage,⁶² maximum hour,⁶³ and worker protection⁶⁴ laws under a doctrine of liberty of contract they found in the Due Process Clause. Frankfurter feared the Privileges or Immunities Clause could provide a vehicle for doing the same thing.⁶⁵ Of course, many constitutional provisions,

and the *New York Herald* reprinted Howard's speech saying that the Privileges or Immunities Clause would require states to obey the Bill of Rights); *Amending the Constitution—Federal Power and State Rights*, N.Y. TIMES, Mar. 2, 1866, at 2 (reporting Representative Bingham's statement that the an early version of the Privileges or Immunities Clause would require states to obey guarantees of the federal Bill of Rights); *Senator Howard's Speech*, PHILADELPHIA INQUIRER, May 24, 1866, at 8 (recounting Howard's speech); *Thirty-Ninth Congress, The Reconstruction Resolutions*, N.Y. TIMES, May 24, 1866, at 1 (recounting Senator Howard's statement, "I believe to these privileges and immunities may be added the personal right [sic] guaranteed by the first eight amendments"); *Thirty-Ninth Congress, The Constitutional Amendment*, N.Y. TIMES, Mar. 1, 1866, at 5 (reporting similar views by Representative Bingham); see also CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard) (discussing the Fourteenth Amendment's Privileges or Immunities Clause); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) (commenting on the Fourteenth Amendment); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 128 (citing news accounts); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 36 (1998) (quoting the *New York Times*, *New York Herald*, and the *National Intelligencer* of May 24, 1866, which reported Howard's statement about the Privileges or Immunities Clause and the Bill of Rights).

61. *Adamson*, 332 U.S. at 61 (Frankfurter, J., concurring).

62. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (1923), *overruled in part by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

63. See *Lochner v. New York*, 198 U.S. 45, 64 (1905), *reversed by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

64. See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

65. Indeed, Frankfurter's fears may be realized. Today some seek to revive economic substantive due process under the Privileges or Immunities Clause of the Fourteenth

including the First Amendment, have the potential for mischief if misapplied. That fact hardly justifies draining them of all significant meaning.

Justice Black shared Justice Frankfurter's concern. His solution was to limit the rights protected by the first section of the Fourteenth Amendment to those set out in the text of the Constitution, such as the guarantees of the Bill of Rights. Increasingly rigid application of this method eventually led Justice Black to reject the claim that the requirement of proof beyond a reasonable doubt could be found in the Due Process Clause.⁶⁶

Though Justice Frankfurter had suggested interpreting constitutional language in accordance with the common understanding at the time of the Amendment's ratification, in fact he made no real effort to explore the common understanding of the words "privileges or immunities of citizens of the United States" in the years 1866–1868. He did, however, remark that "[a]rguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption."⁶⁷ He claimed that a "surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe."⁶⁸ The understanding of Justices (at first a bare majority of the Court) seven years after the Fourteenth Amendment was proposed and five years after ratification was complete⁶⁹ is hardly conclusive proof of common understanding at the time the amendment was proposed and ratified. Judges have a specialized understanding that may be quite

Amendment. See, e.g., PAUL KENS, *LOCHNER V. NEW YORK*, ECONOMIC REGULATION ON TRIAL 182–86 (1998) (describing calls for a return to a *Lochner* approach); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 41–44 (1999) (suggesting the Privileges or Immunities Clause should be used against modern economic regulation). The Congressional history contains some statements that support both an expansive and a more limited reading of privileges or immunities. See, e.g., 2 CONG. REC. 384–85 (1874) (statement of Rep. Mills); CONG. GLOBE, 42d Cong., 2d Sess. 843–44 (1872) (statement of Sen. Sherman); CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871) (statement of Rep. Hoar); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham); see also Crosskey, *supra* note 21, at 92 (delineating different interpretations of "privileges" and "immunities" by legislators).

66. See *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting).

67. *Adamson v. California*, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

68. *Id.* (Frankfurter, J., concurring).

69. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 *passim* (1873).

uncommon. Furthermore, they are guided in their interpretations by far more than the common understanding of the words of the Constitution at the time of adoption. At the time the Justices that Frankfurter cited wrote, the nation and the Court were beginning their long retreat from Reconstruction, and the Fourteenth Amendment, of course, was a centerpiece of Reconstruction.⁷⁰ In short, a judicial decision in 1873 or 1876 does not necessarily represent popular understanding of the meaning of words in 1866–1868.

In 1969, Justice Black returned to the issue raised by Frankfurter's textual criticism. Justice John Marshall Harlan had dissented from a decision requiring states to furnish jury trial for all persons accused of offenses punishable by imprisonment of more than six months.⁷¹ In the course of his dissent, Justice Harlan said that "the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that 'The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well.'"⁷² Justice Black responded:

I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless.⁷³

Justice Black reiterated that he relied on both the Due Process and Privileges or Immunities Clauses to accomplish application of the Bill

70. See generally, e.g., CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 57–91 (discussing the congressional history of the Fourteenth Amendment); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 40–63 (1988) (considering the effects of Reconstruction on the drafting of the amendment).

71. See *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968); *id.* at 172 (Harlan, J., dissenting).

72. *Id.* at 174 n.9 (Harlan, J., dissenting) (citing Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949)).

73. *Id.* at 166 (Black, J., concurring).

of Rights to the states.⁷⁴

Like Frankfurter, some who appeal to common understanding or original meaning make no serious effort to explore the common historic understanding of the words “privileges or immunities of citizens of the United States.” The failure is perfectly understandable. The task is immense, and the methods to be used are not clear. It requires trying to understand how an entire political community in 1866–1868 commonly understood these words.⁷⁵ That fact may be one reason scholars have often pursued intent rather than original meaning and have looked at much smaller groups of people in an effort to determine their intent.⁷⁶ One could look, for example, at the congressmen who framed the Fourteenth Amendment and at the state legislators who ratified it. Most congressmen and state legislators, however, did not address the subject. As a result, some scholars look for still smaller groups—such as “leading proponents.”⁷⁷ Even such people, however, rarely share an explicit, unequivocally expressed, unanimous understanding. That is at least equally true, of course, for original meaning, which involves a far greater number of people.

Although its appeal as a matter of theory is substantial, as a practical matter, original meaning is really quite difficult to determine.⁷⁸ Extensive research may show some usages to be so rare or nonexistent that one can rule them out and others to be so common, pervasive, and unambiguous that the case is clear. But for most, if not all, controversial questions, there will be ambiguities and cross currents raising the difficult question of how much proof is enough. Probability is the very best we can hope for.

74. *Id.* at 166 n.1 (Black, J., concurring).

75. Justice Thomas is a notable exception to the failure to undertake historical excavation. Indeed, he has also advocated reevaluating the historic meaning of the clause. *See Saenz v. Roe*, 526 U.S. 489, 522–23 (1999) (Thomas, J., dissenting). As Justice Thomas explained in his *Saenz* dissent, “[b]ecause I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case.” *Id.* at 527–28 (Thomas, J., dissenting).

76. *See, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 190 (2d ed. 1997).

77. *Id.*

78. For proponents of original meaning, see, for example, *supra* notes 17–20 and accompanying text. Professor William Winslow Crosskey was an early proponent of original meaning. *See* Crosskey, *supra* note 21, at 2–10.

II. AN OVERVIEW

This Article⁷⁹ will show that in the thirty-five years or so before the 1868 ratification of the Fourteenth Amendment, common usage often referred to Bill of Rights liberties as “privileges,” “immunities,” or “rights” of Americans or of citizens of the United States. The Article will show that the usage was widespread and that it had deep historic roots. Few, if any, people in the years 1830–68 explicitly denied that the phrase “privileges or immunities of citizens of the United States” included rights listed in the Bill of Rights, and a number supported the proposition. The evidence suggests that most participants in the political community *probably* would have assented to the following claim as a reasonable meaning of the words “privileges or immunities of citizens of the United States”: “The privileges or immunities of citizens of the United States include the privileges or immunities or rights set out in the Bill of Rights.” Perhaps most of these participants even would have suggested that meaning if asked. But most of them, even most of the elite, were silent. As to the rest, the words of most of those who may have shared a common understanding of the clause have been lost. A poll of public opinion would have been quite helpful, but none was taken. 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. Similar difficulties, of course, face any other proposed original meaning.

The research reported here shows that many Americans in the

79. This Article reports on recent discoveries in my ongoing search for “common understanding” of the words “privileges or immunities of citizens of the United States.” Many of the examples I cite were discovered in research on free speech history. This Article draws on my current research, on my own prior work on the meaning of privileges or immunities in the Fourteenth Amendment, on important recent work by such scholars as Akhil Reed Amar and Richard Aynes, and on the work of scholars who have explored these questions before, especially Professors William Winslow Crosskey and Michael Conant. See AMAR, *supra* note 22, *passim* (providing a particularly rich, eloquent, and important source); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, *passim*; Aynes, *supra* note 22, *passim* (particularly important for its examination of treatise writers around the time of the Fourteenth Amendment); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785 *passim* (1982) (an early and important influence on my thinking about what Conant called “historical linguistics” and the source of several examples used in CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, and later in this Article); Crosskey, *supra* note 21, *passim* (the most important influence on my work); Curtis, *Lovejoy*, *supra* note 16, at 1147–50; Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765, 790–97 (1985) (describing the use of privileges or immunities in treatises). In the interest of space, I will not discuss academic controversies or opposing views surrounding this subject.

eighteenth and nineteenth centuries described certain fundamental rights and liberties set out in the Bill of Rights specifically as privileges or immunities of citizens.⁸⁰ As time went on, references began to evolve. Particularly by the late 1830s, more and more people were likely to assert explicitly that the privileges belonged to all Americans and were established or secured in the Federal Constitution. Such usage was common in the years before the 1866 framing of the Fourteenth Amendment.⁸¹

These findings are inclusive rather than exclusive. Other claims need to be evaluated on a case-by-case basis. For a right to qualify, based on original meaning, as a likely privilege or immunity of citizens of the United States, it should meet at least two criteria. First, the claimed right or liberty must have been described with some regularity as a privilege or immunity or must be quite similar to ones that were. Second, the privilege or immunity should have been understood as one specifically, though not uniquely, belonging to citizens of the United States, as opposed, for example, to a right existing merely under state law. These criteria are based on a natural reading of the text as well as on historical exploration.

I have come to the following conclusions: (1) The words "privileges and immunities" often were used to describe fundamental rights and liberties such as those in the Federal Bill of Rights. (2) When they were used to describe fundamental constitutional rights, the words "privileges" and "immunities" often were used as synonyms for the words "rights" and "liberties." (3) This usage stretches from the English and Colonial period, in which such rights were considered privileges of freeborn Englishmen, through the struggle for American independence, to the American Civil War and the framing of the Fourteenth Amendment and beyond. (4) By the late 1830s, such privileges and immunities were more and more often spoken of as basic rights and liberties of all Americans, secured or established by the federal as well as state constitutions. They were not understood simply as the rights of citizens of particular states. This usage became more frequent and explicit as the nation matured. (5) The more one looks, the more examples one finds. Of course, some examples are clearer than others. Some are ambiguous. (6) The "Privileges and Immunities of Citizens in the several States"⁸² referred to in Article IV were sometimes thought of as certain rights

80. See discussion *infra* Part IV.

81. See *id.*

82. U.S. CONST. art IV, § 2, cl. 1.

arising under state law that temporary visitors from other states were entitled to share and were sometimes thought of as including national constitutional privileges such as those in the Bill of Rights.⁸³ This Article will focus on conclusions one through five. The examples that follow involve uses of the words “privileges” and “immunities” as equivalent to fundamental rights set out in Bills of Rights.

There are three parts to the argument that follows: First, the words “privilege” and “immunity” often were used historically as synonyms for “right” or “liberty.”⁸⁴ Second, people commonly described the rights in the Bill of Rights as “rights,” “privileges,” or “immunities.” Finally, these privileges, immunities, or rights often were described as rights of Americans, American citizens, or citizens of the United States.

Because the word “rights” was used commonly as a synonym for “privileges” or “immunities,” many would have understood a statement that rights in the Bill of Rights are “rights of citizens of the United States” as equivalent to saying that they are “privileges of citizens of the United States.” For example, a statement that free speech is a fundamental constitutional right of citizens of the United States is therefore relevant to whether free speech would be understood as a privilege of citizens of the United States. That is so because “right” and “privilege” were often used interchangeably. Of course, the meaning of the Privileges or Immunities Clause remains intensely controversial. Opposing perspectives are discussed in the sources set out in the notes.⁸⁵

Although the crucial original understanding of the words “privileges or immunities of citizens of the United States” is the understanding of citizens in 1866–1868 (the time of the proposal and

83. See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, at 37–38, 42–44, 60–61.

84. Many people from 1835 to 1860 emphasized the right and the lack of any federal or state power over freedom of speech. Discussions did not clearly distinguish between rights and power.

85. See BERGER, *supra* note 76, at 30–56, 155–89; BOND, *supra* note 22, *passim* (discussing the ratification of the Fourteenth Amendment by the Southern states); DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 342–52 (1985) (arguing mainly that Section 1 merely prohibited discrimination under state law); NELSON, *supra* note 70, at 118 (same). *But see* NELSON, *supra* note 70, at 123 (“Only one historical conclusion can therefore be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well.”). For another analysis, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1410–33 (1992) (interpreting the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment as originally intended to limit discrimination under state law and remaining agnostic on incorporation).

ratification of the Fourteenth Amendment), we should also look at earlier usage for at least three reasons. First, many of the earlier sources were classics in law or the history of liberty and were likely to be known to people in 1866–1868. Others involved controversial events of national significance. The *Writs of Assistance Cases*,⁸⁶ the trial of William Penn,⁸⁷ and the Revolutionary Declarations⁸⁸ would probably have been familiar to many Americans. Blackstone's *Commentaries* were read and relied on by people in 1866 as a preeminent, but not infallible, legal authority.⁸⁹ Revolutionary declarations about the privileges of Englishmen were cited by James Kent's *Commentaries* and other sources familiar to people in 1866–1868.⁹⁰ The Sedition Act debates were available in the *Annals of Congress* and in newspapers of the day.⁹¹ As we move to public discussion in the 1830s, 1840s, and 1850s, many citizens in 1866–1868 would themselves have read discussions of crucial events such as the killing of abolitionist editor Elijah Lovejoy in 1837, just twenty-nine years before the Fourteenth Amendment was framed.⁹² Discussion on the eve of the Civil War would be more immediately familiar and during the Civil War more immediate still. The similarity of rhetoric used in 1866 with that used in earlier times also suggests familiarity with historic sources.

Second, continuous usage of the word "privilege" (or "immunity") as equivalent to the word "right" is some evidence that later usage would be widely understood as having the same meaning. The third point is related. If people at an earlier time referred to liberties such as freedom of the press as a privilege or a privilege of American citizens, their children would be more likely to adopt the

86. For an 1868 discussion of the *Writs of Assistance Cases*, citing earlier sources, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *301–04.

87. Penn's trial had long been a classic source for Quakers. It gave rise to Bushell's case, a leading precedent on the freedom of the criminal jury from coercion by the bench. For citations to these cases, see *id.* at *321 n.1.

88. For a citation to the 1774 Declaration of Rights by the Continental Congress, see, for example, CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence).

89. See THE RECONSTRUCTION AMENDMENTS' DEBATES 162, 164, 197, 205 (Alfred Avins ed., 1967).

90. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1–32 (Da Capo Press 1971) (1827). For a number of references to Kent's *Commentaries*, see THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 89, at 755.

91. See JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 35–93, 101–04 (1956).

92. See Curtis, *Lovejoy*, *supra* note 16, at 1160–62.

usage, and such adoption of the language would also be likely in the next generation. The fact that we will see such usage much earlier and before, during, and after the Civil War tends to confirm that point. Later usage can be relevant for similar reasons.

Of course, words are used in different contexts in different ways. The word “privilege” was used historically at least as expansively as people use the word “right” today. There are, for example, common-law evidentiary privileges, privilege licenses under municipal law, and privileges under state law. The words “privileges” and “immunities” can be used to describe a broader and less well-defined group of legal interests than fundamental constitutional rights of citizens of the United States. For example, a Minnesota court said in 1862 that “a mortgage given to secure a negotiable promissory note partakes of the privileges and immunities of commercial paper.”⁹³

Of course, usage in 1866 may not be in accord with some modern theories. In 1913, Professor Wesley Newcomb Hohfeld published an influential article suggesting that important theoretical and legal distinctions should be made between rights, privileges, and immunities.⁹⁴ Hohfeld’s work had a substantial impact on many trained in the law, though his call to use the words in distinct ways has never fully triumphed. Still, Hohfeld wrote as a legal theorist, not as a linguist or historian. It would be anachronistic to assume that people in the nineteenth century used the words “rights,” “privileges,” and “immunities” exactly as Hohfeld later suggested they should.

The pages that follow will look at usage of “privilege” and “immunities” throughout American history. The discussion will show that by 1866, when Section 1 of the Fourteenth Amendment was proposed, many people described basic rights in the Bill of Rights as “privileges” or “immunities” belonging to citizens of the United States or to American citizens.”

93. *Johnson v. Carpenter*, 7 Minn. 176, 182 (1862).

94. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–44 (1913) (explaining the distinction between rights and privileges).

III. PRIVILEGES, IMMUNITIES, AND FUNDAMENTAL RIGHTS IN AMERICAN HISTORY FROM ENGLISH ORIGINS TO THE AMERICAN REVOLUTION

A. *English and Colonial Background*

By the time of the American Revolution, most basic liberties later set out in the Bill of Rights had been asserted by Parliament as liberties of Englishmen, though (by the orthodox view in England) the guarantees limited only the King, not Parliament.⁹⁵ These rights had been asserted in a series of documents ranging from the Magna Carta⁹⁶ to the Petition of Right⁹⁷ and the English Bill of Rights.⁹⁸ American colonial laws quite early claimed that the colonists were entitled to all the “rights liberties immunities priviledges and free customs” enjoyed by “any naturall born subject of England,” as articulated in the Maryland Act for the Liberties of the People in 1639.⁹⁹ The 1677 Concessions and Agreements of West New Jersey provided that “the common law or fundamental rights and privileges of West New Jersey” were not to be altered by the legislature.¹⁰⁰ These rights and privileges included due process, jury trial, freedom of religious opinion, and public trials.¹⁰¹

Colonial Americans, of course, might have understood the words “rights” and “liberties” to be distinct from the words “privileges” and “immunities.” However, colonial and revolutionary era American attorneys, politicians, journalists, and scholars seem not to have distinguished “privileges” and “immunities” from “rights” and “liberties.” For example, Massachusetts attorney and colonial leader James Otis argued in a 1761 case that writs of assistance were illegal. The writs were general search warrants that did not specify the place to be searched or the thing to be seized. In his argument to the court, Otis said:

Now one of the most essential branches of English liberty is

95. See, e.g., 1 ANNALS OF CONG. 768–69 (Joseph Gales ed., 1789) (statement of James Madison in the First Congress under the Constitution).

96. See MAGNA CARTA ch. 39, *supra* note 55, at 12.

97. See Petition of Right (1628), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 19, 19–21.

98. See Bill of Rights (1689), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 41, 41–46.

99. Maryland Act for the Liberties of the People (1639), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 68, 68.

100. See Concessions and Agreements of West New Jersey (1677), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 126, 126.

101. See *id.*

the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this *privilege*.¹⁰²

The words "rights" and "privileges" were used interchangeably not only in American courtrooms, but also in the colonial press and pamphlets.¹⁰³ *Cato's Letters* were influential essays on liberty that were widely republished in colonial America and were "quoted in every colonial newspaper from Boston to Savannah."¹⁰⁴ Cato used the words "right" and "privilege" synonymously when discussing a fundamental liberty such as free speech:

Without Freedom of Thought, there can be no such Thing as Wisdom, and no such Thing as public Liberty, without Freedom of Speech, which is the *Right* of every Man, as far as by it he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

This sacred *Priviledge* is so essential to free Governments, that the Security of Property, and the Freedom of Speech always go together . . .¹⁰⁵

Similarly, William Penn, a Quaker and the founder of Pennsylvania, asserted that a right to a jury trial was one of the fundamental privileges of British subjects.¹⁰⁶ In 1670, after Quakers had been forbidden to meet in their meeting houses, Penn was tried for speaking to a religious meeting held in the street. When the jury entered a verdict of not guilty, the jury was threatened by the judges.¹⁰⁷ Penn saw this threat as a violation of the basic right to a jury trial. He admonished the jury: "You are Englishmen; mind your privilege, give not away your right."¹⁰⁸ Later, in 1687, when Penn wrote a treatise on English liberties for Americans, he entitled it

102. John Adams, Abstract of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS 134, 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (emphasis added) (recounting Otis's argument).

103. See LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 109-14 (1985).

104. *Id.* at 113 (quoting ELIZABETH CHRISTINE COOK, LITERARY INFLUENCES IN COLONIAL NEWSPAPERS: 1704-1750, at 81 (1912)).

105. *Zenger's Journal Presents "Cato,"* in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 10, 11-12 (Leonard W. Levy ed., Carolina Academic Press 1996) (1966) [hereinafter FREEDOM OF THE PRESS] (emphasis added).

106. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 64.

107. See *The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead*, in 1 SELECT WORKS OF WILLIAM PENN 179-96 (4th ed. 1825), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 144, 144-58.

108. *Id.* at 192, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 154.

*The Excellent Priviledge of Liberty & Property Being the Birth-Right of Free-Born Subjects of England.*¹⁰⁹

Benjamin Franklin similarly used the terms "privileges" and "rights" as equivalent. Writing as "Silence Dogood," Franklin said, "I am naturally very jealous for the Rights and Liberties of my Country; & the least appearance of an Incroachment on those invaluable Priviledges, is apt to make my Blood boil exceedingly."¹¹⁰

The use of the terms "rights" and "privileges" in legal literature mirrors that of the colonial press. William Blackstone's *Commentaries on the Laws of England* were widely read and cited in America.¹¹¹ As one of the few summaries of the English law, the *Commentaries* were read by lawyers and laymen alike. Blackstone wrote that the rights and liberties of "every Englishman" had been set out in the Magna Carta, the Petition of Right, the Habeas Corpus Act, The English Bill of Rights, and the Act of Settlement.¹¹² These documents contain many rights similar to those in the American Bill of Rights. Blackstone described these rights collectively as the "'privileges'" or "'immunities'" of British subjects.¹¹³ For Blackstone, privileges or immunities seemed to refer to positive rights or liberties secured by society.¹¹⁴ In another place he describes the right to trial by jury as a privilege, "the most transcendent privilege which any subject can enjoy."¹¹⁵

B. *Use of the Words "Privileges" and "Immunities" During the American Revolution*

At the time of the Revolution, Americans again seem to have used the words interchangeably. As the American Revolution approached, colonists adopted many protest resolutions. In 1774, a resolution from Georgia insisted that Americans were entitled to "the 'same rights, privileges, and immunities with their fellow subjects in Great Britain.'"¹¹⁶ A meeting that same year in Virginia

109. Excerpts of Penn's treatise are printed in A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* app. D at 412-25 (1968).

110. Silence Dogood, *No. 2*, NEW-ENGLAND COURANT, Apr. 16, 1722, reprinted in BENJAMIN FRANKLIN, *WRITINGS* 7, 8 (J.A. Leo Lemay ed., 1987).

111. See HOWARD, *supra* note 109, at 268.

112. See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, at 75-76 (quoting Blackstone's *Commentaries*, 1 BLACKSTONE, *supra* note 57, at *123).

113. *Id.* at 76.

114. See *id.*

115. 3 BLACKSTONE, *supra* note 57, at *379.

116. CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, at 65 (quoting HOWARD,

chaired by George Washington claimed “‘all the privileges, immunities, and advantages of the people of Great Britain.’”¹¹⁷ The “resolves of the First Continental Congress also claimed ‘all the rights, liberties, and immunities of free’ English subjects.”¹¹⁸ One of these was “‘the great and inestimable privilege of being tried by their peers of the vicinage’” according to the due course of law.¹¹⁹ The Continental Congress’s Declaration to Take up Arms complained of Parliament’s unwarranted extension of the jurisdiction of Admiralty and Vice Admiralty Courts and of “depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property.”¹²⁰

The colonists saw these rights, privileges, and immunities as belonging to Americans. The Address of the Continental Congress to the Inhabitants of Quebec in 1774 catalogued fundamental rights of the English, including the rights of having a share in their own government by representatives chosen by themselves, of habeas corpus, of jury trial, and of freedom of the press.¹²¹ The Address said that press freedom served to advance truth, science, morality, and the arts; to promote diffusion of liberal sentiments on administration of government; to promote union among the people; and to shame or intimidate oppressive officers into better behavior. These rights were described not as belonging to this or that colony but belonging to “the people” or the English.¹²² The Address’s claim for a free press right to shame oppressive government officials went beyond the positive law of England at the time, which treated the criticism of those in power as seditious libel.¹²³ The Declaration of Independence went even further than many of the revolutionary resolves, proclaiming basic rights of *all* people to life, liberty, and the pursuit of

supra note 109, at 174).

117. *Id.* (quoting HOWARD, *supra* note 109, at 175).

118. *Id.* (quoting HOWARD, *supra* note 109, at 180).

119. *Id.* (quoting HOWARD, *supra* note 109, at 180); *see also, e.g.*, The Address to the Inhabitants of Quebec, 1774, 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 40, 44 (Washington, D.C., Way & Gideon 1823) (“Privileges and immunities last no longer than [a Minister’s] smiles.”), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 221, 225.

120. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 145 (1905); *see* 2 KENT, *supra* note 90, at 1–32.

121. *See* The Address to the Inhabitants of Quebec, 1774, *supra* note 119, at 41–43, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 222–23.

122. *Id.*

123. *See* Rex v. Tutchin, 14 HOWELL STATE TRIALS, 1095, 1128 (1704), *quoted in* 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 317–18 (London, MacMillan 1883). Truth was no defense. *See id.*

happiness.¹²⁴

Though Americans had a common heritage of liberty, they also lived in separate states. During the Revolution, state after state adopted new constitutions, typically with guarantees of fundamental liberties or with separate state bills of rights. Though many of the provisions of these state constitutions were identical, they also varied somewhat from state to state.¹²⁵ For many people, these state constitutions seemed to declare and secure basic common rights of the American people, the somewhat mythical and somewhat genuine rights of freeborn Englishmen, or the basic rights of human nature.¹²⁶ For others, they may simply have declared the rights of Virginians or New Yorkers. So from the beginning, Americans thought of themselves as one people with a common heritage of liberty and as many people with distinct heritages living in separate states. The motto of the new nation underlined this tension—*e pluribus unum*, out of many one. The new Constitution would bind Americans together more closely as one people. In this new era, Americans continued to refer to basic rights as privileges and immunities of Americans.

IV. A NEW CONSTITUTION: USE OF THE WORDS “PRIVILEGES” AND “IMMUNITIES”

A. Ratification Debates

In early discussions of the Federal Bill of Rights, speakers often claimed it protected the pre-existing rights of the people.¹²⁷ After the

124. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 251, 251–52.

125. See, e.g., Virginia Declaration of Rights, 1776, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 234, 234–36; Pennsylvania Declaration of Rights, 1776, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 263, 263–75; Delaware Declaration of Rights, 1776, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 276, 276–78; Maryland Declaration of Rights, 1776, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 280, 280–85; North Carolina Declaration of Rights, 1776, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 55, at 286, 286–88.

126. See Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 45, 45 (Barnard Bailyn ed., 1993) [hereinafter DEBATE ON THE CONSTITUTION] (referring to the unwillingness in the Continental Congress to make “such changes and securities [in the proposed Constitution] as Reason and experience prove to be necessary against the encroachments of power upon the indispensable rights of human nature”).

127. 1 ANNALS OF CONG. 437, 440–41 (Joseph Gales ed., 1789) (statement of Rep. Madison) (proposing the Bill of Rights in the first Congress), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 55, at 1012, 1028–29, 1032–33.

adoption of the Bill of Rights and by the late 1830s, references to the Constitution as establishing or securing to all Americans the rights enumerated in the Bill of Rights became more common.

In debates on ratification of the Constitution, basic rights were described as “privileges” and “immunities.” These included the “great” and “darling privilege” of the writ of habeas corpus.¹²⁸ Samuel Bryan, writing in the *Independent Gazetteer* in 1787, warned Pennsylvanians that certain “liberties and privileges” were “secured to you by the constitution of this commonwealth.”¹²⁹ He urged his readers to consider carefully before they “surrender these great and valuable privileges up forever” by adopting the Federal Constitution without a bill of rights.¹³⁰ As apparent examples of these rights, he listed protections from unreasonable searches, civil jury trial, and freedom of speech and writing.¹³¹ Writing again a few weeks later, Bryan noted that many nations in Europe had lost the “invaluable privilege” of civil jury trial.¹³² A letter to James Madison defended the Constitution against the objection of a “total want of a Bill of Rights” because the “enumeration of those priviledges which we retained” would have “left floating in uncertainty a number of non enumerated contingent powers and priviledges.”¹³³ As a result enumeration would trench “upon the powers of the states—& of the Citizens.”¹³⁴

Anti-Federalists feared broad national powers in a federal constitution that lacked a bill of rights. They said that supreme national law undermined the security of fundamental rights provided by their state guarantees.¹³⁵ In light of the Supremacy Clause, Anti-Federalists wisely asked, “what security does [sic] the *Constitutions* of

128. *E.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION at 108, 137 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (statement of Mr. Nason) (reprinting Massachusetts’ ratification debate). The Constitution itself, of course, referred to the right to habeas corpus as a “privilege.” U.S. CONST. art. I, § 9, cl. 2.

129. Samuel Bryan, *A Most Daring Attempt to Establish a Despotick Aristocracy*, INDEP. GAZETTEER (Phila.), Oct. 12, 1787, (emphasis omitted) (published under the pseudonym “Centinel”), reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 52, 52.

130. *Id.*

131. *See id.*

132. Samuel Bryan, Letter, FREEMAN’S J. (Phila.), Oct. 24, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 74, 84; *see also id.* at 82 (describing civil jury trial as a “transcendent privilege”).

133. Letter from George Lee Tuberville to James Madison (Dec. 11, 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 477, 477.

134. *Id.* at 478.

135. Explicit plans to require states to obey the Bill of Rights emerged in 1789 and later, in the era of the Fourteenth Amendment.

the several States afford for the *liberty of the press and other invaluable personal rights*, not provided for by the new plan?"¹³⁶ Once people had parted with their "privileges," an "Old Whig" inaccurately warned, two-thirds of Congress would never vote for the necessary amendment to return them.¹³⁷ In the Virginia ratifying convention, Patrick Henry said that the Virginia Bill of Rights secured the citizens' "most valuable rights and privileges,"¹³⁸ and he complained that the new Constitution endangered "our rights and privileges."¹³⁹ According to Henry, "The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure . . ."¹⁴⁰ Later Henry asked, "How does your trial by jury stand? In civil cases gone—not sufficiently secured in criminal—this best privilege is gone."¹⁴¹ Similarly, in the North Carolina debates, J. M'Dowall complained that even in criminal cases, trial by jury was insufficiently secured by the Federal Constitution because the accused was not assured a jury from the vicinage or neighborhood. As a result, "the substance . . . of this privilege is taken away."¹⁴² Luther Martin's address to the Maryland legislature on the Federal Convention of 1787 echoed this same concern, complaining that Supreme Court jurisdiction over both law and fact was inconsistent with the "inestimable privilege" of "trial by jury."¹⁴³

The word "privilege" was also used more broadly. For example, Patrick Henry referred to the right to elect representatives to the Federal House and complained that the constitutional language would make it possible to have only one representative for each state. Henry worried that such a provision made it too easy "to evade this privilege."¹⁴⁴

During the ratification debate, Federalists attempted to

136. Bryan, *supra* note 132, at 81; see George Mason, *Objections to the Constitution*, VA. J. (Alexandria), Nov. 22, 1797, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 345, 346.

137. George Bryan et al., Letter, INDEP. GAZETTEER (Phila.), Oct. 5, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 122, 123.

138. 3 ELLIOT'S DEBATES, *supra* note 128, at 318 (statement of Patrick Henry).

139. 3 *id.* at 44 (statement of Patrick Henry).

140. 3 *id.* (statement of Patrick Henry).

141. 3 *id.* at 47 (statement of Patrick Henry).

142. 4 *id.* at 211 (statement of J. M'Dowall).

143. Luther Martin's Letter on the Federal Convention of 1787, in 1 ELLIOT'S DEBATES, *supra* note 128, at 381. In the North Carolina ratifying convention, Henry Abbot noted concern about "the privilege of worshipping God according to their consciences." 4 ELLIOT'S DEBATES, *supra* note 128, at 191 (statement of Henry Abbot).

144. 3 ELLIOT'S DEBATES, *supra* note 128, at 46 (statement of Patrick Henry).

discourage anonymous attacks on the proposed new Constitution. Anti-Federalists claimed that this move imperiled the freedom of the press. One "Argus" wrote, "The Liberty of the Press, or the Liberty which every Person in the United States at present enjoys . . . is a Privilege of infinite Importance . . . for which . . . we have fought and bled."¹⁴⁵ Argus asserted that the attempt by "our aristocratical Gentry, to have every Person's Name published who should write against the proposed Federal Constitution, has given many of us a just Alarm."¹⁴⁶

Twenty-one dissenters from ratification of the Constitution by the Pennsylvania Convention published their reasons in December 1787.¹⁴⁷ Prominent among these reasons was the fact that their proposed amendments, including a bill of rights, had been rejected. The rights that they proposed to secure by amendment included free speech, free press, civil and criminal jury trial, a privilege against self-incrimination, and virtually all rights later contained in the Federal Bill of Rights. The dissenters acted, they said, "for the preservation of those invaluable rights."¹⁴⁸ They continued, "It remains with you whether you will think those inestimable privileges, which you have so ably contended for, should be sacrificed . . ."¹⁴⁹ Their proposed amendments also included a provision that states would retain sovereignty over all areas except for matters expressly delegated to the national government (a "reservation of the rights and privileges of the state governments"¹⁵⁰), a provision that no treaty could override a law of Congress until it was expressly repealed, and a larger House of Representatives.¹⁵¹

"Privilege" was sometimes used more expansively and not limited to a synonym for a fundamental right. When people spoke of their invaluable privileges, it is not always clear whether they referred to a common heritage of the American people, merely to specific rights under state law, or to both.

In *The Federalist No. 84*, Alexander Hamilton defended the

145. M. Argus, Letter, PROVIDENCE U.S. CHRON., Nov. 8, 1787, reprinted in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 320-21 (John P. Kaminsky & Gaspare J. Saladino eds., 1981).

146. *Id.* at 321.

147. See *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET (Phila.), Dec. 18, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 126, at 526, 526-52.

148. *Id.* at 535.

149. *Id.*

150. *Id.* at 538-39.

151. See *id.* at 542.

Constitution against the objection that it lacked a Bill of Rights.¹⁵² Hamilton argued in the alternative—both that the Constitution already had a bill of rights and that such an addition would be dangerous because it would suggest that the federal government had powers that it did not. The proposed U.S. Constitution was like the New York Constitution, Hamilton argued. Though there was no separate bill of rights, “provisions in favour of particular privileges and rights” were contained in the body of the document.¹⁵³ Hamilton cited the Constitution’s Treason Clause, the prohibition on ex post facto laws and bills of attainder, jury trial for crimes, habeas corpus, and the prohibition on titles of nobility as examples.¹⁵⁴ The Constitution itself was a bill of rights. One purpose of a bill of rights was to “specify the political privileges of the citizen” and the Constitution did that.¹⁵⁵ Another purpose was to define “immunities and modes of proceeding, which are relative to personal and private concerns.”¹⁵⁶ The Constitution did that also.

The use of “privilege” or “immunity” to describe fundamental rights was common, but not universal. Some revolutionary state constitutions listed basic rights without characterizing them as rights;¹⁵⁷ often they referred to the basic protections as “rights” or “liberties.”¹⁵⁸ And so it went throughout later American history. The words “privilege” and “immunity” were common ways to describe fundamental rights of the sort contained in the American Bill of Rights. But they were not the only way, nor even the most common way. The words “rights” and “liberties” were more often used. In modern times it has become more common to refer to fundamental rights as “rights” and less common to describe them as “privileges” or “immunities.” As we will see, however, the common eighteenth and

152. See THE FEDERALIST NO. 84 (Alexander Hamilton) (Howard Mumford Jones ed., 1961).

153. *Id.*

154. *See id.*

155. *Id.* at 536.

156. *Id.*

157. Connecticut Declaration of Rights, 1776, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 289–90.

158. Virginia Declaration of Rights, 1776, *supra* note 125, at 235 (declaring an accused person’s right to demand the cause and nature of his accusation); Pennsylvania Declaration of Rights, 1776, *supra* note 125, at 265 (declaring the right to counsel in criminal cases, the right to public trial by jury, and the right to be free from warrants that fail to describe particularly the place to be searched); Vermont Declaration of Rights, 1777 (declaring the right to worship according to the dictates of conscience, the right to counsel, and the right to be protected in life, liberty, or property), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 55, at 319, 322–23.

nineteenth century usage has not died out.

B. The First Congress: A Bill of Rights

In the first Congress, James Madison proposed a bill of rights as an amendment to the new Constitution.¹⁵⁹ Madison described the rights of free press, jury trial, and conscience as “invaluable privileges” and as the “choicest privileges of the [American] people,” and he proposed to safeguard these “privileges” against both state and federal violations.¹⁶⁰ He described the proposed bill of rights as securing the “rights and privileges of the people of America.”¹⁶¹ It is noteworthy that Madison thought of his amendment as providing security for existing privileges. When he advocated limits on the states to protect free press, jury trial, and the rights of conscience, he said that there was no reason not to have a “double security” for these rights of the people.¹⁶² The House added freedom of speech to the list, and, with that addition, it passed Madison’s limitation on the states.¹⁶³ Madison’s plan to require the states to obey these “invaluable privileges,” however, was defeated in the Senate.¹⁶⁴

Madison’s remarks and draft amendments show that he assumed that the American people possessed certain rights as a common heritage of liberty. He saw his proposed bill of rights as protecting these rights, even though there was no Federal Bill of Rights when he spoke, and some rights—such as press freedom—were not listed in all state constitutions. Madison distinguished between the rights (assumed somehow to exist) and the security device provided by explicit guarantees of these rights. He thought bills of rights provided security for the rights and that a limit on the states would provide a “double security.”¹⁶⁵ Madison warned that “State Governments are as liable to attack the *invaluable privileges* as the General Government is.”¹⁶⁶ The first clause of the Fourteenth Amendment

159. See 1 ANNALS OF CONG. 424, 426–27, 431, 436, 441, 738 (Joseph Gales ed., 1789) (statement of Rep. Madison), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 55, at 1017, 1019–20, 1023, 1028, 1033, 1096.

160. *Id.* at 436, 441 (statement of Rep. Madison), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 55, at 1028, 1033.

161. *Id.* at 738 (statement of Rep. Madison), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 55, at 1096.

162. *Id.* at 441 (statement of Rep. Madison), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 55, at 1033.

163. See 2 DOCUMENTARY HISTORY, *supra* note 55, at 1050–53.

164. See *id.* at 1145–46.

165. 1 ANNALS OF CONG. 441 (Joseph Gales ed., 1789) (statement of Rep. Madison), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 55, at 1033.

166. *Id.* (statement of Rep. Madison) (emphasis added).

follows the general outlines of Madison's plan by protecting Bill of Rights liberties against state action, providing that "[n]o State shall" deny due process of law to any person nor shall any state abridge the privileges or immunities of citizens of the United States. The clause adds Madison's proposed double security for rights such as free speech, jury trial, and free exercise of religion by providing that "[n]o State shall" abridge privileges or immunities of citizens of the United States.¹⁶⁷

Later in the 1789 debate on the Judiciary Bill before the First Congress, Senator William Maclay of Pennsylvania objected to a provision that he thought imperiled the right to trial by jury. As recorded in his journal, he said:

[T]he barr between Chancery [which tried cases without a jury] and Common law is broken down. . . . [A]ll actions may now be tryed in the federal Courts by the Judges, without the intervention of a Jury. The *Tryal by Jury* is considered as the Birth right of every american, it is a *priviledge* they are fond of, and let me add it is a *priviledge* they will not part with.¹⁶⁸

Americans had struggled to add privileges such as free speech and free press to the Constitution. By 1798, those invaluable privileges were under siege.

C. *The Alien and Sedition Acts*

In 1798, the Congress passed the Alien and Sedition Acts.¹⁶⁹ The Alien Act allowed the President summarily to deport those aliens he considered dangerous.¹⁷⁰ The Sedition Act made it a crime to make false and malicious criticisms of the President (John Adams) or the Congress, but not of the Vice President (Thomas Jefferson, Adams'

167. Compare U.S. CONST., amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."), with 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789) (statement of Rep. Madison) (adopting the "no State shall" language to protect the rights of press, conscience, and jury trial from state denial), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 55, at 1027. Representative Bingham, the primary sponsor on Section 1, stated that he relied on Chief Justice Marshall's statement in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that had the framers of the original Bill of Rights intended to limit the states, they would have used the "no State shall" language. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 161; see also AMAR, *supra* note 22, at 163–65 (offering an elegant textual analysis bearing on the same point); Crosskey, *supra* note 21, at 89 (same).

168. THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 109 (Kenneth R. Bowling & Helen E. Veit eds., 1988) (emphasis added).

169. Act of July 14, 1798, ch. 73, 1 Stat. 596 (1798) (expired).

170. See SMITH, *supra* note 91, at 35–93 (describing the Alien Act).

likely opponent in the election of 1800).¹⁷¹ The Sedition Act was a defining constitutional moment in American history. Adams' defeat, the expiration of the Sedition Act, and Jefferson's decision to pardon all convicted violators helped to establish that criticism of government officials would not be punished as a crime and that political opposition would be legitimate in America. During this controversy, basic rights such as freedom of speech and of the press often were described as privileges of the people at large, and of American citizens. The federal and state constitutions were referred to as declaring and safeguarding such privileges.

But there are crosscurrents here as well. Some Republicans, such as Thomas Jefferson, emphasized the total lack of federal power over speech and said that the states had control over abuses of speech. At times, Jefferson almost seemed to suggest that the problem with the Sedition Act was simply that the wrong government enacted it.¹⁷² Most Jeffersonian Republicans, however, insisted on a basic right of Americans to criticize public men and public measures.¹⁷³

Republicans attacked the Sedition Act as a violation of freedom of press *and* as an exercise of powers not delegated to the United States. Federalists, who had a narrower view of free press and a broader view of federal power, defended the Act. Both, however, often described free speech and press as privileges of the American people.

For example, Massachusetts Federalist Harrison Gray Otis defended the Sedition Act in debates in the House of Representatives. Otis said "that most unusual attempts were made to

171. See *supra* text accompanying note 169.

172. See, e.g., Letter from Thomas Jefferson to John Norvell (June 11, 1807), reprinted in FREEDOM OF THE PRESS, *supra* note 105, at 372, 372; Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804) reprinted in FREEDOM OF THE PRESS, *supra* note 105, at 366, 367; Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), reprinted in FREEDOM OF THE PRESS, *supra* note 105, at 364, 364; see also WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 22 n.34 (2d ed. 1995) (reporting Professor St. George Tucker's belief that no power over speech was to be exercised by the federal government, "leaving it to the state governments to exercise such control over the subject, as their several constitutions and laws permit" (quoting St. George Tucker, *Appendix*, in 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 29 (Philadelphia, William Young Birch & Abraham Small, 1803)).

173. See, e.g., Virginia Resolutions, Dec. 21, 1798, reprinted in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 160 (Melvin I. Urofsky ed., 1989) [hereinafter DOCUMENTS OF AMERICAN HISTORY].

deceive the people and alarm their fears, that they were threatened with the deprivation of a darling privilege."¹⁷⁴ He insisted, however, that this was not so. Otis explained that "[t]hey were still at liberty . . . to use their tongues and their pens, like all other property, so as to do no wanton and unjustifiable injury to others."¹⁷⁵ Similarly, in 1801, a Federalist who advocated extension of the Sedition Act described "liberty of speech and of the press" as "privileges to be prized above all others."¹⁷⁶ Claims that these privileges had been abused, he said, would be decided by an impartial jury, another "privilege."¹⁷⁷

Congressman Livingston, a Jeffersonian Republican from New York, saw the matter differently. He said, "The Constitution seems to have contemplated . . . that majorities . . . might be actuated by dispositions . . . to pass laws to suppress the only means by which its corrupt views might be made known to the people . . ."¹⁷⁸ Therefore, the Constitution had provided that "*no* law shall be passed to abridge the liberty of speech and of the press. This *privilege*," Livingston continued, "is connected with another dear and valuable *privilege*—the liberty of conscience."¹⁷⁹

A resolution from inhabitants of Woodford, Kentucky, attacked the Sedition Act as a "direct" violation of the Constitution and an outrage "against our most valuable rights: that to speak, write, and censure freely, are *privileges* of which freemen cannot divest themselves, much less be abridged in them by others."¹⁸⁰ For "servants of the people to tell those who created them, that they shall not, at their peril, examine into the conduct of, nor censure those servants, for the abuse of power committed to them," the resolution irately continued, "is tyranny more insufferable than Asiatic slavery."¹⁸¹ The resolution insisted that free speech, press, and jury trial were "among the inseparable rights of freemen."¹⁸² Similarly, a meeting of citizens of Fayette County and adjoining Kentucky counties resolved that "the *privilege* of speaking and publishing our sentiments on all public questions" was "unequivocally acknowledged and secured to us by the constitution of this state as well as that of the

174. 8 ANNALS OF CONG. 2151 (1798) (statement of Rep. Otis).

175. *Id.* (statement of Rep. Otis).

176. 10 ANNALS OF CONG. 917 (1801) (statement of Rep. Platt).

177. *Id.* (statement of Rep. Platt).

178. 8 ANNALS OF CONG. 2153 (1798) (statement of Rep. Livingston).

179. *Id.* (statement of Rep. Livingston) (second emphasis added).

180. *Spirit of the Times, Kentucky*, INDEP. CHRON. (Boston), Sept. 24–27, 1798, at 1 (emphasis added).

181. *Id.*

182. *Id.*

United States," and the resolution said that laws to impair these rights were void.¹⁸³

The Boston *Independent Chronicle* printed a piece written in Newark, New Jersey, which warned that force was resorted to against "the dreadful ORDEAL of free discussions.—But can a law," the writer asked, "founded on a violated Constitution, repress a sacred right vested in every freeman by the immutable law of nature?"¹⁸⁴ The writer noted that the violent mob attacks on the Republican Philadelphia *Aurora*, a Jeffersonian paper, had increased its circulation. The increased support was caused by "freemen indignant at the . . . attempt to abridge a right solemnly guaranteed by the Constitution."¹⁸⁵ The writer claimed that even friends of the government were revolted at "being compelled to resign their dear bought privileges."¹⁸⁶

The Philadelphia *Aurora* published an address on the then-upcoming presidential election.¹⁸⁷ It attacked the Sedition Act. Part of the writer's objection was based on lack of federal power and appealed to states' rights. A second objection was based on the restriction of the substantive liberty, however, and the two objections were linked together. The Sedition Act had taken seditious libel from state courts where, the writer optimistically announced, independent and upright judges and juries would recognize that criticism of public officials was not a criminal act but a public duty and that truth could never be a libel. The essay suggested that the Sedition Act was "not only a breach of the constitution, but an open attack of party, on the liberty of speech and of the press, and of the dearest rights of the people."¹⁸⁸ The Act undermined "that free investigation of our public measures which we supposed the constitution had secured to all our citizens."¹⁸⁹ People understood that the Bill of Rights meant that

183. *Spirit of the Times, Kentucky*, INDEP. CHRON. (Boston), Oct. 1-4, 1798, at 1 (emphasis added); see *Spirit of the Times, Albany*, INDEP. CHRON. (Boston), Dec. 6-10, 1798, at 1; *Spirit of the Times, Kentucky*, INDEP. CHRON. (Boston), Oct. 18-22, 1798, at 1; *Spirit of the Times, Knoxville*, INDEP. CHRON. (Boston), Nov. 15-19, 1798, at 1; *Virginia*, INDEP. CHRON. (Boston), Oct. 8-12, 1798, at 1. For a states' rights argument, see, for example, *Massachusetts Legislature, Dr. Hill's Speech*, INDEP. CHRON. (Boston), Feb. 21, 1799, at 2.

184. *Newark, N.J., Sept. 18*, INDEP. CHRON. (Boston), Sept. 24-27, 1798, at 3.

185. *Id.*

186. *Id.*

187. See *On the Election of the President of the United States, No. IV*, AURORA (Phila.), Oct. 23, 1800, at 2.

188. *On the Election of the President of the United States, No. II*, AURORA (Phila.), Oct. 20, 1800, at 3.

189. *Id.*

the rights of religion, of the press and of jury, are sacredly preserved to us; the people have by their constitution prevented congress or the general government from ever altering them; no authority inferior to that of the people can now touch them—such as they are, with all their *privileges* at the adoption of their amendment, such are they to remain.¹⁹⁰

In 1800, the Federalist Senate sought to arrest and punish William Duane, editor of a leading Republican newspaper, for allegedly violating the privileges of the Senate by publishing the text of a bill under consideration.¹⁹¹ The bill was a Federalist proposal for a Federalist dominated commission to resolve electoral disputes in the upcoming presidential election.¹⁹² Senator Stevens Thomson Mason of Virginia urged the Senate

to view the delicacy of the situation in which they would be involved while defining their new discovered privileges and subverting the old acknowledged *privilege* of the liberty of the press ... for the public mind had already been considerably agitated, at what many conceived to be an unconstitutional exercise of power—if session after session, attempts were made to fetter the freedom of the press, the people of the United States would watch with anxious regard every movement of this body.¹⁹³

Complaints about the Sedition Act did not merely appeal to the right of Americans to free speech and press. Republicans also cited both the Tenth Amendment and state constitutional guarantees showing the unconstitutionality of the Sedition Act.¹⁹⁴ Although many appealed to the right of free speech and press enshrined in the national Bill of Rights, these people did not suggest that the federal government had power under the Constitution to stop state abridgements of free speech. Indeed, some suggested that abuses of the right were state law questions.¹⁹⁵ When Massachusetts prosecuted Republican editors under the state common law of sedition, the defendants appealed to their state constitutional guarantees.¹⁹⁶

190. *On the Election of the President of the United States, No. III*, AURORA (Phila.), Oct. 21, 1800, at 3 (citation omitted).

191. See SMITH, *supra* note 91, at 288–306.

192. See *id.*

193. *Debate in Senate, Wednesday, March 5*, AURORA (Phila.), Mar. 18, 1800, at 3 (emphasis added) (summarizing proceedings in the Senate).

194. See, e.g., Virginia Resolutions, Dec. 21, 1798, *supra* note 173, at 159–60; 6 THE WRITINGS OF JAMES MADISON 326–31 (Gaillard Hunt ed., 1906).

195. See VAN ALSTYNE, *supra* note 172, at 22 n.34 (quoting Tucker, *supra* note 172, at app. 29).

196. See *Trial of Mr. Abijah Adams on the Charge of Sedition*, INDEP. CHRON.

Thomas Jefferson would sometimes refer to basic rights as belonging to all Americans, not simply to citizens of states that chose to protect the rights. In 1814, Thomas Jefferson wrote about a state court blasphemy prosecution for the sale of a book: "I am really mortified to be told that, *in the United States of America*, a fact like this can become a subject of inquiry, and of criminal inquiry too, as an offense against religion . . ." ¹⁹⁷ Jefferson did not contend that the prosecution was barred by the First Amendment, but he asked: "Is this then our freedom of religion?" ¹⁹⁸ As his italicized "United States of America" and his reference to "our freedom of religion" indicate, for Jefferson there was a freedom of religion for Americans quite separate from the question of whether state courts or state law respected it. On this occasion, at least, the privilege was national and distinct from the remedy for its violation. ¹⁹⁹

Early American usage of "privileges" and "immunities" left unresolved basic issues of federalism, but it was clear that the words were used to describe constitutional rights. Before the Revolution, Americans had been British subjects claiming all the rights, privileges, and immunities of freeborn Englishmen. After the Revolution, Americans established a new government, at first something like a confederacy of independent states. With the Constitution they established a much stronger central government. Their common heritage led them to think of themselves alternately as both citizens of their states and of the United States, as Americans and Virginians or citizens of Massachusetts. It also led Americans to think of their rights as existing independently—as an English heritage or, for some, as a heritage from a mythical golden age of Anglo-Saxon liberty or as basic rights of all human beings. They tended to think of federal and state constitutional guarantees as security devices to protect their rights, privileges, or immunities. When Americans referred to their basic rights (or "privileges"), they sometimes referred to state constitutions, sometimes to the Federal Constitution, and sometimes to both. But they often insisted that basic rights belonged to Americans and described the Federal Constitution as establishing or declaring rights or privileges and immunities of Americans, as opposed, for example, to simply declaring a lack of power by the national government.

(Boston), Apr. 11–15, 1799, at 1.

197. Letter from Thomas Jefferson to N.G. Dufief (Apr. 19, 1814), in THOMAS JEFFERSON, WRITINGS 1333, 1334 (Merrill D. Peterson ed., 1984).

198. *Id.*

199. *See id.*

So, not only were rights such as those in the Bill of Rights commonly described as privileges, but also they were often spoken of as belonging to all Americans, as being privileges of citizens of the United States. Though such usage existed quite early in American history, it grew more common in the thirty years or so before the Civil War. The Bill of Rights itself—which was read by many lawyers and laymen alike as a people’s charter and not a “lawyer’s contract”²⁰⁰—nourished the idea that all Americans possessed certain basic rights by virtue of the national Constitution. Nevertheless, the idea that all Americans were entitled to these privileges did not, at first, necessarily imply that they were enforceable against the states in federal courts or by the national government.

D. The Crusade Against Slavery (1830–1860) and the Privileges and Immunities of American Citizens

Many Jeffersonian Republicans were sanguine about state power and state protection of fundamental privileges of Americans. As slavery became a central political issue, Southern states passed laws banning anti-slavery speech, and Southerners searched visitors for anti-slavery literature and whipped those found with it.²⁰¹ As a result, the comfortable assumption that citizens’ liberties could be safely entrusted to state power became difficult for many Americans to accept.²⁰² The Civil War and the post-Civil War Amendments reflected a growing conviction that security for liberty must be national to be meaningful.

In the years from 1830 to the Civil War, people increasingly described Bill of Rights liberties, such as free speech and free press, as “privileges” or “rights” of “American citizens,” continued to use the words “privilege” and “right” as equivalents, and began with increasing intensity to assert that state denials of these rights were illegitimate and in some sense violated the rights in the Federal Constitution.²⁰³ Such claims were made even though the Supreme Court had ruled in 1833 that the guarantees of the Federal Bill of

200. President Franklin D. Roosevelt used this phrase to describe the Constitution in his speech commemorating its 150th anniversary. See Franklin D. Roosevelt, *The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract*, reprinted in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359–66 (Samuel I. Rosenman ed., 1941). Large portions of the speech are set out in 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 377–79 (1998).

201. See, e.g., Curtis, *Crisis over Helper’s Book*, *supra* note 16, at 1151–77.

202. See *id.*

203. See, e.g., Curtis, *Lovejoy*, *supra* note 16, at 1147–59, 1171–76, 1184.

Rights did not impose limits on the states.²⁰⁴

Because usage of the terms “privilege” and “immunity” from 1830 to 1866 has been set out extensively elsewhere, I will discuss only a few examples.²⁰⁵ In 1836, the *New York Evening Post* wrote that “[t]o entertain and express freely any opinion respecting our political institutions, is the privilege of all who live under a democrattick government.”²⁰⁶ An 1836 meeting in Willoughby, Ohio, proclaimed “[t]he unquestionable right of all persons in this republic, to discuss every subject pertaining to its welfare,”²⁰⁷ including slavery. The “constitution of the United States,” the meeting insisted, “protects us in so doing.”²⁰⁸ Though the statement does not use the word “privilege” or “immunity,” it shows an understanding that free discussion was a right of citizens of the United States, protected by the Federal Constitution. Examples that follow also show that “privilege” or “immunity” was often used to mean “right” or protection for the right.

Abolitionists faced explicit demands that they abandon anti-slavery agitation. In the mid 1830s, violent mobs in the North dispersed their meetings and attempted to suppress their newspapers.²⁰⁹ Southern states demanded that Northern states pass laws to suppress abolitionist agitation.²¹⁰ In reaction to such suppression efforts, the call for a New York anti-slavery society convention warned that “the privileges of the free are now doomed as a sacrifice on the altar of perpetual slavery. . . . [W]e shall speedily be all free or all slaves together.”²¹¹ The platform of the Convention resolved “that free enquiry and discussion is the corner stone of liberty . . . and that it is the RIGHT of American citizens to discuss the subject of slavery as well any other subject; and to express their opinions freely, and fully; privately, and openly.”²¹² It denounced

204. See *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609–10 (1845); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

205. See Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1275–80 (1998); *supra* note 22 (citing authorities).

206. N.Y. EVENING POST, July 14, 1836, at 2.

207. *From the Cleveland Whig*, PHILANTHROPIST (New Richmond, Ohio), Mar. 11, 1836, at 4.

208. *Id.*

209. See Curtis, *Curious History*, *supra* note 16, at 809–17.

210. See *id.*

211. PROCEEDINGS OF THE NEW YORK ANTI-SLAVERY CONVENTION HELD AT UTICA, OCTOBER 21, AND NEW YORK ANTI-SLAVERY STATE SOCIETY HELD AT PETERBORO, OCTOBER 22, 1835, at 3 (Utica, N.Y., Standard & Democrat Office 1835).

212. *Id.* at 12.

attempts to interfere with this freedom as an exercise of illegal power, and "an infringement on *rights* given us, by God, and guaranteed to us by the constitution of the United States, and of the individual states."²¹³ Free discussion, the platform continued, was a right abolitionists would never relinquish: "This high constitutional privilege we shall assert, and exercise in all places, and at all times."²¹⁴ The people, they said, should abandon "principles, opinions, [and] institutions . . . which cannot bear thorough examination and inquiry."²¹⁵

Nor was such usage limited to abolitionists. In the mid 1830s, Congress considered and rejected federal legislation designed to prevent mailing abolitionist publications to the South or, in a later version, to prevent their delivery once they arrived.²¹⁶ One of the critics of the legislation was Senator Davis of Massachusetts. Davis insisted that the First Amendment meant "that Congress shall not diminish the freedom of the press. . . . The right is a reserved right and we are forbidden to touch it."²¹⁷ Constitutional grants of power were made on the condition that "this *privilege* was to remain unimpaired."²¹⁸ He took a functional view both of the post office and of the press: "The naked right to print, without the right to publish would be a humble *privilege*."²¹⁹ Davis noted that since the time of the framing of the Constitution, a major facet of publishing was transmission of periodicals through the mail.²²⁰ Like others before him, Davis described free press as a basic constitutional privilege, though he recognized that the national guarantee did not limit the states.

When Elijah Lovejoy, a minister and anti-slavery newspaper editor, was killed by an anti-abolition mob in 1837, much of the nation's press protested the killing and reported protests by other citizens.²²¹ Many denounced the assault on free speech that was symbolized by Lovejoy's murder even though they rejected the ideas of the abolitionists. In response to the killing, the *Baltimore Lutheran*

213. *Id.*

214. *Id.* at 13.

215. *Id.* at 16.

216. See generally Curtis, *Curious History*, *supra* note 16, at 823-35 (describing the congressional debate on the postal bill). For a synopsis of the legislation, see CONG. GLOBE, 24th Cong., 1st Sess. 150 (1836).

217. 12 CONG. DEB. 1151-52 (1836) (statement of Sen. Davis).

218. *Id.* at 1152 (statement of Sen. Davis) (emphasis added).

219. *Id.* (statement of Sen. Davis) (emphasis added).

220. See *id.* (statement of Sen. Davis).

221. See Curtis, *Lovejoy*, *supra* note 16, at 1145-50.

Observer noted:

“Freedom of opinion and of the press is an inalienable privilege secured to us by our political *magna charta* [sic] as well as by the original inherent right of our nature, and it is impossible that the citizens of this free and enlightened republic should consent to surrender this inestimable privilege in the present age of liberal view.”²²²

Lawyers were prominent in many of the public meetings held to protest Lovejoy’s death. The meetings typically disclaimed any connection with abolitionists.²²³ A meeting of young men in New York resolved that “the liberty of the press, of speech, and the right of petition, are among the greatest blessings and proudest prerogatives of a free people,” and “that their exercise is guaranteed to every citizen by the Federal Constitution.”²²⁴ Assailing these rights was “an encroachment upon the rights of citizens, and a direct and fatal attack” on that “sacred instrument which unites us as one people.”²²⁵ The resolution also described free speech as a privilege, and as we have seen that word was commonly used to describe First Amendment freedoms. The resolution suggested that these were rights of citizens of the United States. The *New York Daily News* said that Lovejoy’s killers were “‘violators of the rights and privileges of American citizens.’”²²⁶ The *New Hampshire Courier* considered it disgraceful that local authorities had failed to protect Lovejoy, who was “‘battling to protect the freedom of speech, and of the press and of all the sacred rights secured to the citizens by the Constitution of these U.S.’”²²⁷

Once again, throughout this period the words “rights” and “privileges” were often treated as synonymous. For example, the *Newark Daily Advertiser* described “‘the right of free discussion’” as an “‘inalienable privilege of a freeman.’”²²⁸ The *Berkshire Courier* insisted that “‘Liberty of speech must not be surrendered. It was one of the privileges left us by our fathers.’”²²⁹

222. *Testimonies of the Spirit of Liberty*, 2 EMANCIPATOR 129 (Dec. 21, 1837) (quoting the *Baltimore Lutheran Observer*).

223. See, e.g., Curtis, *Lovejoy*, *supra* note 16, at 1148–49.

224. *Meeting of Young Men in New York*, 2 EMANCIPATOR 154 (Feb. 1, 1838).

225. *Id.*

226. *The Voice of the Public Press*, 2 EMANCIPATOR 120 (Nov. 30, 1837) (quoting the *New York Daily News*).

227. *Testimonies of a Free Press*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 2 (quoting the *New Hampshire Courier*).

228. *The Voice of the Public Press*, *supra* note 226, at 120 (quoting the *Newark Daily Advertiser*).

229. *Testimonies of a Free Press*, *supra* note 227, at 3 (quoting the *Berkshire Courier*).

In 1838, anti-slavery and Free Soil activist Seymour B. Treadwell published *American Liberties and American Slavery*.²³⁰ In his book, Treadwell insisted on a federal constitutional right to criticize slavery in the Southern states. Southerners could come North and criticize Northern institutions (and even advocate slavery, as many opponents of slavery pointed out), and no one attempted “to abridge their liberty of speech, or suppress their freedom of opinion, for they are American citizens, still under the gratefully waving banner of the American constitution.”²³¹ Treadwell rejected the claim that “the States are so many independent nations, and that they may enact laws abridging the constitutional liberties of American citizens.”²³² Treadwell did not use the word “privilege” or “immunity,” but he did suggest that the liberty or freedom of speech and press were national rights belonging to all citizens of the United States that no state should abridge.²³³ Because these liberties were commonly described as privileges, the evidence from Treadwell supports the proposition that they were understood to be privileges or immunities “of citizens of the United States.” If free speech is described as a right or liberty of citizens of the United States and if “right” or “liberty” is synonymous with “privilege” or “immunity,” then free speech is a privilege or immunity of citizens of the United States.

In the years leading up to the Civil War, many anti-slavery politicians, including members of the newly formed Republican Party, often described guarantees of the Bill of Rights as rights, privileges, and immunities of American citizens that no state could rightfully deny without violating the American Constitution.²³⁴ In describing Bill of Rights liberties as privileges or immunities, anti-slavery activists were following common usage. As Akhil Amar has noted in his book on the Bill of Rights:

[I]n an 1835 opinion on whether inhabitants of the Arkansas Territory could lawfully take steps toward forming a state government in the absence of congressional authorization [Attorney General Benjamin Butler wrote that territorial inhabitants] “undoubtedly possess the ordinary privileges and immunities of citizens of the United States. Among those is the right of the people ‘peaceably to assemble and

230. SEYMOUR B. TREADWELL, *AMERICAN LIBERTIES AND AMERICAN SLAVERY: MORALLY AND POLITICALLY ILLUSTRATED* (Negro Univ. Press 1969) (1838).

231. *Id.* at 57.

232. *Id.* at 177-78.

233. *See id.*

234. *See, e.g.,* Curtis, *Crisis over Helper's Book*, *supra* note 16, at 1151-59, 1170-74.

petition the government for the redress of grievances.’ ”²³⁵

Indeed, as Arnold T. Guminski and Akhil Amar have noted, in the years before the Civil War, Congress had entered into a number of treaties in which inhabitants of newly acquired territories were granted “all the privileges, rights, and immunities of citizens of the United States” or all “the rights, advantages, and immunities of citizens of the United States.”²³⁶

In his 1841 Inaugural Address, President William Henry Harrison noted that the American Constitution both granted and withheld power. As President Harrison explained, “there are certain rights possessed by each individual American citizen which in his compact with the others he has never surrendered.”²³⁷ Harrison compared American sovereignty to that exercised in ancient Greece or Rome. American sovereignty, he said,

can interfere with no one’s faith, prescribe forms of worship for no one’s observance, inflict no punishment but after well-ascertained guilt, the result of investigation under rules prescribed by the Constitution itself. These *precious privileges*, and those scarcely less important of giving expression to his thoughts and opinions, either by writing or speaking, unrestrained but by the liability for injury to others, . . . [were basic human rights, not merely rights conferred by constitutions].²³⁸

In President Harrison’s view, such rights flowed from no charter granted by one’s fellow man. Instead, the limited sovereignty of the United States recognized these rights that each American claimed “because he is himself a man, fashioned by the same Almighty hand as the rest of his species.”²³⁹

Men were not the only people claiming basic rights or privileges and immunities. Women’s rights advocates claimed for women all the “rights and privileges which belong to them as citizens of the United States”²⁴⁰ or “all the rights, privileges, and immunities of citizens.”²⁴¹

235. AMAR, *supra* note 22, at 168 (citing 2 Op. Att’y Gen. 726, 732–33 (1835)).

236. Guminski, *supra* note 79, at 783–91; see AMAR, *supra* note 22, at 167–69. Amar cites an opinion of Circuit Justice Johnson, reprinted in *American Insurance Co. v. Cantor*, 26 U.S. (1 Pet.) 511, 515, 517 (1828), which reiterates the use of this language to describe the Bill of Rights. See AMAR, *supra* note 22, at 167.

237. William Henry Harrison, Inaugural Address of William Henry Harrison, March 4, 1841, in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO HARRY S. TRUMAN 1946, at 63, 64 (1952).

238. *Id.* at 64–65 (emphasis added).

239. *Id.* at 65.

240. AMAR, *supra* note 22, at 260–61 n.* (quoting Elizabeth Cady Stanton, *This Is the Negro’s Hour*, in 2 HISTORY OF WOMAN SUFFRAGE 94, 94 n.* (Elizabeth Cady Stanton et

Abolitionist legal theorist Joel Tiffany, following a common usage, described the rights in the Federal Bill of Rights as privileges and immunities of citizens of the United States.²⁴² When he insisted that federal courts could declare state acts that violated these rights void, that slaves were citizens, and that the federal courts could enforce the privileges and immunities of slave citizens—such as the right not to be deprived of liberty without due process and to habeas corpus—to free them from bondage, he expressed what then was the view of a minority.²⁴³

E. *On the Eve of the Civil War*

As Dean Richard Aynes has noted, past grievances are an important way of understanding a constitutional amendment.²⁴⁴ The grievances that arose out of the struggle against “the slave power” went well beyond suppression of free speech, press, and religion.²⁴⁵ They included interference with the right to bear arms, freedom from unreasonable searches and seizures, claims of violation of the Fifth Amendment right to due process, claims of violation of the Sixth and Seventh Amendment rights to jury trial, and infliction of cruel and

al eds., Rochester, N.Y., Charles Mann 1887)).

241. *Id.* at 260–61 (quoting Elizabeth Cady Stanton, *Seneca Falls Declaration of 1848*, in 1 HISTORY OF WOMAN SUFFRAGE 70, 71 (Elizabeth Cady Stanton et al eds., Rochester, N.Y., Charles Mann 2d ed. 1889)).

After the Civil War, Victoria Woodhull sought to persuade Congress to enact women’s suffrage by enforcing the Privileges or Immunities Clause of the Fourteenth Amendment. *See* H.R. REP. NO. 41-22, pt. 1, at 4 (1871), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 89, at 466–67; BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL 247–51 (1998) (presenting a recent account). *But see* H.R. REP. NO. 41-22, pt. 2, at 16 (1871) (presenting the minority view agreeing with Victoria Woodhull’s call for women’s suffrage), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 89, at 466–67. The majority of the House Judiciary Committee recommended rejecting the petition. *See* H.R. REP. NO. 41-22, pt. 1, at 4, *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 89, at 466–67. Several Republicans had insisted in the debates over the Fourteenth Amendment that the right to vote was not one of the privileges or immunities of all citizens of the United States (noting that women as well as many Americans of African descent did not enjoy the right), and in 1871 most Republicans continued to take that position. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 168.

242. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 42–44; JOEL TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 55–58, 84–96, 139–40 (Miami, Mnemosyne Publishing Co. 1969) (1849).

243. *See* TIFFANY, *supra* note 242, at 55–58, 84–96, 139–40.

244. *See* Richard Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICHMOND L. REV. 289, 290–93 (1999).

245. *Id.*

unusual punishments.²⁴⁶ The most common grievance was attempts to suppress anti-slavery speech, press, and religious activity.²⁴⁷

In 1860, Congress was in an uproar over Republican endorsement of a book by Hinton Helper that called on non-slaveholding Southerners to unite for political action against slavery.²⁴⁸ Southern congressmen and senators saw the book as a call for slave revolts, and, indeed, it had a few combative passages about what could be done if the slaveholding elite attempted to suppress democratic action against slavery by violence.²⁴⁹ In the ensuing debate, Owen Lovejoy, a Republican congressman from Illinois, insisted on “the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend.”²⁵⁰ “[T]hat Constitution,” Lovejoy continued, “guaranties to me free speech . . .”²⁵¹ Representative Elbert Martin of Virginia warned Lovejoy, “if you come among us we will . . . hang you.”²⁵² Congressman Lovejoy replied, “I have no doubt of it.”²⁵³

In the uproar over Helper’s book, Republicans in the Senate voted for an unsuccessful resolution that proclaimed that “free discussion of the morality and expediency of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and every other subject . . . should be maintained inviolate in all the States.”²⁵⁴

Though most Republicans in the House had signed an endorsement of Helper’s book and had contributed money to print an abridged version as a campaign document, circulators of the book in Southern states were treated as felons, subject to whipping, imprisonment, or worse.²⁵⁵ In North Carolina, Wesleyan minister and Republican activist Daniel Worth was convicted of giving the book to whites and sentenced to prison. The state supreme court upheld the

246. *See id.*; *see also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 34–56 (setting out Republican complaints about slave state denials of civil liberty).

247. *See* Curtis, *Crisis over Helper’s Book*, *supra* note 16, at 1147–67.

248. *See generally id.* at 1141–59 (outlining Congress’ response to Hinton Helper’s controversial book).

249. *See id.* at 1141–44.

250. CONG. GLOBE, 36th Cong., 1st Sess. 205 (1860) (statement of Rep. Lovejoy). Owen Lovejoy was the brother of Elijah—the editor slain by a mob in 1837. *See supra* notes 221–27 and accompanying text.

251. *Id.* (statement of Rep. Lovejoy).

252. CONG. GLOBE, 36th Cong., 1st Sess. 205 (1860) (statement of Rep. Martin).

253. *Id.* at 207 (statement of Rep. Lovejoy).

254. *Id.* at 2321 (setting forth an amendment by Sen. Harlan).

255. *See* Curtis, *Crisis over Helper’s Book*, *supra* note 16, at 1159–67.

conviction and did not even mention state constitutional guarantees of a free press.²⁵⁶ A North Carolina grand jury indicted endorsers of Helper's book and asked the Republican Governor of New York to extradite them (including himself).²⁵⁷ Three of the seven Republicans who sat on the committee that framed the Fourteenth Amendment—including John Bingham, the principal author of Section 1—had endorsed the book.²⁵⁸ So it is hardly surprising that Republicans in 1866 would be unwilling to leave final decisions on the meaning of free speech to Southern states and courts.

A number of other Republicans in Congress complained about the denials of free speech and other Bill of Rights liberties in the slave states. They insisted that these actions deprived citizens of rights or privileges secured by the Federal Constitution or of the rights of American citizens.²⁵⁹ Many Republicans in the years 1860–66 believed that the Bill of Rights contained rights, privileges, or immunities of all American citizens, federal rights that states were required to respect. For example, Senator Nye of Nevada said the Constitution protected “personal” and “natural” rights, including life, liberty, property, freedom of speech, freedom of the press, and freedom in the exercise of religion. Nye denied that any state had the power to subvert or impair these rights.²⁶⁰ Such views, of course, were not consistent with *Barron v. Mayor of Baltimore*²⁶¹ and its progeny. But like Nye, many Republicans implicitly or explicitly rejected *Barron*. In doing so, they were not alone.

F. Some Courts Rejected Barron

Skepticism about the correctness of *Barron v. Mayor of Baltimore* was not limited to Republicans and abolitionists. A minority of state courts refused to follow the Supreme Court's rule that the guarantees of the Federal Bill of Rights did not limit the states.²⁶² Perhaps the most emphatic demand that state legislatures should respect the rights protected by the Bill of Rights came from the Supreme Court of Georgia speaking through Chief Justice Joseph

256. See *State v. Worth*, 52 N.C. (7 Jones) 488, 490–94 (1860); Curtis, *Crisis over Helper's Book*, *supra* note 16, at 1159–67.

257. See Curtis, *Crisis over Helper's Book*, *supra* note 16, at 1144.

258. See *id.* at 1174.

259. See, e.g., CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 26–56.

260. See *id.* at 40–56, 53–54, 80–81.

261. 32 U.S. (7 Pet.) 243 (1833) (holding that guarantees of the Bill of Rights do not limit the states).

262. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 24 & 25 n.36 (citing cases that did not follow the Supreme Court's holding).

Henry Lumpkin. In 1846 in *Nunn v. State*²⁶³ and in 1852 in *Campbell v. State*,²⁶⁴ the Georgia Supreme Court described various rights in the Federal Bill of Rights as “privileges”—the “privilege” of bearing arms,²⁶⁵ the “privilege” of being represented by counsel and “the privileges of an oral and cross examination.”²⁶⁶

In *Nunn v. State*, Chief Justice Lumpkin described the right to bear arms as a “privilege.”²⁶⁷ The court held that the Georgia legislature was required to respect the right under the Second Amendment,²⁶⁸ even though the state constitution had no similar protection.²⁶⁹ Though he was aware of cases holding that the Federal Bill of Rights did not limit the states, Chief Justice Lumpkin rejected their reasoning.²⁷⁰ Lumpkin insisted that Bill of Rights liberties were reserved to the people, not to the states. As to these rights, he said:

State conventions, have virtually adopted them as beacon-lights to guide and control the action of their own legislatures, as well as that of Congress. If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defence?²⁷¹

Lumpkin asserted that the court “[did] not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.”²⁷² He continued:

The right of the people peaceably to assemble and petition the government for a redress of grievances; to be secure in their persons, houses, papers, and effects, against

263. 1 Ga. 243 (1846); *see also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 24–25 (referring specifically to the right to bear arms).

264. 11 Ga. 353 (1852). For a luminous discussion of the Georgia cases, see AMAR, *supra* note 22, at 169, 154–55, 177, 189. For other examples of cases holding that the Bill of Rights limited the states, see CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 25 n.36; Crosskey, *supra* note 21, at 141, 142.

265. *See Nunn*, 1 Ga. at 249–51.

266. *Campbell*, 11 Ga. at 373–74.

267. *Nunn*, 1 Ga. at 247.

268. *See id.* at 250–51.

269. *See id.* at 248–50.

270. *See id.* at 250–51.

271. *Id.*

272. *Id.* at 250.

unreasonable searches and seizures; in all criminal prosecutions, to be confronted with the witness against them; to be publicly tried by an impartial jury; and to have the assistance of counsel for their defence, *is as perfect under the State as the national legislature, and cannot be violated by either.*²⁷³

In *Campbell*, Lumpkin insisted that the privilege of the accused to confront witnesses secured by the Sixth Amendment also limited the states. The Chief Justice wrote:

That the power to pass any law infringing on these principles is taken from the Federal Government, no one denies. But is it a part of the reserved rights of a State to do this? May the Legislature of a State, for example, unless restrained by its own Constitution, pass a law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble[,] and [to] petition the [G]overnment for a redress of grievances?" If so, of what avail, I ask, is the negation of these powers to the General Government?²⁷⁴

The doctrine "that Congress may not exercise this power, but that each State Legislature may do so for itself" falsely implied, Lumpkin wrote, that "a National press and State press, were quite separate and distinct."²⁷⁵ In fact, it should "constantly be borne in mind, that notwithstanding we may have different governments . . . we have but *one* people; . . . that it is in vain to shield them from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own."²⁷⁶

Like Justice Black almost 100 years later, Lumpkin had an almost religious reverence for what he described as "the ten amendments—but for the apparent irreverence, I would say *commandments*—which were added to the Constitution."²⁷⁷ What about the states' rights to violate the liberties protected in the Bill of Rights? "From such *State rights*," Lumpkin exclaimed, "good Lord

273. *Id.* at 251. Chief Justice Lumpkin did note that "questions under some of these amendments . . . can only arise under the laws and Constitution of the United States. But there are other provisions in them, which were never intended to be thus restricted . . ." *Id.* at 250.

274. *Campbell v. State*, 11 Ga. 353, 365–66 (1852) (quoting U.S. CONST. amend. I without citation).

275. *Id.* at 366.

276. *Id.*

277. *Id.* at 368.

deliver us!”²⁷⁸ Lumpkin called for maintenance of “the great principles of civil liberty contained in these amendments—our *American Magna Charta* [sic]” against state as well as national encroachment.²⁷⁹

Lumpkin was also somewhat skeptical of courts basing decisions on natural justice because “our ideas of natural justice are vague and uncertain, regulated by no fixed standard; the ablest and best men differing widely upon this, as well as all other subjects.”²⁸⁰ The rights in the Federal Bill of Rights, however, were a different matter because

as to questions arising under these amendments, there is nothing indefinite. The people of the several States, by adopting these amendments, have defined accurately and recorded permanently their opinion, as to the great principles which they embrace; and to make them more emphatic and enduring, have had them incorporated into the Constitution of the Union—the permanent law of the land.²⁸¹

In short, for Lumpkin, these rights or privileges were rights of all American citizens. In both *Nunn* and *Campbell*, Lumpkin emphasized that most of the rights were not new. Instead, they were part of the heritage of English liberty and he cited the Magna Carta, the English Bill of Rights, and the Act of Settlement.²⁸² As Akhil Amar has noted in his insightful discussion of these decisions, the Georgia court emphasized the declaratory nature of these rights.²⁸³

G. *The Civil War*

Reference to basic liberties, including free speech, as privileges of American citizens continued during the Civil War. The words were used in this way by people on all sides of the debate. As in earlier examples, the word “rights” and the words “privileges” and “immunities” were often used synonymously. That was so in the controversy that swirled around Union General Ambrose Burnside’s military arrest and military trial of Democratic politician Clement Vallandigham for making an anti-war speech.²⁸⁴ Resolutions

278. *Id.* at 367.

279. *Id.* at 368.

280. *Id.* at 371–72.

281. *Id.* at 372; see AMAR, *supra* note 22, at 155 (discussing Justice Lumpkin’s opinion).

282. See *Campbell*, 11 Ga. at 365, 368; *Nunn v. State*, 1 Ga. 243, 249–50 (1846).

283. See AMAR, *supra* note 22, at 155 & n.*; see also *Parham v. Justices*, 9 Ga. 341, 349 (1851) (discussing an individual’s right not to be deprived of property).

284. See Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil*

protesting the Vallandigham arrest were widely reprinted in the press.²⁸⁵ These resolutions typically quoted Daniel Webster: “‘It is the ancient and undoubted prerogative of this people to canvass public measures and the merits of public men. It is a “home-bred right”—a fireside *privilege*. It has been enjoyed in every house, cottage and cabin in the nation.’”²⁸⁶ A typical resolution continued, “This high *constitutional privilege* we shall defend and exercise in all places; in time of war, in time of peace, and at all times.”²⁸⁷ In an article critical of the arrest, the *National Intelligencer* wrote that it “believe[d] that the Government might better afford to let Mr. Vallandigham and [abolitionist] Mr. Phillips enjoy the *privilege* of ‘free speech’ according to their respective notions of propriety, than to proceed against either of them for words spoken in public discussion.”²⁸⁸

The *Albany Democracy*, in its widely reprinted rejoinder to President Lincoln on the *Vallandigham* case, referred to federal constitutional guarantees of free speech, search and seizure, grand jury indictment, and jury trial. It noted that these “sacred rights and *immunities* which were designed to be protected by these constitutional guarantees have not been preserved to the people during your administration.”²⁸⁹ There are a great many other examples.²⁹⁰

Though a number of Republicans and opponents of slavery were critical of the Vallandigham arrest, others defended the administration and castigated those Republicans and abolitionists

War, 7 WM. & MARY BILL RTS. J. 105, 107–08 (1998) [hereinafter Curtis, *Lincoln-Vallandigham*].

285. See *id.* at 131–48.

286. E.g., “*Shall We Remain Free*”—*Large and Enthusiastic Meeting at the City Hall*, DET. FREE PRESS, May 26, 1863, at 1 (emphasis added) (quoting Daniel Webster).

287. *Id.* (emphasis added).

288. *Declaring Disloyal Sentiments*, NAT’L INTELLIGENCER, May 14, 1863, at 3 (emphasis added).

289. *President Lincoln Answered*, DET. FREE PRESS, July 7, 1863, at 2 (emphasis added); cf., e.g., *Speech of Geo. W. Houk; of Dayton, Ohio, On Personal Liberty, and the Arbitrary Arrest, Trial and Banishment of Hon. C.L. Vallandigham, Delivered at Bellbrook, Greene Co., O., Aug. 22*, CINCINNATI ENQUIRER, Sept. 17, 1863, at 1 (implying that the Fourth Amendment, for example, involved the “right of personal immunity from arbitrary arrest and imprisonment”).

290. See, e.g., *From Cincinnati: Vallandigham Returned*, CHI. TRIB., June 16, 1864, at 1 (printing Vallandigham’s speech at Hamilton, Ohio). Congressman Alexander Long said that “we have just the same right to hold meetings, and discuss, and criticise, and canvass the acts of this Administration, that they have themselves. We intend to exercise that right, and to claim that *privilege*.” *Democratic Meeting at New Haven*, CINCINNATI COM., Aug. 21, 1863, at 2.

who joined the Democrats in criticism. The *Chicago Tribune* was one of the strongest defenders of tough measures against anti-war speech. After noting the Vallandigham supporters' "free speech" complaint, the paper pointedly asked "those Copperhead defenders of free speech how much of this *Constitutional and sacred privilege* did their party allow to be exercised in the South before the war broke out?"²⁹¹ General Burnside suggested, in a communication widely reprinted, that because soldiers had given up their privilege of free speech—that "freedom of discussion and criticism"—civilians should likewise curtail their exercise of that privilege.²⁹²

After the Vallandigham arrest and the massive criticism it produced, General Burnside struck again. This time he seized the *Chicago Times* newspaper, impounded copies of the paper, and banned further publication.²⁹³ Again massive protests erupted, joined by a number of Republicans and abolitionists.²⁹⁴ President Lincoln countermanded the order.²⁹⁵ Celebrating one mass protest meeting, the recently liberated *Chicago Times* wrote:

Wednesday was a day for Chicago to be proud of. By the voice of her citizens she proclaimed to the world that the right of free speech has not yet passed away; that *immunity* of thought and discussion are yet among the inalienable *privileges* of men born to freedom. . . . Twenty thousand bold men with one acclaim decreed that speech and press shall be untrammelled, and that despotism shall not usurp the *inborn rights of the American citizen*.²⁹⁶

As one Republican speaker at the *Chicago Times* protest meeting put it, "[C]an we deprive [the people] of this great *privilege* which we have hitherto enjoyed; can we destroy the means which contribute to the general diffusion of that intelligence which is our pride, by wiping out the public press?"²⁹⁷ No one had the right or power, the speaker insisted, "to deprive us of any of the *privileges* which are secured to an American citizen by the constitution."²⁹⁸ Within a few years, the United States Supreme Court described

291. *Free Speech*, CHI. TRIB., June 1, 1863, at 2 (emphasis added).

292. *General Order No. 90*, CINCINNATI COM., June 5, 1863, at 2.

293. See Curtis, *Lincoln-Vallandigham*, *supra* note 284, at 132-34.

294. See *id.* at 133, 145-48.

295. See *id.* at 132-34.

296. *Free Speech—Free Press*, DET. FREE PRESS, June 6, 1863, at 1 (quoting the *Chicago Times* of June 5, 1863) (emphasis added).

297. *Id.* (emphasis added); see also *Immense Meeting at Chicago*, DET. FREE PRESS, June 6, 1863, at 1 (describing protests over the closing of the *Chicago Times*).

298. *Free Speech—Free Press*, *supra* note 296, at 1 (emphasis added).

another Bill of Rights liberty as a "privilege."

Shortly after the Civil War, the Supreme Court reversed the conviction of a civilian by a military tribunal.²⁹⁹ In doing so, the Court noted that a person in the military

surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the *inestimable privilege of trial by jury*. This *privilege* is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.³⁰⁰

In short, for Democrats, abolitionists, and Republicans, for critics and supporters of the Lincoln administration's suppression of speech and press and military trials of civilians, the words "rights," "privileges," and "immunities" were used interchangeably. These words also were used to encompass rights in the Federal Bill of Rights such as free speech, free press, the right to assemble, jury trial, and grand jury indictment. These typically were described as rights or privileges or immunities of American citizens secured to them by the Federal Constitution.

V. JUDICIAL USE OF THE WORDS "PRIVILEGES" AND "IMMUNITIES" BEFORE THE FOURTEENTH AMENDMENT

A. *State Court Usage Under State Law*

State constitutions have provisions much like those in the Federal Bill of Rights and have had them throughout American history. State courts also have described such state constitutional rights as privileges or immunities. For example, the Supreme Court of Massachusetts used "privilege" and "immunity" to describe grand jury indictment, which was protected by the law-of-the-land clause of

299. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866).

300. *Id.* at 123-24 (emphasis added).

the state constitution. In 1857, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court noted the function served by grand jury indictment. According to Shaw, the right protected individuals “from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences.”³⁰¹ This right, which Chief Justice Shaw found implicit in the law-of-the-land clause of the state constitution, was “justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.”³⁰²

Other state law examples abound. In 1849, the Supreme Court of Ohio referred to the prohibition against double jeopardy “in the bill of rights in the constitution of the state” as “the privilege.”³⁰³ It rejected a claim that a second trial—after a new trial had been ordered as a result of the defendant’s successful appeal—violated the state guarantee against double jeopardy.³⁰⁴ Similarly, the California Supreme Court referred to “a constitutional privilege of the accused to be fully heard by his counsel.”³⁰⁵ In 1871, the Georgia Supreme Court noted that its state declaration of rights guaranteed that “every person charged with an offense against the laws shall have the privilege and benefit of counsel.”³⁰⁶

In 1852, the Supreme Court of Texas referred to its state constitutional guarantee of right to trial by jury in civil cases as “a privilege secured to either party, in the ascertainment of facts,” but noted that the privilege could be waived.³⁰⁷ In 1853, the Georgia Supreme Court referred to the right to criminal jury trial as “the greatest of all privileges conferred by *Magna Carta*” and one “guaranteed by our own fundamental law.”³⁰⁸ In 1866, the same court referred to trial by jury as a “Constitutional privilege.”³⁰⁹

In 1867, the Texas Supreme Court considered a case in which the

301. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857). The passage was quoted by Justice Stevens in *Albright v. Oliver*, 510 U.S. 266, 311 (1994) (Stevens, J., dissenting).

302. *Jones*, 74 Mass. (8 Gray) at 344.

303. *Sutcliffe v. State*, 18 Ohio 469, 477–79 (1849).

304. *See id.* at 477–78; accord *State v. Slack*, 6 Ala. 676, 677 (1844) (“[I]t is the privilege [under our bill of rights] of those who have been tried for the commission of a crime, not to be again tried for the same offense.”).

305. *People v. Keenan*, 13 Cal. 581, 584 (1859).

306. *Dean v. State*, 43 Ga. 218, 220 (1871).

307. *Neill v. Tarin*, 9 Tex. 256, 259 (1852).

308. *Mitchum v. State*, 11 Ga. 615, 633 (1852).

309. *Jenkins v. Mayor of Thomasville*, 35 Ga. 145, 147 (1866).

defendant had been prosecuted for selling malt beverages on a Sunday, in violation of a Houston city ordinance.³¹⁰ The court upheld the ordinance against a constitutional challenge and insisted that it did not conflict with the guarantees of religious liberty in the Texas Declaration of Rights.³¹¹ The court cited provisions of the Texas Constitution protecting the right to worship according to conscience and against giving preference to any religion.³¹² The court said:

We are equally well satisfied that the ordinance complained of is not obnoxious to either of these constitutional provisions, but, in fact, has the effect to protect the inhabitants of the city of Houston in the unmolested enjoyment of *these religious privileges, secured by these sections of the constitution of the Republic and State.*

That all people of this country shall have the right to worship God according to the dictates of their own consciences, or not at all, if they prefer, and that the government shall not establish any religion for the people to obey, or prohibit the free exercise thereof, appears to be now the settled American doctrine, well established in the organic law of the nation and the states. None here shall be compelled to observe the Jewish, Mohammedan, Catholic, or Protestant form of religion, or to embrace any at all. All are free to embrace any religious denomination, civilized or pagan, that his judgment or taste may dictate as the best or preferable for him.³¹³

The court also held, without elaboration, that the ordinance did not violate the United States Constitution.³¹⁴

The California Supreme Court reached a different conclusion, holding that a Sunday closing law violated the guarantees of religious freedom in the state constitution.³¹⁵ Here again, however, a justice described these rights or liberties as "privileges." Each of the two justices in the majority wrote his own opinion. Justice Burnette insisted that the constitutional guarantee protected all people or none: "The Constitution protects the freedom of religious *profession* and *worship*, without regard to the sincerity or insincerity of the worshipper. . . . His motives in exercising a *constitutional privilege* are

310. See *Gabel v. City of Houston*, 29 Tex. 335, 337 (1867).

311. See *id.* at 343-45.

312. See *id.* at 344 (citing TEX. CONST. OF 1845, art. I, § 4; CONST. OF REPUBLIC OF TEX. OF 1836, Declaration of Rights, Fourth).

313. *Id.* at 344-45 (emphasis added).

314. See *id.* at 346.

315. *Ex parte Newman*, 9 Cal. 502, 510 (1858).

matters too sacred to be submitted to judicial scrutiny.”³¹⁶

These cases show that it was common for state courts to refer to guarantees under state constitutions that were similar to rights protected by the Bill of Rights as constitutional privileges or immunities. It would be quite natural, then, to describe such rights as privileges and immunities of citizens of the state. Because similar rights were (as most understood it) guaranteed by the Federal Constitution, it would also be quite natural to refer to federal rights as privileges or immunities of citizens of the United States. The Georgia Constitution of 1868, for example, forbade the state from abridging “the privileges or immunities of citizens of the United States or of this State.”³¹⁷

B. Usage in Federal Cases

In the years before the ratification of the Fourteenth Amendment in 1868, the criminal jurisdiction of the federal courts was limited to a small number of federal crimes, and relatively few questions involving Bill of Rights guarantees reached these courts. Still, courts and counsel did refer to guarantees in the Bill of Rights as “privileges” or “immunities.”

In an 1858 South Carolina case, for example, the federal district court addressed an alleged denial of “constitutional rights,” particularly “the privilege of confronting the witness.”³¹⁸ Chief Justice John Marshall had referred to the right of confrontation in the same way in the trial of Aaron Burr for treason. Marshall noted that the right did not apply to certain preliminary proceedings, but “[a]t a trial in chief, the accused possesses the valuable privilege of being confronted with his accuser.”³¹⁹

In 1827, Circuit Justice Bushrod Washington considered a challenge to the seizure of lawful money from a defendant charged with counterfeiting.³²⁰ Washington ordered the money returned, noting that holding the money would make it difficult for the defendant to enjoy his constitutional rights. As explained by Justice Washington,

316. *Id.* at 514 (opinion of Burnette, J.) (emphasis added).

317. GA. CONST. of 1868, art. I, § 2, in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 411, 411-12 (Washington, D.C., Gov’t Printing Office, 2d ed. 1878) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

318. *In re Bates*, 2 F. Cas. 1015, 1018 (D.S.C. 1858) (No. 1099a).

319. *United States v. Burr*, 25 F. Cas. 27, 29 (C.C. Va. 1806) (No. 14,692c).

320. *See Ex parte Craig*, 6 F. Cas. 710, 711 (C.C.E.D. Pa. 1827) (No. 3321).

[t]he constitution, by one of its amendments, has secured to every person under a criminal prosecution, the right to have compulsory process for obtaining witnesses in his favour, and the *privilege of having the assistance of counsel to defend him*. But what would these securities avail the accused, if a judicial officer, or any other officer of the court may legally deprive him of the means of obtaining his witnesses, and of employing the counsel in whom his confidence is placed; by detaining the money found upon his person, which, in many cases, may be his all?³²¹

In another circuit court case, Supreme Court Justice William Johnson used the words “privileges and immunities” as equivalent to rights listed in a “bill of rights.”³²² He considered whether the Constitution and laws automatically applied to all territories acquired by the United States. On this issue he gave some weight to the fact that Congress had passed a special statute setting out the laws of Congress that would apply to the Florida territory and also setting out rights and liberties of inhabitants of the territory.³²³ Johnson wrote, “we have an enumeration of the acts of congress, which are to be held in force in the territory; and . . . an enumeration, in nature of a bill of rights, or privileges, and immunities which could not be denied to the inhabitants of the territory.”³²⁴ Among the rights listed in the act which Justice Johnson cited as “a bill of rights or privileges or immunities” were “freedom of religious opinions,” “the benefit of the writ of habeas corpus,” and protections against excessive bail, cruel and unusual punishment, and taking of private property for public use without just compensation.³²⁵

One of the most notable uses of the words “privileges or immunities” by a federal court comes in *Scott v. Sandford* (“Dred Scott”).³²⁶ In the *Dred Scott* case, the Court said that every right, privilege, or immunity under the Constitution of the United States belonged only to citizens of the United States, a class that excluded all people descended from African slaves whether or not they were free citizens of one of the states.³²⁷ Specifically, the Court held that Americans descended from African slaves could not sue in federal

321. *Id.* (emphasis added).

322. *American Ins. Co. v. Canter*, 1 F. Cas. 658, 660 (C.C.S.C. n.d.) (No. 302a); *see also* AMAR, *supra* note 22, at 167 (discussing Justice Johnson’s phrasing).

323. *See Canter*, 1 F. Cas. at 660.

324. *Id.*; *see also* AMAR, *supra* note 22, at 167 (discussing Justice Johnson’s opinion).

325. *Canter*, 1 F. Cas. at 660.

326. 60 U.S. (19 How.) 393 (1856).

327. *See id.* at 403–04.

court.³²⁸ A close reading of the opinion shows that the Court used the words “right” and “privilege” as equivalent:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the *rights, and privileges, and immunities*, guaranteed by that instrument to the citizen? One of which *rights* is the *privilege* of suing in a court of the United States in the cases specified in the Constitution.³²⁹

Clearly among the privileges and immunities referred to by the Court were those protected by the interstate Privileges and Immunities Clause of Article IV of the U.S. Constitution.³³⁰ But as the previous passage indicates, the word “privilege” was used to encompass virtually all federal constitutional rights. As Chief Justice Taney asserted, the Constitution “speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the *powers* granted or the *privileges secured to the citizen*.”³³¹ *Dred Scott* was the most famous (and infamous) decision of the age. Its reference to federal constitutional rights as privileges solely belonging to citizens of the United States illuminates the meaning of the words in the Fourteenth Amendment. That Amendment made all persons born in the nation citizens and provided that no state shall abridge the privileges or immunities of citizens of the United States.³³²

Such usage continued in the years immediately after the ratification of the Fourteenth Amendment. For example, in the 1869 case of *Thompson v. Railroad Cos.*,³³³ the Court held that, on removal, the lower federal court had improperly changed the suit from one in law (with a civil jury) to one in equity (without a jury).³³⁴ By the lower court’s error, the Court said, “an action at law, which sought solely to recover damages for a breach of contract, was transmuted into a suit in equity, and the defendant deprived of the *constitutional privilege of trial by jury*.”³³⁵ As we have seen, the Court

328. *See id.* at 403; *Shelby v. Bacon*, 51 U.S. (10 How.) 56, 61 (1850).

329. *Dred Scott*, 60 U.S. (19 How.) at 403 (emphasis added).

330. U.S. CONST. art IV, § 2, cl. 1.

331. *Dred Scott*, 60 U.S. (16 How.) at 411 (third and fourth emphases added).

332. U.S. CONST. amend. XIV, § 1.

333. 73 U.S. (6 Wall.) 134 (1867).

334. *See id.* at 137.

335. *Id.* (emphasis added).

also described criminal jury trial as a "privilege."³³⁶ Another early federal court decision soon after the passage of the Fourteenth Amendment explicitly held that the rights in the Bill of Rights were among the privileges or immunities of citizens of the United States that no state could abridge.³³⁷

Counsel also used the word "privilege" to describe constitutional rights in arguments in federal court. This was so in two famous cases. In *Prigg v. Pennsylvania*,³³⁸ Prigg was charged with kidnapping and removing from the state black residents of Pennsylvania who were claimed as slaves in Maryland. A Pennsylvania personal liberty law made it a crime to seize and remove black people from the state in order to enslave them without a prior judicial determination of whether they were in fact slaves.³³⁹ The attorney for Pennsylvania defended the law as protecting basic constitutional rights:

[I]n a free state every man is prima facie a free man who is at large. If so, he comes under that class called "people;" and the right of "the people" to be secure in their persons against unreasonable seizures is guaranteed by the Constitution. Aye! but he is a slave, say the opponents of this doctrine. But that is not admitted. The very question at issue is, slave or free. Now, so long as he is not proved a slave, he is presumed free; and, therefore, if you seize him, it is a violation of this *constitutional privilege*.³⁴⁰

In a disgraceful opinion, the Supreme Court of the United States struck down the Pennsylvania law.³⁴¹ The decision was disgraceful

336. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123-24 (1866).

337. *See* *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282); Justice Wood's views in *Hall* were consistent with those of Justice Bradley, *see* Letter from Justice Bradley to Judge Woods, *supra* note 15; *see also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 160, 171-72 (describing *Hall*). *But see* *United States v. Cosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893) (excluding the Fourth Amendment).

338. 41 U.S. (16 Pet.) 539 (1842).

339. *See id.* at 550-51.

340. *Id.* at 579 (emphasis added). Counsel also apparently referred to the rights in the Bill of Rights as privileges and immunities.

Among the people of this free country, there is nothing which should be guarded with more watchful jealousy, than the charter of their liberties; which, being the fundamental law of the land, in its judicial construction every one is immediately interested, from the highest dignitary to the meanest subject of the commonwealth. Any irreverential touch given to this ark of public safety should be rebuked, and every violence chastened; its sanctity should be no less than that of the domestic altar; its guardians should be Argus-eyed; and as the price of its purchase was blood, its privileges and immunities should be maintained, even if this price must be paid again.

Id. at 571-72.

341. *See id.* at 625-26.

because it allowed Americans of African descent—many of whom were free—to be seized in a free state as alleged slaves (though the law of Pennsylvania presumed all people to be free) and be transported to a slave state where all blacks were presumed to be slaves. This seizure and transportation could be accomplished without a shred of legal process. The attempt of the state to provide a trial in such cases was held to violate the Federal Constitution.

Counsel also used the word “privileges” as equivalent to “constitutional rights” in *Ex parte Vallandigham*,³⁴² one of the most controversial and extensively publicized cases of the Civil War era. After General Ambrose Burnside’s soldiers arrested Ohio Democrat Clement Vallandigham for making an anti-war political speech,³⁴³ Vallandigham sought a writ of habeas corpus in federal court. Vallandigham’s attorney claimed the arrest was illegal, because General Burnside, a federal officer, was bound by the First Amendment’s protection for speech and press.³⁴⁴ He also claimed a military trial would violate Vallandigham’s Fifth Amendment right to grand jury indictment and Sixth Amendment right to jury trial.³⁴⁵ Vallandigham’s attorney argued, “General Burnside admonishes us of a certain ‘quietness’ which might prevail as the consequence of enforcing his military order: I answer him that quietness attained by the sacrifice of our ancestral rights, by the destruction of our constitutional privileges, is worse than the worst degree of confusion and violence.”³⁴⁶ As the evidence set out shows, in the years leading up to the adoption of the Fourteenth Amendment, it was common to describe Bill of Rights liberties as privileges or immunities belonging to American citizens.

In a leading scholarly treatise by a famous Supreme Court Justice, the word “privilege” was also used to describe rights given protection in the Bill of Rights. Justice Story in his *Commentaries on the Constitution* described the Seventh Amendment guarantee of civil jury trial as “plac[ing] upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all persons to be essential to political and civil liberty.”³⁴⁷ This passage

342. 28 F. Cas. 874, 875 (1863) (C.C.S.D. Ohio 1863) (No. 16,816). For a discussion of the case, see Curtis, *Lincoln-Vallandigham*, *supra* note 284, at 121–31.

343. See Curtis, *Lincoln-Vallandigham*, *supra* note 284, at 121–25.

344. See *Vallandigham*, 28 F. Cas. at 881.

345. See *id.* at 890–91.

346. *Id.* at 880.

347. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED

from Story was quoted by de Tocqueville in his discussion of the civil jury in *Democracy in America*.³⁴⁸

VI. THE THIRTEENTH AND FOURTEENTH AMENDMENTS

A. *Debate on Constitutional Amendments*

During the congressional debates on an amendment to abolish slavery and in the debates in the Thirty-Ninth Congress, which framed the Fourteenth Amendment, Republicans repeated basic themes. They asserted that slavery had destroyed the constitutional rights of American citizens, including rights to free speech, press, and religion.³⁴⁹ The Republican view was that Southern laws and violence had violated these basic rights of all American citizens, rights that no state should abridge.³⁵⁰ These rights were alternately described as “privileges,” “immunities,” and “rights.” There are many examples.³⁵¹

Slavery, declared Representative John Kasson of Iowa, “denies the constitutional rights of our citizens in the South, suppresses freedom of speech and of the press, throws types into the rivers when they do not print its will, and violates more clauses of the Constitution than were violated even by the rebels when they commenced this war.”³⁵² In 1864, before the adoption of the Fourteenth Amendment, House Judiciary Committee Chairman James Wilson reflected a change in constitutional understanding that accelerated after Lovejoy’s death.³⁵³ Wilson said that

[f]reedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no state may interfere without breach of the bond which holds the Union together.³⁵⁴

STATES, bk. III, ch. 38, § 919, at 654 (Carolina Academic Press 1987) (1833).

348. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 271 n.3 (J. P. Mayer, ed., Anchor Books 1969).

349. See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 22, at 34–56 (setting out examples of the Republican view of state abridgment of various privileges, immunities, and rights).

350. See *id.*

351. See, e.g., *id.* at 26–91 (citing examples of Republican views on these questions).

352. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson).

353. See Curtis, *Lovejoy*, *supra* note 16, at 1160–84 (describing the political climate after the Lovejoy murder).

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

Slavery had practically destroyed these rights because it persecuted religionists, denied the *privilege* of free discussion, prevented free elections, [and] trampled upon all of the constitutional guarantees belonging to the citizen. . . . Throughout all the dominions of slavery republican government, constitutional liberty, the blessings of our free institutions were mere fables. An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the *inestimable privileges* which by right they should have enjoyed . . . by the Constitution.³⁵⁵

John Bingham, the primary author of Section 1 of the Fourteenth Amendment, and Jacob Howard, who presented the Amendment to the Senate on behalf of the Joint Committee on Reconstruction, both explained the Privileges or Immunities Clause of the Fourteenth Amendment as requiring states to obey guarantees of the Federal Bill of Rights.³⁵⁶ As we have seen, in using the words “privileges” and “immunities” to encompass constitutional rights of citizens of the United States such as those in the Bill of Rights, Bingham, Howard, and other Republicans used words in accordance with a long American tradition. Their usage of the words “privileges or immunities of citizens of the United States” to denote fundamental constitutional rights was consistent with common usage that stretched from the time of the American Revolution to the framing of the Bill of Rights and other debates in the first Congress to the battle over the Sedition Act, to the struggle over slavery and its denial of civil liberties, and finally up to and through the American Civil War. Their use of the words to denote federal constitutional rights was also part of a long tradition. They were using the words “privileges” and “immunities” as American statesmen, lawyers, judges, newspaper editors, and others had often used them. Their belief that the rights enumerated in the Bill of Rights were privileges of citizens of the

355. *Id.* (statement of Rep. Wilson) (emphasis added).

356. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Rep. Howard) (explaining that under the Fourteenth Amendment the privileges or immunities of citizens of the United States would include rights in the Federal Bill of Rights, which would now be protected against state as well as federal infringement); *id.* at 2542 (statement of Rep. Bingham) (asserting that the Fourteenth Amendment would protect the privileges and immunities of all citizens of the Republic from unconstitutional state acts); *id.* at 1291 (statement of Rep. Bingham) (denying assertions by some Republicans that the Civil Rights Bill could be justified under federal power to enforce the Bill of Rights and arguing that a constitutional amendment was required for that purpose); *id.* at 1064, 1089–90 (statement of Rep. Bingham) (commenting that *Barron v. Mayor of Baltimore* and *Livingston v. Moore* showed the need for the amendment); *id.* at 1034 (statement of Rep. Bingham) (discussing a prototype of the Fourteenth Amendment).

United States was consistent with a long and well established usage. By 1866, the idea that states should not be able to abridge these rights of all American citizens was similarly widespread. In spite of such common usage, however, in the few early cases, courts typically rejected application of the Bill of Rights to the states after ratification of the Fourteenth Amendment.³⁵⁷

B. *The Congressional Campaign of 1866*

The theme that the Fourteenth Amendment would protect fundamental constitutional rights of American citizens was reiterated during the political campaign of 1866.³⁵⁸ The Amendment had been proposed in 1866, shortly before Congress adjourned, and it was ratified in July 1868. In part, the 1866 campaign was a referendum on the congressional plan for Reconstruction, the centerpiece of which was the Fourteenth Amendment.³⁵⁹ Republicans reminded voters of Southern denials of free speech and other basic liberties and insisted that the Fourteenth Amendment would protect the fundamental rights of American citizens.³⁶⁰ A few examples are worth repeating.

A Convention of Southern loyalists met in Philadelphia after Congress adjourned,³⁶¹ and it received substantial press coverage. The call for the convention was issued in July and read again when the convention met in September.³⁶² The call put the question squarely:

To the loyal Unionists of the South: The great issue is upon us. The majority in Congress, and its supporters, firmly declare that "the rights of the citizen enumerated in the Constitution, and established by the supreme law, must be maintained inviolate."

Rebels and Rebel sympathizers assert that "the right of the citizens must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe."³⁶³

357. See, e.g., *Rowans v. State*, 30 Wis. 129, 148-50 (1872) (holding that grand jury indictments are not required); Jonathan Lurie, *The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberty Cases, 1870-1890—A Preliminary Assessment*, 28 AM. J. LEGAL HIST. 295, 303-12 (1984).

358. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 130-53 (discussing the years from 1866-1868).

359. See *id.* at 131.

360. See *id.* at 171-96.

361. See *id.* at 133-37 (discussing the convention of the Southern loyalists).

362. See *id.* at 133.

363. *Proceedings of the Convention*, N.Y. DAILY TRIB., Sept. 4, 1866, at 1.

A letter that accompanied the call expressed the hope that Southern loyalists would at least receive protection for “all Constitutional rights of American citizens.”³⁶⁴ The loyalists’ *Appeal of the Loyal Men of the South to Their Fellow Citizens* was widely reprinted in the Republican press.³⁶⁵ It reflected the loyalists’ understanding that free speech rights were among the rights of citizens of the United States that states must respect. It said that “seeds of oligarchy [were] planted in the constitution by its slavery feature” and had produced monstrous results.³⁶⁶ The recognition of slavery

wrung from the reluctant framers of that great instrument, enabled these [slave] States to entrench themselves behind the perverted doctrine of State rights. . . . The hand of the government was stayed for eighty years. The principles of constitutional liberty languished for want of government support. Oligarchy matured its power with subtle design. . . . Statute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition for redress of grievances; it proscribed democratic literature as incendiary; it nullified constitutional guarantees of freedom and free speech and a free press; it deprived citizens of the other States of their privileges and immunities in the States³⁶⁷

Republican orators expressed similar ideas during the 1866 congressional campaign. Andrew Jackson Hamilton, a former Texas congressman who had remained loyal to the Union, had been appointed provisional governor of Texas by Abraham Lincoln.³⁶⁸ Before the Civil War, he had been Attorney General of Texas.³⁶⁹ In 1866, Hamilton, a gifted orator, campaigned for Republican congressional candidates throughout the North. In Trenton, New Jersey, he spoke on the central issues of the election. Hamilton said Republicans agreed with Andrew Johnson in wanting the Union restored. But “althoug [sic] much was said about the Union as it was and the Constitution as it is,” that was not what Hamilton sought.³⁷⁰

364. *The September Convention, Address of the Committee*, PHIL. INQUIRER, Aug. 25, 1866, at 2.

365. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 134.

366. *Address of the Southern Loyalists: Appeal of the Loyal Men of the South to Their Fellow Citizens*, NEWARK DAILY ADVERTISER, Sept. 7, 1866, at 1.

367. *Id.*

368. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 133–34.

369. See *id.*

370. *The Loyal Southerners, Speech of Gov. Hamilton*, N.Y. DAILY TRIB., Sept. 11,

As a newspaper account of the speech reported,

[Hamilton] wanted a Union of loyal men in which all, even the humblest, can exercise the rights of American freemen everywhere—not the least of which are the rights to speak, to write and to impress their thoughts on the minds of others. . . . Any other [Union] than one which guaranteed these fundamental rights was worthless to him.³⁷¹

The need to protect constitutional rights of free speech throughout the nation was repeated by Republicans again and again during the campaign of 1866.³⁷² The congressional election of 1866 resulted in an overwhelming victory for the Republican Party, which had made the Fourteenth Amendment its election platform.³⁷³

C. *Congressional Discussion in the Early 1870s*

Between 1866 and 1871, Congress had undertaken to reconstruct the Southern state governments as multi-racial democracies. In 1871, John Bingham spoke in Congress on “the scope and meaning of the limitations imposed” by Section 1 of the Fourteenth Amendment.³⁷⁴ According to Bingham, “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.”³⁷⁵ Other Republicans also described the rights in the Bill of Rights as privileges or immunities under the Fourteenth Amendment. Representative George F. Hoar, for example, said that the “‘privileges and immunities as used in the fourteenth amendment’” included “all the privileges and immunities declared to belong to the citizen by the Constitution itself.”³⁷⁶ Representative Henry L. Dawes described rights in the Bill of Rights as “privileges and immunities” and said that the Fourteenth Amendment made every person born in America a citizen “clothed with them all.”³⁷⁷

Many other Republicans referred to rights in the Bill of Rights as privileges or immunities or insisted that the Fourteenth Amendment

1866, at 5.

371. *Id.*

372. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 131–53. As Dean Richard Aynes has shown in impressive detail, three contemporary legal treatises, published after the amendment was proposed, supported this reading. *See* Aynes, *supra* note 22, at 83–94; Aynes, *supra* note 244, at 299 n.67.

373. *See* 2 ACKERMAN, *supra* note 200, at 182.

374. CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham).

375. *Id.* (statement of Rep. Bingham).

376. *Id.* at 334 (statement of Rep. Hoar).

377. *Id.* at 475–76 (statement of Rep. Dawes).

required the states to respect guarantees of the Bill of Rights.³⁷⁸ Some, like Senator John Sherman, rejected Bingham's suggestion that privileges or immunities of citizens of the United States were mainly limited to those set out in the Constitution. But Sherman also read the Fourteenth Amendment's Privileges or Immunities Clause to encompass Bill of Rights liberties. The Amendment's "privileges and immunities," he insisted, were not at all limited to those defined in the Constitution.³⁷⁹ In a 1871 speech to his constituents in Ohio, John Bingham insisted that no state "ever had the right to make or enforce any law which abridged the privileges or immunities of citizens of the United States, as guaranteed by the Constitution of the United States."³⁸⁰ Still, Bingham noted, basic rights such as freedom of speech and the right to bear arms had been abridged "in nearly half the States of the Union."³⁸¹ The Fourteenth Amendment, Bingham said, had remedied this defect.³⁸²

Even a number of Southern Democrats embraced the definition of privileges and immunities as including those rights set out in the Bill of Rights. For example, Representative Roger Mills of Texas described the "privileges or immunities mentioned in the fourteenth amendment" as including the right to peaceably assemble, freedom of speech, press and religion, "immunity" against unlawful seizure and search, and the right to a criminal jury trial.³⁸³ Similarly, Senator Thomas Norwood of Georgia insisted that the privileges or immunities protected by the Fourteenth Amendment included all rights in the Bill of Rights together with other rights protected by the Constitution. Before the Fourteenth Amendment, he explained, a

378. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 310 (1871) (statement of Rep. Maynard); *id.* at 370 (statement of Rep. James Monroe) (concurring with Rep. Hoar); *id.* at 382 (statement of Rep. Hawley); *id.* at 414 (statement of Rep. Roberts) (insisting that the Fourteenth Amendment protected freedom of speech); *id.* at 499 (statement of Sen. Frelinghysen) (describing the protection against taking of private property for public use without just compensation as one of the privileges protected by the Privileges or Immunities Clause); CONG. GLOBE, 41st Cong., 3d Sess. 1244-45 (1871) (statement of Rep. Lawrence) (stating that the right to a civil jury trial would be applied to states by the Due Process and Privileges or Immunities Clauses); CONG. GLOBE, 41st Cong., 2d Sess. 515 (1870) (statement of Sen. Folwer).

379. CONG. GLOBE, 42d Cong., 1st Sess. 843, 844 (1872) (statement of Sen. Sherman) (stating that the phrase encompassed common law rights, those engrafted in the Constitution, those embraced by English law, and other rights enumerated by the founding fathers).

380. HALBROOK, *supra* note 60, at 131 (quoting Hon. John A. Bingham, Speech at Belpre, Ohio (Sept. 14, 1871), in CADIZ REPUBLICAN, Sept. 28, 1871, at 1).

381. *Id.*

382. See *id.*

383. 2 CONG. REC. 284-85 (1874) (statement of Rep. Mills).

state “could have deprived its citizens of any of the privileges and immunities contained in those [first] eight [amendments].”³⁸⁴ In an illuminating article on the early interpretation of the Privileges or Immunities Clause, Bryan H. Wildenthal has collected additional examples of Democrats who embraced this reading.³⁸⁵ Indeed, Wildenthal describes application of the Bill of Rights to the states under the Fourteenth Amendment as the “conservative, baseline position” and one that reflected common ground between Republicans and a number of conservative Democrats.³⁸⁶

VII. MORE RECENT USAGE BY SUPREME COURT JUSTICES AND FDR’S PROCLAMATION OF BILL OF RIGHTS DAY

The words “privileges” and “immunities” are such a natural way of describing the rights in the Bill of Rights that the United States Supreme Court often describes them in that way. That is true both for Justices in the majority and for those who dissented.

A. *Majority Opinions*

There can be little doubt that these privileges and immunities are privileges and immunities of citizens of the United States. The common understanding of Americans has long been that they have these rights as American citizens.³⁸⁷ Indeed, in his effort to strip Americans of African descent of each and every constitutional right, Justice Taney in the 1857 *Dred Scott* decision had described *all* rights in the Federal Constitution as rights, privileges, and immunities of citizens of the United States *and no one else*.³⁸⁸ Because the Court held descendants of slaves could not be United States citizens, it deprived free blacks of all federal constitutional rights, including those in the Bill of Rights.³⁸⁹

Many Justices have described Bill of Rights liberties as privileges or immunities. Liberties so described have included jury trial, confrontation, the privilege against self-incrimination, the privilege or

384. 2 CONG. REC. app. 242 (1874) (statement of Sen. Norwood).

385. See Wildenthal, *supra* note 15, at 102–47.

386. *Id.* at 59; see also HALBROOK, *supra* note 60, at 124–31 (illustrating different viewpoints on constitutional rights through the debates surrounding certain bills).

387. Of course, at first they were only effective against the federal government, according to the orthodox view.

388. See *Scott v. Sandford* (“*Dred Scott*”), 60 U.S. (19 How.) 393, 403 (1857); Crosskey, *supra* note 21, at 4–6.

389. See *Dred Scott*, 60 U.S. (19 How.) at 403; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 44; Crosskey, *supra* note 21, at 4–5.

immunity against unreasonable searches and seizures, free speech, free press, and freedom of religion.

Let us begin with criminal procedure guarantees. As we have seen, in 1866, the Supreme Court referred to the right to jury trial as “the *inestimable privilege of trial by jury*.”³⁹⁰ Likewise, Justice Stevens has recently referred to “our recognition that ‘the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice.’ ”³⁹¹ The Court regularly describes the right against self-incrimination as the “privilege against self-incrimination”³⁹² and as a “ ‘constitutional privilege.’ ”³⁹³ In *Weeks v. United States*,³⁹⁴ the Court referred to the “constitutional privilege against unlawful search or seizure.”³⁹⁵

The Supreme Court has applied the same usage to free speech, press, and religion. In *Chaplinsky v. New Hampshire*,³⁹⁶ for example, the Court upheld a breach of the peace conviction of a Jehovah’s Witness who called an officer a “ ‘damn racketeer’ ” and “ ‘damn Fascist.’ ”³⁹⁷ Because these were “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace,” the Court concluded that the conviction did not impinge “upon the privilege of free speech.”³⁹⁸ In *Murdock v. Pennsylvania*,³⁹⁹ the Court struck down a tax imposed on distributors of religious literature. It emphasized that the tax at issue was “a license tax[,] a flat tax imposed on the exercise of a privilege granted by the Bill of Rights” and referred to free speech, press, and religion

390. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (emphasis added).

391. *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens J. dissenting) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123).

392. *United States v. Robinson*, 485 U.S. 25, 26 (1988).

393. *Id.* at 30 (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

394. 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

395. *Id.* at 395; *see also* *Rios v. United States*, 364 U.S. 253, 255 (1960) (recognizing the “defendant’s immunity from unreasonable searches and seizures under the Fourth Amendment” (quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960))); *Wheeler v. United States*, 226 U.S. 478, 490 (1913) (referring to “the privilege of the Constitution against unreasonable searches and seizures” and against self-incrimination); *Interstate Commerce Comm’n v. Baird*, 194 U.S. 25, 45 (1904) (referring to the “4th Amendment to the Constitution, [as] securing immunity from unreasonable searches and seizures” and referring to the “constitutional rights and privileges of citizens”); *In re Swan*, 150 U.S. 637, 649 (1893) (referring to “familiar constitutional provisions for the security of person and property and immunity from unreasonable searches and seizures”).

396. 315 U.S. 568 (1942).

397. *Id.* at 569 (quoting the complaint without citation).

398. *Id.* at 574.

399. 319 U.S. 105 (1943).

as "constitutional privileges."⁴⁰⁰ In the 1941 case of *Bridges v. California*,⁴⁰¹ the Court overturned contempt convictions for criticism or threatened criticism of a judge in a pending case. The Court noted that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."⁴⁰² In 1969, in *Shuttlesworth v. Birmingham*,⁴⁰³ the Court described the constitutional right to use streets and sidewalks to distribute information and communicate ideas. According to the *Shuttlesworth* Court,

"Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative"⁴⁰⁴

Likewise, though he rejected general application of Bill of Rights liberties to the states, Justice Cardozo, as we have seen,⁴⁰⁵ used the words "privileges" and "immunities" to describe each and every guarantee in the Federal Bill of Rights.⁴⁰⁶

B. *Dissents and Concurrences*

Other individual justices have also used the words "privileges or immunities" to describe Bill of Rights liberties. Of course, some dissenting justices have understood the words of Section 1—and particularly its Privileges or Immunities Clause—to require the states to obey the guarantees of the Bill of Rights. These dissenters, including Justices Bradley and Swayne,⁴⁰⁷ Justice Harlan,⁴⁰⁸ Justices

400. *Id.* 112, 113. The reference to "a privilege granted by the Bill of Rights," was quoted in *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 386 (1990).

401. 314 U.S. 252 (1941).

402. *Id.* at 270.

403. 394 U.S. 147 (1969).

404. *Id.* at 152 (Roberts, J.) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515–516 (1939)).

405. *See supra* note 44 and accompanying text.

406. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

407. *See* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116, 118 (1873) (Bradley, J., dissenting) (*dicta*). Justice Swayne joined in the dissent. *See id.* (Bradley, J., dissenting).

408. *See* *Patterson v. Colorado*, 205 U.S. 454, 464–65 (1907) (Harlan, J., dissenting);

Field and Brewer,⁴⁰⁹ and Justices Black and Douglas,⁴¹⁰ describe these guarantees as “privileges” or “immunities.”

Justice Stone, joined by Justices Black, Murphy, and Douglas, referred to “freedom of speech, freedom of the press, or freedom of worship, those historic privileges which are so essential to our political welfare and spiritual progress.”⁴¹¹ Indeed, Justice Douglas explicitly relied on the Privileges or Immunities Clause in his dissent in *Gertz v. Robert Welch, Inc.*⁴¹² stating:

The Fourteenth Amendment speaks not only of due process but also of “privileges and immunities” of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition against state abridgment than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory.⁴¹³

Furthermore, sixteen years later, four justices described the Confrontation Clause as securing a constitutional privilege:

[T]he Confrontation Clause serves to afford a criminal defendant the privilege “of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”⁴¹⁴

Nor was such usage limited to justices favorable to general application of the Bill of Rights to the states. For example, Justice Reed, who authored the *Adamson* majority opinion, dissented in *Beauharnais v. Illinois*.⁴¹⁵ Justice Reed noted:

Maxwell v. Dow, 176 U.S. 581, 612–17 (1900) (Harlan, J., dissenting), *abrogated by Williams v. Florida*, 398 U.S. 78 (1970). On grand juries and due process, see *Hurtado v. California*, 110 U.S. 516, 539 (1884) (Harlan, J. dissenting).

409. See *O’Neil v. Vermont*, 144 U.S. 323, 361–66, 379 (1892) (Field, J., dissenting).

410. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 (1974) (Douglas, J., dissenting); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 290 (1974), (Douglas, J., concurring in result); *Duncan v. Louisiana*, 391 U.S. 145, 165 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 69–123 (1947) (Black, J., dissenting), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

411. *Jones v. City of Opelika*, 316 U.S. 584, 611 (1942) (Stone, J., dissenting), *judgment vacated by* 319 U.S. 103 (1943).

412. 418 U.S. 323 (1974).

413. *Id.* at 359 (Douglas, J., dissenting).

414. *Clemons v. Mississippi*, 494 U.S. 738, 769 (1990) (Blackmun, J., concurring in part and dissenting in part) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)).

415. 343 U.S. 250, 277–84 (1952) (Reed, J., dissenting). In that case, *Beauharnais* had posted leaflets with insulting characterizations of African-Americans and was charged

In carrying out its obligation to conform state legal administration to the "fundamental principles of liberty and justice" imposed on the states by the Fourteenth Amendment, this Court has steadily affirmed that the general principle against abridgment of free speech, protected by the First Amendment, is included in the command of the Fourteenth. So important to a constitutional democracy is the right of discussion that any challenge to legislative abridgment of those *privileges of a free people* calls for careful judicial appraisal.⁴¹⁶

Justice Frankfurter himself spoke of the guarantees in the Bill of Rights as "privileges" or "immunities." In *Davis v. United States*,⁴¹⁷ he spoke of the "usual privilege to be free of unreasonable search and seizure."⁴¹⁸ Even in *Adamson*, Justice Frankfurter slipped into the common usage of the words, describing the right against self-incrimination as an immunity. He said "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions."⁴¹⁹ In addition, in *Dennis v. United States*,⁴²⁰ Justice Frankfurter quoted an earlier opinion to establish that the first ten amendments to the Constitution were designed to "embody certain guaranties and immunities which we had inherited from our English ancestors" and were subject to exceptions.⁴²¹

While the Supreme Court and individual Justices have often used "privilege" or "immunity" to describe basic liberties in the Bill of Rights, they usually have employed the word "right" or "liberty."⁴²² That is increasingly true in recent years. Still, the Court often has

under an Illinois statute that forbade portraying "lack of virtue" in members of any race or religion. See *id.* at 251-52; *id.* at 267 (Black, J., dissenting). Beauharnais had done so in a petition to his city council seeking segregated neighborhoods. See *id.* at 252; *id.* at 267-68 (Black, J., dissenting).

416. *Id.* at 279 (Reed, J., dissenting) (emphasis added) (citations omitted).

417. 328 U.S. 582 (1946).

418. *Id.* at 602 (Frankfurter, J., dissenting) (quoting *United States v. Davis*, 151 F.2d 140, 144 (2d Cir. 1945) (Frank, J., concurring)).

419. *Adamson v. California*, 332 U.S. 46, 61 (1943) (Frankfurter, J., concurring), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964).

420. 341 U.S. 494 (1951).

421. *Id.* at 524 (Frankfurter, J., concurring in affirmance of the judgment) (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

422. E.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (citing *Bose Corp. v. Consumer Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984); *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

referred to rights in the Bill of Rights as “privileges and immunities,” “constitutional privileges or immunities,” and as “privileges, immunities, or rights of citizens of the United States.” Why such usage is good enough for the Justices, but “strange”⁴²³ or “peculiar”⁴²⁴ and altogether unacceptable when engaged in by the drafters of the Fourteenth Amendment, remains one of the abiding mysteries of American constitutional law. The word “privileges” has been used to describe Bill of Rights liberties by other branches of government as well.

C. *The 1941 Proclamation of Bill of Rights Day*

In 1941, in the midst of a world war against fascist totalitarianism, the United States Congress passed a joint resolution to establish December 15 as Bill of Rights Day.⁴²⁵ As Americans had done for generation after generation, President Franklin D. Roosevelt in his Bill of Rights Day proclamation referred to rights in the Bill of Rights as privileges of Americans. Like many before him, Roosevelt used the words “rights” and “privileges” synonymously. As President Roosevelt noted,

[t]hose who have long enjoyed such privileges as we enjoy forget in time that men have died to win them. They come in time to take these rights for granted and to assume their protection is assured. We, however, who have seen these privileges lost in other continents and other countries can now appreciate their meaning⁴²⁶

VIII. A CAVEAT

The sources cited so far show that rights in the American Bill of Rights often were described as “privileges” or “immunities” of citizens of the United States or of Americans. The usage of “privilege” to describe a constitutional right, however, was not universal. For example, in 1868 Thomas Cooley published his *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*.⁴²⁷ Cooley focused on state constitutions as the primary guarantors of liberty. He did not discuss the Fourteenth Amendment, which probably had not been ratified at the time his book was written, though it was

423. *Adamson*, 332 U.S. at 63 (Frankfurter, J., concurring).

424. *Duncan v. Louisiana*, 391 U.S. 145, 174–75 n.9 (1968) (Harlan, J., dissenting).

425. See Joint Resolution of Aug. 21, 1941, Pub. L. No. 77-243, 55 Stat. 665, 665.

426. See Proclamation No. 2524, 3 C.F.R. 272, 272 (1938–1943).

427. COOLEY, *supra* note 86.

apparently in effect by the date of publication. Cooley sometimes used the words "privilege" or "immunity" to describe fundamental constitutional rights. For example, under the heading "Right to Counsel," Cooley opened his discussion by saying, "Perhaps the most important privilege of the person accused of crime, connected with his trial, is to be defended by counsel."⁴²⁸ Cooley then proceeded to survey the history and development of the right. In another context, Cooley wrote that in "criminal cases . . . the doctrine that a constitutional privilege may be waived, must be true to a very limited extent only."⁴²⁹ He referred to a maxim of the common law "which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers even against the process of the law, except in a few specified cases."⁴³⁰ The maxim, he continued, that a man's home is his castle has been made a "part of our constitutional law."⁴³¹ But for Cooley, these usages were comparatively rare. He typically described liberties in state bills of rights as "rights," not as "privileges" or "immunities." So as Cooley shows, while people have often described basic constitutional rights as "privileges or immunities," it is equally true that often they have used the word "rights" instead.

Cooley's 1868 *Constitutional Limitations* seems not to have addressed the meaning of Section 1,⁴³² but he soon rejected incorporation,⁴³³ a view that is consistent with the *Slaughter-House Cases*.⁴³⁴ Cooley later did suggest that free speech was protected by the Due Process Clause.⁴³⁵

The Texas Constitution of 1866 and the Maryland Constitution of 1867 referred to "liberty of the press" as a "privilege."⁴³⁶ The

428. *Id.* at *330.

429. *Id.* at *182.

430. *Id.* at *299.

431. *Id.* at *299-300.

432. *See id.*

433. *See, e.g.,* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, bk. III, ch. 47, § 1937, at 658-59 (Thomas Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873).

434. *See supra* notes 7-16.

435. *See* Everett S. Brown, *The Contribution of Thomas M. Cooley to Bryce's "American Commonwealth,"* 31 MICH. L. REV. 346, 352-53 (1933).

436. AMAR, *supra* note 22, at 169. The Texas Constitution provided: "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." TEX. CONST. OF 1866, art. I, § 5, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 1784, 1785. The Maryland Constitution provided: "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write, and publish his sentiments on all

Alabama Constitution of 1865 provided that “no person within this State shall . . . be deprived of the inestimable *privilege* of worshiping God in the manner most agreeable to his own conscience.”⁴³⁷ The Georgia Constitution of 1868 described the right to counsel as a “privilege.”⁴³⁸ After listing a number of rights in its state bill of rights—not one of which was labeled as a “privilege”—the Oregon Constitution of 1857 provided that “[t]his enumeration of *rights and privileges* shall not be construed to impair or deny others retained by the people.”⁴³⁹ A number of other state constitutions, however, did not use the word “privilege” to describe one or more rights in their bills of rights. Instead, they typically used the word “right” or “liberty.”⁴⁴⁰ Finally, even if the reader were persuaded that most people if asked would probably have agreed that the liberties in the Bill of Rights were reasonably described as privileges or immunities of citizens of the United States (and probability is the most one can expect the evidence to show as to the original meaning of this clause and the other great clauses of the Constitution), that would not prove that other conceptions were not also included by some people—and perhaps by most.

CONCLUSION

When Justice Felix Frankfurter made it clear that his textual “common understanding” argument was aimed at the Due Process Clause and not the Privileges or Immunities Clause, he made a clever strategic move. Indeed, the Privileges or Immunities Clause should be an embarrassment for those advocates of original meaning who also insist that the application of the Bill of Rights to the states was a recent invention of the Supreme Court. Some, like Robert Bork,

subjects, being responsible for the abuse of that privilege.” MD. CONST. of 1867, Declaration of Rights, art. 40, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 888, 891.

437. ALA. CONST. of 1865, art. I, § 3, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 48, 48 (emphasis added).

438. GA. CONST. of 1868, art. I, § 7, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 412.

439. OR. CONST. of 1857, art. I, § 34, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 1492, 1493.

440. *See, e.g.*, DEL. CONST. of 1831, art. I, § 5 (referring to the “liberty” of a free press), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 289, 289; MINN. CONST. of 1857, art. I, §§ 4, 6, 10 (referring respectively to “the right of trial by jury,” the “right to a speedy and public trial,” and the “right” against unreasonable searches and seizures), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 317, at 1029, 1029.

have treated the clause as an "illegible inkblot."⁴⁴¹ In taking this position, Bork and others have followed a line of attack suggested by Professor Wallace Mendelson. Mendelson wrote a revised *Slaughter-House* opinion holding the clause non-justiciable and suggesting that it might be unconstitutionally vague.⁴⁴² In support of this novel approach, he wrote, "we are [not] aware of any common law, or other traditional usage, or any dictionary, that elucidates this inherently obscure and enigmatic terminology."⁴⁴³

History provides substantial support for a very different interpretation: the clause refers to constitutional rights of citizens of the United States and requires states to respect those rights. The most obvious place to look for such rights is in the Constitution. Our modern view that the Bill of Rights declares and protects the rights of citizens of the United States and the continuing tendency to describe the rights as privileges or immunities are very old and very tenacious indeed.

An effort to discover a former era's common usage can at best identify what the Privileges or Immunities Clause likely meant to an average reader at the time. I think it meant those constitutional rights of citizens that were recognized by the Federal Constitution. These rights include those in the Bill of Rights and undoubtedly some other privileges and immunities as well, such as the privilege of the writ of habeas corpus, the immunity against ex post facto laws, the privileges mentioned in Article IV, Section 2, as well as privileges added later such as equal protection. They would, no doubt, also include other rights less explicit in the text, such as the right to travel and to immunity from conviction unless the proof satisfies the jury beyond a reasonable doubt. The suppression of civil liberties from 1830–1860 in the interest of protecting slavery and silencing its critics provides substantial additional support for this conclusion. It explains why Republicans, who were targeted for criminal prosecution (or worse) in Southern states would be motivated to write Section 1 to protect fundamental Bill of Rights liberties.

Because of the number of people involved, the vast number of surviving sources, and the plastic nature of language, history can provide few certainties. It does seem fair to say, however, that the history shows that the use of the label "privileges or immunities of

441. BORK, *supra* note 11, at 166.

442. See Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HAST. CONST. L.Q. 437, 451 (1979).

443. *Id.* at 446.

citizens of the United States” was neither a “strange”⁴⁴⁴ nor “peculiar”⁴⁴⁵ way to refer to national constitutional liberties like those in the Bill of Rights.

Several factors limit our ability to discover common understanding. These include the very large number of people potentially sharing any common understanding in 1866–1868; the fact that most of the discussion of the Fourteenth Amendment did not focus on Section 1; the fact that most people, in any case, probably said nothing on the subject of what the privileges or immunities of citizens of the United States were; the fact that the words of many who did discuss the question have been lost; and the fact that at least some people would not have agreed on a single meaning—although most probably would have assented to the meaning suggested in this Article as at least part of the meaning encompassed by the clause.

As a result, we can hope, at most, to reconstruct a probable understanding. In light of the history and usage recited above, it seems likely that most people understood the privileges or immunities of citizens of the United States to include the rights in the Bill of Rights—rights that are positive rights that states can not abridge. It is also likely, as I believe, that more and clearer evidence can be mustered to support this reading than can be mustered for alternative claims.

Although it is extraordinarily difficult to show with any certainty how most people understood particular words more than 100 years ago, we can look at the comparative strength of rival hypotheses. For example, some scholars contend that the exclusive meaning of “no State shall . . . abridge the privileges or immunities of citizens of the United States” was that states could not discriminate based on race or caste as to certain rights under state law, which rights were nevertheless subject to repeal or alteration by the states.⁴⁴⁶ Such scholars cite a few statements by Congressmen that seem consistent

444. *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (suggesting that if the drafters of the Due Process Clause of the Fourteenth Amendment intended for the specific guarantees of the first eight amendments to apply to the states, they chose an “extraordinarily strange” way to accomplish that end), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

445. *Duncan v. Louisiana*, 391 U.S. 145, 174–75 n.9 (1968) (Harlan, J., dissenting) (noting that the broad language of Section 1 of the Fourteenth Amendment would have been a “peculiar” way to say that the Bill of Rights applied to the states).

446. For readings of the Amendment’s Privileges or Immunities Clause as an equality guarantee, see BERGER, *supra* note 76, at 30–69; CURRIE, *supra* note 85, at 342–52; NELSON, *supra* note 70, at 118. *But see* NELSON, *supra* note 70, at 123 (stating that historical analysis cannot settle the question whether the Fourteenth Amendment was meant to do more than guarantee equal treatment).

with their view.⁴⁴⁷ Devotees of original meaning could look for historic uses of the word “abridge,” “privilege,” and “immunity” that supported such a reading. They could look, that is, for people who read “abridge” to mean discriminate based on race or caste and for people who read “privileges or immunities of citizens of the United States” to mean certain rights that states choose to provide. They could then compare the evidence in support of the rival hypotheses and evaluate any evidence suggesting that one reading was exclusive of the other. Although we may not be able to prove common understanding, we can at least come to comparative conclusions. While use by judges, legislators, and lawyers is important, it cannot be sufficient if we take seriously the idea that we seek the *common* understanding.

Because the Supreme Court has breathed new life into the Privileges or Immunities Clause, it is natural for scholars and judges to give renewed attention to its meaning. If the original understanding of the words of a constitutional text is an important factor in determining its meaning, then an inquiry into the historic use of those words in the clause is unavoidable—but the inquiry brings new legal and methodological problems of its own.

If we look for common understanding and usage of the words “privileges or immunities of citizens of the United States,” certain conclusions are inescapable. The words were commonly used to describe rights such as those in the American Bill of Rights. The rights in the Federal Bill of Rights were often described as privileges or immunities. These liberties were often described as rights of Americans, of American citizens, or of citizens of the United States. There are a great many examples of such usage; the more one looks, the more one finds. The words “privileges,” “immunities,” and “rights” were often used interchangeably. These privileges and immunities were also typically described as rights and liberties.

Privileges or immunities are rights people enjoy because of a

447. See BERGER, *supra* note 76, at 30–69; CURRIE, *supra* note 85, at 345–51; NELSON, *supra* note 70, at 115–19. A number of Republicans believed that the Constitution forbade certain forms of irrational discrimination—such as those based on race, national origin, and probably origin in another state. Some seem to have found such a right in the structure of the Constitution; some in an analogy to the Privileges or Immunities Clause of Article IV, Section 2, which had been held to protect temporary visitors from out of state; some perhaps based on Article IV, Section 2 itself; and some thought an implicit constitutional right to equal protection provided such equality. See generally Curtis, *Resurrecting the Privileges or Immunities Clause*, *supra* note 22, at 44–64 (describing equality views by members of the 39th Congress). For detailed responses to arguments that the Bill of Rights does not apply against the states, see, for example, *id.* at 44–67.

special status. Thus, lawyers are entitled to the privileges and immunities of members of the bar. Similarly, the rights possessed by virtue of the Privileges or Immunities Clause of the Fourteenth Amendment are held by those with the status of citizens of the United States.⁴⁴⁸ The rights include those national rights listed or declared in the Constitution, and chief among these are the rights enumerated in the first eight amendments. Though one can argue that the First Amendment simply expresses a lack of federal power and declares no right, by 1866 most people thought the First Amendment both declared a right and denied federal power to abridge it.

The ratification of the Fourteenth Amendment with its Privileges or Immunities Clause suggests that rights in the Federal Bill of Rights were now to be positive rights that no state could abridge and that courts could enforce. By 1866, judicial review was an accepted American institution. Americans were quite familiar with the idea that constitutional provisions would be enforced by the courts. Other constitutional limits on the states prefaced by the words “no State shall” (such as the Contract Clause) had been enforced by the Supreme Court.⁴⁴⁹ So a constitutional provision that “no State shall . . . abridge the privileges or immunities of citizens of the United States” would be understood as setting enforceable limits on state power in favor of protecting those privileges and immunities.

What to make of these facts is a separate question. The Court has a long history of applying most substantive and procedural Bill of Rights guarantees to the states under the Due Process Clause, which protects all “persons.”⁴⁵⁰ A change to the Privileges or Immunities Clause could raise complex questions such as the status of corporate rights to free speech.⁴⁵¹ As a textual matter, full incorporation of all substantive and procedural guarantees seems harder to avoid under the Privileges or Immunities Clause together with the Due Process

448. Many of the rights are extended to all persons by the Due Process Clause.

449. See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 650 (1819).

450. See generally CURTIS, NO STATE SHALL ABRIDGE, *supra* note 22, at 197–211 (reciting the history of application of Bill of Rights liberties to the states). For a recent critique of the claim that no substantive protections for genuine persons can be found in the Due Process Clause, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315 *passim* (1999).

451. Cf. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (holding that the protections of Article IV apply only to natural persons and not to corporations), *overruled in part* by *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–87 (1839) (holding that the Privileges and Immunities Clause of Article IV, Section 2 does not extend to corporations).

Clause—if one focuses on original meaning. As a result, the Court would have to confront the application of the rights to a grand jury, to a civil jury, and to bear arms to the states and would have to weigh original meaning against reliance by states on contrary Supreme Court precedent.

The discovery that free speech is a privilege or immunity of citizens of the United States protected from state abridgement by the Fourteenth Amendment does not conclusively settle, for example, the scope of free speech. Americans will continue to argue about these questions as they have throughout their history. If it continues to resurrect the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court will have to decide how to evaluate the claims of those who hope to use the Privileges or Immunities Clause as a vehicle to revive (or further revive) *Lochner*-era jurisprudence. The idea that the Fourteenth Amendment would allow the federal judiciary to judge the rationality of all state laws was far from the common understanding of 1866–1868.

It may be that advocates of original meaning will find the evidence presented here (and elsewhere) unconvincing. If they do, they will advance our understanding of their method by explaining the basis for their conclusions and how the evidence falls short. One candid answer would be to concede that there is quite a lot of evidence, but to maintain that it is not “enough” or that it is insufficiently clear. In that case, if advocates of original meaning wish to be consistent, they may have to abandon a great many of their claims about original meaning where the evidence is less substantial. To embrace original meaning as a key constitutional method, to equate it to common understanding, to deny that applying any Bill of Rights guarantees to the states is supported by original meaning, and to ignore very substantial evidence to the contrary is not calculated to advance our understanding of the issue. Indeed, denial in the face of so much evidence may undermine the claim of original meaning to provide a clear way of interpreting the Constitution.

Still, critics may point to other interpretations. They will find it quite hard, however, to locate statements between 1866 and 1871 that explicitly say that fundamental liberties in the Bill of Rights were *not* to be protected by Section 1 or to find usage rejecting the idea that free speech, for example, was a basic privilege of citizens of the United States. There are many statements that explicitly prove just the opposite. If the existence of divergent interpretations is enough to refute a claim of original meaning, then very few claims can survive. If not, advocates must arrive at methods of weighing

conflicting evidence that go beyond “did” and “did not!”

When the understandings of so many people count, there will always be divergence. If unanimity is required, then original meaning does not mean much. Nor does it seem appropriate to deprive the Privileges or Immunities Clause of the Fourteenth Amendment of any significant meaning merely because it is difficult to determine all its possible meanings. As the Court noted in *Marbury v. Madison*, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”⁴⁵² Text, history, contemporary usage, original usage, constitutional structure, our ethical aspirations, and current precedent (to a significant degree) suggest that those rights set out in the Constitution itself naturally form the central meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.

452. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

