

Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67

BRYAN H. WILDENTHAL*

*For many years, the reigning view among scholars was that the Fourteenth Amendment was never understood—except by a few “eccentric” or “confused” figures—to nationalize (or incorporate) the entire Bill of Rights so as to apply it to the states. That modern, conventional, anti-incorporation view was developed primarily by Charles Fairman and Stanley Morrison starting in 1949, and defended by Raoul Berger from 1977 to 1997. The pro-incorporation view had been asserted in 1947 by Justice Hugo Black in his famous dissent in *Adamson v. California*. Scholars taking a revisionist, pro-incorporation position, in response to Fairman and Morrison, included William Winslow Crosskey in the 1950s and Alfred Avins in the 1960s. The pro-incorporation view was given powerful scholarly support by Michael Kent Curtis starting in 1980, joined by Akhil Reed Amar, Richard Aynes, Earl Maltz, and Stephen Halbrook, among others, in the 1990s.*

Some scholars and judges still question, or reject outright, the legitimacy of the selective incorporation doctrine by which the Supreme Court, in practical effect, by 1969, applied most of the Bill of Rights to the states.

* Associate Professor, Thomas Jefferson School of Law (TJSL), San Diego; J.D., Stanford Law School; Social Science Research Network (SSRN) Author Page, <http://ssrn.com/author=181791>; homepage, <http://members.cox.net/bryanw64/prof.html>. This Article was originally posted on SSRN in February 2007 and remains available for free download at <http://ssrn.com/abstract=963487> (for my other published scholarship, see the Author Page cited above). I am grateful to TJSL (and Deans Ken Vandeveld and Rudy Hasl) for a sabbatical and several summer stipends supporting the project of which this Article is a part, and to all my colleagues at TJSL for their collegial support. Michael Kent Curtis, Richard Aynes, George Thomas, Kurt Lash, Saul Cornell, Mark Scarberry, Tim Dowling, and Andrew Hyman provided helpful comments and criticism. Dale Carpenter kindly facilitated such feedback by blogging the Article on the Volokh Conspiracy. See *New Originalist Evidence for the Incorporation Debate*, Mar. 27, 2007, available at <http://volokh.com/posts/1175033211.shtml>. The usual caveats apply—any remaining mistakes are mine, and these scholars do not necessarily agree with much (if any) of what I say or how I say it.

I also thank my beloved partner, Ashish Agrawal, for all his love, support, and inspiration. He came into my life when I was already well along on this project, and has watched me struggle to continue and complete it. One sometimes searches for a personal connection to earlier times like those discussed here. I found one in a manifest showing the arrival in New York City of the steamship *Ericsson* from Bremen, Germany, via Southampton, England. On board was my father’s father’s father, Bernard Wildenthaler, age 19. The date was July 26, 1866—just a month after Congress proposed the Fourteenth Amendment.

They have also questioned the total incorporation doctrine espoused by Justice Black and others. But this Article demonstrates the truly shocking and inexcusable extent to which Fairman, Morrison, and especially Berger, mishandled the evidence and profoundly misunderstood the meaning of the Fourteenth Amendment. The extent of their scholarly malpractice has not been fully explored until now. Yet their works remain amazingly influential. Fairman's 1949 article has been viewed as a classic for more than half a century. It is one of the most-cited law review articles of all time. Berger's books remain widely cited and admired, especially in conservative circles.

*The research presented in this Article shows, surprisingly, that there is still a great deal new to say about the original understanding of the Amendment. Part I briefly reviews the doctrine of *Barron v. Baltimore*, the 1833 Supreme Court decision holding that the Bill of Rights did not originally apply to the states. Parts II to VI review in great depth the congressional debates over the Amendment, focusing on the crucial speeches of Rep. John A. Bingham (R-Ohio) and Sen. Jacob M. Howard (R-Mich.), the reactions of their colleagues in Congress, the contemporary press coverage, and the analysis of later generations of scholars. Part VII then reviews crucial aspects of the debates throughout the country during the state ratification process. The Article analyzes primary source materials never fully discussed before—indeed, barely quoted or mentioned in earlier scholarship. These include, most notably, a New York Times editorial published two days after the Amendment was introduced in the Senate (discussed in Part VI) and an essay by Samuel Smith Nicholas, a Kentucky state judge (discussed in Part VII.B). These materials, together with other evidence, suggest that nationalizing the Bill of Rights may have been widely understood during the ratification period as a key purpose of the Fourteenth Amendment.*

In addition to providing a descriptive reevaluation of the evidence, the Article offers several theoretical and analytical arguments and insights. The Introduction grounds the Article in the modern scholarly approach focusing on the original public meaning of constitutional provisions. Part VII.B, among other points, applies to the debates over the Amendment the insights of linguist George Lakoff on the framing of political issues. Part VII.C develops an argument about how we should weigh and evaluate the available record—and its silences—in seeking to illuminate the original understanding. Parts VIII and IX suggest how we might construe the text of the Amendment in light of the historical evidence. The Article concludes that the evidence is sufficient to support the inference that the Amendment was understood to nationalize the Bill of Rights. But it concedes the uneven and incomplete nature of the surviving evidence from 1866–67, and that more work is required to explore the early understanding of the Amendment in the years after 1867, and to analyze the ultimate significance of all the evidence.

TABLE OF CONTENTS

INTRODUCTION	1511
I. MADISON'S AMENDMENT AND THE <i>BARRON</i> DOCTRINE	1530
II. BINGHAM'S AMENDMENT	1532
III. BINGHAM, HALE, AND THE SCHOLARS.....	1540
IV. BINGHAM AND THE PRESS	1557
V. HOWARD'S AMENDMENT.....	1561
VI. HOWARD, THE PRESS, AND THE SCHOLARS.....	1564
VII. THE AMENDMENT AND THE STATES.....	1583
A. "Silence" or Implicit Contradictions <i>in the 1866 Congress?</i>	1585
B. "Silence" or Implicit Contradictions <i>During Ratification?</i>	1589
C. <i>Weighing the "Sounds of Silence"</i>	1609
VIII. TEXT AND BEYOND	1615
IX. THE DUAL-CITIZENSHIP THEORY	1620
CONCLUSION.....	1625

INTRODUCTION

This Article is part of a larger project on the history and meaning of the Fourteenth Amendment, begun in two articles published in 2000 in the *Ohio State Law Journal*. The first of those articles focused mainly on the evidence regarding the Amendment's "incorporation" of the Bill of Rights¹ to be

¹ The constitutional debate that is the focus of this project is commonly called the "incorporation debate," and the theory that the Fourteenth Amendment was and is properly understood to apply the Bill of Rights to the states is commonly called the "incorporation" theory or doctrine. It has, of course, nothing to do with business corporations. As my title indicates, I have come to prefer "nationalization" to describe what the Amendment is thought to accomplish in this regard, though I use both terms interchangeably. For the relevant text, see U.S. CONST. amend. XIV, § 1:

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

See also *id.* § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

For the sake of convenience, I use the following acronyms: AMERICAN NATIONAL BIOGRAPHY (John A. Garraty & Mark C. Carnes eds., Oxford Univ. Press, 24 vols., 1999) [hereinafter ANB] (differently formatted online version available at <http://www.anb.org>); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005 (H.R. Doc. 108–222, U.S.G.P.O., 2005) [hereinafter BDC] (differently formatted online version

found in and surrounding the *Slaughter-House Cases* and some other Supreme Court decisions of the 1870s.² The second focused mainly on the incorporation debate in the Supreme Court from 1880 to 1908, especially the crucial role of the elder Justice John Marshall Harlan.³ The entire project, which I plan to publish eventually in book form, will present a comprehensive study of the incorporation theory over the past 140-plus years.⁴

This Article focuses on a subject only briefly addressed in my earlier work: the evidence on incorporation in and surrounding the debates over the Fourteenth Amendment as proposed in 1866.⁵ Many readers, especially

available at <http://bioguide.congress.gov>); CONG. GLOBE (1833–73), available at <http://memory.loc.gov/ammem/amlaw/lwgc.html> [hereinafter CG] (citations followed by Congress and Session, then page number; e.g., “CG (39:1) 1090” for 39th Congress, 1st Session, p. 1090); DICTIONARY OF AMERICAN BIOGRAPHY (Allen Johnson & Dumas Malone eds., Scribners, originally published in 20 vols., 1928–36, republished in 10 vols., 1946) [hereinafter DAB] (citations preceded by 1946 volume number and followed by part and page number; for example, “4 DAB, *supra* note 1, at pt. 1, 347” for vol. 4, 1946 ed., part 1, p. 347). The *Congressional Globe* does not provide adequate information on the full names, states, and party affiliations of members of Congress. To the extent such information (along with dates of service) is not provided in sources otherwise cited, I have relied on BDC, *supra*, and GUIDE TO U.S. ELECTIONS (CQ Press, 2 vols., 5th ed. 2005) [hereinafter ELECTIONS].

² Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000) [hereinafter Wildenthal, *Lost Compromise* (2000)]; see also, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); Bryan H. Wildenthal, *How I Learned to Stop Worrying and Love the Slaughter-House Cases: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241 (2001) [hereinafter Wildenthal, *How I Learned* (2001)].

³ Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000) [hereinafter Wildenthal, *Road to Twining* (2000)].

⁴ For a working draft of the Introduction and Chapters One and Two, of what is planned as a twenty-chapter book, see <http://ssrn.com/abstract=905621>. Chapter Two will be revised to correspond to parts of this Article.

⁵ The Amendment was ratified in July 1868. See 15 Stat. 708–11 (July 28, 1868) (statement of Secretary of State William H. Seward, certifying ratification). But evidence (even pre-ratification) dating from 1868—even, arguably, most evidence dating from 1867—has little direct bearing on the original understanding (strictly speaking), since it postdates Congress’s 1866 debates on proposing the Amendment, the 1866 elections largely fought over the Amendment, and the early ratifications by many states. It is thus more appropriate to consider most material from 1867 and 1868 together with all of the early post-ratification evidence up to 1873. I will do so in forthcoming articles. But it is appropriate—indeed, unavoidable—to consider some evidence from 1867 (and later) in any coherent discussion of the original understanding. See, e.g., *infra* Parts VIII–IX (discussing some evidence from the 1870s). George Thomas, in his thoughtful response

professors of constitutional law, will immediately groan. They may well ask what more there could possibly be to say at this late date. But as this Article seeks to demonstrate, there is a great deal more that needs to be said.

True, the incorporation debate is, to put it mildly, well-worn scholarly ground. This Article will not try to survey it in detail. Suffice it to say that from 1949 to the 1980s, the reigning, though hotly contested, view among scholars was that the Fourteenth Amendment had never been understood—except by a few “eccentric” or “confused” figures⁶—to apply the entire Bill of Rights to the states. This modern, conventional view was developed primarily by Charles Fairman, Stanley Morrison, and Raoul Berger.⁷ A revisionist, pro-incorporation view began to take hold in the 1980s, thanks largely to the work of Michael Kent Curtis. The revisionist view is rooted in the historical research of Justice Hugo L. Black. His 1947 dissenting opinion in *Adamson v. California* triggered the counterattack of the modern conventional scholars, most notably Fairman and Morrison in articles

to this Article, understandably chooses to delve into some post-1867 material. See George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1649–56 (2007) [hereinafter Thomas, *Riddle* (2007)]; see also Bryan H. Wildenthal, *A Reply to Professor Thomas*, 68 OHIO ST. L.J. 1659 (2007) [hereinafter Wildenthal, *Reply* (2007)]. While I respond in this Article and my Reply to some of Thomas’s post-1867 points, I generally leave that to future articles. See also *infra* note 57.

⁶ See, e.g., *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring) (dismissing the elder Justice Harlan, who repeatedly urged the incorporationist view of the Amendment, as “an eccentric exception”). “Confused” refers to the various pejorative labels repeatedly hurled at Rep. John A. Bingham (R-Ohio) and Sen. Jacob M. Howard (R-Mich.). See *infra* Parts II, VI.

⁷ See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) [hereinafter Fairman, *Original* (1949)]; CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE, at 1260–1388 (Macmillan 1971) (vol. 6 of the OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES) [hereinafter FAIRMAN, RECONSTRUCTION (1971)]; CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART TWO, at 132–289 (Macmillan 1987) (vol. 7 of the HOLMES DEVISE HISTORY); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Harv. Univ. Press 1977) [hereinafter BERGER, GOVERNMENT (1977)]; *id.* (Liberty Fund, 2d ed. 1997) [hereinafter BERGER, GOVERNMENT (1997)]; RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (Univ. Okla. Press 1989) [hereinafter BERGER, FOURTEENTH (1989)]; Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) [hereinafter Berger, *Nine-Lived Cat* (1981)].

published in 1949.⁸ Black's view was defended during the 1950s by William Winslow Crosskey and by Alfred Avins in the 1960s,⁹ and then attacked vociferously by Berger starting in 1977. But it was not until the work of Curtis starting in 1980, joined later and most notably by Akhil Reed Amar, Richard Aynes, Earl Maltz, and Stephen Halbrook,¹⁰ that the revisionist view began to hold its own.

⁸ See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., joined by Douglas, J., dissenting); see also *id.* at 123 (Murphy, J., joined by Rutledge, J., dissenting) (“substantial[ly] agree[ing]” with Black); Fairman, *Original* (1949), *supra* note 7; Morrison (1949), *supra* note 7.

⁹ See 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1083–1175*, 1381 n.11 (Univ. Chicago Press, 2 vols., 1953) [hereinafter CROSSKEY, *POLITICS* (1953)]; William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 2–119 (1954) [hereinafter Crosskey, *Fairman* (1954)]; Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) [hereinafter Avins, *Incorporation* (1968)].

¹⁰ See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (Duke Univ. Press 1986) [hereinafter CURTIS, *NO STATE* (1986)]; MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 357–83* (Duke Univ. Press 2000) [hereinafter CURTIS, *FREE SPEECH* (2000)]; Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter Curtis, *Bill of Rights* (1980)]; Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter Curtis, *Further Adventures* (1982)]; 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* (1996)]; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000) [hereinafter Curtis, *Historical Linguistics* (2000)]; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 135–307* (Yale Univ. Press 1998) [hereinafter AMAR, *BILL OF RIGHTS* (1998)]; AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY 385–92* (Random House 2005) [hereinafter AMAR, *AMERICA’S CONSTITUTION* (2005)]; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Bill of Rights* (1992)]; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) [hereinafter Aynes, *Bingham* (1993)]; Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994) [hereinafter Aynes, *Constricting* (1994)]; Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995) [hereinafter Aynes, *Fairman* (1995)]; Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment* [hereinafter Aynes, *Unintended* (2000)], in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 110 (David E. Kyvig ed., Univ. Ga. Press 2000); Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell*

Few scholars would dispute today that the modern conventional account has, at the very least, been severely challenged. Many have been persuaded that Black, and the “eccentric” Justice Harlan the elder, were right all along. But it seems that some people, both scholars and others, continue to doubt the legitimacy of the decisions by which the Supreme Court has, in practical effect, applied almost all of the Bill of Rights to the states.¹¹ It seems they have not yet appreciated the extent to which the conventional view has been undermined.

One also worries that the Supreme Court Justices themselves—not always known for carefully following the twists and turns of legal scholarship, and never having fully embraced the incorporation theory in any majority opinion—may not realize how thorough and convincing the revisionist scholarship has been. Justice Clarence Thomas, on the other hand, has shown that he *does* pay attention to legal scholarship. He has cited some revisionist works on the Fourteenth Amendment. He is also, however, the only current member of the Court to openly question a significant aspect of the incorporation doctrine. Adopting a position promoted by some scholars in recent years, Justice Thomas has argued that “it makes little sense to incorporate the Establishment [of Religion] Clause” of the First Amendment.¹²

Us About Its Interpretation, 39 AKRON L. REV. 289 (2006) [hereinafter Aynes, *Unintended* (2006)] (revising and updating Aynes, *Unintended* (2000), *supra*); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 113–18 (Univ. Press Kan. 1990) [hereinafter MALTZ, CIVIL RIGHTS (1990)]; STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 107–53 (Independent Institute, rev. 2d ed. 2000; orig. pub. Univ. New Mexico Press, 1984) [hereinafter HALBROOK, ARMED (1984)]; STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (Praeger 1998) [hereinafter HALBROOK, FREEDMEN (1998)].

¹¹ See Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1077 n.91 (collecting decisions so holding).

¹² *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment); see also *id.* at 49–51; *Cutter v. Wilkinson*, 544 U.S. 709, 728 n.3 (2005) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring). Incorporating the Establishment Clause does raise unique difficulties. See, e.g., Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1125–30 (touching on the issue); Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1511–12 (same). I will address the issue in more depth in a future article. On Justice Thomas’s attention to incorporation scholarship, see, for example, *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., joined by Rehnquist, C.J., dissenting) (citing, e.g., CROSSKEY, *POLITICS* (1953), *supra* note 9; CURTIS, *NO STATE* (1986), *supra* note 10; BERGER, *GOVERNMENT* (1997), *supra* note 7); *Elk Grove*, 542 U.S. at 50 (Thomas, J., concurring in the judgment) (citing, e.g., AMAR, *BILL OF RIGHTS* (1998), *supra* note 10).

Justice Thomas is not the only currently serving federal judge who has questioned at least some aspects of the incorporation doctrine. Judge Janice Rogers Brown—controversially appointed by President Bush in 2005 to the U.S. Court of Appeals for the District of Columbia Circuit—criticized the doctrine in a 1999 speech while serving on the California Supreme Court. She described the historical support for the theory as “sketchy” and the arguments against it “overwhelming.”¹³ She backtracked somewhat at her Senate confirmation hearing, suggesting that her later reading on the Reconstruction debates had caused her to rethink her views and accept that there may be “argument[s] on both sides.”¹⁴

What really surprised me, when I took a careful look at the evidence and scholarship on the original and early understandings between 1866 and 1873, was how much more remained to be said. Even after publishing my articles in 2000—which, as noted, focused mainly on the period from 1873 to 1908—I remained for some time under the impression that the revisionist scholars, building on the conventional studies, had pretty thoroughly raked over all the earlier evidence. I had intended the early chapters of my book

¹³ David G. Savage, *Bush Appeals Court Choice Under Fire*, L.A. TIMES, Oct. 23, 2003, at A13; see also Richard B. Schmitt & Nick Anderson, *Bush to Revive Failed Judicial Nominations*, L.A. TIMES, Dec. 24, 2004, at A1; David D. Kirkpatrick, *Seeing Slavery in Liberalism: Janice Rogers Brown*, N.Y. TIMES, June 9, 2005, at A1; *Roll-Call Vote on Justice Brown*, N.Y. TIMES, June 9, 2005, at A25 (56–43 confirmation vote).

¹⁴ Kenneth Katkin, “*Incorporation*” of the Criminal Procedure Amendments: *The View from the States*, 84 NEB. L. REV. 397, 398 n.5 (2005) (quoting colloquy between Brown and Sen. Patrick J. Leahy, D-Vt., at 2003 Judiciary Committee hearing). Another controversial Bush appointee, Judge Jay S. Bybee of the U.S. Court of Appeals for the Ninth Circuit, also questioned the incorporation doctrine before joining the federal bench. See Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1545–46, 1577–1616 (1995). Bybee is more famous as the author of the most infamous Bush Administration “torture memo,” written in 2002 in his capacity as head of the Justice Department’s Office of Legal Counsel, but not disclosed until after his judicial confirmation in 2003. See Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 172–73, 213–14 (Karen J. Greenberg & Joshua Dratel eds., Cambridge Univ. Press 2005) (advising the White House, *inter alia*, that “torture” should be narrowly defined to include only certain “extreme acts” such as those inflicting pain “equivalent in intensity to . . . organ failure . . . or even death,” and that federal laws forbidding torture might be unconstitutional to the extent they allegedly infringed on “the President’s authority to conduct war”); see also, e.g., Kathleen Clark & Julie Mertus, Editorial, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3; Gail Gibson, *Smooth Sailing Into Judgeship*, BALTIMORE SUN, June 26, 2004, at 4A; Henry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES, Mar. 14, 2003, Part 2 (California Metro), at 6.

project, including what is covered by this Article, to be fairly brief syntheses of what other scholars had written, to be gotten out of the way so I could move on to the main story.

But the more I studied the 1866–73 period, the more I realized I was going to have to add to—not merely synthesize—the prior scholarship. I found original source materials that have never previously been adequately analyzed in published scholarship—notably, for example, a *New York Times* editorial published two days after the Fourteenth Amendment was introduced in the Senate and an essay published during 1866–67 by Samuel S. Nicholas, a Kentucky jurist. Both of those have been briefly cited before, but neither has yet been fully quoted or sufficiently discussed.¹⁵ I found, on point after point, that even where the revisionists had done a commendable job (as far as they went) in criticizing the conventional scholarship, they had not fully deconstructed it. Lest I sound one-sided, I should note that I have also found points on which the revisionist scholars themselves erred or overstated their position. Despite my deep respect for their work—and my personal friendship with some of them, including Curtis and Aynes—I do not hesitate to disagree and criticize and follow the evidence wherever it leads. But the flaws of the revisionist scholarship are very minor compared to those of the conventional studies.

Every scholar has normative beliefs and commitments. Readers are entitled to know mine. My studies of law and history strongly incline me to sympathize with the most progressive goals of the Reconstruction Republicans. Their goals centered on overcoming the monstrous legacy of slavery, enhancing equal rights and liberty under law, and reuniting a nation torn to bloody shreds by civil war. But they did not favor reunion at any cost—only reunion of a nation that would finally, in the words of a later prophet, “rise up and live out the true meaning of its creed.”¹⁶ My studies

¹⁵ See *infra* Parts VI, VII.B.

¹⁶ The quotation is from Martin Luther King, Jr.’s “I Have a Dream” speech at the March on Washington, August 28, 1963, available at <http://www.presidentialacademy.org/dream.html>—arguably the greatest speech in American history since President Lincoln’s Gettysburg Address a century before. Both speeches dealt with the same basic problem: uniting, in freedom, a nation torn asunder by slavery and its legacy. I hasten to add that I do not (at least I try not to) unrealistically idealize the Republicans of the 1860s and 70s. I am fully aware that only a minority of them—most of the many Black Republicans who entered politics in that era, and perhaps a handful of White Republicans—fully embraced complete racial equality. But I think they adopted, in a grand and noble exercise of cognitive dissonance, constitutional amendments that require full racial equality. And I am painfully aware that most Republicans did eventually accept national reunion on far less than ideal terms. But many of them fought as long and as hard as they could against the pervasively racist and reactionary views of too many Americans of that time, both in the North and the South. As many scholars have chronicled, Reconstruction was largely a failure—but a noble failure, and also a partial

have persuaded me that their goals included, as both a means and an end, the idea of nationalizing the Bill of Rights. How well or widely this idea was shared and understood—and the extent to which it should be part of legitimate modern interpretations of the Fourteenth Amendment—are, however, different, complex, and more difficult questions. But I candidly say that I think it is a morally and intellectually beautiful idea, and represents a profoundly important achievement of justice and human rights. I think it should be viewed as a central theme of American history. But I have tried to clearly separate my normative views and arguments from my objective presentation and analysis of the evidence. Readers and critics will judge whether I have succeeded.

This Article covers, for the most part, only 1866–67. There is much more to be said about the 1867–73 period. Both the conventional and the revisionist scholars were less thorough in exploring the latter period than they were in rehashing the 1866–67 debates. I will present my studies of 1867–73 in forthcoming articles.¹⁷

My studies, in any event, demonstrate the truly shocking and inexcusable extent to which Fairman, Morrison, and especially Berger mishandled the evidence and profoundly misunderstood the meaning of the Fourteenth Amendment—and clouded the understanding of innumerable readers of their works. This makes it especially disturbing that their works remain amazingly influential, even decades after they were largely debunked by other scholars. Fairman's 1949 article, in particular, has been viewed as a "classic," even "legendary," for more than half a century now—one of the most-cited law review articles of at least two generations.¹⁸ But, as this Article will demonstrate, the full extent of their scholarly malpractice has not yet been adequately explored.

success in many ways. For example, it wrote some things into the Constitution that turned out to have enduring value.

I should note here that I capitalize "Black," "White," and other terms used to designate human social groups according to racial, ethnic, religious, political, cultural, or geographic criteria for reasons suggested by Kimberlé Williams Crenshaw in *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Most "Whites" are not literally white, of course, nor most "Blacks" black. While such terms may have some physically visible basis, they are primarily social and cultural constructs, much like such terms as "African," "Hispanic," "Asian," or, for that matter, "American" or "Republican."

¹⁷ See *supra* note 5.

¹⁸ See, e.g., Aynes, *Fairman* (1995), *supra* note 10, at 1229 (noting that, as of 1985, it had received among the most citations of any law review article of the previous forty years); Richard L. Aynes, *Charles Fairman*, 7 ANB, *supra* note 1, at 689 [hereinafter Aynes, *Fairman* (ANB)] (same); BERGER, *FOURTEENTH* (1989), *supra* note 7, at 141 (praising the article). For the earlier scholarship debunking Fairman, Morrison, and Berger, see generally the works cited *supra* note 10.

Berger, like Fairman, was a liberal New Dealer in his earlier career.¹⁹ Yet Berger has emerged as an unlikely scholarly icon for many right-wing writers. He has been described as “one of the great intellectual heroes of American conservatism.”²⁰

William Graves, an Oklahoma state legislator and avowedly conservative Christian, sternly rejected the incorporation doctrine in a 2001 law review article as “turning the Bill of Rights on its head.”²¹ Citing Fairman and Berger with approval,²² Graves falsely asserted that, during the congressional debates on the Fourteenth Amendment and the 1866 Civil Rights Act, “no mention was made of the Bill of Rights.”²³ Ironically, John A. Bingham—the

¹⁹ On Berger, see Forrest McDonald, *Foreword* [hereinafter McDonald, *Foreword* (1997)] to BERGER, GOVERNMENT (1997), *supra* note 7, at xv, xvi–xvii (noting that some of Berger’s earlier scholarly work pleased liberals, and describing Berger as a “liberal” who worked for the Franklin D. Roosevelt and Truman administrations); BERGER, GOVERNMENT (1997), *supra* note 7, at 336 (Berger describing his “political principles” as those of “the moderate left of the Democratic party”); Douglas Martin, *Obituary: Raoul Berger, 99, an Expert on Constitution in 2nd Career*, N.Y. TIMES, Sep. 28, 2000, at C27 [hereinafter Martin, *Berger Obituary* (2000)] (generally same). On Fairman, see MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA, at xv (La. St. Univ. Press 2003) (describing Fairman as “an ardent supporter of the New Deal”); Aynes, *Fairman* (ANB), *supra* note 18, at 689 (noting Fairman’s “lifetime friendship” with Felix Frankfurter); *id.* at 690 (describing Frankfurter as Fairman’s “mentor” and noting that Fairman supported constitutional doctrines enabling “the New Deal Supreme Court” to uphold government regulations of business); Michael E. Parrish, *Felix Frankfurter*, 8 ANB, *supra* note 1, at 375–77 [hereinafter Parrish, *Frankfurter* (ANB)] (discussing Frankfurter’s deep ties to Roosevelt’s New Deal policies).

²⁰ Gary McDowell, *The True Constitutionalist*, TIMES LITERARY SUPP., May 25, 2001, at 15, *quoted in* MARK KOZLOWSKI, THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS 31, 229 n.98 (New York Univ. Press 2003).

²¹ William D. (Bill) Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U. L. REV. 513, 544 (2001); *see also id.* at 513 n.* (describing the author as “an advocate of the pro-life and homeschool causes” and of “allowing voluntary prayer . . . in public schools”); *id.* at 562 (criticizing certain Supreme Court decisions for waging an “all-out assault on Christianity and morality” and on “Christian sexual mores”). He also asserted that the incorporation theory, among other problems he identified in American jurisprudence, reflects what he viewed as the malign influence of Charles Darwin’s theory of biological evolution, and that the Fourteenth Amendment “was not legally enacted” in any event. *See id.* at 514–22, 541 n.210, 567–68.

²² *Id.* at 543–44 & nn.220–23, 226, 230 & 234.

²³ *Id.* at 543 & n.223; *see generally id.* at 541–44. Though he erroneously cited BERGER, GOVERNMENT (1977), *supra* note 7, at 23, for this false claim, neither Berger nor Fairman—nor any responsible scholar to my knowledge—has ever made such a claim.

father of the Fourteenth Amendment and a key original advocate of nationalizing the Bill of Rights—was himself a devout Christian whose religious beliefs deeply influenced his political and legal views. But, as Graves—and Justice Thomas—might want to consider, Bingham expressly included the First Amendment’s prohibition of any “establishment of religion” among the Bill of Rights guarantees applicable to the states.²⁴

In 1999, an editor of the *Texas Law Review*, citing Fairman and Morrison with approval,²⁵ similarly dismissed the doctrine. He offered the different (but equally false) assertion that “no one recognize[d] th[e] fact [of possible incorporation via the Amendment] until Justice Black described it in . . . *Adamson*.”²⁶

Among serious academic scholars today, the incorporation theory continues to draw skepticism—in some cases outright rejection—from across the philosophical spectrum. A detailed survey would be tedious, but following are a few highlights.

Stephen Presser, who holds a chair at Northwestern University Law School endowed by and named for Berger, made it clear in a 2002 article that he embraces Berger’s anti-incorporation views. Presser thinks “the Supreme Court’s opinions that incorporate the Bill of Rights into the Fourteenth Amendment are judicial usurpations.”²⁷

Charles Rice, professor emeritus at Notre Dame Law School, likewise rejected the doctrine in a 2003 article, citing Berger and Fairman.²⁸

Donald Dripps, a scholar of constitutional and criminal law now at the University of San Diego Law School, set forth in a 1996 article his reasons for rejecting incorporation, especially the version propounded by Amar.²⁹ On

²⁴ CG (42:1) app. 84 (Mar. 31, 1871) (Rep. Bingham, R-Ohio); *see also supra* p. 1515 & n.12; *see generally infra* Parts II–III.

²⁵ David DeGroot, *Book Review: “Freedom” and the First Amendment*, 3 TEX. REV. L. & POL. 323, 341 & nn.63–65 (1999) (reviewing DAVID LOWENTHAL, NO LIBERTY FOR LICENSE: THE FORGOTTEN LOGIC OF THE FIRST AMENDMENT (Spence Publishing 1997)); *see also id.* at 323 n.* (identifying DeGroot as an Articles Editor of the *Texas Law Review*, J.D. expected in 2000).

²⁶ *Id.* at 340 (citing LOWENTHAL (1997), *supra* note 25, at 228, and referring to *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting)). DeGroot did not cite Fairman, Morrison, or any other authority for this false claim, which no responsible scholar (to my knowledge) has ever made.

²⁷ Stephen B. Presser, *Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall*, 43 WM. & MARY L. REV. 1495, 1497 (2002).

²⁸ Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George’s Law and Culture*, 1 AVE MARIA L. REV. 81, 89 & n.43 (2003).

²⁹ Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559, 1564, 1571–92 (1996).

at least one point, Dripps fell prey to a key error about the original understanding propagated by Fairman and Berger.³⁰

In 2001, George Thomas, a scholar of constitutional and criminal law at the Rutgers (Newark) Center for Law and Justice, published one of the most thoughtful and interesting articles in recent years on the incorporation problem—and, of course, he graciously and thoughtfully responds to my current Article in this Issue of the *Ohio State Law Journal*.³¹ Thomas's 2001 article did not call for overruling the effective substance of Supreme Court decisions applying most Bill of Rights guarantees to the states. Indeed, his main point was to argue that enforcement of the Bill of Rights against *federal* government abuses has been unduly weakened, and to urge steps to remedy that problem.³² But as an essential part of his argument, Thomas broadly rejected the theory that the Fourteenth Amendment substantively nationalized the Bill of Rights.³³

In 2002, Richard Uviller and William Merkel published a book reexamining the Second Amendment. They generally argued that its guarantee of the right “to keep and bear arms” cannot be divorced, in historical context, from its reference to a “well regulated militia,” thus undermining any modern interpretation of that Amendment as protecting an individual right to bear arms.³⁴ Their work has been criticized by scholars and gun-rights activists who favor the individual-right view of the Second Amendment.³⁵ They also rejected the idea that the Fourteenth Amendment applied to the states any individual right to bear arms, relying heavily (indeed, exclusively) on Berger's scholarship to support that position. They discussed the incorporationist views of Amar, Halbrook, and a few other

³⁰ See *id.* at 1577 n.107 (mistakenly asserting that Rep. John A. Bingham, R-Ohio, misunderstood *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)); see also *infra* Part III (pp. 1540–43 & n.115) (discussing the origins of that fallacy and a related problem in Dripps's argument).

³¹ George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) [hereinafter Thomas, *When* (2001)]; Thomas, *Riddle* (2007), *supra* note 5.

³² See Thomas, *When* (2001), *supra* note 31, at 145–80, 216–31.

³³ See *id.* at 180–216. Thomas now openmindedly reconsiders several significant aspects of his arguments in 2001. See Thomas, *Riddle* (2007), *supra* note 5, at 1631–32, 1656–57.

³⁴ H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (Duke Univ. Press 2002) [hereinafter UVILLER & MERKEL, *MILITIA* (2002)].

³⁵ For one critical scholarly response, see Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004) [hereinafter Barnett, *Was the Right* (2004)] (reviewing UVILLER & MERKEL, *MILITIA* (2002), *supra* note 34).

scholars (only in regard to the Second Amendment, for the most part). But they otherwise completely ignored the extensive scholarship rebutting Berger's views and generally refuting the anti-incorporation thesis.³⁶

Uviller and Merkel were criticized for their inadequate treatment of the revisionist scholarship on incorporation.³⁷ They conceded in a 2004 response that "the theme . . . perhaps most weakly argued in . . . [their 2002 book was] the effect of the Reconstruction Amendments—and in particular, the Privileges and Immunities Clause of the Fourteenth on the meaning of the Second Amendment."³⁸ But they persisted in strongly questioning the theory of incorporation via that clause, again citing Berger as their only authority.³⁹

In 2006, Merkel—now a professor at Washburn University Law School, writing by himself—strongly rejected what he termed "sub silentio total incorporation via the Privileges and Immunities Clause."⁴⁰ "The problem with this argument," he declared, "as Charles Fairman showed nearly sixty years ago, and as Raoul Berger demonstrated again and again until his 95th year, is that it simply cannot accommodate a floodtide of countervailing evidence"⁴¹ By this time Merkel did at least cite (in addition to Amar)

³⁶ See UVILLER & MERKEL, *MILITIA* (2002), *supra* note 34, at 14–18, 197–209. For their reliance on Berger (the only anti-incorporationist scholar they cited), see *id.* at 200, 205–06, 235 n.14, 313–15 nn.120, 122–23, 129 & 131 (citing primarily BERGER, *GOVERNMENT* (1997), *supra* note 7). They did not refer, for example, to the work of Fairman, Crosskey, Curtis, Aynes, or Maltz. While criticizing Amar's views on incorporation of the Second Amendment specifically, and giving ample space to Berger's criticisms of Amar, they essentially ignored the thorough refutations by Amar and other scholars of Berger's and Fairman's work on incorporation generally. See *id.* at 202–06, 314 n.129; see also *id.* at 202, 314 nn.124 & 126 (citing, in addition to Amar and Halbrook, William W. Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991)).

³⁷ See, e.g., Barnett, *Was the Right* (2004), *supra* note 35, at 266–69; Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel*, *The Militia and the Right to Arms*, 12 WM. & MARY BILL RTS. J. 315, 325–30 (2004). Uviller and Merkel also relied, in regard to the separate issue of early American gun ownership, on the now-discredited work of historian Michael Bellesiles. See Barnett, *Was the Right* (2004), *supra* note 35, at 267–68 n.166.

³⁸ H. Richard Uviller & William G. Merkel, *The Authors' Reply to Commentaries on, and Criticisms of The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*, 12 WM. & MARY BILL RTS. J. 357 (2004).

³⁹ See *id.* at 361–62 & n.22 (citing BERGER, *GOVERNMENT* (1997), *supra* note 7).

⁴⁰ William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 691 (2006) [hereinafter Merkel, *Cultural* (2006)]; see also *id.* at 689–92.

⁴¹ *Id.* at 691; see also *id.* at 691 nn.87–90 (citing, *inter alia*, Fairman, *Original* (1949), *supra* note 7; BERGER, *GOVERNMENT* (1997), *supra* note 7).

incorporationist works by Crosskey, Curtis, and Aynes, as well as Justice Black's *Adamson* dissent.⁴² How carefully he studied any of their writings is, however, another question. For example, he cited Berger's discussion (in a 1981 article) of the 1876 debate on the so-called "Blaine Amendment" (copying Berger's misdating of it to 1875), without even mentioning the later discussions by Curtis and Amar (and two other scholars he did not cite) disputing the significance of that debate.⁴³

Merkel unwisely relied on that same Berger article to erroneously assert that none of the opinions in *Slaughter-House*—not even Justice Joseph P. Bradley's dissent, which Merkel specifically referenced—"took up any claim that the Bill of Rights applied against the states."⁴⁴ In fact, as discussed by

⁴² *Id.* at 691 & n.89 (citing, *inter alia*, *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting); Crosskey, *Fairman* (1954), *supra* note 9; CURTIS, NO STATE (1986), *supra* note 10; Aynes, *Bingham* (1993), *supra* note 10); *see also id.* at 689–90 (citing and discussing AMAR, BILL OF RIGHTS (1998), *supra* note 10).

⁴³ *Id.* at 692 (citing Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 464). The Blaine Amendment debate occurred in August 1876, toward the end of Reconstruction, more than ten years after the Fourteenth Amendment emerged from Congress. It is thus, at face value, doubtful what weight it deserves in construing the original understanding of the Amendment, though it certainly tends to cut against the incorporation theory. For discussions suggesting it deserves little weight, *see*, for example, CURTIS, NO STATE (1986), *supra* note 10, at 169–70; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1145–50 (1995); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 254–55 n.*; Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1125–30, 1134–35.

Another "principal problem" Merkel identified with the incorporation theory was that some states in 1866–68 were not in compliance with all Bill of Rights guarantees, most notably with regard to grand jury indictment. While citing Fairman for this argument—which does raise interesting problems, *see infra* Part VII.B (pp. 1590 & note 265, pp. 1606–07)—Merkel did not refer to the discussions of it by (among others) three of the scholars he cited. *See* Merkel, *Cultural* (2006), *supra* note 40, at 691 & n.90 (citing Fairman, *Original* (1949), *supra* note 7). *But see, e.g.*, Crosskey, *Fairman* (1954), *supra* note 9, at 84–88, 111–16; CURTIS, NO STATE (1986), *supra* note 10, at 155–56, 185; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 198–206; Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1475–80.

⁴⁴ Merkel, *Cultural* (2006), *supra* note 40, at 691; *see also id.* at 691–92 & n.91 (citing Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 441); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Berger cannot bear full blame for Merkel's error. While Berger's discussion on the cited page was incomplete and misleading, he (unlike Merkel) did not deny the incorporationist character of Bradley's Supreme Court dissent. Berger simply did not mention Bradley's dissent. He only discussed Justice Stephen J. Field's dissent and Bradley's 1870 opinion in a related case. *See Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408) (Bradley, Circuit Justice). Bradley's 1870 opinion, as Berger and Merkel correctly noted, did not clearly embrace incorporation—although, contrary to their implication, he did not reject it either. One cannot be too

Black in *Adamson*—and by many scholars, including Curtis and Amar—Bradley, joined by Justice Noah H. Swayne, clearly embraced in *Slaughter-House* the idea that the Fourteenth Amendment incorporates the Bill of Rights against the states.⁴⁵

Concluding his 2006 discussion, Merkel wondered whether “anyone besides myself is interested in revisiting the . . . Fairman/W.W. Crosskey debates” and suggested that “[p]erhaps I should content myself with declaring victory on behalf of Fairman and Frankfurter and leaving the field in the hands of the routed but numerous, committed, and undaunted forces of the total incorporationists.”⁴⁶ This Article doubtless answers his first question. As for which academic army will emerge victorious on the field of scholarly battle, he may want—as the Scots conveyed to proud King Edward in 1314—“tae think again.”⁴⁷

In 1997, the Liberty Fund republished Berger’s landmark 1977 book, *Government by Judiciary* (originally issued by Harvard University Press), “liberally sprinkled with fresh addenda”⁴⁸ in which Berger responded to his critics on various points. Forrest McDonald, an historian now retired from the University of Alabama, wrote a laudatory foreword to the new edition, reiterating his view that “Berger defeated his critics ‘at every turn.’”⁴⁹

careful when relying on Berger. He once referred to Justice Black’s “solitary dissent” in *Adamson v. California*, 332 U.S. 46 (1947). See Raoul Berger, *Incorporation of the Bill of Rights: A Response to Michael Zuckert*, 26 GA. L. REV. 1, 17 & n.113 (1991) [hereinafter Berger, *Response to Zuckert* (1991)]. And Berger claimed once that Bradley “stood alone” in his *Slaughter-House* dissent. See BERGER, *GOVERNMENT* (1997), *supra* note 7, at 67. But see *supra* note 8 (Black joined in *Adamson*, in relevant substance, by three other justices); *infra* note 45 (Bradley joined unreservedly by Swayne in *Slaughter-House*).

⁴⁵ See *Adamson*, 332 U.S. at 75 n.6, 120–21 (Black, J., dissenting) (quoting and discussing *Slaughter-House*, 83 U.S. (16 Wall.) at 118–19, 124 (Bradley, J., joined by Swayne, J., dissenting)); see also, e.g., CURTIS, *NO STATE* (1986), *supra* note 10, at 174–77; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 176, 209–14, 226–27; Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1102–05. Merkel also stated that “it does not appear from the published opinions [in *Slaughter-House*] that plaintiffs’ briefs made such a [pro-incorporation] claim.” Merkel, *Cultural* (2006), *supra* note 40, at 691. In fact they did, at several points, even though the issue was not germane. See Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1106–11.

⁴⁶ Merkel, *Cultural* (2006), *supra* note 40, at 692.

⁴⁷ See MAGNUS MAGNUSON, *SCOTLAND: THE STORY OF A NATION* 184–86 (Grove 2001) (originally published, HarperCollins 2000) (discussing King Robert the Bruce’s victory over the English at Bannockburn). The quoted phrase appears in the popular song, *The Flower of Scotland*, available at <http://www.fordham.edu/halsall/mod/flowerofscotland.html>.

⁴⁸ McDonald, *Foreword* (1997), *supra* note 19, at xv, xviii.

⁴⁹ *Id.* at xviii (citation omitted).

McDonald also endorsed the view of the late Philip B. Kurland, a constitutional scholar at the University of Chicago Law School, that “in the rare instances when [Berger] misinterpret[ed] his evidence, [he] courageously and candidly acknowledge[d] his error.”⁵⁰ Berger himself quoted McDonald’s somewhat less diplomatic assertion that Berger had “devastated” the critiques of his work by Curtis—indeed, that Berger had “engaged in ‘overkill, roughly comparable to shooting rabbits with a cannon.’”⁵¹ Readers can judge for themselves the accuracy of those statements, and all the foregoing views, in light of the evidence and arguments set forth in this Article.

What can account for the tangled and contradictory politics, academic and otherwise, of the incorporation theory? Curiously, the crucial role of Black and other famously “liberal” judges in reviving the doctrine seems to have led many “conservative” judges and scholars to side with the modern conventionalists. Conservatives seem to view the theory with suspicion, as just another piece of newfangled “liberal activism.”

Yet the Supreme Court has never adopted Black’s *theory* of incorporation, even though it has applied most of the Bill of Rights to the states in practical effect. And the theory seems far from popular among many liberals today. It has little to say about a wide range of rights—notably abortion and other “privacy” interests—which are deeply important to most liberals but lack obvious textual roots in the Bill of Rights. Gun rights advocates, by contrast, are one constituency—usually viewed as “conservative,” though that is a somewhat inaccurate generalization—who seem generally to have become strong supporters of the doctrine. That is doubtless because the Second Amendment right to keep and bear arms *is* rooted in the text of the Bill of Rights. The incorporation theory suggests that this right—if it is, in fact, an individual right—may properly be applied to the states, though the Supreme Court has never so held.⁵² Yet, attesting to the downright weird politics of the issue, some extremist “militia movement” fanatics, who are certainly very enthusiastic about the right to bear arms,

⁵⁰ *Id.* at xvi n.2 (citation omitted).

⁵¹ BERGER, GOVERNMENT (1997), *supra* note 7, at 186 (citation omitted).

⁵² See generally, e.g., HALBROOK, ARMED (1984), *supra* note 10, at 107–53; HALBROOK, FREEDMEN (1998), *supra* note 10; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 46–63, 257–66; Barnett, *Was the Right* (2004), *supra* note 35. But see, e.g., UVILLER & MERKEL, MILITIA (2002), *supra* note 34, at 14–18, 197–209. The Court’s long silence on the Second Amendment will soon be broken, though in a case not raising the incorporation angle. See *District of Columbia v. Heller*, 2007 WL 2508615 (U.S. Nov. 20, 2007) (granting certiorari). For a recent and thoughtful study of the Second and Fourteenth Amendments and their bearing on the gun-rights issue, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (Oxford Univ. Press 2006).

view it as an article of faith that the Fourteenth Amendment is a tyrannical usurpation that must be repealed.⁵³

Likewise rooted in the text of the Bill of Rights is the Fifth Amendment's protection of private property against improper takings by the government. That protection has aroused new interest in recent years across the political spectrum, as shown by the storm of hostile reaction to the Supreme Court's 2005 decision in *Kelo v. New London*, which refused, as many saw it, to fully enforce the Court's application of that protection to the states through the Fourteenth Amendment.⁵⁴

The incorporation doctrine is, in truth, the furthest thing from a "liberal activist" innovation. It is as old as the hills. As a constitutional theory it is profoundly textualist and originalist, methodologies usually associated with "conservatives." Justice Black, a rare "liberal" exponent of textualism, merely awakened it from a long slumber.

One last introductory note of explanation is required. Because this Article focuses on the original understanding of the Fourteenth Amendment, I should say something about my general views on "originalism" as a theory and method of constitutional interpretation. Yet, I am reluctant to say too much. First, the Article is too long already. Second, my broader views on originalism and constitutional theory are still in a state of flux and development. Third, my intention is for this Article, and my broader book project, to be agnostic about originalism and constitutional theory.

The ultimate relevance of my originalist discussion may be contingent for many readers. It is still contingent for me to some extent, since I myself remain agnostic about many aspects of originalism. But now seems as good a time as any to "come out of the closet" and declare in print that I am indeed, in some sense, an "originalist."⁵⁵ In any event, this originalist discussion

⁵³ See, e.g., DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 201–02, 206–07 (Yale Univ. Press 2003).

⁵⁴ See *Kelo v. New London*, 545 U.S. 469 (2005); see also *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (the decision commonly cited as establishing, in effect, that the Fifth Amendment Just Compensation or "Takings" Clause applies to the states). On the national reaction to *Kelo*, see, for example, Kenneth Harney, *Justices' Ruling on Property Seizure Ignites Revolt*, DETROIT FREE PRESS, July 24, 2005: "To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision of the highest court of the land would be more accurate . . . [A] firestorm has broken out . . ." For critical scholarly analysis, see, for example, Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006).

⁵⁵ My mother and father, and the few other close readers of all my published scholarship, may note that my coming out as an originalist is no big shock. "Originalism" and "textualism" are, of course, closely allied approaches, and three years before I came out as gay, I came out in print as a "true (if troubled)" textualist. Bryan H. Wildenthal,

should be of wide interest, if only because many important judicial and political decisionmakers claim to place great value on the originalist approach. This Article is, in part, about what light may be shed by originalist methods on the Fourteenth Amendment and the issue of nationalizing the Bill of Rights. Whether, in turn, this discussion sheds light on the value and nature of originalist theory is an issue I leave to readers and critics, and to future work.

I should at least define “originalism” at this point. Keith Whittington offered a good summary in his landmark 1999 book, *Constitutional Interpretation*:

The critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification. The primary source of those understandings is the text of the Constitution itself, including both its wording and structure. The text is supplemented by a variety of secondary sources of information, however. Historical sources are to be used to elucidate the understanding of the terms involved and to indicate the principles that were supposed to be embodied in them. The guiding principle is that the judge should be seeking to make plain the “meaning understood at the time of the law’s enactment.”⁵⁶

Whittington offered several additional clarifications, one of which is especially important to the Fourteenth Amendment: “[T]he intentions supporting later amendments are independent of the intentions of those who drafted the original Constitution.”⁵⁷

The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism, 48 WASH. & LEE L. REV. 1323, 1392 (1991). Neither has turned out to be, as they say, “just a phase.”

⁵⁶ KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35 (Univ. Press Kan. 1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999)] (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (Free Press 1990)).

⁵⁷ *Id.* This Article, especially *infra* Part VII.C, generally indicates how I think we should weigh evidence relating to the original understanding of the Fourteenth Amendment. Since this Article discusses some post-ratification evidence, *see supra* note 5, it is also appropriate to preview how that type of evidence should be weighed. Post-ratification evidence, by definition, could not have influenced the understanding of the members of Congress who proposed the Amendment or the state legislators who ratified it. Thus, strictly speaking, it is not direct evidence of the original understanding at all. But early post-ratification materials can be useful indirect evidence. They tend to illustrate prevailing views. Evidence that politicians, lawyers, or commentators believed, soon after ratification, that the Amendment incorporated the Bill of Rights would corroborate evidence that it was originally understood to do so—or vice versa. Of course, the further

As constitutional scholars are well aware, though many outside the field seem not to be, the variant of originalism captured by the simple notion of divining the subjective “intent of the Framers” is no longer much in vogue. Berger was an old-style originalist of that sort, for whom the *intention* of the drafters literally *was* the law, even to the point of contradicting the plain text on occasion. He could cite authority for that view, quoting, for example, the opening words of the Supreme Court’s unanimous opinion in an 1874 case: “A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.”⁵⁸ Interestingly, the author of that 1874 opinion was

after 1866–68 we get, the less value such evidence has, one way or the other. Scholars may well debate the exact date at which the value of such evidence becomes insignificant for purposes of analyzing the original understanding. At the outside, the views of anyone active in public life during 1866–68 might have some probative value, even if expressed years or even decades later. I think views expressed before 1876 have a very substantial bearing, given the general continuity of party ideologies, legal theories, and overall public attitudes during the Reconstruction era. Historians generally identify the disputed 1876 presidential election and resulting “Compromise of 1877” as the crucial turning point that marked the end of Reconstruction. Furthermore, the Supreme Court—with essentially no explanation—appeared to reject the incorporation theory in two decisions handed down in the spring of 1876. See *Walker v. Sauvinet*, 92 U.S. 90 (Apr. 24, 1876); *United States v. Cruikshank*, 92 U.S. 542 (Mar. 27, 1876); Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1134–69. Whether or not these decisions were correct, they probably influenced subsequent views. Thus, I think the proper weight and value of views expressed after the spring of 1876—and especially after 1877—falls off sharply.

It is also appropriate to weigh evidence differently depending on its source. For example, the views of Democrats or others known to have opposed the Fourteenth Amendment should carry much less weight, to the extent they expressed narrow readings of the Amendment. Their natural motive and tendency, which we must be careful to discount, was to minimize and undercut the Amendment, even render it a nullity as much as possible. On the other hand, pro-incorporation views (or other broad readings) expressed by Democrats or their sympathizers would be especially strong and intriguing evidence. Presumably, they would no longer be exaggerating the Amendment’s scope in hopes of preventing its passage. But we would (again) have to consider carefully whatever tactical motives might be at work. By the same token, anti-incorporation views expressed by Republicans or their sympathizers would be especially damaging to the theory. Scholars may well debate how much weight to give pro-incorporation views expressed by Republicans after ratification. One might argue such Republicans would have a motive or tendency to exaggerate the scope of the Amendment once it was safely ratified. That possibility must be carefully considered, especially if a particular view goes beyond those prominently expressed during 1866–68. But I think such post-ratification Republican views, if consistent with views expressed before ratification, are entitled to substantial weight.

⁵⁸ *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874) (footnote omitted), *quoted in* BERGER, *GOVERNMENT* (1997), *supra* note 7, at 8 n.24; *see also* *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (also quoting this statement in *Smythe*); BERGER, *GOVERNMENT* (1997), *supra* note 7, at 18–29, 402–27.

Justice Swayne, one of the Court's earliest supporters of the incorporation doctrine that Berger so emphatically rejected.⁵⁹

By contrast, Justice Antonin Scalia, that most notorious modern originalist, has rightly admonished: "It is the *law* that governs, not the intent of the lawgiver."⁶⁰ "Original intent" has thus generally been replaced by the concept summarized by Whittington and widely described as "original public meaning." In any event, that is what I mean by "originalism" or the "original understanding."

Randy Barnett's appealingly titled 1999 article, *An Originalism for Nonoriginalists*, may offer the most accessible introduction to the theoretical debate. Barnett demonstrated, among other things, that even many of the original critics of originalism have yielded over the years, at least implicitly, to its frame of reference.⁶¹ It was once said in the field of economics that "we are all Keynesians now."⁶² Barnett seemed to suggest that "we are all originalists now"⁶³—or at least that many of us are. In any event, an inquiry using originalist methods is at least likely to interest most people concerned with the meaning of the Constitution.

Whittington commented that "[t]he justification for an interpretive method is a task for political and constitutional theory. The application of

⁵⁹ See Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1102–05.

⁶⁰ ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., Princeton Univ. Press 1997) [book cited hereinafter as SCALIA-GUTMANN (1997)] (emphasis in original), *quoted in* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) [hereinafter Barnett, *Originalism* (1999)]. See also the helpful surveys of originalist approaches and related issues in EARL M. MALTZ, *RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW* (Univ. Press Kan. 1994), and Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 915–67 (1998).

⁶¹ See Barnett, *Originalism* (1999), *supra* note 60, at 611–20.

⁶² Many sources credit President Nixon with coining this phrase in 1971. But Nixon was apparently quoting economist Milton Friedman, who said it in 1965. See *U.S. Business in 1965—The Economy: "We Are All Keynesians Now,"* TIME, Dec. 31, 1965, at 64, 65.

⁶³ Barnett has not (to my knowledge) used this exact phrase. I think it entered my mind from reading Tribe's essay in the marvelous Scalia-Gutmann collection. See Laurence H. Tribe, *Comment*, in SCALIA-GUTMANN (1997), *supra* note 60, at 65, 67. Tribe himself did not assert the truth of this phrase; he was paraphrasing what he took to be the thrust of Dworkin's essay in the same collection. See Ronald Dworkin, *Comment*, in SCALIA-GUTMANN (1997), *supra* note 60, at 115.

that method is a matter for legal practice and detailed historical work.”⁶⁴ Let that work now continue.

I. MADISON’S AMENDMENT AND THE *BARRON* DOCTRINE

The first effort to nationalize the Bill of Rights, at least in part, was proposed by James Madison in the First Congress of 1789. With eerie numerological foresight, the House of Representatives passed, at Madison’s urging, a version of the original Bill of Rights that included a proposed “fourteenth” amendment, providing: “No state shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.” In Madison’s view, this was “the most valuable” part of the package. He foresaw that “the State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against.” This ancestral “Fourteenth Amendment” failed to pass the Senate, however, so it never went to the states for ratification.⁶⁵

⁶⁴ WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999), *supra* note 56, at xii. Kurt Lash has suggested that despite my above rejection of the original intent approach, and my embrace of original public meaning, I eventually work my way back around, in effect, to a focus on framers’ intent. This is a very enlightening comment, one of several that Lash thoughtfully offered in reviewing this Article. It alerts me to what may well be a certain tension in my argument. I attempt to resolve the tension, or at least avoid any outright self-contradiction, as discussed *infra* Part VII.C (especially note 342). There is doubtless more to ponder here.

⁶⁵ See 1 *ANNALS OF CONG.* 452 (June 8, 1789) (1st Congress, 1st Session) (Madison’s original proposal, not the version passed by the House and quoted in the text); *id.* at 458 (June 8, 1789) (the second and third quotations in the text, quoting Madison’s views that this was “the most valuable part” of his overall proposed Bill of Rights, and that the states would be “as liable to attack” such key rights as would the federal government); *id.* at 784 (Aug. 17, 1789) (the first quotation in the text, quoting the proposed amendment as passed by the House); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 40 (Yale Univ. Press 1999) [hereinafter LEVY, *ORIGINS* (1999)] (brief discussion); *id.* at 289 (the version passed by the House, as set forth in the text). Compare Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 *SUP. CT. REV.* 301, 303–04 (1991) [hereinafter Finkelman, *Madison* (1991)] (arguing that “[s]uch an amendment would have radically altered the federal structure of the new government”), with Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 *LOY. L.A. L. REV.* 1159, 1165–67 (1992) (arguing that it was not such a radical alteration and that, upon later adoption of the actual Fourteenth Amendment, “the Constitution assumed its complete Madisonian form”). For other brief discussions, see, for example, William J. Brennan, Jr., *Landmarks of Legal Liberty*, in *THE FOURTEENTH AMENDMENT CENTENNIAL VOLUME 1* (Bernard Schwartz ed., New York Univ. Press 1970) (papers delivered at the Centennial Conference on the Fourteenth Amendment held at New York

This episode is one of several compelling reasons why Chief Justice John Marshall, in *Barron v. Baltimore*, almost certainly got it right in 1833 in holding that the Bill of Rights, by itself, was never properly understood to apply to the states.⁶⁶ Another is that the primary concern of Americans over potential abuses of power was then directed towards the federal government, not the states. The states all had constitutions of their own, most including a state “bill of rights” or similar guarantees. It was not obvious to the founding generation why a national Bill of Rights would be any more useful as a limit on state power.⁶⁷ Madison himself recognized this argument, though he noted a lack of protection in some state constitutions and said he could not “see any reason against obtaining even a double security on those points.”⁶⁸

A textual basis for the *Barron* doctrine, as Marshall noted, is that Article I, Section 9, in the original Constitution “enumerated, in the nature of a bill of rights, the limitations . . . imposed on the powers of the general government,” while Article I, Section 10, “enumerate[d] those which . . . operate . . . by express words applied to the states.”⁶⁹ It is difficult to see why limitations without such express language should also apply to the states.

Madison’s original Bill of Rights was not proposed as a unified supplement to the Constitution. Rather, Madison urged that the amendments be inserted at various appropriate points throughout the original text. Tellingly, the substance of all provisions of the eventual Bill of Rights was to be inserted into Article I, Section 9, which, for the most part, clearly limited only federal power. Only Madison’s ill-fated “Fourteenth Amendment” was to be inserted into Article I, Section 10, along with other express limits on state power.⁷⁰

University School of Law, Oct. 1968); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503–04 (1977) (noting the “prophetic” nature of Madison’s proposal); Curtis, *Resurrecting* (1996), *supra* note 10, at 10, 23; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 114–15 (Univ. Chicago Press 1997) [hereinafter CURRIE, *CONGRESS: FEDERALIST* (1997)]; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 22–23; AMAR, *AMERICA’S CONSTITUTION* (2005), *supra* note 10, at 320, 386.

⁶⁶ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); see also AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 143–44.

⁶⁷ See LEVY, *ORIGINS* (1999), *supra* note 65, at 12–35; CURRIE, *CONGRESS: FEDERALIST* (1997), *supra* note 65, at 110–15; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 144.

⁶⁸ 1 ANNALS OF CONG. 458 (June 8, 1789) (1st Congress, 1st Session).

⁶⁹ *Barron*, 32 U.S. (7 Pet.) at 248.

⁷⁰ See LEVY, *ORIGINS* (1999), *supra* note 65, at 37–38, 281–83; see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 191 (Univ. Chicago Press 1985) [hereinafter CURRIE, *SUPREME COURT: FIRST*

For all these reasons, despite the strenuous efforts of *Barron*-contrarian scholars, there is little doubt that *Barron* was correctly decided. Nevertheless, it is important to recognize the contrarian view, because some versions of it became influential among many Reconstruction Republicans.⁷¹

II. BINGHAM'S AMENDMENT

Any discussion of the original understanding of the Fourteenth Amendment properly centers on two key proponents in the 39th Congress in 1866: Representative John A. Bingham, Republican of Ohio, and Senator Jacob M. Howard, Republican of Michigan. They were both members of the powerful Joint Committee on Reconstruction primarily responsible for crafting Reconstruction laws and policies.⁷² Bingham drafted Section 1 of the Amendment, except for the Citizenship Clause, which was added by the Senate at Howard's instigation. Howard was the floor manager of the Amendment in the Senate, formally introducing it on behalf of the Joint Committee.⁷³

It is important to keep in mind, in any study of this sort, the limits of proper reliance on historical evidence. Peter Low and John Jeffries said it well:

[T]he uncertainty of historical reconstruction increases with remoteness in time. The legislators who spoke and voted [during the Reconstruction era] did so against a background of political experience and constitutional

HUNDRED (1985)]; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 142–43; Finkelman, *Madison* (1991), *supra* note 65, at 303, 340–41; Edward A. Hartnett, *A "Uniform and Entire" Constitution: Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251 (1998).

⁷¹ Compare 2 CROSSKEY, POLITICS (1953), *supra* note 9, at 1049–82 (taking a *Barron*-contrarian view), and Crosskey, *Fairman* (1954), *supra* note 9, at 119–43 (same), with AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 140–62 (ultimately siding with the orthodox pro-*Barron* view, though of course Amar, like Crosskey, concluded that the Fourteenth Amendment reversed *Barron* in any event). See also *infra* note 99; Part VI (p. 1569 & n.199).

⁷² See MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869 143–44 (Norton 1974) [hereinafter BENEDICT, COMPROMISE (1974)]; KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877 110 & n.7 (Vintage 1967) (originally published, Knopf 1965). See generally BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865–1867 (Colum. Univ. Press 1914).

⁷³ See, e.g., CG (39:1) 1033–34 (Feb. 26, 1866) (Bingham introducing an early version of Section 1); *id.* at 2764–67 (May 23, 1866) (Howard introducing the Amendment in the Senate); *id.* at 2890 (May 30, 1866) (Howard proposing the opening sentence defining U.S. and state citizenship); *infra* Parts V–VI (generally discussing Howard's role).

interpretation vastly different from what we know today. Projecting their views forward in time inevitably invites distortion. Ultimately, what [we are] asking is not merely what the [Reconstruction] Congress thought with respect to the kinds of problems then before it, but also what it would have thought if confronted with the issues now at hand. The more radical the change between that day and this, the less likely that the question is susceptible to meaningful answer.⁷⁴

A more specific limitation relates to “speechmaking procedures in the Congress” of that time.⁷⁵ One scholar has commented that relatively few members of the House

spoke directly to the final passage of the Fourteenth Amendment and . . . their speeches were limited to one half hour, [thus making it] apparent that reading those debates alone will not adequately convey the attitudes of the members. Not everyone could speak every day, nor necessarily speak at all. Those who did speak during the direct debates often simply assumed that their positions on highly related and important subjects were understood by their fellow members.⁷⁶

The latter limit may cut both ways on the Bill of Rights incorporation issue. It suggests some caution in relying on incorporationist statements such as those by Bingham and Howard. But it also helps put into context the common argument by anti-incorporationists that such statements were not sufficiently repeated or corroborated by other speakers.⁷⁷ It suggests that public statements by such recognized leaders may be entitled to especially great weight.

In any event, much clarity and understanding may still be gleaned from these old debates. After all these years, they still burn with remarkably vivid passion. The issues at stake during Reconstruction remain central to America’s struggles over liberty, power, race, and justice. All Americans should read and ponder these debates. They should be taught in the schools. Shame on us if we forget them.

Bingham’s central role as the “James Madison of the Fourteenth Amendment” has often been recounted.⁷⁸ He was influential in the 39th

⁷⁴ PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 1133 (Foundation, 5th ed. 2004).

⁷⁵ George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 W. POL. Q. 829, 831 (1970) [hereinafter G. Smith, *Republican* (1970)].

⁷⁶ *Id.* at 831–32.

⁷⁷ See *infra* Parts VII–VII.A (pp. 1583–89).

⁷⁸ Justice Black gave Bingham the “Madison” honorific. *Adamson v. California*, 332 U.S. 46, 73–74 (1947) (Black, J., dissenting). Discussions of Bingham’s role include,

Congress for several reasons. His views were squarely in the moderate mainstream of the dominant Republican Party. Historian Michael Les Benedict rated Bingham a “conservative” who “led the Republican nonradicals in the House” and had “greater influence on the course of Reconstruction” than “radical leaders” like the more famous Representative Thaddeus Stevens of Pennsylvania.⁷⁹

“Conservative” in this context means closer to the Democratic Party of that time and less supportive of equal rights for Blacks, a stronger federal government, or stern measures to reform the defeated South. The Democrats, on the constitutional issues of concern here, were the more “conservative”

for example, AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 181–97; IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 318–43 (Bobbs-Merrill 1965); CURTIS, *NO STATE* (1986), *supra* note 10, at 26–130; FAIRMAN, *RECONSTRUCTION* (1971), *supra* note 7, at 1260–90; HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 30–33, 55–83 (Johns Hopkins Univ. Press 1908) (facsimile reprint, Peter Smith, 1965); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 81–131, 182–202 (U. Illinois Press 1965) (originally published, *ILLINOIS STUDIES IN THE SOCIAL SCIENCES*, vol. 37, 1956) [hereinafter JAMES, *FRAMING* (1956)]; KENDRICK (1914), *supra* note 72, at 183–85, 214–20; Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003) [hereinafter Aynes, *Continuing* (2003)]; Aynes, *Bingham* (1993), *supra* note 10; Erving E. Beauregard, *John A. Bingham and the Fourteenth Amendment*, 50 HISTORIAN 67 (1987) [hereinafter Beauregard, *Bingham and the Fourteenth* (1987)]; Crosskey, *Fairman* (1954), *supra* note 9, at 10–72; Fairman, *Original* (1949), *supra* note 7, at 19–54; Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671 (2003) [hereinafter Finkelman, *Bingham* (2003)]; William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S. L. REV. (NEW SERIES) 558, 568–71 (1878).

⁷⁹ BENEDICT, *COMPROMISE* (1974), *supra* note 72, at 31 (“conservative,” one of eleven House members “with pre-eminent influence” in the 38th through 40th Congresses); *id.* at 36 (other quotations in the text); *see also id.* at 57, 143, 162–87. One of the pervasive flaws of Jay Bybee’s analysis was his apparent belief—deeply mistaken—that Bingham and other supporters of incorporation were generally “Radical Republicans, holding idiosyncratic views of the Constitution.” Bybee (1995), *supra* note 14, at 1545 (characterizing as “Radical” and “idiosyncratic” the view that the First Amendment protected personal rights and privileges eligible for incorporation, in supposed contrast to what “Democrats and more moderate Republicans maintained”); *see also id.* at 1581–82, 1589 (correctly associating Bingham with the views Bybee mistakenly categorized as radical and idiosyncratic). Rather bizarrely, Bybee seemed to accord more respect and weight to the views of diehard minority Democrats opposed to the Fourteenth Amendment than to those of leaders like Bingham who were squarely in the mainstream of the dominant Republican supermajority of the time. *See id.* at 1581–83, 1587–89. Senator Howard was, of course, a radical Republican. But as we will see, *infra* Part VI (pp. 1572–78), there is simply no basis to treat incorporationist views—whether expressed by Howard or anyone else—as reflecting a radical outlook.

party during the postwar 19th century, with overwhelming support among Southern Whites.⁸⁰

Bingham was a fearless, aggressive lawyer and politician. His politically marginal congressional district near the Ohio River was invaded by rebel forces during the Civil War, threatening his home town of Cadiz.⁸¹ First elected to Congress in 1854, he was defeated in 1862, and his later victories were all dramatically close.⁸² Bingham was widely respected for his intellect, chairing the House Judiciary Committee from 1869 to 1873. His Republican colleague James G. Blaine of Maine—who later became House speaker, senator, and presidential nominee—described him as “an effective debater, well informed, ready, and versatile. A man of high principle, of strong faith, of zeal, enthusiasm, and eloquence, he could always command the attention of the House.”⁸³ A modern biographer concurred, describing Bingham as “the Cicero of the House.”⁸⁴

Some anti-incorporationist scholars, however, have subjected Bingham—along with Howard, as we will see later—to a tendentious campaign of denigration, disparagement, and outright derision. Because *they* found Bingham’s ideas surprising and unorthodox, they became convinced

⁸⁰ See *supra* note 16 (comment on terminology); see also BENEDICT, COMPROMISE (1974), *supra* note 72, at 21–24; ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 216–39 (Harper & Row 1988) [hereinafter FONER, RECONSTRUCTION (1988)]; LEWIS L. GOULD, GRAND OLD PARTY: A HISTORY OF THE REPUBLICANS 42–77 (Random House 2003); JULES WITCOVER, PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS 224–36 (Random House 2003).

⁸¹ See ERVING E. BEAUREGARD, BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY 93–94 (Peter Lang 1989) [hereinafter BEAUREGARD, BINGHAM OF THE HILLS (1989)] (describing raids by General John Hunt Morgan in July 1863).

⁸² See BDC, *supra* note 1, at 657; Richard L. Aynes, *John Armor Bingham*, 2 ANB, *supra* note 1, at 792 [hereinafter Aynes, *Bingham* (ANB)]; BEAUREGARD, BINGHAM OF THE HILLS (1989), *supra* note 81, at 115–16 (describing the 1866 campaign, fought mainly over the Fourteenth Amendment); 2 ELECTIONS, *supra* note 1, at 938 (defeated in 1862, in new District 16, 55.2–44.8%); *id.* at 941 (winning in 1864, 52.7–47.3%); *id.* at 944 (same, 1866, 52.8–47.2%); *id.* at 947 (same, 1868, 50.8–49.2%); *id.* at 951 (same, 1870, 51.0–49.0%).

⁸³ 1 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 328 (Henry Bill; vol. 1, 1884; vol. 2, 1886); see also Allan Burton Spetter, *James Gillespie Blaine*, 2 ANB, *supra* note 1, at 902; BDC, *supra* note 1, at 657 (Bingham chairing the Judiciary Committee).

⁸⁴ BEAUREGARD, BINGHAM OF THE HILLS (1989), *supra* note 81, at 111; see also Aynes, *Bingham* (1993), *supra* note 10, at 66 n.54 (providing more evidence of strong contemporary praise for Bingham’s leadership and legal abilities); Aynes, *Continuing* (2003), *supra* note 78, at 590–91 (same). For biographical overviews, see generally BEAUREGARD, BINGHAM OF THE HILLS (1989), *supra* note 81; Aynes, *Bingham* (ANB), *supra* note 82; Aynes, *Continuing* (2003), *supra* note 78.

his colleagues could not have taken him seriously either. Fairman, for example, called Bingham “befuddled,” “careless,” and “confused” (albeit “sincere”), a man of “peculiar conceptions” that “cannot be accepted as serious propositions.”⁸⁵ Fairman’s Stanford Law School colleague Morrison agreed, dismissing Bingham’s views as “so confused and so conflicting as to be of little weight.”⁸⁶ As Crosskey dryly observed:

Fairman’s method was to let drop, here and there, throughout his discussion, derogatory hints and comments which gave the impression that the framers of the amendment, and Bingham in particular, were not very bright; that they held the strangest ideas about the Constitution; knew little about it, or about the decisions of the Supreme Court under it; that they were poor draftsmen; and that it was not to be expected anything intelligible could come from their hands.⁸⁷

Berger, the leading anti-incorporationist scholar after Fairman—and seemingly always eager to take a more extreme stance—blasted Bingham as “muddled” and “inaccurate,” a man who “veered as crazily as a rudderless ship,” made remarks “rife with contradictions,” and produced the Fourteenth Amendment by “inept midwifery.”⁸⁸ Such denigration has had a persistent, corrosive influence over the years. It has been echoed by scholars like Alexander Bickel, Leonard Levy, Wallace Mendelson, John Harrison, and others.⁸⁹

⁸⁵ See FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 461 (“peculiar conceptions”); *id.* at 1289 (“cannot be accepted”); Fairman, *Original* (1949), *supra* note 7, at 26 (“befuddled”); *id.* at 31 (“careless”); *id.* at 54 (“show[ed] great confusion”); *id.* at 137 (“confused” but “sincere”). *But see* CURTIS, NO STATE (1986), *supra* note 10, at 109, 120–21 (disputing such views); Aynes, *Bingham* (1993), *supra* note 10, at 65–66 (same).

⁸⁶ Morrison (1949), *supra* note 7, at 161.

⁸⁷ Crosskey, *Fairman* (1954), *supra* note 9, at 11; *see also* Aynes, *Fairman* (1995), *supra* note 10, at 1231–33.

⁸⁸ See BERGER, GOVERNMENT (1997), *supra* note 7, at 164 (“muddled”); *id.* at 182 (“careless, inaccurate, stump speaker” who made “confused, contradictory utterances”); *id.* at 243 (“inept midwifery”); BERGER, FOURTEENTH (1989), *supra* note 7, at 131 (“rife”); Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 450 (“veered”).

⁸⁹ See BERGER, FOURTEENTH (1989), *supra* note 7, at 128 (quoting statements by Bickel, Levy, and Mendelson); LEONARD W. LEVY, *The Fourteenth Amendment and the Bill of Rights* (1970), in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64, 77 (Quadrangle 1972); Wallace Mendelson, *Mr. Justice Black’s Fourteenth Amendment*, 53 MINN. L. REV. 711, 716–19 (1969) [hereinafter Mendelson, *Black* (1969)]; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1404 n.61 (1992) [hereinafter Harrison, *Reconstructing* (1992)] (opining that “either Bingham’s analytical powers were mediocre or he was too lazy to use them”); *see also, e.g.*, Boyce (1998), *supra* note 60, at 980–81, 1005–06.

But Bingham, far from befuddled, was intensely focused. He was perhaps, like Shakespeare's Mercutio, too fond of hearing himself talk. Benedict described him as "[i]nflexible," "quick to anger," with a demeanor "like a steel scythe."⁹⁰ Fairman, taking a somewhat more balanced view in his 1971 book, quoted praise for Bingham by several colleagues, including Blaine (as noted above) and Bingham's fellow Ohio Republican, Senator John Sherman. Sherman called Bingham "eloquent," "a favorite with his colleagues," though "rather too much given to flights of oratory."⁹¹

Avins nicknamed Bingham "Mr. Windbag."⁹² Berger ridiculed his "florid, windy rhetoric . . . liberally interspersed with invocations to the Deity."⁹³ But that was the typical style of the day, which emphasized lofty discourse heavy with religious imagery. Lincoln's Gettysburg Address is a famous example, albeit more concise.

Bingham, a devout Christian, believed that a "Divine Plan" predestined America to greatness and that "worldly institutions must be perfected to display God's greater glory."⁹⁴ Nationalizing the Bill of Rights was part of Bingham's plan for worldly perfection, and he pursued it tenaciously. He was deeply influenced by antislavery legal theories, which dominated Republican ideology. He also embraced the Republican goal of "completing the Constitution" by infusing it with the principles—both libertarian and

⁹⁰ BENEDICT, COMPROMISE (1974), *supra* note 72, at 36 (duplicate quotation marks omitted).

⁹¹ FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1270 (quoting Sherman's memoirs and the Blaine comment quoted above). *But see* Aynes, *Bingham* (1993), *supra* note 10, at 66 n.54 (noting Fairman's more positive treatment in 1971, but criticizing him for artificially distinguishing between Bingham's oratorical and analytical abilities); Richard L. Aynes, *The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship*, 8 WM. & MARY BILL RTS. J. 407, 423–29 (2000) (reviewing AMAR, *BILL OF RIGHTS* (1998), *supra* note 10) (Aynes elaborating on this criticism of Fairman, and noting additional positive comments on Bingham, and a few negative ones, by Bingham's contemporaries).

⁹² Avins, *Incorporation* (1968), *supra* note 9, at 16.

⁹³ BERGER, *GOVERNMENT* (1997), *supra* note 7, at 164.

⁹⁴ Beauregard, *Bingham and the Fourteenth* (1987), *supra* note 78, at 70; *see generally id.* at 67–76; *see also* AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 190–91; GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 96–99 (Henry Holt 2006) [hereinafter EPPS, *DEMOCRACY REBORN* (2006)]; Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881, 886–914 (1988) [hereinafter Aynes, *Antislavery* (1988)]. Epps has provided a vividly readable account of the Amendment's proposal, adoption, and legacy, offering many striking and thoughtful insights. He suggested agreement with the incorporation theory, but did not explore the issue in great depth. *See* EPPS, *DEMOCRACY REBORN* (2006), *supra*, at 95–98, 166–71, 232.

egalitarian—of the Declaration of Independence. Those principles had been stunted and marginalized during the first ninety years of the republic by the malign influence of slavery.⁹⁵

⁹⁵ On the relevance of the Declaration, see generally, for example, JACOBUS TENBROEK, *EQUAL UNDER LAW* 14–15, 20–21, 85 n.20 (Collier, rev. ed. 1965) (originally published as *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (U. Cal. Press 1951)) [hereinafter TENBROEK, *EQUAL* (1965)]; Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 *TEMP. L. REV.* 361 (1993). Regarding antislavery influences on Bingham, see generally CURTIS, *NO STATE* (1986), *supra* note 10, at 26–56; Aynes, *Antislavery* (1988), *supra* note 94; Aynes, *Bingham* (1993), *supra* note 10, at 74–78; Aynes, *Continuing* (2003), *supra* note 78; Crosskey, *Fairman* (1954), *supra* note 9, at 10–21; Finkelman, *Bingham* (2003), *supra* note 78.

On Republican ideology generally, see first of all the foundational work of Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 *WIS. L. REV.* 479, 610 (reprinted in HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM* 152 (State Historical Society of Wisconsin 1968) [hereinafter GRAHAM, *EVERYMAN'S CONSTITUTION* (1968)]); see also Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *STAN. L. REV.* 3 (1954) (reprinted in GRAHAM, *EVERYMAN'S CONSTITUTION* (1968), *supra*, at 295).

Following Graham came the studies of tenBroek, Foner, Hyman, Wiecek, Benedict, and Kaczorowski. See, e.g., TENBROEK, *EQUAL* (1965), *supra*; ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (Oxford Univ. Press, rev. ed. 1995, originally published 1970); ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* (Oxford Univ. Press 1980); HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (Knopf 1973) [hereinafter HYMAN, *MORE PERFECT* (1973)]; WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (Cornell Univ. Press 1977); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875* (Harper & Row 1982); BENEDICT, *COMPROMISE* (1974), *supra* note 72; Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 *J. AM. HIST.* 65 (1974) [hereinafter Benedict, *Preserving* (1974)]; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *N.Y.U. L. REV.* 863, 871–99 (1986) [hereinafter Kaczorowski, *Revolutionary* (1986)]; Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 *AM. HIST. REV.* 45 (1987) [hereinafter Kaczorowski, *To Begin* (1987)].

For additional discussions by modern scholars, see, for example, JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 57–104 (Cornell Univ. Press 1983); DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 21–148 (Princeton Univ. Press 1993); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 *LAW & CONTEMP. PROBS.* 175 (2004); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 *CONST. COMMENT.* 235 (1984); Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 389 (2004); David A.J.

As Crosskey, Curtis, Amar, Aynes, Maltz, and others have demonstrated, careful study of Bingham's speeches, with sympathetic understanding of his premises, produces a fairly clear picture of his constitutional vision.⁹⁶ Fairman and Berger never gained a clear grasp of that vision because they disdained the visionary. As Michael Zuckert put it: "Important historical actors . . . make sense to those around them; that is why they are important actors. The historian's task is to bring out their sense, not to denounce them as fools."⁹⁷

Bingham presented to the House of Representatives an early version of Section 1 of the Fourteenth Amendment on February 26, 1866. This proposal would have granted Congress the power to protect "all privileges and immunities of citizens in the several States" and to guarantee "all persons in the several States equal protection in the rights of life, liberty, and property."⁹⁸ As Bingham explained, he believed the states were already bound, in principle, to respect these rights, but that, by established judicial "construction of the Constitution," Congress lacked power to enforce them. Bingham wanted to give Congress that power, to enforce "this immortal bill of rights embodied in the Constitution."⁹⁹

This early proposal aroused opposition because some viewed it as granting Congress too much direct power over matters traditionally handled by the states, rather than simply prohibiting state abuses. Bingham later revised the Amendment, so that in the final version Section 1 stated a direct, judicially enforceable prohibition on the states, with a grant of enforcement

Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187 (1992). See also *infra* note 351.

⁹⁶ See, e.g., AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 181–97; CURTIS, *NO STATE* (1986), *supra* note 10, at 58–71; MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 115; Aynes, *Bingham* (1993), *supra* note 10, at 66–74; Crosskey, *Fairman* (1954), *supra* note 9, at 10–21.

⁹⁷ Michael Zuckert, Book Review, 8 CONST. COMMENT. 149, 161 (1991) [hereinafter Zuckert, Review (1991)] (reviewing ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876* (Oceana 1985) [hereinafter KACZOROWSKI, *POLITICS* (1985)]; CURTIS, *NO STATE* (1986), *supra* note 10, and BERGER, *FOURTEENTH* (1989), *supra* note 7) (criticizing Berger's treatment of Bingham and Howard).

⁹⁸ CG (39:1) 1033–34 (Feb. 26, 1866).

⁹⁹ *Id.* at 1034. Bingham and other Republicans relied, at least in part, on the old Article IV Privileges and Immunities Clause to support their *Barron*-contrarian views. See, e.g., CURTIS, *NO STATE* (1986), *supra* note 10, at 59–61; Aynes, *Bingham* (1993), *supra* note 10, at 66–85. I will explore further in a forthcoming article the relationship between the Amendment and Article IV, along with the related "equal rights only" reading of the Amendment that some have advocated. See *infra* note 223; Part VII.A (pp. 1588 & n.260).

power to Congress in Section 5.¹⁰⁰ The debates over the original proposal remain a useful guide to understanding the Amendment, however, because both versions shared the key language regarding “privileges” and “immunities.”

III. BINGHAM, HALE, AND THE SCHOLARS

Representative Robert S. Hale, a very conservative New York Republican, took up the theme of excessive federal power on February 27, criticizing Bingham’s proposed Amendment on that ground. Though Hale ended up voting for the later, revised version of the Amendment, he also argued, in February, that Bingham’s proposal was unnecessary. That was because, in Hale’s view, the Bill of Rights already “limit[ed] the power of Federal and State legislation,” thus “provid[ing] safeguards to be enforced by the courts.”¹⁰¹ Hale’s statement indicates he shared with Bingham, and apparently many other Republicans, the unorthodox *Barron*-contrarian view that the states were already bound, at least in principle, to respect the Bill of Rights. But Hale, unlike Bingham, was not aware of *Barron*.

Bingham interrupted Hale several times and offered to cite a case proving the need for the Amendment. But Hale refused to yield, blustering that he “never claim[ed] to be a very learned constitutional lawyer” and admitting that he did “not know of a case” protecting “the liberties of the citizen” against state abuse. “But still I have, somehow or other, gone along with the impression that there is that sort of protection thrown over us in

¹⁰⁰ Bingham’s revision apparently relied, at least in part, on a suggestion by Rep. Giles W. Hotchkiss (R-N.Y.). See *Adamson v. California*, 332 U.S. 46, 98–99 (1947) (appendix to opinion of Black, J., dissenting) (citing CG (39:1) 1095 (Feb. 28, 1866) (Hotchkiss)); CURTIS, NO STATE (1986), *supra* note 10, at 128–29 (same). Bingham also relied, as he recalled later, on a review of *Barron* and the phrasing of Article I, Section 10 of the Constitution. See CG (42:1) app. 84 (Mar. 31, 1871). I disagree with Thomas’s suggestion that Hotchkiss was concerned only with equal rights. See Thomas, *Riddle* (2007), *supra* note 5, at 1645. The Hotchkiss statement that Thomas quotes in support of this suggestion is perfectly consistent with the strong incorporationist implication of the preceding Hotchkiss statement that Thomas quotes. Hotchkiss seems simply to have expressed the concern for equal rights running heavily through most Republican statements (including those of Bingham himself) about the various proposed versions of the Amendment. Nationalizing the Bill of Rights was one very effective means to achieve the goal of requiring states to respect equal rights for all. I will discuss the “equal rights only” reading of the Amendment that Thomas and others have suggested in a forthcoming article. See *infra* note 223; Part VII.A (p. 1588 & n.260).

¹⁰¹ CG (39:1) 1064 (Feb. 27, 1866); see also *id.* at 3149 (June 13, 1866) (Hale voting for the Amendment on final passage).

some way, whether with or without the sanction of a judicial decision that we are so protected. Of course, I may be entirely mistaken”¹⁰²

Hale was indeed mistaken. Bingham obtained the floor the next day, February 28. This time it was he who rebuffed interruptions by Hale. Bingham triumphantly cited *Barron* and another Supreme Court decision rejecting application of the Bill of Rights to the states, introducing them as “exactly what makes plain the necessity of adopting this amendment.”¹⁰³

This Bingham-Hale episode has been raked over many times by scholars and is crucial to understanding Bingham’s design. It also says much about the modern conventional scholarship on incorporation, because Fairman badly misconstrued it in his influential 1949 article. Surprisingly, multiple previous critiques have not yet fully explored the troubling distortion in the treatments by Fairman and some other scholars. It merits yet another look.

Fairman discussed in detail Bingham’s remarks on February 26 and various other Bingham-Hale colloquies on February 27, but omitted any mention of Hale’s *Barron*-contrarian views or Bingham’s February 27 attempt to cite *Barron*.¹⁰⁴ Fairman praised Hale as “formerly a judge” in New York, “a discriminating lawyer” who “subjected to a tough lawyer-like examination the ‘extremely vague, loose, and indefinite provisions’ of [Bingham’s] proposed amendment.”¹⁰⁵ Such puffery verges on laughable in light of Hale’s self-confessed befuddlement and ignorance of major Supreme Court precedents in the passage Fairman omitted. It took remarkable nerve for Fairman to suggest Bingham was “befuddled” and un-“lawyer-like.” It was, in fact, *Bingham* who conducted a “tough, lawyer-like,” and devastatingly effective cross-examination of *Hale*.¹⁰⁶

¹⁰² *Id.* at 1064 (Feb. 27, 1866); *see also id.* at 1064–65.

¹⁰³ *Id.* at 1089–90 (Feb. 28, 1866) (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Livingston’s Lessee v. Moore*, 32 U.S. (7 Pet.) 469 (1833)). *Barron* dealt with the Fifth Amendment Just Compensation Clause, and *Livingston’s Lessee* dealt with the Seventh Amendment right to civil jury trial. *See Barron*, 32 U.S. (7 Pet.) at 247; *Livingston’s Lessee*, 32 U.S. (7 Pet.) at 552. Bybee noted Hale’s mistake in believing that the Bill of Rights was already secured against state violation. But Bybee missed the significance of the fact that even an ultraconservative like Hale—who, contrary to Bybee’s view, was a more “idiosyncratic” Republican than Bingham, *cf. supra* note 79—embraced such *Barron*-contrarian and incorporation-friendly views. *See* Bybee (1995), *supra* note 14, at 1582–83 & n.203. Apparently, in Bybee’s mistaken perspective—clearly influenced by Fairman—Hale was a mainstream moderate while Bingham was a cranky outlier. But the irony is that even if Bybee’s view of Bingham and Hale were accurate, he (like Fairman) failed to grasp how that cut on the underlying issue.

¹⁰⁴ Fairman, *Original* (1949), *supra* note 7, at 24–26, 29–32.

¹⁰⁵ *Id.* at 29 (first and third quotations) (quoting CG (39:1) 1063–64 (Feb. 27, 1866) (Hale)); FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1277 (second quotation).

¹⁰⁶ *See* CURTIS, NO STATE (1986), *supra* note 10, at 109.

Fairman did acknowledge Bingham's February 28 citation of *Barron*, but without identifying Hale as the one to whom Bingham responded.¹⁰⁷ Then, instead of conceding the obvious import of the *Barron* citation to the relevant issue, Fairman falsely (and irrelevantly) accused Bingham of misunderstanding *Barron*. "How did [Bingham] extricate himself?" Fairman asked. "He hailed *Barron* . . . as though it were a vindication of his position, and plunged on to worse confusion . . ." ¹⁰⁸

But *Barron* did vindicate Bingham's position. It was Fairman who was hopelessly confused. Fairman charged that Bingham misread *Barron* as holding that "the first eight Amendments really extended to the states, but that Congress was without power to make the requirements effective."¹⁰⁹ But Bingham never suggested any such reading of *Barron*. He was presenting his own theory, in conflict with *Barron*. Even if he had misunderstood the rationale of *Barron*, that was totally beside the point.¹¹⁰

Bingham studied the *Barron* decision further after February 1866, gained a clearer and more respectful understanding of its rationale, and even modified the final version of the Amendment in light of that understanding. But he never wavered in his desire to effectively overturn it.¹¹¹ And he

¹⁰⁷ Fairman, *Original* (1949), *supra* note 7, at 34.

¹⁰⁸ *Id.* at 35.

¹⁰⁹ *Id.* at 34.

¹¹⁰ See Crosskey, *Fairman* (1954), *supra* note 9, at 39 (criticizing Fairman's misstatement but not explaining why Fairman was wrong); Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1072 nn.71 & 74 (exonerating Bingham and noting that even if he had misunderstood *Barron*, that was irrelevant) (quoting BRANT (1965), *supra* note 78, at 326-27).

¹¹¹ See CG (42:1) app. 84 (Mar. 31, 1871) (Bingham). On March 9, 1866, Bingham noted that "the bill of rights . . . has been solemnly ruled by the Supreme Court of the United States . . . not [to] limit the powers of States." CG (39:1) 1292. On January 28, 1867, during debate on an anti-whipping bill sponsored by Rep. John A. Kasson (R-Iowa), Bingham corrected Kasson's *Barron*-contrarian view:

[I]t has always been decided that [Bill of Rights guarantees] are . . . not such limitations upon the States as can be enforced by Congress and the judgments of the United States courts. On the contrary, the Supreme Court, when presided over by men who never were suspected of mere partisan judgments, whose ability and integrity were acknowledged by all and challenged by none, ruled invariably as I have stated.

Bingham then noted that the Amendment pending before the states would reverse such rulings. CG (39:2) 811, *cited in, e.g.,* Aynes, *Bingham* (1993), *supra* note 10, at 70 n.72; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 183; *see also* CG (39:2) 810-12 (Jan. 28, 1867); 14 Stat. 485, 487 (§ 5) (Mar. 2, 1867) (enacting a limited ban on whipping). For an especially enlightening discussion of this 1867 debate, see HALBROOK, FREEDMEN (1998), *supra* note 10, at 62-64. *See also infra* Part VII.B (pp. 1599-1600); Part VIII (pp. 1618-19).

correctly grasped its basic import all along. As he said on February 28, *Barron* “involv[ed] the question whether [the Fifth Amendment is] binding upon the State of Maryland and to be enforced in the Federal courts.” *Barron*, Bingham noted, held that “the existing amendments are not applicable to and do not bind the States” As part of a somewhat convoluted sentence, Bingham then stated his *own* view, “in *answer to*” *Barron* (my emphases):

I stand relieved to-day [*sic*] from entering into any extended argument in *answer* to these decisions of your courts, that *although as ruled* [*i.e.*, in *Barron* and the other cited case] the existing amendments are not applicable to and do not bind the States, they are *nevertheless* [*i.e.*, under Bingham’s preferred approach] to be enforced and observed in [the] States

To support his view, Bingham then invoked the dubious authority of a speech by Daniel Webster.¹¹²

Berger parroted Fairman’s charge that Bingham misunderstood *Barron*,¹¹³ and ridiculed Bingham’s Webster argument.¹¹⁴ But that was all totally irrelevant. Few would dispute that the *Barron*-contrarian view was and remains unorthodox and incorrect. What counts is that Bingham and some of his colleagues held that view, Bingham understood perfectly well how *Barron* was in conflict with it, and Bingham made perfectly clear his desire, therefore, to overturn *Barron* in practical result.

Fairman’s and Berger’s treatments obscured the relevant issues and unjustly tarnished Bingham’s reputation. The canard that Bingham misunderstood *Barron* has, regrettably, propagated down through the years—embraced, for example, by the second Justice John Marshall Harlan, Justice Potter Stewart, and scholars Wallace Mendelson and Donald Dripps.¹¹⁵

¹¹² CG (39:1) 1089–90 (Feb. 28, 1866).

¹¹³ See, e.g., BERGER, *FOURTEENTH* (1989), *supra* note 7, at 129–33. Berger’s discussion made painfully clear that it was *he* who misunderstood *Bingham’s* views. Berger could be almost comically obtuse. In response to Curtis’s objection to his blatantly misleading editing of a Bingham comment, Berger reproduced the original alongside his edited version. Apparently not grasping that he had just confirmed Curtis’s point, Berger feistily dismissed the problem as “a figment of Curtis’[s] imagination.” *Id.* at 132 (quoting and discussing CURTIS, *NO STATE* (1986), *supra* note 10, at 122–23); see also *infra* note 180.

¹¹⁴ See BERGER, *GOVERNMENT* (1997), *supra* note 7, at 164–65 n.54, 183; see also Fairman, *Original* (1949), *supra* note 7, at 35.

¹¹⁵ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 174–75 n.9 (1968) (Harlan, J., joined by Stewart, J., dissenting); Mendelson, *Black* (1969), *supra* note 89, at 716–17; Dripps (1996), *supra* note 29, at 1577 n.107. Dripps, in his aptly titled article (there he went “down that wrong road again”), argued that under Bingham’s theory, the courts could only find that the Fourteenth Amendment applied the Bill of Rights to the states if

Straining to be charitable to Fairman, one might conclude at this point that he honestly overlooked Hale's *Barron*-contrarian views and Bingham's February 27 offer to cite *Barron*, did not really grasp the *Barron*-contrarian view in any event, and thus simply did not understand why Bingham waved *Barron* in Hale's face. Of course, by omitting Hale's statement of *Barron*-contrarian views, Fairman (perhaps unintentionally) obscured a strong piece of evidence that Bingham's underlying goal—application of the Bill of Rights to the states—was perfectly in line with prevailing sentiments.

Crosskey elegantly disentangled what we have seen so far of this episode in his brilliant 1954 rebuttal to Fairman's article—a rebuttal that has mostly been unjustly ignored for more than half a century.¹¹⁶ He called Fairman's treatment "misleading" and "not untypical of his handling of the evidence all through his discussion of the debates in Congress."¹¹⁷ Digging past the critiques by Crosskey and other scholars, I can only confirm and amplify that judgment.

Fairman did, for example, quote Bingham's February 27 reply to Hale stating that his proposal would "protect" many "thousands" of citizens "whose property, by State legislation, has been wrested from them under

they agreed with Bingham's view that *Barron* was wrongly decided to begin with. One "who believed (or believes) that *Barron* was *rightly* decided" should conclude that the Privileges and Immunities Clause "imposes no new limits on the states; it would only empower Congress to enforce such things as the antebellum Constitution's ban on state *ex post facto* laws." *Id.* at 1578 (emphasis in original); *see also id.* at 1577–79. But that cannot be squared with the facts set forth in the text. As Irving Brant well noted: "[I]t is utterly irrelevant whether [Bingham] thought his amendment was needed to overcome *wrongful* or *rightful* decisions of the Supreme Court. The point that counts is that the Fourteenth Amendment was *intended to overcome those decisions.*" BRANT (1965), *supra* note 78, at 326–27 (emphases in original).

¹¹⁶ Crosskey, *Fairman* (1954), *supra* note 9, at 30–41; *see generally id.* at 2–119; *see also, e.g.*, CURTIS, *NO STATE* (1986), *supra* note 10, at 69–71, 94–96, 100–02, 109 (discussing what we have seen so far); AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 182–83 (brief discussion); PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* 110–11 (Duke Univ. Press 1999) (same); MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 115 (same). *Cf.* BRANDWEIN (1999), *supra*, at 108–16 (discussing how Fairman was locked into his orthodox understanding of *Barron* and hobbled by then-prevailing views of Reconstruction). Curtis, Amar, and Aynes are certainly exceptions to the general tendency to disregard Crosskey. They have paid careful attention to Crosskey's insights, greatly enhancing their own work on the incorporation issue. *See, most notably,* Curtis's gracious acknowledgment of Crosskey at the outset of his own landmark book. CURTIS, *NO STATE* (1986), *supra* note 10, at 8. It must be conceded, of course, that Crosskey's scholarship did suffer from significant flaws. For a discussion of that, and why Crosskey has been so disrespected in the scholarly world, *see infra* note 147.

¹¹⁷ Crosskey, *Fairman* (1954), *supra* note 9, at 32–33.

confiscation.”¹¹⁸ This was an obvious reference to the Fifth Amendment Just Compensation Clause, the very Bill of Rights provision that *Barron* had found inapplicable to the states. But Fairman never pointed that out, though he slammed Bingham just three pages later with the false charge of misreading *Barron*.¹¹⁹ Instead, after quoting a few other statements, Fairman said, “Let us focus upon this episode.”¹²⁰ If only! Fairman referred again to Bingham’s confiscation comment, then veered off into a ridiculous and irrelevant quibble over Bingham’s word choice in another statement.

The latter digression sheds still more light on Fairman’s pervasive tone-deafness to the relevant lessons of the congressional history. Bingham, challenged by Hale on whether his proposal would apply only to former rebel states, said it would apply to any states with laws “in direct violation of every principle of our Constitution.”¹²¹ Fairman quibbled that “a state law could hardly violate *every* principle of the Constitution.”¹²² Bingham’s live floor comment may have been imprecise; he probably meant “any” rather than “every.” But either way, this is still more evidence that he meant to apply—to *all* the states, not just some—*every* (or *any*) right guaranteed by the Constitution.

Fairman summed up in terms that were (again) better suited to himself: “Bingham’s answers simply did not meet the issue. Maybe he was intentionally evasive. It seems far more likely, however, that he was exercised over the bad things he wanted to hit, without ever having thought out . . . the import of the words he had chosen.”¹²³

An especially risible aspect of Fairman’s article is the often arrogant, supercilious, and just plain disrespectful tone he took toward Bingham and some other members of the 1866 Congress—who, after all, wrote and

¹¹⁸ CG (39:1) 1065 (Feb. 27, 1866), *quoted in* Fairman, *Original* (1949), *supra* note 7, at 31; *see also* CURTIS, NO STATE (1986), *supra* note 10, at 69 (paraphrasing Bingham as “insist[ing] that the amendment would apply to loyal whites as well as blacks,” and not discussing Fairman’s treatment); Curtis, *Bill of Rights* (1980), *supra* note 10, at 71 (same, paraphrasing Bingham as stating that his proposal “was also intended to protect loyal whites from confiscation of their property and banishment”); BERGER, GOVERNMENT (1997), *supra* note 7, at 242 (quoting the Bingham statement in a context not relating to incorporation).

¹¹⁹ *See* Fairman, *Original* (1949), *supra* note 7, at 34.

¹²⁰ *Id.* at 32.

¹²¹ CG (39:1) 1065 (Feb. 27, 1866).

¹²² Fairman, *Original* (1949), *supra* note 7, at 32 (Fairman’s emphasis); *see also* CURTIS, NO STATE (1986), *supra* note 10, at 95 (quoting Bingham’s statement and Fairman’s comment, without further discussion).

¹²³ Fairman, *Original* (1949), *supra* note 7, at 32.

adopted the Amendment Fairman was analyzing.¹²⁴ Yet Fairman was often very respectful, as we have seen, towards speakers like Hale—who, Fairman thought, supported his argument—even when they plainly made fools of themselves. Fairman’s professorial scolding was sometimes laughably anachronistic. At one point he rebuked Bingham—challenged on how his Amendment would affect married women’s property rights—for not framing his response in terms of the “rational basis” test not crafted until the next century, nor applied to sex discrimination until the year before Fairman’s article was published.¹²⁵

It gets worse. Recall that Fairman’s entire article was devoted to responding to the historical evidence famously presented by Justice Black’s dissent in *Adamson v. California*.¹²⁶ Fairman’s colleague Morrison joined the attack in a companion article: “Professor Fairman’s work demonstrates that the similar research of Mr. Justice Black was both inadequate and misleading.”¹²⁷ Morrison suggested that Black might have some excuses for shoddy research:

Perhaps it is not surprising that in his historical study [Black] did not get an accurate picture. Obviously a Justice of the Supreme Court, even with the aid of a capable secretary, does not have the time for exhaustive historical research. But if such great weight is to be given to history, surely the Supreme Court should be vigilant in seeing to it that its actions are based on research which is adequate.

¹²⁴ It is difficult to choose among the wealth of examples. Ever the stern professor, Fairman noted at one point that “[w]e are not examining Bingham on the law of property or on conflict of laws, but are pushing him on his constitutional law.” *Id.* at 30. It is diverting to imagine a time-traveling Bingham response (especially given that he was “quick to anger,” BENEDICT, *COMPROMISE* (1974), *supra* note 72, at 36): “Sir, I wrote that part of the Constitution!” Fairman ridiculed a speech by Rep. William Higby (R-Cal.) that suggested Higby endorsed Bingham’s theory—as shown by Crosskey, *Fairman* (1954), *supra* note 9, at 29—though Fairman missed that. Wasting more than a page of his article without advancing anyone’s understanding of the incorporation issue (including his own) one iota, and mocking Higby’s suggestions that the Amendment would give “life and vitality” to the Constitution, Fairman snidely snorted: “Evidently a sort of elixir calculated to give a general toning-up to the Constitution.” Fairman, *Original* (1949), *supra* note 7, at 28; *see also id.* at 27–28. Never was Fairman in greater need of Zuckert’s caution. *See supra* Part II (p. 1539 & n.97).

¹²⁵ *See* Fairman, *Original* (1949), *supra* note 7, at 30 (quoting CG (39:1) 1089 (Feb. 28, 1866)); *see also* *Goesaert v. Cleary*, 335 U.S. 464 (1948) (applying “rational basis” analysis to uphold partial exclusion of women from work as bartenders); AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 191 (noting other examples of Fairman’s “anachronistic” approach and his general lack of patience or empathy in trying to understand the 1866 debates).

¹²⁶ 332 U.S. 46, 92–123 (1947) (appendix to opinion of Black, J., dissenting).

¹²⁷ Morrison (1949), *supra* note 7, at 161.

Morrison found it “disturbing . . . that such inadequate research should be made the pretext for one of the most far-reaching changes in constitutional interpretation . . . in our . . . history.” He condemned Black and his dissenting colleagues—Justices William O. Douglas, Frank Murphy, and Wiley B. Rutledge—as “willing to distort history . . . in order to read into the Constitution provisions which they think ought to be there. It is particularly regrettable that the great talents of Mr. Justice Black should be so misdirected.”¹²⁸

Morrison and Fairman might better have recalled the saying about people in glass houses. One might fairly expect scholars at prestigious law schools—presumably, as Morrison suggested, with far more research assistance and time on their hands than Black—to at least study carefully what Black actually wrote in 1947, along with the pages of congressional history he specifically cited.¹²⁹ But it appears that neither of the Stanford law professors did so.

Black *twice* cited the very pages on which the Bingham-Hale episode appears. He first stated that “[s]ome [opposition speakers] took the position that the Amendment was unnecessary because the Bill of Rights [was] already secured against state violation.” Just three pages later, he identified Hale as the speaker who took that view, which Black then discussed at more length.¹³⁰ One of the other pages Black cited contained comments by

¹²⁸ *Id.* at 162.

¹²⁹ See Aynes, *Fairman* (ANB), *supra* note 18, at 689 (Fairman receiving his Ph.D. and S.J.D. from Harvard, and teaching at Stanford and Harvard); see also Aynes, *Fairman* (1995), *supra* note 10, at 1229–36 (discussing Fairman’s and Morrison’s articles and anticipating some of my criticisms here). One of the truly depressing things about the mess Fairman and Morrison made of the incorporation issue is that they were truly the *crème de la crème* of the legal academic establishment of their day. Consider also that Fairman and Morrison were defending the anti-incorporation argument of Justice Felix Frankfurter, one of the greatest professors in the history of Harvard Law School. And this was the best they could do? As noted in the preface to the issue where their 1949 articles appeared, Fairman was a highly regarded “judicial historian and biographer” and Morrison was a “constitutional law scholar” who had clerked for Justice Oliver Wendell Holmes, Jr. See *President’s Page*, 2 STAN. L. REV. 1, 3 (1949); see also Aynes, *Fairman* (1995), *supra* note 10 (generally discussing the connection between Frankfurter and Fairman); Parrish, *Frankfurter* (ANB), *supra* note 19, at 375–77 (discussing Frankfurter’s academic career); *Adamson*, 332 U.S. at 59–68 (Frankfurter, J., concurring) (rejecting the incorporation theory). Morrison was such a respected figure at Stanford (my alma mater) that an endowed chair is named for him, currently held by former Dean (and renowned constitutional scholar in her own right) Kathleen M. Sullivan. See <http://www.law.stanford.edu/directory/57>.

¹³⁰ *Adamson*, 332 U.S. at 95 (quotation in the text) (citing CG (39:1) 1063–65 (Feb. 27, 1866) (containing the relevant Bingham-Hale debate); *id.* at 1054, 1057, 1059, 1066 (Feb. 27, 1866); *id.* at 1082–83, 1085–88 (Feb. 28, 1866)); see also *Adamson*, 332 U.S. at

Representative Hiram Price, Republican of Iowa, supporting the Amendment in part, it seems, to protect freedom of speech from state suppression. As Crosskey complained, Fairman omitted any mention of Price.¹³¹ Black then

98 (citing CG (39:1) 1064–65 (Feb. 27, 1866)) (specifically identifying and discussing Hale and his views). Black's comment quoted in the text was followed by a citation only to pages 1059, 1066, and 1088. With slight imprecision, he cited pages 1063–65 after a related and immediately preceding comment about the "opposition speakers." But just three pages later, as noted in the text and cited above, Black correctly cited pages 1064–65 in discussing Hale's views.

Black was inconsistent in first referring to "opposition speakers" while stating three pages later that *only* Hale thought the Bill of Rights was already enforceable against the states. Black's first reference may, in fact, be correct, thus strengthening his argument. At least one other opponent, Rep. Charles A. Eldredge (D-Wis.), arguably suggested that he agreed with Hale's view (on a page twice cited by Black). During the Bingham-Hale debate, Eldredge broke in right after Hale's statement that the Constitution was already "sufficient for the protection of the liberties of the citizen" against state violation, to ask if Bingham could cite "a case in which the Constitution . . . [was found] insufficient?" Bingham said he could, but as we saw earlier, Hale refused to let him, and Bingham had to wait until the next day to cite *Barron*. CG (39:1) 1064 (Feb. 27, 1866) (quoted and discussed in Crosskey, *Fairman* (1954), *supra* note 9, at 32, where Crosskey noted that Fairman omitted any mention of Eldredge, along with most relevant aspects of the Bingham-Hale episode); *see also* CG (39:1) 3149 (June 13, 1866) (Eldredge voting against the Amendment on final House passage). Eldredge's name is misspelled "Eldridge" in the *Congressional Globe*, and thus, not surprisingly, by Crosskey, who also mistakenly gave him the middle initial "H." *See* BDC, *supra* note 1, at 1009 (biographical entry on Eldredge in an authoritative source).

I do not see the relevance of page 1059 as cited by Black, where speakers other than Hale discussed congressional power over elections. On page 1066, Hale concluded his remarks, though not reiterating his *Barron*-contrarian views or continuing his colloquies with Bingham, followed by Price (discussed in the text and *infra* note 131). On page 1088, Rep. Frederick E. Woodbridge (R-Vt.) spoke in support of the proposal, expressing what seem to have been *Barron*-contrarian views. *See* Fairman, *Original* (1949), *supra* note 7, at 32–33; Crosskey, *Fairman* (1954), *supra* note 9, at 34. In any event, there is no excuse for Fairman's failure to carefully review all the pages cited by Black—nor, indeed, for his failure to simply read carefully and respectfully these few pages by Black himself.

¹³¹ *See* CG (39:1) 1066 (Feb. 27, 1866) (Price); *Adamson*, 332 U.S. at 95; Crosskey, *Fairman* (1954), *supra* note 9, at 33–34. To be sure, Price also seemed to refer in part to the interstate-equality protection of the Article IV Privileges and Immunities Clause, which I will discuss in a forthcoming article that will also address the "equal rights only" reading of the Fourteenth Amendment that Thomas and others have advocated. *See infra* note 223; Part VII.A (p. 1588 & n.260); Thomas, *When* (2001), *supra* note 31, at 180–216; Thomas, *Riddle* (2007), *supra* note 5, at 1640; *see also id.* at 1643, 1646 (discussing Price). But Price clearly indicated his concern for an out-of-state visitor's substantive right to speak freely upon visiting any other state, not merely to enjoy the same speech rights as the locals, which might already be severely limited. He cited antebellum antislavery advocates who "dared not express [an] opinion on the subject of slavery in a slave State." CG (39:1) 1066. Article IV was construed before the Civil War to allow

proceeded to quote at length from Bingham's crucial February 28 speech citing *Barron*.¹³²

What took Fairman seven pages to obscure and confuse in 1949, and Crosskey twelve pages to untangle in 1954, Black had briskly and lucidly conveyed in just four in 1947. Perhaps the largely self-taught justice from Alabama had a thing or two to teach members of the cream of American legal academia such as Fairman, Morrison, and Justice Felix Frankfurter.¹³³

They were slow to learn. Mendelson, one of the best political scientists of his generation, writing fifteen years after Crosskey, accused Black of being "confusing" in this very same passage. Mendelson asserted, incredibly, that "[o]ne finds in [Black's] page references no evidence that any Congressman took th[e] position" that "Bill of Rights provisions already appli[ed] to the states."¹³⁴ But it was Mendelson, like Fairman, who was, at best, confused. It is difficult to take seriously Mendelson's complaint, since he promptly conceded that "Hale . . . thought the Bill of Rights was judicially enforceable against the states," citing the very same pages cited by Black—in the same passage Mendelson quoted and criticized—that supported Black's

suppression of antislavery speech by visitors and locals alike, *see, e.g.*, CURTIS, NO STATE (1986), *supra* note 10, at 30—exactly the problem Price wanted to overcome. *See also* Curtis, *Resurrecting* (1996), *supra* note 10, at 44–47 (noting that the equal-rights-only reading of the Amendment would not meet deeply held Republican concerns about freedom of speech). Price's comments were, concededly, somewhat unclear. He indicated that "it was not until the last fifteen minutes that [he] had the least intention of saying one syllable on this subject." A businessman with a common-school education, he twice noted that he was "not a constitutional lawyer." CG (39:1) 1066; *see also* BDC, *supra* note 1, at 1764.

¹³² *Adamson*, 332 U.S. at 95–98 (quoting CG (39:1) 1089–91, 1093).

¹³³ *Compare Adamson*, 332 U.S. at 95–98, with Fairman, *Original* (1949), *supra* note 7, at 29–35, and Crosskey, *Fairman* (1954), *supra* note 9, at 30–41. *See also supra* note 129 (discussing the academic credentials of Fairman, Morrison, and Frankfurter); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 3–22 (Pantheon 1994) (Black's humble origins and schooling in Alabama); *id.* at 67, 125–26, 200–01, 300–01, 445–56 (his voracious reading of classical, historical, and other books).

¹³⁴ Mendelson, *Black* (1969), *supra* note 89, at 720 (quoting and discussing *Adamson*, 332 U.S. at 95). Mendelson conceded that if "some congressmen thought the proposed . . . amendment was surplusage because it embraced Bill of Rights provisions already applicable to the states" (precisely Hale's argument, as Black had clearly explained 22 years before), then that "would support the incorporation theory." *Id.* at 720. My late uncle, William E. Lockhart III, a student at the University of Texas in the 1960s, remembered Mendelson as one of his best professors. Mendelson had suggested his anti-incorporation view in his classic textbook, citing Fairman and Morrison and asserting that "the historical foundation for [Black's] position is highly questionable." WALLACE MENDELSON, THE CONSTITUTION AND THE SUPREME COURT 228 (Dodd, Mead, 1959); *accord id.* (2d ed. 1966) at 290.

essential point!¹³⁵ One would think Mendelson, in an article devoted entirely to criticizing Black's view of the Fourteenth Amendment, could at least have read carefully Black's primary text on the subject.

Fairman never explicitly replied to Crosskey's critique on these points. His brief 1954 response to Crosskey's article avoided most points of substance.¹³⁶ Fairman's 1971 book revisited the congressional history without even deigning to cite Crosskey. But curiously, Fairman, in 1971—while still discussing some of Hale's colloquies with Bingham—dropped any mention of the crucial Bingham-Hale episode.¹³⁷ He did not seem interested in responding to Crosskey's insights, which might have produced a helpful synthesis.

Fairman's book also dropped almost all mention of Bingham's crucially important February 28 discussion of *Barron*. He briefly referred to Bingham's speech that day, while reasserting an oddly persistent fallacy that Bingham, in referring to "the bill of rights," did not mean the Bill of Rights as commonly understood.¹³⁸ But Fairman buried the only hint that Bingham

¹³⁵ Mendelson, *Black* (1969), *supra* note 89, at 720–21 & nn.39–41 (citing CG (39:1) 1063–64 (Feb. 27, 1866) (Hale)). Adding to the muddle, Mendelson claimed that "[Hale's] objection was not that the . . . amendment was surplusage [but] . . . rather the congressional enforcement problem" (i.e., that it granted too much power to Congress). In fact—*again*, as Black had explained years before—Hale made *both* arguments. Indeed, Mendelson *quoted the very passage* in which Black stated that "[o]pposition speakers" made precisely those two arguments! Where Black, *in that very passage*, cited the same *Globe* pages that Mendelson cited (containing Hale's relevant comments), Mendelson actually went to the trouble (in his quotation of Black) to *delete* Black's relevant page citations and *replace* them with "[citations omitted]"—while leaving in other page citations by Black! *Id.* at 720. Mendelson never did mention Black's discussion, just three pages later, identifying Hale by name, explaining that Hale made those two arguments, and *again* citing relevant *Globe* pages! *See Adamson*, 332 U.S. at 95, 98.

¹³⁶ *See* Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954) [hereinafter Fairman, *Reply* (1954)] (not mentioning the Bingham-Hale episode); *see also* Aynes, *Fairman* (1995), *supra* note 10, at 1252–56 (discussing Fairman's reply).

¹³⁷ *See* FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1277–78 (discussing Hale); *see generally id.* at 1260–98; *see also* CURTIS, NO STATE (1986), *supra* note 10, at 121 (noting, without specifics, that Fairman in 1971 "did not repeat many of the arguments that Crosskey criticized in Fairman's original article").

¹³⁸ Fairman suggested that Bingham meant only a narrow understanding of the Article IV Privileges and Immunities Clause and the Fifth Amendment Due Process Clause. *See* FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1280; *see also id.* at 1288–89; Fairman, *Original* (1949), *supra* note 7, at 26, 33–34, 134 (first floating this theory); BERGER, GOVERNMENT (1997), *supra* note 7, at 161 (endorsing this theory); Boyce (1998), *supra* note 60, at 981–82 & n.366, 1005 (also flirting with this theory). For persuasive counterarguments showing that Bingham clearly meant to refer—and was almost certainly understood to refer—to the Bill of Rights as traditionally understood, *see* Crosskey, *Fairman* (1954), *supra* note 9, at 27–41; CURTIS, NO STATE (1986), *supra* note

ever mentioned *Barron* in a footnote nine pages later that simply repeated the false and irrelevant charge from his 1949 article that Bingham misunderstood *Barron*. He avoided any hint of Bingham's avowed desire to overturn *Barron*.¹³⁹

In another implicit response to Crosskey, Fairman did mention Price in 1971, and even quoted Price's concern about the freedom of antislavery speech. But even then, Fairman fumbled. While a well-informed reader could deduce the importance of Price's comment, Fairman offered no help. Instead, he dismissed its significance.¹⁴⁰

Berger only compounded the confusion sown by Fairman. In his 1977 book, Berger several times cited Hale to suggest that Hale and others would have viewed imposition of the Bill of Rights on the states as intolerable, even though Hale thought the Bill of Rights *already* bound the states. Berger was obviously fully aware of Black's famous *Adamson* dissent, which had discussed Hale's views thirty years earlier. Could it be that Berger never carefully read Black's dissent? Did he just rely on Fairman's deeply flawed account? In any event, Berger repeated such glaring misuses of Hale in his 1989 and 1997 books, even after Curtis had shown—in articles and a book to which Berger otherwise responded at length—how grossly mistaken Berger was in this regard.¹⁴¹ Frustratingly, as with the myth that Bingham

10, at 102, 110; Amar, *Bill of Rights* (1992), *supra* note 10, at 1234–35 & n.195; Aynes, *Bingham* (1993), *supra* note 10, at 66–74; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 182–83.

¹³⁹ See FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1289 n.263. That desire, along with ample additional evidence, shows plainly that Bingham referred—and was understood to refer—to “the bill of rights” in the commonly understood sense. See sources cited *supra* note 138.

¹⁴⁰ See FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1278–79. Fairman's concluding comment on Price's contribution was to dismiss it as “typical of many men's reaction to . . . [the] Amendment: the words sounded excellent—how could anyone object?”

¹⁴¹ See BERGER, GOVERNMENT (1977), *supra* note 7, at 145–46, 153–54, 178 n.47, 182 n.65, 184; Curtis, *Bill of Rights* (1980), *supra* note 10, at 69–71; Curtis, *Further Adventures* (1982), *supra* note 10, at 91; CURTIS, NO STATE (1986), *supra* note 10, at 69–71, 94–96, 100–02, 109; BERGER, GOVERNMENT (1997), *supra* note 7, at 165, 172, 208 n.47, 212 n.65, 213. Berger's 1997 book included a 15-page “Supplementary Note on Incorporation” responding to various critiques of his 1977 book, but nowhere in that section did he correct his misuse of Hale or respond in any way to Curtis's critiques on that score. See *id.* at 174–89. Berger's 1981 and 1983 articles, and his 1989 book—responding to Curtis's 1980 and 1982 articles cited above—also ignored Curtis's critiques on this point. See generally Berger, *Nine-Lived Cat* (1981), *supra* note 7; Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983) [hereinafter Berger, *Reply* (1983)]; BERGER, FOURTEENTH (1989), *supra* note 7. On the contrary, Berger yet again misused Hale in this regard, in both his

misunderstood *Barron*, such misleading discussions of Hale likewise propagated down through the years. At least two more scholars, including legal historian William Nelson, have slipped up in this regard, in works published in 1988 and 1998.¹⁴²

Returning to the 1866 debates, Bingham took the floor on March 9 to indicate, regretfully, his opposition to the proposed Civil Rights Act that would soon pass over President Andrew Johnson's veto.¹⁴³ Bingham, unlike Johnson, supported the goals of the Act, but felt that his proposed Amendment was necessary to empower Congress to deal with the subject. "[T]he enforcement of the bill of rights," he declared, "is the want of the Republic."¹⁴⁴ In a clear reference to *Barron*, Bingham acknowledged that "the bill of rights . . . has been solemnly ruled by the Supreme Court of the United States . . . not [to] limit the powers of States." He coupled that with a suggestion that *Barron* also limited the power of Congress to pass legislation like the Act. Later on the same page, he noted that he had proposed "an

1981 article and 1989 book. The latter consolidated Berger's arguments in his various articles responding to Curtis and others on the incorporation issue. See Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 452-53; BERGER, *FOURTEENTH* (1989), *supra* note 7, at 53 n.38, 58 n.57, 133.

¹⁴² See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 115, 233 n.12 (Harv. Univ. Press 1988) (quoting a statement in CG (39:1) 1065 (Feb. 27, 1866) (Hale), following shortly after Hale's expression of *Barron*-contrarian views). Nelson overlooked Hale's *Barron*-contrarian views, despite Curtis's then-recent and extensive discussion in his 1986 book—a work which Nelson acknowledged. See *id.* at 2-3, 204 n.21. Instead, Nelson used the Hale statement he quoted—about the importance of preserving "rights of the States"—to support the argument that the Amendment may be interpreted "not [to] protect specific fundamental rights" but only to prohibit denial of equal treatment. *Id.* at 115; see generally *id.* at 115-24; see also *id.* at 108, 232 n.95 (quoting another Hale statement the same day, also in CG (39:1) 1065, about the alleged danger that the Amendment would promote excessive federal power); Michael Kent Curtis, *A Blueprint for a New Interpretation of the Fourteenth Amendment*, 26 WILLAMETTE L. REV. 831, 835 (1990) [hereinafter Curtis, *Blueprint* (1990)] (reviewing NELSON (1988), *supra*, and criticizing his use of Hale); Curtis, *Resurrecting* (1996), *supra* note 10, at 58-59 & n.199 (reiterating that criticism). I will discuss the "equal rights only" reading promoted by Nelson and others in a forthcoming article. See *infra* note 223; Part VII.A (p. 1588 & n.260); see also Curtis, *Resurrecting* (1996), *supra* note 10, at 44-65 (generally criticizing the equal-rights-only theory).

Boyce's use of Hale was also deficient. Boyce emphasized Hale's excessive-federal-power objection to Bingham's proposal without ever mentioning Hale's *Barron*-contrarian views, despite Boyce's obvious familiarity with the work of Crosskey and Curtis. See Boyce (1998), *supra* note 60, at 979-81; see also *id.* at 1004-14 (discussing Crosskey and Curtis).

¹⁴³ 14 Stat. 27, 29-30 (Apr. 9, 1866).

¹⁴⁴ CG (39:1) 1291 (Mar. 9, 1866).

amendment which would arm Congress with the power to . . . punish all violations by State officers of the bill of rights.”¹⁴⁵

Fairman quoted the last of these March 9 statements, but omitted any mention of the first two, thus (again) erasing Bingham’s crucially relevant views on *Barron*.¹⁴⁶ Black, in the opinion which Fairman’s article was devoted to attacking, had quoted and clearly explained all three statements, including the obvious relevance of *Barron*.¹⁴⁷

¹⁴⁵ *Id.* at 1292.

¹⁴⁶ See Fairman, *Original* (1949), *supra* note 7, at 39–40; see also Crosskey, *Fairman* (1954), *supra* note 9, at 47–48 (showing that Fairman, in what he did describe, misrepresented some of Bingham’s views).

¹⁴⁷ See *Adamson v. California*, 332 U.S. 46, 100–02 (1947) (appendix to opinion of Black, J., dissenting). Crosskey did not point this out. He also did not mention Bingham’s March 9 acknowledgment of *Barron*, though he did convey well enough Bingham’s view that Congress lacked constitutional power to pass the Act. See Crosskey, *Fairman* (1954), *supra* note 9, at 47–51. Crosskey was himself a *Barron* contrarian. See *supra* note 71. He tended to emphasize, and perhaps exaggerate, the *Barron*-contrarian views of Bingham and other Republicans. He may have been reluctant to admit the degree to which Bingham, over time, seemed to modify his views and accept the *Barron* doctrine as a valid interpretation of the antebellum Constitution. See *supra* p. 1542 & n.111. Thus, Crosskey’s only two references to *Barron* in his discussion of the Civil Rights Act debates were to insist that the views of Bingham and Rep. James F. Wilson (R-Iowa) could only be understood if one kept in mind their (supposed) complete rejection of *Barron*. See Crosskey, *Fairman* (1954), *supra* note 9, at 49, 50; see generally *id.* at 44–51.

Generally speaking, I agree with Thomas that Crosskey sometimes overstated the pro-incorporation argument. See Thomas, *Riddle* (2007), *supra* note 5, at 1632 & n.18. We also agree, however, that “Crosskey present[ed] the evidence [on incorporation] more objectively than Fairman and Berger.” *Id.* It appears that Crosskey lost the respect of many scholars because of his flawed and improbable arguments that *Barron* was wrongly decided, and on other issues. See, e.g., Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1068–69 n.61 (also noting, however, that Crosskey’s views, even if “incorrect” and “unorthodox” on some points, “hardly deserve ridicule”).

It is striking that the ANB entry on Fairman—written by Aynes, an ardent incorporationist who has strongly criticized Fairman elsewhere—is far more respectful and less critical of Fairman than the ANB entry on Crosskey is of Crosskey. Compare Paul Moreno, *William Winslow Crosskey*, 5 ANB, *supra* note 1, at 792 (noting that while much of Crosskey’s “work is either neglected or rejected by scholars, his position in the incorporation debate is more widely supported,” but “[n]evertheless, Fairman got the better of the historical argument,” and noting that even many pro-incorporation writers have “appealed to other authorities than [Crosskey]”); *id.* at 793 (describing Crosskey as “a famous curmudgeon,” and asserting that “[i]n the final analysis, Crosskey’s work suffered from fundamentally flawed methods” and that he “approached his work in the style of an advocate rather than as a disinterested judge, and he wrote what is often characterized as ‘law office history’”), with Aynes, *Fairman* (ANB), *supra* note 18, at 689–90 (adhering throughout to a highly respectful and strictly objective approach); *id.* at 689 (noting that Fairman’s “classic” 1949 article was among the most-cited law review

On May 10, with the Amendment about to pass the House and Section 1 in its final form (except for the Citizenship Clause), Bingham spoke with religious fervor about the need for national enforcement of constitutional rights. Singling out one Bill of Rights guarantee as an example, from the Eighth Amendment, he noted that “[c]ontrary to the express letter of [the] Constitution, ‘cruel and unusual punishments’ have been inflicted under State laws.”¹⁴⁸

Bingham made clear, as reflected in Section 1, that the revised Amendment would no longer merely grant congressional power—that was relegated to Section 5—but would now be self-executing as well.

That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.¹⁴⁹

articles for many years); *id.* at 690 (stating that Fairman’s 1971 book “was widely praised” without mentioning any criticisms of it; noting, in the most critical comment in the entry, that “the accuracy of [Fairman’s] views on the Fourteenth Amendment has been called into question by scholars such as Alfred Avins, Michael Curtis, and Akhil Amar”; but concluding that Fairman’s “work on constitutional law and legal history remained standard sources, relied on by scholars working in the areas”). As it happens, Crosskey’s best-known and most controversial work, *see* CROSSKEY, *POLITICS* (1953), *supra* note 9, and Fairman’s 1971 book (probably his leading work), both received decidedly mixed reviews. *Compare, e.g.,* Aynes, *Fairman* (1995), *supra* note 10, at 1243–44 (discussing the reception of Crosskey’s 1953 work, which included favorable as well as harsh reviews), *with, e.g.,* Michael Les Benedict, Book Review, 39 U. CHI. L. REV. 862 (1972) (reviewing FAIRMAN, *RECONSTRUCTION* (1971), *supra* note 7); Morton Keller, Book Review, 85 HARV. L. REV. 1082 (1972) (same); John E. Semonche, Book Review, 51 N.C. L. REV. 375, 381–86 (1972) (same); Gerhard Casper, Book Review, 73 COLUM. L. REV. 913 (1973) (same); Harry N. Scheiber & Michael E. Parrish, Book Review, 17 AM. J. LEGAL HIST. 303 (1973) (same); *see also* Aynes (1995), *supra* note 10, at 1269 & nn.488–89 (noting the mixed reviews of Fairman’s book).

Aynes perceptively noted the underlying irony: Crosskey’s weakest and most controversial arguments (not relating to incorporation)—and Fairman’s incorporation arguments—were flawed for basically the same reasons. In each case, they handled historical evidence in a strained and disrespectful manner. By contrast, “the enduring portions of Fairman’s and Crosskey’s works” are those in which “they used traditional sources of legislative history to create a coherent reading.” *Id.* at 1255 n.384.

¹⁴⁸ CG (39:1) 2542 (May 10, 1866).

¹⁴⁹ *Id.* at 2543; *see also supra* Part II (pp. 1539–40 & n.100).

Fairman, noting that this was “the last major speech before the House voted on the Amendment,”¹⁵⁰ quoted all of Bingham’s May 10 comments just given—indeed, he reprinted a lengthy excerpt of Bingham’s speech.¹⁵¹ Finally, one might be forgiven for hoping, he would live up to his name and treat Bingham and the overall issue fairly. But no. Fairman’s two pages of analysis thoroughly mangled and misconstrued the speech. Yet again, note Fairman’s own words aimed at Bingham: “Does not this . . . still show great confusion?”¹⁵² Indeed.

One keeps thinking the light will finally dawn on Fairman. He singled out Bingham’s telling comment about “cruel and unusual punishments” and suggested he understood Bingham’s view that the Bill of Rights already *should* have prohibited such state abuses.¹⁵³ But he then lost patience and once again dismissed Bingham’s view.¹⁵⁴ “[W]hy,” he asked, if this were true—never mind that it was only relevant whether Bingham held such a view, not whether it was correct—“did not the victims raise the federal question and if need be carry it to the Supreme Court? Bingham did not explain.”¹⁵⁵

One can only gape in astonishment. Bingham *had* explained—clearly and exhaustively in February, with reminders in March—how the Court’s *Barron* decision blocked any such relief and how that was “exactly what

¹⁵⁰ Fairman, *Original* (1949), *supra* note 7, at 51. There were, of course, a few more speeches before the House finally repassed the Amendment as revised by the Senate. But none of those directly addressed the incorporation issue. See CG (39:1) 3144–49 (June 13, 1866). As we will see, *infra* Parts V–VI, there is no reason to expect they would have, since the point by then had been amply expressed in both the House and the Senate, and seemed not to raise any controversy—in contrast to many other issues surrounding the Amendment.

¹⁵¹ Fairman, *Original* (1949), *supra* note 7, at 51–53 (quoting CG (39:1) 2542–43 (May 10, 1866)).

¹⁵² *Id.* at 54; see also *id.* at 53–54. Crosskey, perhaps exhausted by his other laborious critiques of Fairman, did not attempt to dissect Fairman’s treatment here in any detail. After quoting and discussing Bingham’s speech at some length, he simply noted that those unaware of the proper context “might very easily take Bingham’s remarks as confused, incoherent, and incomprehensible. And it was thus that Mr. Fairman presented them.” Crosskey, *Fairman* (1954), *supra* note 9, at 69–70; see also *id.* at 67–72.

¹⁵³ “Admit, very frankly, that this necessarily implies that the first eight Amendments were already limitations—though not enforceable by congressional action—upon the states.” Fairman, *Original* (1949), *supra* note 7, at 53.

¹⁵⁴ “Marshall’s Court [in *Barron*] had said they were not limitations on the states, Bingham somehow believes that they are—but we need not go over that again.” *Id.* Perhaps *Fairman* should have.

¹⁵⁵ *Id.*

makes plain the necessity of adopting this amendment.”¹⁵⁶ And it was not as if Fairman missed Bingham’s explanation. Fairman himself quoted an ample portion of Bingham’s speech containing the just-quoted words and Bingham’s explicit citation of *Barron*, and another decision, to show that the Bill of Rights—wrongly, in Bingham’s view—had been held not to be enforceable against the states.¹⁵⁷

Fairman revisited Bingham’s May 10 speech a generation later in his 1971 book. Time did not bring clarity. Fairman still dismissed “this confused discourse.”¹⁵⁸ He complained that Bingham’s Eighth Amendment reference “illustrates the disconcerting way in which [he] would pluck a constitutional phrase and toss it in at some point to which it had no relevance.”¹⁵⁹ It obviously had relevance to Bingham. One can only, finally, give up on Fairman.

Black’s private reaction in 1950 to Fairman’s article was understandable: “He was greatly disappointed . . . and questioned Fairman’s detachment. ‘I now think of Mr. Fairman as an advocate, not a historian, and I would not rank him at the top of [the] advocates of the world.’”¹⁶⁰ Aynes concluded, rather mildly, that Fairman’s article gives “considerable pause as to whether he was then the disinterested scholar.”¹⁶¹ Amar put it better in bluntly describing it as an exercise in “Black-bashing” whose “unfair substance and tone put almost an entire generation of lawyers, judges, and law professors off track.”¹⁶²

Black’s only public response to Fairman’s article came much later in 1968 when he pointed out that it

completely failed to refute . . . my *Adamson* dissent. Professor Fairman’s “history” relies very heavily on what was *not* said in the state legislatures that passed on the . . . Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who

¹⁵⁶ CG (39:1) 1089 (Feb. 28, 1866).

¹⁵⁷ See Fairman, *Original* (1949), *supra* note 7, at 34.

¹⁵⁸ FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1288; see also *id.* at 1287–89.

¹⁵⁹ *Id.* at 1289.

¹⁶⁰ Aynes, *Fairman* (1995), *supra* note 10, at 1236 (citing NEWMAN (1994), *supra* note 133, at 356) (quoting a letter from Black to his former law clerk John P. Frank) (my brackets correct the quotation to reflect the original); see also NEWMAN (1994), *supra* note 133, at 355–57 (quoting several very thoughtful and cogent criticisms by Black of Fairman’s article, in that same letter).

¹⁶¹ Aynes, *Fairman* (1995), *supra* note 10, at 1272.

¹⁶² AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 188 & n.*.

actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered.¹⁶³

Black probably erred in waiting so long, and saying so little, to respond to Fairman and other critics. From his perch on the Court, Black may not have grasped how much damage Fairman's article had done to both the incorporation theory and Black's own reputation, especially in scholarly circles. Black himself was a partisan advocate of the theory. But as Amar noted, Black nevertheless "proved the more faithful historian."¹⁶⁴ To paraphrase Morrison's comment on Black, it is regrettable that Fairman's talents—and those of Morrison himself, Mendelson, and Berger—were misdirected in this way.

IV. BINGHAM AND THE PRESS

The speeches by Bingham and others on the Amendment received ample press coverage. The *New York Times*, for example, covered the debates over Bingham's original proposal in five articles published four days in a row. The *Times*, on February 27, 1866, reported Bingham's declaration that it was essential to enforce the "immortal bill of rights." On February 28, the *Times*, under its front-page "Washington News" headline, provided a subheadline, "Debate in the House on the Constitutional Amendment," highlighting the "Clear and Forcible Speech by Mr. Hale Against its Adoption." Readers were certainly notified that Congress was debating a major new restriction on the states. According to this February 28 article, "this amendment tends more directly to the obliteration of all State rights, and the consolidation of National authority, than any other . . ." The phrasing of that early version of the Amendment, as a broad grant of power to Congress, undoubtedly accentuated such fears. A separate February 28 front-page article included a more detailed transcript of the debate, including Bingham's stated intent to protect citizens from unjust confiscation. The *Times*, on March 1, quoted

¹⁶³ *Duncan v. Louisiana*, 391 U.S. 145, 165 (1968) (Black, J., concurring). Black's respectful tone stands in notable contrast to Fairman's and Morrison's scathing, condescending (and thoroughly bungled) treatment of his *Adamson* opinion. See also HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 34 (Knopf 1968) (obliquely remarking, without mentioning Fairman or other critics, that "the attacks made upon my historical beliefs . . . simply have not convinced me that I am wrong").

¹⁶⁴ AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 191. For an example of when Black's instincts as a zealous advocate got the better of him—though with no harm to the ultimate truth, as it turned out—see *infra* Part VI (p. 1579).

Bingham indicating again his design “to enforce the Bill of Rights,” and on March 2 reprinted the entire Hale speech headlined on February 28, again quoting Bingham’s comment on confiscation.¹⁶⁵

On March 10, the *Times* gave front-page coverage to Bingham’s statements that “the enforcement of the bill of rights in the Constitution [is] the want of the Republic,” that the Civil War might have been avoided “if [the bill of rights] had been observed in good faith in every State of the Union,” and that he wanted, through his proposed Amendment, “to have the bill of rights in the Constitution respected and enforced everywhere.”¹⁶⁶

Bingham’s crucial February 28 speech, and his March 9 speech, were both apparently distributed in pamphlet form during 1866. The title of the February 28 pamphlet was “One country, one Constitution, and one people.” The subtitle referred to it as a “[s]peech . . . in support of the proposed amendment to enforce the bill of rights.”¹⁶⁷

The *New York Times* provides an excellent window on the political views of this era, thus providing insight into the original public meaning of the Fourteenth Amendment. It is also, admittedly, by far the easiest major

¹⁶⁵ See *Thirty-Ninth Congress*, N.Y. TIMES, Feb. 27, 1866, at 8; *Washington News*, N.Y. TIMES, Feb. 28, 1866, at 1; *Thirty-Ninth Congress*, N.Y. TIMES, Feb. 28, 1866, at 1; *Thirty-Ninth Congress*, N.Y. TIMES, Mar. 1, 1866, at 4; *Amending the Constitution—Federal Power and State Rights*, N.Y. TIMES, Mar. 2, 1866, at 2. Curiously, the *Times* apparently never reported Bingham’s February 28 response to Hale (citing *Barron*), even though the *Times* twice reported Hale’s February 27 speech, and included in its March 2 report Bingham’s February 27 attempt to cite *Barron*. Bingham’s February 28 response does not appear in the March 1 article reporting the February 28 debate. Hale was a home-state colleague of *Times* editor and fellow New York Republican Rep. Henry J. Raymond, see *infra* pp. 1559–60 & nn.168–69, so perhaps it is not surprising that the *Times* gave extra coverage to Hale and omitted an episode in which Bingham embarrassed him by highlighting his ignorance of a major Supreme Court precedent.

¹⁶⁶ *Thirty-Ninth Congress*, N.Y. TIMES, Mar. 10, 1866, at 1. The *Times*, however, summarized Bingham’s lengthy May 10 speech in a front-page article without reprinting any of his remarks on incorporation. This was part of the paper’s lengthy coverage devoted mainly to that day’s convoluted political maneuvering surrounding House passage of the Amendment, especially a section (later removed by the Senate) that would have disenfranchised until 1870 all Southern voters who had supported the rebellion. See *Thirty-Ninth Congress*, N.Y. TIMES, May 11, 1866, at 1; *Washington News*, N.Y. TIMES, May 11, 1866, at 1; see also Editorial, *Reconstruction—The Action of Congress*, N.Y. TIMES, May 12, 1866, at 4 (focusing on politics); Editorial, *Reconstruction—The Proposed Amendment to the Constitution*, N.Y. TIMES, May 14, 1866, at 4 (same).

¹⁶⁷ Both pamphlets were published by the *Congressional Globe*, the official reporter of congressional debates, and presumably distributed pursuant to the congressional franking privilege. See Aynes, *Bingham* (1993), *supra* note 10, at 72 & n.84; *Bingham, John Armor, 1815–1900: Extended Bibliography* (available in the online version of the BDC, *supra* note 1, at <http://bioguide.congress.gov/scripts/bibdisplay.pl?index=B000471>).

newspaper of this period to research today. Most papers had a frank partisan slant during that time and the *Times* was no exception, being a Republican paper with a conservative slant.¹⁶⁸ In early 1866, it was still defending President Johnson, a Unionist Democrat, against growing Republican criticism. The paper's founding editor and co-owner, Henry J. Raymond, was himself a Republican elected to the Thirty-Ninth Congress. He and the *Times* supported Johnson's veto of the Civil Rights Act of 1866. The *Times* harshly criticized Thaddeus Stevens, the radical Republican leader, and deprecated its media rivals *The Nation* and *Harper's Weekly* as allegedly too radical. *The Nation* was actually quite moderate; it and *Harper's*, along with the *Atlantic Monthly*, also provide useful insights. The *Times* and Raymond both

¹⁶⁸ See, e.g., FONER, RECONSTRUCTION (1988), *supra* note 80, at 226, 243, 264, 266; David T.Z. Mindich, *Henry Jarvis Raymond*, 18 ANB, *supra* note 1, at 214 [hereinafter Mindich, *Raymond* (ANB)]. It must be conceded, as suggested in the text, that there is a danger of overemphasizing the *Times* as a source, simply because of the current ease of access to its online archive going back to 1851, which is fully searchable for nominal fees. See <http://www.nytimes.com/ref/membercenter/nytarchive.html>. Richard Aynes has pointed out to me that the *New York Tribune*, a Republican paper published by Horace Greeley, was probably more influential. And the Democratic-leaning *New York Herald* had, at the time, "the largest circulation of any newspaper in the country." FONER, RECONSTRUCTION (1988), *supra* note 80, at 260–61, *cited in* AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 187, 369 n.26. On the somewhat erratic politics of the *Herald*, and its transition during 1866–67 from famed publisher-editor James Gordon Bennett to his notoriously dissolute son, James Gordon Bennett, Jr., see James L. Crouthamel, *James Gordon Bennett*, 2 ANB, *supra* note 1, at 584–85 (Bennett Sr. "opposed Abraham Lincoln's election in 1860," took no stand on his 1864 reelection, and "supported most of Andrew Johnson's Reconstruction policies"); Julie A. Doyle, *James Gordon Bennett, Jr.*, 2 ANB, *supra* note 1, at 586 (Bennett Jr. became editor in 1866 and assumed ownership in 1867); see also FONER, RECONSTRUCTION (1988), *supra* note 80, at 260–61 (noting that the *Herald* "abandoned" President Johnson during 1866); Erik S. Lunde, *Horace Greeley*, 9 ANB, *supra* note 1, at 467–70 (describing Greeley's memorable career as publisher-editor of the *Tribune*, writer, antislavery activist, and 1872 presidential nominee on the "Liberal Republican" (anti-Grant) and Democratic tickets). Researching the *Tribune*, *Herald*, and other historical papers remains very difficult, however, and I have not had time to do so.

For a fine recent book in this field whose author has researched the *Tribune*, *Herald*, and other papers to some extent, see EPPS, DEMOCRACY REBORN (2006), *supra* note 94. Epps indicated that in addition to the *Times*, *Tribune*, and *Herald*, he researched the *Boston Daily Advertiser* and the *Richmond [Va.] Examiner*. See *id.* at 297 (bibliography); *id.* at 322, 328, 330 (index entries). In addition to the *Times*, I have researched—as Epps has, see *id.* at 297, 325, 328—two important magazines of this era, *The Nation* and *Harper's Weekly*. I have also researched a third useful magazine, the *Atlantic Monthly*. *The Nation* is archived and searchable online (back to 1865) at <http://www.thenation.com/archive>, as is *Harper's* (back to 1857) at <http://www.harpweek.com>. The *Atlantic* is available (back to 1857) at <http://www.theatlantic.com> and, for free, at <http://library5.library.cornell.edu/moa>.

eventually supported the Fourteenth Amendment and turned against Johnson. By 1868, the *Times* was praising the 1866 Act and Congress's Reconstruction policies.¹⁶⁹

¹⁶⁹ On *The Nation*, *Harper's*, and the *Atlantic*, see the discussion and citations below in this note and *supra* note 168. Contemporary critics often labeled all but very conservative Republicans, such as Hale and Raymond, as "radicals"—even Republicans, like Bingham, who were in fact moderate or even somewhat conservative. Cf. BENEDICT, COMPROMISE (1974), *supra* note 72, at 22–23 (noting *The Nation's* relative moderation, and growing conservatism, during Reconstruction); *id.* at 102–03, 222; Richard F. Hixson, *Edwin Lawrence Godkin*, 9 ANB, *supra* note 1, at 152–53 (noting the prestige of *The Nation* and Godkin, its founding editor from 1865 to 1900); 4 DAB, *supra* note 1, at pt. 1, 347–49 (same); Mindich, *Raymond* (ANB), *supra* note 168, at 215 (describing Raymond's general background, stating he was Johnson's "chief supporter" in the House); EPPS, DEMOCRACY REBORN (2006), *supra* note 94, at 112–13 (similar discussion of Raymond); Fairman, *Original* (1949), *supra* note 7, at 47 (generally praising Raymond's stature); FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 219 (describing Raymond as "innately moderate" and "holding aloof from the radicals"); STAMPP (1965), *supra* note 72, at 83 (Raymond "solidly committed to Johnson" at the outset of the Thirty-Ninth Congress); *id.* at 115 (Raymond "mortified" by Johnson's behavior in the 1866 election campaign); *supra* note 165 (my speculation about Raymond's possible role in the *Times's* reporting on the Bingham-Hale debate); CG (39:1) 1861 (Apr. 9, 1866) (Raymond voting against the override of Johnson's veto of the Civil Rights Act); *id.* at 3149 (June 13, 1866) (Raymond voting in favor of the Fourteenth Amendment).

While the *Times* sought to brand *The Nation* and *Harper's* as radical, just a few years later *The Nation* named the *Times* and *Harper's* as among "papers which zealously support the Republican party." *Police Duty*, THE NATION, Apr. 27, 1871, at 284; *see also*, e.g., *Washington News*, N.Y. TIMES, Feb. 27, 1866, at 1 (lauding a speech by Sen. John Sherman, R-Ohio, defending President Johnson); Editorial, *The Differences Between Congress and the President—Who Is Responsible?*, N.Y. TIMES, Mar. 5, 1866, at 4 (praising Johnson); Editorial, *Mr. Stevens and the Radical Press*, N.Y. TIMES, Apr. 5, 1866, at 4 (denouncing Stevens; opposing the Civil Rights Act, which at that time had been vetoed by Johnson and faced a pending override vote; and associating *The Nation* and *Harper's* with radical "ultraists"); Editorial, *The Civil Rights Bill—The Veto, and Mr. Trumbull's Great Argument*, N.Y. TIMES, Apr. 7, 1866, at 4 (praising Johnson's veto and mocking the override argument of Sen. Lyman Trumbull, R-Ill.); Editorial, *The President's Slanderers*, N.Y. TIMES, May 14, 1866, at 4 (protesting criticisms of Johnson); Editorial, *The Constitutional Amendment and the Action of Congress*, N.Y. TIMES, June 15, 1866, at 4 [hereinafter *Editorial* (June 15, 1866)] (praising Congress's passage of the Amendment); Editorial, *The Fourteenth Amendment*, N.Y. TIMES, July 17, 1868, at 4 (celebrating the apparent ratification of the Amendment); Editorial, *The President and the Constitutional Amendment*, N.Y. TIMES, July 18, 1868, at 4 (strongly denouncing Johnson); Editorial, *The Fortieth Congress—Its Reconstruction Record*, N.Y. TIMES, July 27, 1868, at 4 (praising the Civil Rights Act and the Thirty-Ninth and Fortieth Congresses).

V. HOWARD'S AMENDMENT

Senator Howard provided the most striking support for the incorporation doctrine. On May 23, 1866, he formally introduced the Fourteenth Amendment in the Senate on behalf of the Joint Committee. He declared, first, that the “privileges” and “immunities” protected by the Amendment would include a range of fundamental rights falling within the scope of the old Article IV Privileges and Immunities Clause, citing an avowedly *non-exhaustive* list in Justice Bushrod Washington’s famous 1825 circuit court opinion in *Corfield v. Coryell*. These included, Howard noted, “the benefit of the writ of *habeas corpus*.”¹⁷⁰ He stated that the foregoing privileges and immunities “are not and cannot be fully defined in their entire extent and precise nature.”¹⁷¹

Howard then proceeded, however, to offer a specific list of rights—again explicitly *non-exhaustive*, a point sometimes missed—that “should be added” to the scope of the Amendment’s Privileges and Immunities Clause (my emphasis):

[T]he personal rights guarantied [*sic*] and secured by the first eight amendments of the Constitution; *such as* the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances . . . ; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.¹⁷²

Howard noted that under prevailing court decisions, this “mass of privileges, immunities, and rights” did “not operate in the slightest degree as a restraint or prohibition upon State legislation,” and that this was true of the very right at issue in *Barron*, “the restriction . . . against the taking of private property for public use without just compensation.”¹⁷³ Although he did not

¹⁷⁰ CG (39:1) 2765 (May 23, 1866) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230)) (duplicate quotation marks omitted).

¹⁷¹ *Id.*

¹⁷² *Id.* (emphasis added). For my reasons for referring to the Fourteenth Amendment “Privileges *and* Immunities Clause,” rather than the commonly rendered alternative, the “Privileges *or* Immunities Clause,” see Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1054 n.3.

¹⁷³ CG (39:1) 2765 (May 23, 1866).

cite *Barron* or any specific case, this obviously referred to the *Barron* doctrine.

Howard's presentation goes far to refute George Thomas's suggestion that "privileges" and "immunities," in the prevailing nineteenth-century understanding, "had little to do with the first eight amendments."¹⁷⁴ The idea that the Privileges and Immunities Clause was not an apt vehicle for nationalizing the Bill of Rights has been articulated in different forms by various scholars. Berger embraced an especially extreme version, arguing that the clause had a peculiarly cramped, narrow, legal term-of-art meaning, largely restricted to common law property and contract rights.¹⁷⁵

But Curtis has shown that Howard's speech fits comfortably within a long tradition of legal and political discourse in the decades leading up to 1866. The "privileges" and "immunities" of American citizens were widely understood during this time to include many, perhaps all, of the specific guarantees of the Bill of Rights. Furthermore, the terms "rights," "liberties," "privileges," and "immunities" were often used synonymously and interchangeably. As Curtis suggested, more rigid and narrow modern conceptions of such terms may, anachronistically, reflect twentieth-century legal theories purporting to assign highly technical, nonobvious definitions to them.¹⁷⁶

"The great object of the first section of this amendment," Howard summed up, "is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."¹⁷⁷ His references to habeas corpus (protected by Article I, Section 9) and most of the Bill of Rights, as illustrative examples, strongly suggest that he regarded

¹⁷⁴ See Thomas, *Riddle* (2007), *supra* note 5, at 1635; see also *id.* at 1633 & n.24 (disagreeing with the contrary argument in Curtis, *Historical Linguistics* (2000), *supra* note 10).

¹⁷⁵ See, e.g., BERGER, *GOVERNMENT* (1997), *supra* note 7, at 44–45; see generally *id.* at 30–69.

¹⁷⁶ See, e.g., Curtis, *Historical Linguistics* (2000), *supra* note 10, at 1093 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30–44 (1913), which assigned certain technical definitions, for Hohfeld's own analytical purposes, to terms such as "right" and "privilege"); see generally *id.* at 1089–1136, 1145–51 (discussing the widely understood meaning of "rights," "liberties," "privileges," and "immunities"); see also Aynes, *Continuing* (2003), *supra* note 78, at 601–02 (making a similar argument). For a remarkably unconvincing and anachronistic application of Hohfeldian hairsplitting, in an attempt to question the eligibility of First Amendment rights for incorporation in the Fourteenth Amendment, see Bybee (1995), *supra* note 14, at 1547–48 & nn.26–30, 1552 & n.56 (citing Hohfeld (1913), *supra*). Curtis did not note Bybee's analysis, but it illustrates his point perfectly. See also *infra* note 293 (discussing Bybee's analysis of First Amendment rights).

¹⁷⁷ CG (39:1) 2766 (May 23, 1866).

all rights guaranteed anywhere in the original Constitution or Bill of Rights as, by definition, “great” and “fundamental” in nature.

The foregoing dealt only with the Privileges and Immunities Clause. Howard went on to discuss “[t]he last two clauses of the first section,” which would “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying him the equal protection of the laws.” It is not certain that Howard shared Bingham’s *Barron*-contrarian view. But that is strongly suggested by Howard’s comment, echoing Bingham’s theory, that without the proposed Amendment the guarantees he mentioned “stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect.”¹⁷⁸ While Howard, like Bingham, acknowledged the *Barron* doctrine, he expressed no more agreement with it than Bingham had. Quite obviously, he shared Bingham’s desire to overturn it.

As Howard noted, the prior lack of express congressional power to enforce constitutional rights required “that additional power should be given to Congress to that end. This is done by the fifth section”¹⁷⁹ Fairman and Berger wildly misconstrued Howard as suggesting that Section 5 was to be the *only* means of enforcing the Amendment, omitting any direct judicial enforcement of Section 1.¹⁸⁰ But Howard never hinted at any such rejection of the long-established doctrine of judicial review. On the contrary, he made perfectly clear that Section 5 would *complement* a fully self-executing Section 1. He noted that Section 1 included “a general prohibition upon all the States, as such, from abridging the privileges and immunities of the

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; see also *id.* at 2768 (further discussing the importance of Section 5).

¹⁸⁰ See FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1294–95; BERGER, FOURTEENTH (1989), *supra* note 7, at 89–90 & nn.103–04; *id.* at 136; BERGER, GOVERNMENT (1997), *supra* note 7, at 245–52. *But see* CURTIS, NO STATE (1986), *supra* note 10, at 128–29 (noting the bizarre, topsy-turvy misconstrual in this regard of the speech by Rep. Giles W. Hotchkiss, R-N.Y., in Berger’s 1977 book—as somehow suggesting the exact opposite of what it obviously indicated—an error Berger republished verbatim without any correction or response in 1997, even while providing extensive supplemental comments on many other points). For Berger’s sublimely uncomprehending 1981 response on this point (first raised in Curtis’s 1980 article), see Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 459–60. See also CG (42:1) app. 83–84 (Mar. 31, 1871) (Bingham explaining his revision of the Amendment to include the directly prohibitory Section 1 and the grant of congressional power in Section 5); *supra* Part II (pp. 1539–40 & n.100) (discussing Bingham’s revision, partly prompted by Hotchkiss); *supra* note 113 (providing another example of Berger’s obtuseness).

citizens of the United States. That is its first clause, and I regard it as very important."¹⁸¹ He continued a bit later (my emphases):

*[S]ection one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has . . . is derived, not from that section, but from the fifth section, which gives it authority to pass laws . . . appropriate to the attainment of the great object of the amendment. I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States*¹⁸²

Howard confirmed beyond any doubt, just a week later, that he and his Republican colleagues understood the Amendment to authorize—indeed, to require—direct judicial enforcement of its guarantees. They certainly did *not* want to rely solely on enforcement by a Congress they feared might fall out of Republican control. A key purpose of the Amendment, Howard noted (my emphasis), was “to put . . . the rights of citizens and freedmen under the civil rights bill *beyond the legislative power.*”¹⁸³

VI. HOWARD, THE PRESS, AND THE SCHOLARS

Much of Howard’s speech, including all the key language on nationalizing the Bill of Rights, was reprinted as front-page news the next day in the *New York Times*, which quoted verbatim Howard’s non-exhaustive list of rights “guaranteed by the first eight amendments” and his ringing statement about the “great object” of Section 1.¹⁸⁴ At least four other major papers apparently covered the relevant parts of Howard’s speech: the *Philadelphia Inquirer*, the Washington, D.C. *National Intelligencer*, the front page of the *New York Herald*, and, with only slight ambiguity, the front page of the *Boston Daily Advertiser*.¹⁸⁵ The close attention being paid is suggested

¹⁸¹ He continued: “It also prohibits each one of the States from depriving any person of life, liberty, or property without due process of law, or denying to any person . . . the equal protection of its laws.” CG (39:1) 2765 (May 23, 1866); *see also id.* at 2766 (Howard’s comment, quoted in the text above, about the direct prohibitory force of the Due Process and Equal Protection Clauses).

¹⁸² *Id.* at 2766 (emphases added).

¹⁸³ *Id.* at 2896 (May 30, 1866) (emphasis added).

¹⁸⁴ *See Washington News*, N.Y. TIMES, May 24, 1866, at 1 (subheadline noting Howard’s speech, but not providing any relevant details in the article); *Thirty-Ninth Congress*, N.Y. TIMES, May 24, 1866, at 1 (providing a detailed transcript).

¹⁸⁵ The speech also seems to have been mentioned, at least generally, in other papers. *See HALBROOK, ARMED* (1984), *supra* note 10, at 117–18 (citing, *inter alia*, the

by a *New York Times* editorial published two days earlier, which alerted readers that the Senate debate on the Amendment was about to begin and would, the *Times* predicted, be of higher quality than the House debate.¹⁸⁶

Anti-incorporationists have tried to dilute the impact of Howard's speech in various ways. Like Bingham, he has been subjected by some to tendentious, *ad hominem* denigration. Anti-incorporationists have also tended not to mention the fact that Bingham himself was acknowledged during the Senate debates as the primary House sponsor of the Amendment. While not specifically mentioning Bingham's discussion of incorporation, senators treated his views as important and worthy of attention and respect—in marked contrast with how some anti-incorporationist scholars have treated him. One senator referred generally to Bingham's "very able" March 9 speech on the Civil Rights Act, in which Bingham referred repeatedly to the Bill of Rights and the need for the Amendment.¹⁸⁷

New York, Washington, and Philadelphia papers); HALBROOK, FREEDMEN (1998), *supra* note 10, at 36 (same); *see also* AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 187 (noting the New York papers' coverage and that the *Herald* was the bestselling paper in the nation); *supra* note 168 (discussing the newspapers of this era). Fairman himself helpfully quoted the Boston paper's coverage, which did not quote verbatim Howard's discussion of the Bill of Rights, but did paraphrase Howard as follows:

[T]he first section was intended to secure . . . the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees

BOSTON DAILY ADVERTISER, May 24, 1866, at 1, *quoted in* Fairman, *Original* (1949), *supra* note 7, at 69. About these obvious references to the Constitution's "guarantees" or "declarations" of "rights," the *Barron* doctrine, and the need to overcome that doctrine, Fairman opined that "it could not be said that [this] . . . gave the public any understanding that Senator Howard said that the [Fourteenth] Amendment included Amendments I to VIII." Fairman, *Original* (1949), *supra* note 7, at 69.

¹⁸⁶ Editorial, *The Debate on Reconstruction*, N.Y. TIMES, May 21, 1866, at 4 (focusing mainly on political issues).

¹⁸⁷ *See* CG (39:1) 2896 (May 30, 1866) (comments by Sen. James R. Doolittle, R-Wis. ("very able"), and Joint Committee chairman Sen. William P. Fessenden, R-Maine), *cited in, e.g.*, *Adamson v. California*, 332 U.S. 46, 108 (1947) (appendix to opinion of Black, J., dissenting); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 369 n.22; *see also* FONER, RECONSTRUCTION (1988), *supra* note 80, at 239 (Fessenden chairing the Joint Committee). As Aynes has suggested, it thus seems likely that many (perhaps most or all) senators were well aware of Bingham's (and thus the Amendment's) incorporationist design, "even before . . . Howard's May 23 . . . speech." Aynes, *Bingham* (1993), *supra* note 10, at 73 n.88. After all, Fessenden, Howard, and other senators had, by that time, served for months with Bingham on the Joint Committee. Neither Fairman nor Berger, to

Fairman took a subtle approach, depicting Howard as a sort of hearty but fuzzy-minded politician from the Michigan backwoods, to be admired for his progressivism on racial issues but probably not taken that seriously by his colleagues. He suggested Howard “spoke inaccurately” and found legal concepts “puzzling.” Fairman puffed up with praise senators whose views he thought were in tension with Howard’s, while ignoring Howard’s impressive background.¹⁸⁸ He even suggested that “a key to understanding Howard’s speech” could be found in a mildly deprecatory remark at an 1871 memorial service, a remark with no bearing whatsoever on his speech or the incorporation issue.¹⁸⁹ Berger, again, was harsher, labeling Howard “reckless,” an “arch-radical,” “purely partisan,” and a man of “loose utterances” whose views were “patently fallacious” and must be taken “with a bushel of salts.”¹⁹⁰

my knowledge, ever acknowledged this obvious likelihood, or mentioned any reference to Bingham in the Senate debates.

¹⁸⁸ See FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1294 (“spoke inaccurately”); *id.* at 1295 (asserting that Howard “found the content of ‘privileges and immunities’ rather puzzling”); see generally *id.* at 1294–96. For example, Fairman praised Sen. Luke P. Poland (R-Vt.) as a former state judge with good lawyering skills, without noting Howard’s comparable record. See Fairman, *Original* (1949), *supra* note 7, at 60–62; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1296. As discussed below in the text, contrary to Fairman’s argument, Poland’s views were probably not in any tension with Howard’s.

¹⁸⁹ Chief Justice James V. Campbell of the Michigan Supreme Court, at a service held at the court, suggested that, “[i]f [Howard] did not, as has been suggested, possess . . . an intellect . . . to sever the gauzy veil that was not worth severing, he was able to wield the ponderous battle ax of the Lion-Hearted, before which iron and steel went down like wood.” *Death of Hon. Jacob M. Howard*, 20 Mich. 525, 530 (Apr. 7, 1871) [hereinafter *Death of Howard* (1871)], quoted in Fairman, *Original* (1949), *supra* note 7, at 134 n.381. Campbell’s eulogy, apparently referring to remarks by others not published, also referred to “those apparent defects in [Howard’s] intellectual character, that have been spoken of.” But Campbell’s point was precisely to *deny* that any such defects affected Howard’s handling of legal matters. Indeed, Campbell said that Howard’s work “showed him to be a master in the law.” *Id.* at 531. Campbell’s comment that “[s]uch faults as Mr. Howard had were the faults which belong very naturally to a man of strong character,” *id.* at 530, suggests he was perhaps referring to Howard’s ardent passion for justice. State Attorney General May’s opening remarks noted that Howard “loved his country . . . with a zeal that amounted to a passion,” *id.* at 526, and Campbell commented that “[h]e was conscientiously determined in all things, to do that which he believed to be right,” *id.* at 535–36. If Campbell’s comments are taken as discrediting Howard’s legal abilities, they seem in conflict with the weight of other evidence (discussed in the text) depicting a gifted lawyer and politician who translated French literature in his spare time—a hobby which, if not necessarily “gauzy,” presumably required more intellectual finesse than a “battle ax.”

¹⁹⁰ BERGER, FOURTEENTH (1989), *supra* note 7, at 135 (“reckless”); *id.* at 136 (“purely partisan,” “loose utterances”); *id.* at 137 (“patently fallacious”); *id.* at 138

The truth? Standard histories describe Howard as a former Attorney General of Michigan who was viewed as one of the Senate's "better constitutional lawyers."¹⁹¹ Fairman, while conceding the general "admiration" of Howard expressed at the 1871 memorial, did not quote comments remembering Howard "as a profound lawyer, erudite scholar and accomplished statesman," "without a superior and with few peers in the Senate," and as "a master in the law."¹⁹²

Howard wrote the 1854 convention platform in Jackson, Michigan, that some view as the founding of the Republican Party.¹⁹³ According to Benedict, Howard was among the "more influential" radical Republicans: "More moderate in temperament if not in principle, they had the confidence of more conservative Republican Senators and thus had larger impact on Reconstruction legislation than their more belligerent allies."¹⁹⁴ Howard was "eloquent" though "ponderous," and "appealed to reason rather than . . . emotions." He was erudite not only in law but in history, classics, and English and French literature. He even published a two-volume translation of

("arch-radical"); BERGER, *GOVERNMENT* (1997), *supra* note 7, at 166 ("bushel of salts") (duplicate quotation marks omitted); *see also id.* at 184. *But see* CURTIS, *NO STATE* (1986), *supra* note 10, at 87, 126–28 (disputing such views). Joseph James agreed with Berger to the extent of calling Howard "more radical and purely partisan than . . . [Sen. William P.] Fessenden [R-Maine]." JAMES, *FRAMING* (1956), *supra* note 78, at 135. *But see* EPPS, *DEMOCRACY REBORN* (2006), *supra* note 94, at 94 (describing Fessenden himself as "a strong party man" who once said he would "vote for a dog if he were the candidate of my party"). In any event, the fact that Howard was a partisan radical has little if any bearing on the incorporation issue. *See infra* pp. 1573–78.

¹⁹¹ Silvana Siddali, *Jacob Merritt Howard*, 11 ANB, *supra* note 1, at 304 [hereinafter Siddali, *Howard* (ANB)]; *see also* 5 DAB, *supra* note 1, at pt. 1, 278; ALLAN G. BOGUE, *THE EARNEST MEN: REPUBLICANS OF THE CIVIL WAR SENATE* 39 (Cornell Univ. Press 1981); EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 70 (Carolina Academic Press 2003) [hereinafter MALTZ, *FOURTEENTH* (2003)].

¹⁹² Fairman, *Original* (1949), *supra* note 7, at 134 n.381 ("admiration"); *Death of Howard* (1871), *supra* note 189, at 525 (Attorney General May: "profound"); *id.* at 528 (Michigan State Bar resolution: "without"); *id.* at 531 (Campbell, the same speaker selectively quoted by Fairman as deprecating Howard: "master").

¹⁹³ BOGUE (1981), *supra* note 191, at 39; *see also* GOULD (2003), *supra* note 80, at 14 (noting the earlier claim of Ripon, Wisconsin, to the founding); HANS L. TREFOUSSE, *THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE* 77–78 (Knopf 1969).

¹⁹⁴ BENEDICT, *COMPROMISE* (1974), *supra* note 72, at 38; *see also* CURTIS, *NO STATE* (1986), *supra* note 10, at 87.

a French historical work, apparently in his spare time.¹⁹⁵ All in all, he was not quite the rustic, marginalized buffoon some would have led us to think.

During the Senate debate on the Amendment, not a single senator disputed Howard's incorporationist reading—just as not a single representative disputed Bingham's incorporationist reading during the House debates.¹⁹⁶ That has not deterred some scholars from straining to identify some implicit contradiction or tension in this or that remark. The most persistent such argument has focused on a speech by Senator Luke P. Poland, Republican of Vermont, two weeks after Howard introduced the Amendment. Poland commented during this speech that the Amendment's Privileges and Immunities Clause would only enforce the old Privileges and Immunities Clause of Article IV.¹⁹⁷ Several scholars, taking for granted the narrow, orthodox reading of the latter Clause as dealing only with interstate comity, have argued that Poland may have disagreed with the portion of Howard's May 23 speech that went beyond Article IV and *Corfield* and expressly embraced the Bill of Rights.¹⁹⁸

¹⁹⁵ 5 DAB, *supra* note 1, at pt. 1, 278 (quotations); *see also* Siddali, *Howard* (ANB), *supra* note 191; *Death of Howard* (1871), *supra* note 189, at 529 (Michigan State Bar resolution noting that Howard's "intellectual tastes were refined and cultivated," and that "[h]e was an excellent classical scholar," "conversant with the language and literature of France," and "familiar with the best English writers, . . . poetry and history"); *id.* at 533–34 (Campbell, whose deprecations Fairman selectively quoted, lavishly praising Howard's scholarly abilities).

¹⁹⁶ As discussed *infra* Part VII (p. 1583–84 & n.248), it appears that *no one* during 1866–68, in or out of Congress—with perhaps a handful of implicit and debatable exceptions—ever contradicted or even directly questioned the Bingham-Howard reading.

¹⁹⁷ *See* CG (39:1) 2961 (June 5, 1866); *see generally id.* at 2961–64 (Poland's entire speech).

¹⁹⁸ On the orthodox reading of the Article IV Clause, *see*, for example, Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1086–89, and, generally, Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989). Fairman premiered the Poland argument in 1949 and revived it in 1971. *See* Fairman, *Original* (1949), *supra* note 7, at 60–62; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1296. My discussion in the text is largely based on the refutations of the Poland argument in Crosskey, *Fairman* (1954), *supra* note 9, at 81–83, CURTIS, NO STATE (1986), *supra* note 10, at 127, Aynes, *Bingham* (1993), *supra* note 10, at 81–82, and HALBROOK, FREEDMEN (1998), *supra* note 10, at 37–38. I have found revivals of Fairman's Poland argument by four different scholars—by Berger in 1977, 1989, and 1997, by Lambert Gingras in 1996, by Bret Boyce in 1998, and by Saul Cornell in 2006. All, like Fairman, assumed without explanation that Poland embraced the orthodox reading of Article IV. Berger in 1989, and Cornell, at least acknowledged the existence of contrary analyses. *See* BERGER, FOURTEENTH (1989), *supra* note 7, at 137–38 & nn.51–52 (briefly quoting and dismissing Curtis's analysis); CORNELL (2006), *supra* note 52, at 172–73, 252 nn.9–10 (discussing Aynes's analysis); *id.* at 252 n.10 (stating without explanation, however, that Poland's reliance on Article IV

The main problem with this argument is that Poland never explained how he read Article IV. As alluded to several times in this Article, many Republicans of this era embraced the unorthodox, *Barron*-contrarian view that the Bill of Rights was properly understood to apply to the states even before the Civil War—a view based largely on their unorthodox reading of the Article IV Clause. These Republicans included Bingham, Hale, and probably Howard, among others.¹⁹⁹ If they included Poland, which seems more than likely, then his remark not only does not conflict with Howard's view, it corroborates it.

It seems highly unlikely that Poland meant to dispute Howard's view for several reasons. First of all, Poland denied at the outset of his speech that he was going to say "anything new" about the Amendment, which he said had been "so elaborately and ably discussed on former occasions . . . that I do not feel at liberty to attempt to argue [it] at length and in detail."²⁰⁰ That certainly sounds like a deferential nod to Howard's elaborate and able presentation on May 23.

Poland also indicated he shared Howard's radical views favoring Black voting rights.²⁰¹ That was an issue quite separate from incorporation of the Bill of Rights. *Barron*-contrarian views on Article IV and the Bill of Rights were certainly not limited to radical Republicans. They were embraced, as we have seen, by the moderately conservative Bingham and the very conservative Hale. But it seems especially unlikely that a radical like Poland dissented from such widely held Republican views. If he meant to dispute Howard's explicit, emphatic view on nationalizing the Bill of Rights, he was certainly cloaking it well.

Finally, Poland declared—in this very same speech, on the very same page as his Article IV comment—that the Amendment would protect rights guaranteed "in all the provisions of the Constitution" and would overcome

indicated he embraced a "more narrow interpretation of the . . . Amendment"). Berger's 1977 book (republished in 1997), and Boyce, simply ignored the available contrary analyses of Crosskey, Curtis, and Aynes. See BERGER, *GOVERNMENT* (1997), *supra* note 7, at 58, 184; Boyce (1998), *supra* note 60, at 986–87. Gingras also ignored Crosskey, Curtis, and Aynes, and flatly asserted, without any cited basis—Poland never said so—that Poland's view of Article IV "correspond[ed] to [the orthodox] definition." Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41, 53 (1996); see also *id.* at 52–53.

¹⁹⁹ See *supra* Part I (p. 1532); Part II (p. 1539 & n.99); Part III (pp. 1540–43 & n.111; pp. 1552–56 & n.147); Part V (p. 1563); *infra* Part VII.B (pp. 1599–1600).

²⁰⁰ CG (39:1) 2961 (June 5, 1866).

²⁰¹ See *id.* at 2963–64. See also my discussion in the text below, *infra* pp. 1573–78, on the (lack of) significance of Howard's radical views.

“State laws . . . in direct violation of these principles.”²⁰² These statements did not explicitly embrace the Bill of Rights, and it was unclear to which clause or clauses Poland referred. He seemed to be summing up his view of Section 1 as a whole. But these comments would seem to weigh on the incorporationist side of the balance. It is telling that the Poland argument—the most perennial and popular among scholars seeking to show that the Bingham-Howard view was not shared by their colleagues—falls apart so decisively under scrutiny.

Fairman and Berger tried to minimize Howard’s speech by stressing that he was filling in for the ill chairman of the Joint Committee, Senator William P. Fessenden, Republican of Maine.²⁰³ But Howard was a member of that committee, privy to its discussions, and his colleagues obviously entrusted him with the task of speaking on their behalf. Fessenden was apparently present throughout Howard’s speech, made floor comments before and afterward, and neither he nor any other senator ever expressed any disagreement or concern on the issue of incorporation.²⁰⁴

Howard’s lengthy address showed thorough preparation and command of the issues. His discussion of the Privileges and Immunities Clause and the Bill of Rights took up more than two full columns of fine-print text in the *Congressional Globe*. Yet Berger dismissed it as a “remark, casually tucked away in a long speech.”²⁰⁵

²⁰² CG (39:1) 2961 (June 5, 1866) (quoted and discussed in HALBROOK, FREEDMEN (1998), *supra* note 10, at 37–38). Both Fairman (who first made the Poland argument) and Crosskey (who first refuted it) included these statements in quoting Poland’s speech, without devoting any attention to them—a case of hiding in plain sight? See Fairman, *Original* (1949), *supra* note 7, at 61; Crosskey, *Fairman* (1954), *supra* note 9, at 82. Halbrook’s discussion was selective. He did not mention Poland’s Article IV comment or any other scholar’s analysis of the speech. But Berger, Gingras, Boyce, and Cornell likewise never mentioned these Poland statements.

²⁰³ See Fairman, *Original* (1949), *supra* note 7, at 54; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1290–91; BERGER, FOURTEENTH (1989), *supra* note 7, at 135–36; BERGER, GOVERNMENT (1997), *supra* note 7, at 166–67, 184. See also *supra* note 187 (Fessenden chairing the Joint Committee). For two echoes of this argument, see Boyce (1998), *supra* note 60, at 984–85; Thomas, *When* (2001), *supra* note 31, at 200. Howard’s own membership on the committee, which Thomas noted—and the fact that Fessenden chose Howard as the spokesman, presumably with the support of other Republicans—are surely more worthy of emphasis.

²⁰⁴ See CG (39:1) 2763 (May 23, 1866) (lengthy comments by Fessenden, before Howard’s speech, in favor of debating the Amendment that day); *id.* at 2769 (Fessenden posing a brief question after Howard’s speech); *id.* at 2770 (three more Fessenden comments).

²⁰⁵ BERGER, GOVERNMENT (1997), *supra* note 7, at 167; see also CURTIS, NO STATE (1986), *supra* note 10, at 126–27 (pointing out the misleading nature of this same statement in the 1977 edition of Berger’s book).

Fairman and Berger, quite ludicrously, even tried to exploit the *pro forma* courtesy of Howard's modest self-introduction to cast doubt on whether he could be trusted to speak for others.²⁰⁶ One dares to think his colleagues were better judges of that. Fessenden's illness, by the way, was not unusual and would not have caused any surprise or disruption. He "complain[ed] continually of his physical infirmities."²⁰⁷ A front-page *New York Times* subheadline on May 24 put it all quite plainly: "Mr. Howard Speaks on Behalf of the Committee."²⁰⁸

Berger, nonetheless, stubbornly insisted that Howard "did *not* have 'charge of the amendment in the Senate.' Up to this point his participation . . . had been negligible."²⁰⁹ But even Fairman conceded that Howard's speech "must be given very serious consideration, coming from the Senator who had the measure in charge."²¹⁰ Benedict confirmed that "Howard, the respected, radical member of the Reconstruction committee . . . managed the amendment through the Senate when Fessenden pleaded illness."²¹¹ And how could Berger or any modern scholar possibly know that Howard's prior involvement was "negligible"? For the most part, as Berger himself noted (quoting Joseph James), "Republican members of the Senate refrained from defining their positions on the floor."²¹² As James explained, "[t]heir

²⁰⁶ See Fairman, *Original* (1949), *supra* note 7, at 54; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1291; BERGER, FOURTEENTH (1989), *supra* note 7, at 135; BERGER, GOVERNMENT (1997), *supra* note 7, at 167. Howard began by noting Fessenden's illness and expressing hope that the Senate would eventually "have the benefit of a full and ample statement of [Fessenden's] views. For myself, I can only promise to present to the Senate, in a very succinct way, the views and the motives which influenced th[e] committee, so far as I understand those views and motives . . ." CG (39:1) 2765 (May 23, 1866).

²⁰⁷ BENEDICT, COMPROMISE (1974), *supra* note 72, at 38.

²⁰⁸ *Washington News*, N.Y. TIMES, May 24, 1866, at 1.

²⁰⁹ BERGER, FOURTEENTH (1989), *supra* note 72, at 135 (emphasis in original) (quoting CURTIS, NO STATE (1986), *supra* note 10, at 115); see also BERGER, GOVERNMENT (1997), *supra* note 7, at 166.

²¹⁰ Fairman, *Original* (1949), *supra* note 7, at 58.

²¹¹ BENEDICT, COMPROMISE (1974), *supra* note 72, at 184; see also MALTZ, FOURTEENTH (2003), *supra* note 191, at 70; G. Smith, *Republican* (1970), *supra* note 75, at 850. Howard's leadership role was clearly recognized, for example, by Sen. Thomas A. Hendricks (D-Ind.) who, in a colloquy with Howard about the Amendment (which Hendricks opposed), referred to Howard first as "the chairman—I was going to say the chairman of the caucus, but I will not say that," and then as "the distinguished Senator who has this measure now in charge." CG (39:1) 3039 (June 8, 1866); see also *infra* note 256 (discussing Thomas's treatment of Hendricks and another opponent).

²¹² BERGER, FOURTEENTH (1989), *supra* note 7, at 137 (quoting JAMES, FRAMING (1956), *supra* note 78, at 146).

opinions and arguments found expression only in the party caucus. Their actions in the Senate were mostly confined to voting.”²¹³

We will never know what Howard and his colleagues said in private party caucuses and crucial committee meetings.²¹⁴ But the facts we do know,

²¹³JAMES, FRAMING (1956), *supra* note 78, at 146; *see also* AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 204, 372 n.78 (quoting JAMES, FRAMING (1956), *supra* note 78, at 150); *supra* Part II (p. 1533) (discussing “speechmaking procedures in the Congress”). Thomas, in 2001, asserted that “Howard had not been a major figure in the drafting of the Fourteenth Amendment.” Thomas, *When* (2001), *supra* note 31, at 200 & n.230 (citing JAMES, FRAMING (1956), *supra* note 78, at 135). The cited page in James’s book, it should be noted, described *Fessenden*, not Howard, as lacking extensive prior involvement. James said it therefore “constitutes no real obstacle to a present-day understanding of fundamental purposes that [Fessenden] entrusted his duties to Howard.” JAMES, FRAMING (1956), *supra* note 78, at 135. Thomas’s point about “drafting” was fair enough. It may well be accurate, though I do not think we can ever know for sure, given the fragmentary surviving records. Thomas cited evidence that Howard—in private committee proceedings not publicly revealed until years later—voted against some of Bingham’s draft language and supported some language that was stronger on racial equality. *See* Thomas, *When* (2001), *supra* note 31, at 200–01 & nn.232–35 (citing KENDRICK (1914), *supra* note 72, at 90–91, 98, 106). Thomas generally concedes the importance of Howard’s role. *See* Thomas, *Riddle* (2007), *supra* note 5, at 1642, 1646. Yet he also suggests that Howard and Bingham may have been unrepresentative of other Republicans on the incorporation issue. *See id.* at 1642–47; *see also* Wildenthal, *Reply* (2007), *supra* note 5, at 1661–64 (responding to Thomas on this point).

Be all that as it may, I would contend this is all perfectly consistent with the profound importance of Howard’s *public* support for incorporation. As I will argue elsewhere, there is no conflict between supporting equality as a primary goal and favoring substantive nationalization of the Bill of Rights. They are mutually reinforcing. *See infra* note 223; Part VII.A (p. 1588 & n.260). Howard loyally and actively supported, in public, all the relevant language the committee ended up publicly proposing, while noting his personal disagreement on certain issues not related to incorporation, as discussed below in the text. It is pointless, and impossible in any event, to try to sort out at this late date the full range of private motivations—and “off-stage politicking,” Thomas, *When* (2001), *supra* note 31, at 201—that doubtless lay behind the private wrangling on the committee.

As stated in the Introduction, *supra* pp. 1527–29, I believe—and Thomas authorizes me to state that he agrees on this point—that any proper analysis of the original understanding must be based on contemporaneous *public* statements and actions. Thus, for example, while I admire Maltz’s exhaustive exploration of the background of the Amendment in the Joint Committee (so typical of his rigorous and impartial scholarship), *see* Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984), I question the value and weight of such evidence to the extent that it remained contemporaneously secret and not publicly aired—notwithstanding Maltz’s conclusion that such evidence suggests the Amendment’s Privileges and Immunities Clause “encompasses not only the entire Bill of Rights, but other rights as well.” *Id.* at 970.

²¹⁴The Joint Committee journal, published years after the fact, reveals the bare outline of committee votes and proceedings, and other intriguing facts, but obviously falls

plus common sense, suggest that Howard played an extensive and influential role in the Amendment's passage. That is certainly suggested by his proposal, a week after he introduced it, to add the sentence defining citizenship.²¹⁵ It is also suggested by the Michigan State Bar's memorial resolution, upon Howard's death in 1871, declaring that his "name is inseparably connected with the momentous legislation and constitutional changes of the last ten years."²¹⁶

Berger argued that Howard's colleagues would have disregarded his views on incorporation because he was a radical and an early supporter of Black voting rights. Howard was indeed out in front on racial issues in 1866.²¹⁷ But as Curtis has noted, "[t]he argument is a non sequitur."²¹⁸ The two issues are quite separate, though it may be argued that incorporation was one means—less controversial than most—to achieve a minimum degree of equal rights. Berger should have understood this, since he himself emphasized (correctly) that Bingham was notably *less* supportive of Black suffrage. There is simply no evidence that *anyone* at the time, certainly not any Republican, viewed incorporation—the brainchild of the moderately conservative Bingham—as a radical idea.²¹⁹

far short of revealing the full story. See generally KENDRICK (1914), *supra* note 72, at 37–129; see also *supra* note 213. Oh, to have been a fly on the wall in some of those smoke-filled rooms in 1866!

²¹⁵ See CG (39:1) 2890 (May 30, 1866).

²¹⁶ *Death of Howard* (1871), *supra* note 189, at 528. This, too, Fairman omitted from his selective use of this memorial service. The first two scholars to publish significant studies of the Amendment's congressional history certainly appreciated Howard's importance—and they wrote far more closely in time to the underlying events than have the modern scholars who have denigrated Howard's role. See Royall (1878), *supra* note 78, at 569–72 (discussing Bingham and Howard); WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 22–24, 60–61 (Little, Brown & Co. 1898) (facsimile reprint, Da Capo 1970) (discussing Howard without mentioning Bingham).

²¹⁷ See BERGER, FOURTEENTH (1989), *supra* note 7, at 135–36; BERGER, GOVERNMENT (1997), *supra* note 7, at 166, 169, 184; Siddali, *Howard* (ANB), *supra* note 191; see also BERGER, FOURTEENTH (1989), *supra* note 7, at 55–66 (fallaciously arguing that persistent Northern racism refuted the relevance of abolitionist ideology to understanding the Fourteenth Amendment).

²¹⁸ CURTIS, NO STATE (1986), *supra* note 10, at 126; see also MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 114–15; Zuckert, Review (1991), *supra* note 97, at 160. Boyce in 1998, and Thomas in 2001, offered arguments somewhat reminiscent of Berger's here. See Thomas, *When* (2001), *supra* note 31, at 200 (noting Howard's "radicalism"); see also *id.* at 200–01; Boyce (1998), *supra* note 60, at 984–85.

²¹⁹ See BERGER, FOURTEENTH (1989), *supra* note 7, at 131–35 (discussing Bingham's views on Black suffrage); BERGER, GOVERNMENT (1997), *supra* note 7, at 77, 81, 85 n.2, 99, 101–02, 112–13, 255–57, 259 (same). In a forthcoming article, I will

Berger's insistence on confusing such issues, and how far astray it led him, is shown by his incessant touting of Senator Sherman as a conservative whose views supposedly militated against any broad understanding of the Amendment.²²⁰ Sherman, actually more of a moderate overall, certainly was more conservative than Howard on some issues. But as revealed in an 1872 Senate speech, Sherman was an equally expansive incorporationist, taking an even broader view of the Amendment's Privileges and Immunities Clause than Bingham.²²¹

During twenty years of writing on the incorporation issue, Berger never mentioned Sherman's 1872 speech, even though Avins reprinted and discussed it in a 1967 book, and quoted and discussed it prominently in a 1968 article. Berger relied heavily on the Avins book in two books and at least five articles of his own. The Avins article was cited by Curtis on the first page of his 1982 article responding to Berger. Curtis himself discussed the Sherman speech in that 1982 article, which prompted Berger to write an article in response—but not to address the Sherman speech. Curtis again discussed it in his 1986 book, to which Berger responded in a 1989 book—but again, without finding time to discuss or even mention the Sherman speech.²²²

discuss how incorporation may have been viewed as one means, notably less "radical" than others, to promote a certain limited degree of equal rights. *See infra* note 223; Part VII.A (p. 1588 & n.260); *see also supra* Part II (pp. 1533–35) (discussing Bingham's moderately conservative overall views). The harshest contemporary comment on incorporation of which I am aware—from a rabidly reactionary Democrat—was the complaint of Samuel S. Nicholas. While he made it clear he disliked the idea, as he disliked pretty much all Republican ideas, he never suggested he found it especially "radical" or extreme in comparison to other Republican goals. He was much more vituperative and longwinded about many others. *See infra* Part VII.B (pp. 1590–95).

²²⁰ *See* BERGER, *FOURTEENTH* (1989), *supra* note 7, at 40–41, 60, 65, 82, 86 n.88, 100, 108–09, 134, 144 n.4; BERGER, *GOVERNMENT* (1997), *supra* note 7, at 34, 256–57, 260.

²²¹ Sherman asserted that the early "amendments to the Constitution do not define all the rights of American citizens [under the clause]. They define some of them . . . What are those rights? Sir, they are as innumerable as the sands of the sea." CG (42:2) 843 (Feb. 6, 1872); *see also id.* at 843–44; CURTIS, *NO STATE* (1986), *supra* note 10, at 164–65 (quoting and discussing this speech); BENEDICT, *COMPROMISE* (1974), *supra* note 72, at 32 (identifying Sherman as a "centrist" Republican); Allan Burton Spetter, *John Sherman*, 19 ANB, *supra* note 1, at 813 (generally describing him as a moderate).

²²² *See* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS, at xxvii (Alfred Avins ed., Delaware Law School, 2d ed. 1974) (originally published, Virginia Commission on Constitutional Government, 1967) [hereinafter AVINS, *DEBATES* (1967)] (reader's guide discussing the 1872 Sherman speech); *id.* at 614 (reprinting the speech); Avins, *Incorporation* (1968), *supra* note 9, at 8, 15, 24 (quoting

Fairman and Berger both cited an 1866 campaign speech by Sherman to argue that he rejected incorporation.²²³ Berger certainly could not have

and discussing the speech); Raoul Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U. L. REV. 311, 314 n.22 (1979) [hereinafter Berger, *Light From the Fifteenth* (1979)] (there and throughout citing AVINS, DEBATES (1967), *supra*, which he noted “is a compendious and convenient reprint of almost all of the relevant debates”); Curtis, *Further Adventures* (1982), *supra* note 10, at 89 & nn.1 & 3 (citing Avins, *Incorporation* (1968), *supra* note 10, on the first page of an article responding to Berger, *Nine-Lived Cat* (1981), *supra* note 7); Curtis, *Further Adventures* (1982), *supra* note 10, at 116–17 (quoting and discussing the 1872 Sherman speech); Berger, *Reply* (1983), *supra* note 141, at 1 & n.2 (responding to Curtis but ignoring the Sherman speech and the 1968 Avins article, while citing the 1967 Avins book and blaming it for one of Berger’s own misquotations of a congressional speech); CURTIS, NO STATE (1986), *supra* note 10, at 164–65 (again quoting and discussing the 1872 Sherman speech); BERGER, FOURTEENTH (1989), *supra* note 7, at 151 (there and throughout citing Avins’s 1967 book but not his 1968 article, and again ignoring the Sherman speech, in a book devoted mostly to responding to Curtis); Berger, *Response to Zuckert* (1991), *supra* note 44, at 5 n.24 (there and throughout citing Avins’s 1967 book but not his 1968 article, and omitting the Sherman speech); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 62 U. CIN. L. REV. 1, 3 n.14 (1993) (same); Raoul Berger, *The “Original Intent”—as Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 245 n.23 (1996) (same); BERGER, GOVERNMENT (1997), *supra* note 7, at 493 (same).

²²³ Fairman, like Berger, never mentioned Sherman’s 1872 speech, but Fairman was consistent in that regard, since he felt that statements made after the adoption of the Amendment have little relevance. See Fairman, *Original* (1949), *supra* note 7, at 137. That is a legitimate argument, though I tend to disagree. For my preliminary views on the subject, see *supra* note 57.

Sherman’s 1866 speech, made in Cincinnati at the height of the election campaign, asserted that the Amendment

was an embodiment of the Civil Rights [Act], namely: that [all people] . . . should have equal rights before the law; that is all there is to it; that [all people] . . . have the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause.

CINCINNATI COMMERCIAL, Sep. 29, 1866, at 1, *quoted in* Fairman, *Original* (1949), *supra* note 7, at 77 & n.143; *see also* BERGER, FOURTEENTH (1989), *supra* note 7, at 41, 82; BERGER, GOVERNMENT (1997), *supra* note 7, at 131, 170; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1298. Even Curtis opined that this statement “seems inconsistent with incorporation.” CURTIS, NO STATE (1986), *supra* note 10, at 253 n.46.

But Sherman’s 1866 speech, overall, is quite ambiguous on the incorporation issue. First of all, Sherman never explicitly addressed that issue. Second, he could not seriously have contended that the points he mentioned were truly “all there [was]” to Section 1, which explicitly prohibits denying *any person* the protections of “due process of law,” thus clearly going beyond (at least to that extent) a mere guarantee of equal rights, freedom of movement, and to sue and make contracts. See *infra* Part VII.B (p. 1605 & n.318) (noting that “due process of law” was widely understood during that era to encompass most or all procedural guarantees of the Bill of Rights). Third and most

argued, with any consistency, that Sherman's 1872 speech came too late to shed light on the original understanding. Berger relied on several 1876 congressional speeches in attempting to refute the incorporation theory.²²⁴

Fairman and Berger, and other scholars, should have considered more carefully a *New York Times* editorial published on May 25, 1866, two days after Howard's speech. It carefully distinguished Howard's "clear and cogent" exposition of the Privileges and Immunities Clause from his personal views on Black suffrage and other issues. The *Times* made perfectly clear that Howard "candidly" revealed issues on which his views departed from those of the Joint Committee as a whole. No one at the time appears to have even suggested that nationalizing the Bill of Rights was such an issue. The *Times* indicated that Howard's presentation was generally understood to be in scrupulous conformity with the views of Fessenden and the Joint Committee. That suggests that Howard's views on incorporation faithfully reflected those of the dominant Republican Party in Congress as a whole. Indeed, the May 25 editorial, read together with Howard's speech, implies that nationalizing the Bill of Rights—in contrast with issues like voting rights for Blacks or former rebels—may have been viewed as uncontroversial, as simply a "needful constitutional change." The *Times* said it "regretted," "[o]n many grounds," that Fessenden's illness precluded his full participation, but

importantly, as Fairman himself proceeded to quote, Sherman wound up by declaring—albeit only in regard to "the black race"—that "we are bound to protect them in *all their natural rights*." Fairman, *Original* (1949), *supra* note 7, at 77 (my emphasis). That seems like it might encompass and go well beyond the Bill of Rights, much in the spirit of Sherman's 1872 speech. This was, after all, a political stump speech, not a careful legal analysis. Concededly, Sherman framed the Amendment's primary goal as protecting equal rights. But there is no conflict whatsoever between that goal and the incorporation theory. On the contrary, as I will discuss in a forthcoming article dealing with the "equal rights only" reading of the Amendment that some have advocated, the two are perfectly consistent and mutually reinforcing. See *infra* Part VII.A (p. 1588 & n.260). There is a surprisingly strong argument that the Civil Rights Act itself was widely understood to substantively protect Bill of Rights guarantees. See, e.g., *infra* Part VII.B (pp. 1593–94 & n.272) (discussing the Nicholas essay); CURTIS, NO STATE (1986), *supra* note 10, at 71–83. Protecting a substantive set of rights for everyone is a simple, direct, and obvious way to achieve a certain limited degree of equal rights. See, e.g., MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 4, 157–58; Curtis, *Blueprint* (1990), *supra* note 142, at 834–35; Curtis, *Resurrecting* (1996), *supra* note 10, at 55.

²²⁴ See Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 464 (discussing the Blaine Amendment debate, though misdating it to 1875); Berger, *Reply* (1983), *supra* note 141, at 16–18 (same, misdating it to 1875 in text); *id.* at 17–18 nn.140, 152, 154 & 157 (correctly dating it to 1876 in footnotes). I discussed in Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1125–30, 1134–35, why that debate, while certainly cutting against the incorporation theory, does not deserve much weight. See also *supra* Introduction (p. 1523 & n.43).

that apparently had nothing to do with Howard, Section 1, or the incorporation issue.²²⁵

It is worth quoting much of this editorial, which seems never to have been discussed in depth in prior scholarship:

With reference to the amendment, as it passed the House of Representatives, the statement of Mr. Howard, upon whom the opening task devolved, is frank and satisfactory. His exposition of the considerations which led the Committee to seek the protection, by a Constitutional declaration, of the privileges and immunities of the citizens of the several States of the Union,' [*sic*; no opening quotation mark in original] was clear and cogent. To this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance. The second section [which proposed to reduce representation in Congress for any state denying the vote to any law-abiding adult men, and remained in the Amendment as ratified] is equally unobjectionable in its aim and form. Mr. Howard candidly admits that while his personal preferences are in favor of a qualified negro suffrage, the question of suffrage pertains to "positive local law," as distinguished from national enactment; and the change in the basis of representation, adapting the number of representatives to the number of voters, therefore becomes the best possible means of meeting the political emergency resulting from emancipation.

Mr. Howard puts the matter in the practical light when he suggests that it should be dealt with, not alone in regard to the abstract principles or partisan predilections of Northern Senators, but in regard, also, to the probable course of the Southern Legislatures, to whom the amendment must be submitted. "The question is," as he alleges, "what will the Legislatures of the various States do in the premises? What is likely to meet the approbation of the various State Legislatures?" Starting with this impression, the inexpediency of the third (disfranchising) section is manifest. [The Senate later removed this section.] And Mr. Howard, albeit on this occasion the representative of the Committee, unhesitatingly admits his opposition to the clause. He had resisted it in Committee, and he opposes it still. The Southern Legislatures would unquestionably refuse to ratify an amendment of which wholesale disfranchisement is the most prominent feature; and its adoption by the Senate would destroy the utility, by destroying the practicability of the whole. As the *locum tenens*²²⁶ of Mr. Fessenden, Mr. Howard had no alternative but to submit the amendment as it came from the Committee. But his emphatic repudiation of the clause

²²⁵ Editorial, *The Reconstruction Committee's Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4 [hereinafter *Editorial* (May 25, 1866)].

²²⁶ A Latin legal term meaning "deputy," "substitute," or "representative" (literally, "holding the place"). BLACK'S LAW DICTIONARY 959 (Bryan A. Garner ed., Thomson-West, 8th ed. 2004).

which Mr. Thaddeus Stevens pronounced the chief glory of the amendment is nevertheless significant. It shows that those who really desire the adoption of an amendment providing for needful constitutional changes as a preliminary to the reestablishment of national harmony, are alive to the mischief which is being wrought by the extreme Radicals.²²⁷

Fairman quoted only the first half of the first above-quoted paragraph, describing that as “the full context” and crowing: “Not a word about the Bill of Rights!”²²⁸ But as Fairman conceded, the *Times* on May 24 had fully reported Howard’s discussion of the Bill of Rights—an “exposition” the *Times* described on May 25 as “clear and cogent.”²²⁹ The May 25 editorial was not a news article but an opinion piece, obviously focusing on issues the *Times* viewed as especially controversial. Nationalizing the Bill of Rights, an issue governed by Section 1 of the Amendment, was evidently not one of those. The *Times*, as quoted above, thought “the first section” would obtain “ready acquiescence” from Unionists “throughout the country,” and that “the South could offer no justifiable resistance” to it. Why should the *Times* have used this occasion to regurgitate uncontroversial news fully reported the day before, as Fairman seemed to demand? Fairman’s treatment most certainly did *not* provide fair or adequate context, especially in light of his tendentious attempts to marginalize Howard.

Berger just ignored the May 25 editorial altogether—perhaps again relying on Fairman, as so many have. Indeed, Berger generally ignored the press coverage of the Bingham and Howard speeches. This provides yet another example—especially egregious and telling—of Berger’s repeated perpetuation of serious factual mistakes, even after they were called to his attention. It requires a little more background. Horace Flack, in his 1908 book favoring the incorporation theory, mistakenly said there was no explicit, contemporary newspaper coverage of the idea that the Fourteenth Amendment would apply the Bill of Rights to the states.²³⁰ This was an understandable mistake, given the severe difficulties involved, especially at that time, in researching old newspapers. Flack did describe numerous newspaper articles by which, overall, he argued, “the people were kept

²²⁷ *Editorial* (May 25, 1866), *supra* note 225, at 4; *see also* FLACK (1908), *supra* note 78, at 142 (briefly citing this editorial, slightly misquoting it as describing Howard’s speech as “cogent and clear”); Fairman, *Original* (1949), *supra* note 7, at 79 & n.146 (noting Flack’s citation, and quoting a small portion); HALBROOK, ARMED (1984), *supra* note 10, at 117–18 (quoting a small portion); HALBROOK, FREEDMEN (1998), *supra* note 10, at 36 (quoting the “clear and cogent” comment).

²²⁸ Fairman, *Original* (1949), *supra* note 7, at 79 n.146. That was the extent of Fairman’s discussion.

²²⁹ *Id.* at 68.

²³⁰ FLACK (1908), *supra* note 78, at 153; *see also id.* at 140–60.

informed as to the objects and purposes of the Amendment,” and from which incorporation of the Bill of Rights “may be inferred . . . [as] the logical result.”²³¹ Fairman, to his credit, caught Flack’s mistake and provided a correction in his 1949 article.²³²

Justice Black himself acknowledged and quoted Flack’s erroneous statement in this regard in his 1947 *Adamson* dissent, thereby undercutting his own argument.²³³ Ironically, Fairman savaged Black for exaggerating the newspaper coverage Flack did discuss so as to make it sound more supportive of Black’s thesis. Black was indeed guilty of applying too much “spin” on this point, though Fairman overstated the matter.²³⁴ But if Black—a very busy judge, as Morrison noted²³⁵—had taken the time to retrace and supplement Flack’s newspaper research, he would have found he had no need to hype what Flack said. Black could safely have gone much further than either he or Flack actually did in asserting contemporary newspaper recognition of the incorporation theory.²³⁶

Enter Berger. In his 1977 book, he *twice* repeated Flack’s mistaken claim of no newspaper coverage—which, conveniently, supported Berger’s anti-incorporation thesis. In support of his first statement to this effect, Berger cited the very pages of Fairman’s article in which Fairman corrected Flack on this point. Berger made no mention of Fairman’s correction of Flack’s mistake. Indeed, his footnote citing Fairman made no mention of Flack at all. He simply misrepresented Flack’s claim as Fairman’s and linked it to a separate anti-incorporation comment by Fairman.²³⁷ Curtis, in his 1980 article, called Berger on this double mistake, noting that “[o]n this point Berger miscites Fairman.”²³⁸

²³¹ *Id.* at 142 (first quotation); *id.* at 153–54 (second quotation).

²³² See Fairman, *Original* (1949), *supra* note 7, at 68.

²³³ *Adamson v. California*, 332 U.S. 46, 110 (1947) (appendix to opinion of Black, J., dissenting).

²³⁴ See Fairman, *Original* (1949), *supra* note 7, at 80 (focusing on whether Black could properly have relied on Flack to assert that incorporationist speeches were “published widely,” while downplaying the ultimate reality that they *were* published widely); see also *id.* at 78–81.

²³⁵ See *supra* Part III (p. 1546) (quoting Morrison (1949), *supra* note 7, at 162).

²³⁶ See *supra* Part IV (discussing news coverage of Bingham’s speeches); see also *supra* pp. 1564–65, 1571, 1576–78 (same as to Howard’s speech).

²³⁷ BERGER, *GOVERNMENT* (1977), *supra* note 7, at 148 n.66 (citing and quoting Fairman, *Original* (1949), *supra* note 7, at 68–69, 137); see also BERGER, *GOVERNMENT* (1977), *supra* note 7, at 151–52 & n.77 (quoting FLACK (1908), *supra* note 78, at 153, and noting that Black cited Flack in this regard).

²³⁸ Curtis, *Bill of Rights* (1980), *supra* note 10, at 96 n.383.

Berger's 1981 article, replying to Curtis, very grudgingly admitted *only* the underlying mistake as to newspaper coverage. He first offered several excuses, then a pompous disclaimer: "But no; scholarly integrity demands exactitude in every detail, and I therefore freely confess error, for no scholar worthy of the name would delude his fellows by mistaken testimony." He rather spoiled the effect of that by then lobbing yet another of his many *ad hominem* attacks on Curtis: "Would that activists would as freely confess their errors."²³⁹ But backing up to Berger's proffered then hastily disclaimed excuse, it appears he did not "freely confess" all his errors. His primary excuse was that he relied on Flack and Black.²⁴⁰ That would certainly sound plausible to Berger's readers, at first blush. Flack and Black both supported the incorporation theory, so why not trust what amounted to their "statements against interest"? But only one of Berger's statements cited Flack and Black. The first statement, as Curtis noted, miscited Fairman and no one else. Berger had before him the very pages by Fairman correcting Flack's mistake. Instead of following that correction, he compounded the mistake. He never admitted that. And, of course, both mistakes went in favor of his overall argument.

Taking the most charitable view, Berger in 1977 may indeed have relied on Flack and Black. Perhaps he was simply inattentive and careless in his citations and somehow forgot that Fairman did not support—indeed, had refuted—this point. But if that can excuse Berger's original mistake, one would expect him to fully own up to it when challenged. One would think Berger, at the very least, would stand by his limited, disingenuous, and extremely ungracious acknowledgment of Curtis's correction. Think again.

The Liberty Fund published the second edition of Berger's book in 1997, reproducing the original text apparently unchanged, though newly typeset. Berger added extensive new supplemental notes after most chapters, providing whatever updates and additional commentary he chose to offer. One would think a clear and important factual error would be corrected in the original text, perhaps in brackets or a footnote, to avoid misleading readers who might easily overlook a correction some pages later in a supplemental note. At the very least, such an error should have been mentioned and corrected somewhere in the fifteen-page supplement Berger provided after that chapter. That supplement repeatedly referenced Curtis's responses to his work, always to disparage or dismiss them—including two quotations of the

²³⁹ Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 459. He never identified any comparable error by Curtis, whom he disparaged as "[l]ike a hen which scratches and scratches and at length finds a grain of corn." *Id.*; see also *infra* pp. 1582–83 & n.245.

²⁴⁰ See Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 459.

very same 1980 Curtis article calling him on the error under discussion, and one citation to his own 1981 article admitting (in part) that error.²⁴¹

But no. Berger in 1997 repeated verbatim *both* erroneous statements from his 1977 book, without any correction whatsoever. The first statement again falsely claimed that Fairman said “that no newspaper reported Howard’s [speech].”²⁴² The second statement again quoted Flack directly for the mistaken underlying point.²⁴³ *Nowhere* in the 1997 edition did Berger alert his readers to these repeated mistakes, much less that they had been called to his attention seventeen years before as part of an extended debate with Curtis that dominated the last two decades of his scholarship.

Sadly, that is not all. Berger added a *third* statement of this double falsehood *freshly written for the 1997 edition*. He described it as a “fact” that the Bingham and Howard speeches “caused hardly a ripple. Horace Flack found no published statement that ‘the first eight amendments were made applicable to the States.’ Howard’s remark, Charles Fairman recounts, ‘seems at the time to have sunk without leaving a trace in public discussion.’ This obliviousness is remarkable . . .”²⁴⁴ Berger’s sentence citing Fairman, yet again, misleadingly cited *the very same pages* in Fairman’s article *correcting* the mistaken assertion by Flack that Berger—in the sentence just before—once again served up to his unsuspecting readers. “This obliviousness” was indeed “remarkable.” I cringe at the need to delve into such convoluted details. But Berger’s scholarship here, as in other instances, did not meet minimum acceptable standards.

²⁴¹ See BERGER, *GOVERNMENT* (1997), *supra* note 7, at 176 & nn.10–11 (quoting Curtis, *Bill of Rights* (1980), *supra* note 10); *id.* at 189 n.104 (citing Berger, *Nine-Lived Cat* (1981), *supra* note 7); *see generally id.* at 174–89.

²⁴² *Id.* at 167 n.66 (citing and quoting Fairman, *Original* (1949), *supra* note 7, at 68–69, 137).

²⁴³ *Id.* at 170 & n.77 (quoting FLACK (1908), *supra* note 78, at 153).

²⁴⁴ *Id.* at 175–76 & nn. 7–8 (quoting FLACK (1908), *supra* note 78, at 153; Fairman, *Original* (1949), *supra* note 7, at 68–69). Berger noted in his preface to this 1997 revision that it “was completed in my ninety-fifth year, so the gentle reader should cast upon it a charitable eye, bearing in mind Dr. Johnson’s remark about ‘a dog’s walking on his hind legs. It is not done well; but you are surprised to find it done at all.’” *Id.* at xxii (citation omitted). That shows charm and good humor. Berger’s longevity and energy were indeed remarkable, admirable, and enviable. He died in 2000 at the age of 99. The 1997 book was apparently his last published work. *Cf.* Martin, *Berger Obituary* (2000), *supra* note 19. But his extensive, articulate, and heavily researched 1997 supplemental notes seem inconsistent with any age-related excuse. Nor would that explain why his errors usually favored his arguments. Whether age aggravated the general rigidity of his thinking is a question I would not try to answer. The issue is not Berger’s subjective personal blameworthiness (if any), but the objective (un)reliability of his scholarship.

Ironically indeed, Berger dismissed Curtis and various other scholars as unreliable “activists.”²⁴⁵ Berger justified such personally pejorative labeling

²⁴⁵ On Curtis, see, for instance, BERGER, GOVERNMENT (1997), *supra* note 7, at 176, 180, 185. Curtis was in good company. Berger similarly dismissed Dean Alfange, John Hart Ely, Thomas Grey, Harold Hyman, Alfred Kelly, Stanley Kutler, Louis Lusky, Nathaniel Nathanson, William Nelson, and Michael Perry (and probably others I missed), while singling out Jacobus tenBroek as a “neoabolitionist” (is that a bad thing?). See *id.* at 177 (Kelly, tenBroek); *id.* at 185 & n.76 (Hyman, Nelson); see also Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 453 n.147 (Kelly a “perfidious activist,” though unclear why he deserved that special honor); Berger, *Light From the Fifteenth* (1979), *supra* note 222, at 311 (Lusky, Nathanson); *id.* at 312 (Kutler); *id.* at 345 (Alfange, Perry); *id.* at 359 (Grey); *id.* at 364–65 (Ely).

Berger’s low point was his accusation that Robert Cottrol “read[s] constitutional history through black-colored lenses.” Raoul Berger, *Cottrol’s Failed Rescue Mission*, 27 B.C. L. REV. 481, 481 (1986) (responding to Robert J. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 26 B.C. L. REV. 353 (1985) [hereinafter Cottrol, *Static* (1985)]). Berger may not have known that Cottrol is African-American. Such a comment, regardless, is disturbingly *ad hominem*. The context made clear that he used the term in a racial sense. He may have been stung by Cottrol’s criticism, but Cottrol never personally attacked Berger. The harshest comment I could find focused strictly on Berger’s work and was mixed with praise: “Berger’s often prodigious scholarship is marred by an all too facile consideration of the materials he has developed.” Cottrol, *Static* (1985), *supra*, at 386.

The point is not the color of Cottrol’s skin, but the thinness of Berger’s. Berger could dish it out, but he could not take it. A telling illustration was Berger’s complaint that “Curtis cannot bring himself to state his opponent’s case fairly and accurately.” BERGER, FOURTEENTH (1989), *supra* note 7, at 47 n.12. What was going on there? Well, Curtis had criticized Berger’s claim that Bingham’s frequent references to “the bill of rights” did not really mean the Bill of Rights. See CURTIS, NO STATE (1986), *supra* note 10, at 123; see also *supra* Part III (pp. 1550–51 & nn.138–39). But in fact, it was Berger who could not be trusted to state *his own* view fairly or accurately. He reprinted only a selective and misleading portion of his 1977 statement that Curtis, very reasonably, had relied upon: “As Fairman pointed out, the antecedent of [Bingham’s] remark was Article IV sec. 2, and the Fifth Amendment due process clause which Bingham equated with equal protection.’ So it was not Berger but Fairman who ‘said.’” BERGER, FOURTEENTH (1989), *supra* note 7, at 47 n.12 (quoting BERGER, GOVERNMENT (1977), *supra* note 7, at 141) (emphasis added by Berger in 1989). First of all, would any rational reader, based on that sentence alone, doubt that Berger had adopted Fairman’s claim as his own? In any event, Berger omitted in 1989 the very next sentence in his 1977 book, which stated flatly: “There is no reason to believe that [Bingham’s] subsequent references to the Bill of Rights had broader compass.” BERGER, GOVERNMENT (1977), *supra* note 7, at 141. Apparently, Berger forgot that in 1981 he spent two pages defending this very claim, emphatically presenting it as his own and quoting Curtis ascribing it to him with nary a hint that Curtis misstated his views. See Berger, *Nine-Lived Cat* (1981), *supra* note 7, at 461–63 & nn.201–17. Berger’s only mention of Fairman in that entire 1981 passage was in a single footnote invoking him as *additional* supporting authority. See *id.* at 463 n.214 (quoting Curtis, *Bill of Rights* (1980), *supra* note 10, at 68). In 1997, Berger republished verbatim, without further comment, his 1977 statement of this view, thus

on the grounds that Curtis was “passionate[ly] concern[ed] for civil liberties” and feared that Berger’s writings might lead to a “rollback” of important rights.²⁴⁶ The latter two statements are true. They are also true of me and probably many other scholars. Indeed, it would be fair enough, though a matter of opinion and debatable word choice, to call me and many other scholars “activists,” in the sense that we have (in various spheres) actively pursued what we each conceive to be justice and liberty under law. But it will be a sad day when concern for civil liberties disqualifies a legal scholar. Are only those callously indifferent to the harmful potential of flawed scholarship like Berger’s allowed to critique it?

What was unfair about Berger’s *ad hominem* attacks was the defamatory sting that such concern or “activism,” by itself, automatically renders a scholar unreliable or even dishonest. Of course, by the same token, the possible consequences of Berger’s scholarship—and Berger’s normative views, if any—do not impeach, commend, or have any bearing on its merits either. All scholarship should be judged strictly on its merits as such—its factual accuracy, interpretive fairness, and whether it advances overall understanding—or its lack of those qualities. Curtis, unlike Berger, has adhered rigorously to that approach.²⁴⁷ Berger’s approach degraded the scholarly discourse on the incorporation issue for twenty years.

The broader lesson of this sorry tale is how rigid and incapable Berger proved to be when it came to learning from other scholars. It was not just Curtis whom he contemptuously swatted aside. Nearly half a century after Fairman launched the modern conventional scholarship on incorporation, Berger could not even be shaken loose from a false rendition of what his own anti-incorporationist ally had demonstrated.

VII. THE AMENDMENT AND THE STATES

Not a single member of either House of Congress, throughout all the 1866 debates, nor anyone during the ensuing ratification debates—with perhaps a handful of implicit and debatable exceptions—ever contradicted or

echoing his 1981 view but apparently retracting his 1989 attempt to retract his 1977 and 1981 views. See BERGER, *GOVERNMENT* (1997), *supra* note 7, at 161. Who can keep track?

²⁴⁶ Berger, *Response to Zuckert* (1991), *supra* note 44, at 3 & n.13 (citing, *inter alia*, Curtis, *Bill of Rights* (1980), *supra* note 10, at 46–47) (duplicate quotation marks omitted).

²⁴⁷ Curtis’s co-authored textbook on constitutional law twice cites Berger’s work on the incorporation issue, noting only (politely) that it has been “challenged.” 1 MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON M. DOUGLAS & PAUL FINKELMAN, *CONSTITUTIONAL LAW IN CONTEXT* 700, 736 (2 vols., Carolina Academic Press, 2d ed. 2006).

even directly questioned the incorporationist reading of the Amendment set forth by Bingham and Howard.²⁴⁸ As Justice Black suggested, one might well conclude that others accepted and relied upon the reading propounded by these two leading proponents.²⁴⁹ The best that anti-incorporationists have

²⁴⁸ See, e.g., CURTIS, NO STATE (1986), *supra* note 10, at 91, 105 (summarizing the congressional debates); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 187 (same). On the ratification debates, see the sources cited *infra* notes 262–63. The only significant (but highly debatable) exception I am aware of is the 1866 Sherman campaign speech. See *supra* note 223. Anti-incorporationist scholars have generally gone no further than to point out the general silence on the issue. They have occasionally argued that a handful of other statements show implicit conflicts. See, e.g., *supra* Part VI (pp. 1568–70) (discussing Sen. Poland’s speech); BERGER, GOVERNMENT (1997), *supra* note 7, at 184–85 (citing Poland and three other examples from the 1866 Congress). Two of Berger’s other examples involved speakers said, like Sherman, to equate the Amendment and the 1866 Civil Rights Act. But those might better support an incorporationist view of the Act. See *supra* note 223. Berger’s fourth example, inexplicably, described as “incompatible with incorporation” a sweeping statement by Rep. William Windom (R-Minn.) “summariz[ing] the meaning of the Amendment as ‘your life shall be spared, your liberty shall be unabridged, your property shall be protected.’” BERGER, GOVERNMENT (1997), *supra* note 7, at 185 (quoting AVINS, DEBATES (1967), *supra* note 222, at 238, which in turn reprinted CG (39:1) 3169 (June 14, 1866)). Windom’s point—which was, in fact, highly *consistent* with incorporation—was that former rebels had no reason to complain about the Amendment because it guaranteed their own rights as much as it did those of the freed Blacks. Rather, Blacks could rightfully complain because it did not explicitly guarantee their *political* rights. See CG (39:1) 3169–70.

Exasperatingly, even this basic historical fact—the essential lack of contemporary contradiction of the incorporation theory—remains subject to widespread misinformation. For example, a social studies textbook sponsored by the National Archives notes the incorporationist statements by Bingham and Howard. But after quoting Howard, this book states: “He was, however, alone in this assertion. Most senators argued that the privileges and immunities clause did not bind the states to the federal Bill of Rights.” TEACHING WITH DOCUMENTS: THE COLONIAL PERIOD TO 1879 113 (2002) (Article 1.21, “Reconstruction, the Fourteenth Amendment, and Personal Liberties, 1866 and 1874”). The first quoted sentence is literally true, but the implication is misleading. There are ample grounds, as we have seen, to conclude that Howard was far from “alone” in his view. The second sentence is simply false. Not a single senator—nor anyone during 1866–68, to my knowledge—made any such argument. Most legislators said nothing at all on the subject. I am pleased to report, however, that after I alerted the National Archives to this error, its Office of Education and Volunteer Programs responded very promptly and thoughtfully by correcting the authorized online version of the textbook available (in relevant part) at <http://www.ourdocuments.gov/doc.php?doc=43>. Unfortunately, an unauthorized and uncorrected version of the relevant section—the textbook, as a government work, is not copyrighted—still appears as this Article went to press at <http://www.historicaldocuments.com/14thAmendment.htm>.

²⁴⁹ See *Duncan v. Louisiana*, 391 U.S. 145, 164–65 (1968) (Black, J., concurring).

been able to do is to raise doubts about whether the Bingham-Howard view should be given decisive weight in construing the Amendment as ratified.²⁵⁰

They have generally made four arguments:

First, the Bingham-Howard view was not sufficiently echoed or corroborated by others in the 1866 Congress.

Second, there were some statements in Congress that lend themselves to a narrower “equal-rights-only” reading of the Amendment’s Privileges and Immunities Clause, thus implying tension with the Bingham-Howard view.

Third, the Bingham-Howard view—and that of Congress as a whole, if Congress agreed with them—was not sufficiently echoed or corroborated outside Congress, and was implicitly contradicted in certain ways, during the two-year battle in the states over ratification.

Fourth, to the extent that explicit, affirmative corroboration was lacking, either inside or outside Congress, the default conclusion must go against incorporation.

Lambert Gingras, in a thoughtful but flawed article, helped to clarify these questions, and correctly suggested that each may yield a very different answer.²⁵¹

A. “Silence” or Implicit Contradictions in the 1866 Congress?

On the first and second issues noted above, Gingras argued that while Bingham himself was not necessarily “confused,” he may have appeared so to many of his colleagues. Gingras thus concluded that Congress as a whole did not sufficiently understand or embrace the incorporation theory. George Thomas made a similar argument in his valuable 2001 article.²⁵² But while Gingras and Thomas raised some interesting questions, they did not succeed in rebutting the powerful case constructed by Crosskey, Curtis, Amar, Aynes, and others that the Bingham-Howard view was widely understood and corroborated in Congress, both explicitly and implicitly.²⁵³

²⁵⁰ Some scholars have suggested that Bingham himself did not really mean what we think of as the Bill of Rights when he repeatedly referred to “the bill of rights.” *But see supra* Part III (pp. 1550–51 & nn.138–39).

²⁵¹ *See* Gingras (1996), *supra* note 198, at 41–42, 61–63. Among the flaws in Gingras’s article were his failures to discuss or even cite Aynes, *Bingham* (1993), *supra* note 10, or to deal in any depth with Crosskey’s work. *See id.* at 45 n.30 (citing only once, generally, to Crosskey, *Fairman* (1954), *supra* note 9); *see also supra* note 198 (Gingras echoing Fairman’s misunderstanding of Sen. Poland’s speech).

²⁵² *See* Gingras (1996), *supra* note 198, at 43–63, 70; Thomas, *When* (2001), *supra* note 31, at 184, 198–99; *see generally id.* at 180–216.

²⁵³ *See, e.g.,* Crosskey, *Fairman* (1954), *supra* note 9, at 10–84; CURTIS, *NO STATE* (1986), *supra* note 10, at 26–130; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 181–97; Aynes, *Bingham* (1993), *supra* note 10, at 66–83.

Thomas actually did a very good job of confirming how little controversy, inside or outside Congress, seemed to surround Section 1 of the Amendment—in stark contrast with the other sections dealing with touchy matters like the political rights of Blacks and former rebels, representation in Congress, and war debts.²⁵⁴ He also helpfully confirmed that Republican proponents of the Amendment had many and far more pressing political priorities on their minds—including those just listed—other than “nice judicial questions about privileges or immunities, due process, or equal protection.”²⁵⁵

In this light, the taciturnity of Republicans in the face of Democratic taunts is far less puzzling than Thomas painted it.²⁵⁶ As noted earlier,

²⁵⁴ See Thomas, *When* (2001), *supra* note 31, at 184–85, 198–200, 204–05, 208–10.

²⁵⁵ *Id.* at 203; see also *id.* at 191–96, 200, 202–03, 209. As Thomas acknowledged, Curtis had made the same basic point. See CURTIS, NO STATE (1986), *supra* note 10, at 105, cited in Thomas, *When* (2001), *supra* note 31, at 209; see also AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 202–04.

²⁵⁶ Thomas makes too much of two senators—Democratic *opponents* of the Amendment—who claimed to be confused about the meaning of the Privileges and Immunities Clause. Thomas argued in 2001 that the Republican response was inadequate, if incorporation were generally understood to be the goal, though he ultimately conceded that Republicans might simply have dismissed such comments by opponents as “political rhetoric.” Thomas, *When* (2001), *supra* note 31, at 198–99 & n.221 (quoting CG (39:1) 3039 (June 8, 1866) (Sen. Thomas A. Hendricks, D-Ind.); *id.* at 3041 (June 8, 1866) (Sen. Reverdy Johnson, D-Md.)). Cf. Fairman, *Original* (1949), *supra* note 7, at 60, 64 (also relying on Hendricks and Johnson). Thomas, while now conceding “[i]t is understandable that Howard did not wish to repeat his crystal clear presentation,” continues to argue that it is “a little strange that none of the other proponents used Howard’s theory to rebut the claim of lack of clarity.” Thomas, *Riddle* (2007), *supra* note 5, at 1646; see also *id.* at 1633 & n.25 (earlier citing Hendricks and Johnson). For reasons stated in the text, this still seems to me like Monday-morning quarterbacking. Given that Howard’s speech was sufficiently clear, why should he or anyone else bother to belabor it with diehard opponents? The apparent Republican strategy seems clear enough—let anointed spokesmen present the party line, maintain discipline, and (as much as possible) avoid getting dragged into pointless arguments with unpersuadable Democrats. After all, the strategy worked—the Amendment passed.

For similar reasons, Thomas’s argument about Sen. Edgar A. Cowan (R-Pa.)—“we just do not know what [he] had in mind,” *id.* at 1643; see also *id.* at 1642–43, 1646—seems beside the point. Cowan, though nominally a Republican, was a very conservative supporter of President Johnson who also voted *against* the Amendment. See CG (39:1) 3042 (June 8, 1866) (Senate vote). Cowan was not only denied reelection to the Senate, but his colleagues—in a strikingly unusual snub—refused to confirm his nomination by Johnson to a diplomatic post. See Silvana Siddali, *Edgar A. Cowan*, 5 ANB, *supra* note 1, at 605.

Boyce also trotted out Sens. Hendricks and Johnson to suggest the Senate “remain[ed] confus[ed].” Boyce (1998), *supra* note 60, at 987; see also Bybee (1995), *supra* note 14, at 1587–88. But opponents would obviously try any tactic to defeat the

Republicans generally “refrained from defining their positions on the floor”; they hashed things out in private party caucuses and generally “confined [their public actions] to voting.”²⁵⁷ The alleged failure of floor leaders like Howard to do a better job—as Thomas sees it with more than a century of hindsight—in drafting or explaining the Amendment, responding to questions, or referring back to earlier speeches, is simply not the mystery Thomas claims.²⁵⁸ Such arguments have the ring of anachronistic Monday-morning quarterbacking—after a 140-year-long weekend.

The argument over the first issue noted above cannot logically be reduced to a quibble over the burden of proof—whether “silence” in the 1866 Congress should be construed one way or the other, as if the issue were in equipoise. The debates in the 1866 Congress were *not* “silent” on the incorporation issue. There was “silence” on only one side of the

Amendment—and failing that, plant seeds of confusion to undermine its efficacy. The claim of “confusion” or “lack of clarity” is a classic make-weight argument—an obvious indicator that opponents feel uncomfortable attacking the merits. It is easily leveled against almost any legal proposal, especially a constitutional amendment necessarily phrased in broad terms.

I do not want to overstate my argument or be too dismissive of Sen. Johnson in particular:

For one thing, Reverdy Johnson was not a Copperhead like [Rep. Andrew J.] Rogers [D-N.J.] or a clown like [Rep. James] Brooks [D-N.Y.]. [Johnson’s] objections would carry more weight. For another, the Republicans in the Senate were not a united group like those in the House. There was no Thaddeus Stevens to crack the party whip above their heads. Unity in the caucus could not be achieved by force, but only by persuasion.

EPPS, *DEMOCRACY REBORN* (2006), *supra* note 94, at 113; *see also* Fairman, *Original* (1949), *supra* note 7, at 64 (noting Johnson’s membership on the Joint Committee). But still, I think my argument remains sound. The fact that Johnson was a more formidable opponent than most may have given Republicans that much more reason to be wary of getting drawn into profitless debate with him about the Amendment’s clarity, or lack thereof.

²⁵⁷ JAMES, *FRAMING* (1956), *supra* note 78, at 146; *see also supra* Part VI (pp. 1571–72). Thomas cited this work by James extensively, but overlooked this point. *See* Thomas, *When* (2001), *supra* note 31, at 181 & n.132, 192 & n.181, 193 & nn.190–93, 194 n.194, 195 n.197, 196 nn.206–07, 200 & nn.225, 227 & 230–31, 202 & n.243. *Cf.* Wallace Mendelson, *A Note on the Cause and Cure of the Fourteenth Amendment*, 43 J. POL. 152, 154–55 (1981) (noting this Republican practice and citing bitter complaints about it by Democrats—including Sen. Hendricks, discussed *supra* note 256).

²⁵⁸ Thomas suggested an alternative wording of Section 1 that he said would have avoided any lingering doubts about incorporation—as indeed it might have—saying it took him “about five minutes” to come up with it. Thomas, *When* (2001), *supra* note 31, at 198; *see also id.* at 198–99; Thomas, *Riddle* (2007), *supra* note 5, at 1629–30 (offering a slightly revised version). I would say such revisions take many decades of 20/20 historical and jurisprudential hindsight.

incorporation “debate”: the nonexistent *anti*-incorporation side. Lack of dispute, in a deliberative body, in the face of a view clearly and repeatedly articulated within that very same body on a plainly important matter, is inherently confirmatory of such a view. It is important to keep in mind the basic facts: The incorporationist view was clearly presented at least four separate times—three times in the House and once in the Senate—at crucial points in the debates and by two influential floor leaders: the primary drafter of the Amendment and the floor manager in the Senate.²⁵⁹

This Article does not attempt to discuss in detail the second issue noted above, relating to the “equal rights only” reading of the Amendment’s Privileges and Immunities Clause. That will require, as essential background, an involved discussion of the Article IV Privileges and Immunities Clause. I will revisit the relationship of that Clause to the Fourteenth Amendment in a forthcoming article that will explore that reading, which is the most interesting and substantial of several long-espoused theories said to undermine the incorporation doctrine. The scholars who have offered the most thoughtful arguments for variants of this reading are William Nelson, John Harrison, and George Thomas. My own ultimate argument will hew closely in many ways to their insights, to which I am deeply indebted, though I differ on certain fundamental points—for example, I drop the “only” element.²⁶⁰

The Freedmen’s Bureau and Civil Rights Acts of 1866 provide very intriguing evidence on this “equal rights only” issue. These crucial Reconstruction statutes, debated and passed by Congress at the same time it debated and proposed the Fourteenth Amendment, turn out to provide surprisingly powerful support to the incorporation theory. They suggest that even a narrow reading of “civil rights” was understood to include, at a minimum, all Bill of Rights guarantees. One might even say the Freedmen’s Bureau Act provides the “smoking gun,” since it expressly prohibited state or

²⁵⁹ This counts the extended three-day debate on February 26–28 (the introduction of the original version of the Amendment in the House) as a single occasion. March 9 (during the Civil Rights Act debate in the House), May 10 (House passage of the near-final version of the Amendment), and May 23 (the introduction of the near-final version in the Senate) were the others. *See supra* Part III (pp. 1556–57) (quoting Justice Black’s view based on his years of Senate experience); *see generally supra* Parts II–III, V.

²⁶⁰ *See generally* NELSON (1988), *supra* note 142, at 115–24; Harrison, *Reconstructing* (1992), *supra* note 89; Thomas, *When* (2001), *supra* note 31, at 180–216; *see also supra* notes 99, 223. My forthcoming article will also draw upon Maltz’s insights on “limited absolute equality,” a baseline principle embraced by even conservative Reconstruction Republicans. *See* MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 4, 157–58. Protecting a substantive set of rights for everyone is a simple, direct, and obvious way to achieve a certain limited degree of equal rights. *See, e.g., id.*; Curtis, *Blueprint* (1990), *supra* note 142, at 834–35; Curtis, *Resurrecting* (1996), *supra* note 10, at 55.

local authorities subject to its reach from denying to anyone, including Blacks newly freed from slavery, the Second Amendment's "constitutional right to bear arms."²⁶¹

B. "Silence" or Implicit Contradictions During Ratification?

On the third issue noted above—the evidence outside Congress during ratification—the picture is mixed. Some scholars, notably Crosskey, Curtis, Amar, Aynes, and Halbrook, have pointed to evidence that the incorporationist understanding was shared to some extent out in the country during 1866–68.²⁶² Other scholars, notably Fairman, Berger, Thomas, and James Bond, have argued strenuously to the contrary. Neither group of scholars has ever identified anyone during the ratification debates—with perhaps a handful of implicit and debatable exceptions—who ever contradicted the incorporationist reading of the Amendment espoused by Bingham and Howard. The latter scholars have generally based their conclusions on what they have viewed as the deafening silence on the issue, and on certain facts they have viewed as implicitly contradicting the theory.²⁶³

Evidence on this issue may be found in various sources: the ratification debates in the state legislatures; the 1866 congressional election campaigns, fought mainly over the Amendment; published commentary during these early years; and debates in Congress and state conventions over new state

²⁶¹ 14 Stat. 173, 176 (§ 14) (July 16, 1866); see also CURTIS, NO STATE (1986), *supra* note 10, at 72.

²⁶² See, e.g., Crosskey, *Fairman* (1954), *supra* note 9, at 84–88, 100–11; CURTIS, NO STATE (1986), *supra* note 10, at 131–56; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 197–206, 373 n.92; Aynes, *Bingham* (1993), *supra* note 10, at 78–91; HALBROOK, ARMED (1984), *supra* note 10, at 115–42; HALBROOK, FREEDMEN (1998), *supra* note 10, at 71–106.

²⁶³ See, e.g., Fairman, *Original* (1949), *supra* note 7, at 68–132, 137–38; Fairman, *Reply* (1954), *supra* note 136, at 154–55; FAIRMAN, RECONSTRUCTION (1971), *supra* note 7, at 1298–1300; BERGER, FOURTEENTH (1989), *supra* note 7, at 37–42, 82–87; BERGER, GOVERNMENT (1997), *supra* note 7, at 170–71; James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89, 99–101, 112–13 (1984) [hereinafter Bond, *Ratification* (1984)]; James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985) [hereinafter Bond, *Original* (1985)]; JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 45, 57–58, 111, 180–82, 220–21, 234–38, 252–62 (Praeger, 1997) [hereinafter BOND, NO EASY WALK (1997)]; Thomas, *When* (2001), *supra* note 31, at 184–85, 204–10. The only significant (but highly debatable) exception to the general lack of contradiction of the incorporation theory during ratification, that I am aware of, is the 1866 Sherman speech. See *supra* notes 223, 248.

constitutions in the reconstructed Southern states and over readmission of those states to representation in Congress. As both sides of the scholarly debate have lamented, however, much of the relevant evidence has been lost.²⁶⁴

I will discuss the evidence and arguments relating to this third issue more fully in forthcoming articles, but it is useful to begin the discussion here. The anti-incorporationist ace-in-the-hole, some have suggested, is that there were some conflicts between contemporary state laws and the strictures of the Bill of Rights. Yet no one seemed to take note of such conflicts or view them as grounds for objecting to the Amendment. That makes it implausible, some have argued, that total incorporation of the Bill of Rights could have been widely understood or accepted as one effect of the Amendment. On the other hand, there was broad congruence and overlap between the Bill of Rights and the rights guaranteed by the various state constitutions. For politicians and voters casually considering the general concept, incorporation may have seemed an untroubling and even welcome idea—at worst redundant, providing “double security” as sought by Madison back in 1789.²⁶⁵

The newspaper coverage of the Bingham and Howard speeches provides substantial evidence that the national body politic, during 1866–68, was placed on fair notice about the incorporationist design of the Amendment. That was certainly true of at least one Democratic commentator outside Washington, D.C.: Samuel Smith Nicholas, a Kentucky jurist who published frequently on law and politics during the Civil War and Reconstruction. In an essay possibly written in 1866 and printed in an 1867 book, Nicholas indicated his understanding that the Thirty-Ninth Congress was seeking to enforce the Bill of Rights against the states.

Nicholas seems to be almost invisible to most modern scholars. He and his views have never previously received substantial discussion in any scholarship on the incorporation issue. But he was apparently better known in his day, serving as a Kentucky appeals court judge, legislator, and reviser of the state code. The modern historian Harold Hyman described him as an “important Democratic party theoretician and self-styled conservative essayist.”²⁶⁶ Nicholas published four volumes of essays on legal and political

²⁶⁴ See, e.g., Fairman, *Original* (1949), *supra* note 7, at 82; CURTIS, *NO STATE* (1986), *supra* note 10, at 145; BOND, *NO EASY WALK* (1997), *supra* note 263, at 8.

²⁶⁵ See *supra* Part I. I discussed this general problem, what I would now call the “state law variance” issue, in Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1475–80. See also *supra* note 43, and my discussion *infra* pp. 1606–07.

²⁶⁶ HYMAN, *MORE PERFECT* (1973), *supra* note 95, at 143. After working as a merchant in Baltimore and New Orleans, Nicholas moved to Louisville and became a lawyer. There is no mention of him in standard modern biographical dictionaries, but a brief entry appears in an 1876 collection. See CHARLES LANMAN, *BIOGRAPHICAL ANNALS*

topics between 1863 and his death in 1869. He was a Unionist, but sympathetic to the South—an avowed White supremacist, defender of slavery, and opponent of the Thirteenth and Fourteenth Amendments. Nicholas did, however, condemn the *Dred Scott* decision. He remained bitterly opposed to the Republican Party and Reconstruction.²⁶⁷ He assailed President Lincoln for allegedly trampling on Bill of Rights guarantees during the Civil War.²⁶⁸

Hyman did not refer to Nicholas's discussion of nationalizing the Bill of Rights. The only such mention I have found is buried in a footnote towards the end of a lengthy law review article by Robert Kaczorowski, briefly stating that Nicholas believed "Congress was empowered to enforce the Bill of Rights" against the states.²⁶⁹ In fact, Nicholas opposed any such power in

OF THE CIVIL GOVERNMENT OF THE UNITED STATES, DURING ITS FIRST CENTURY 311 (Anglim [Washington, D.C.] 1876) (facsimile reprint, Gale 1976).

²⁶⁷ See S.S. NICHOLAS, *CONSERVATIVE ESSAYS, LEGAL AND POLITICAL*, SECOND SERIES vii (Lippincott [Philadelphia] 1865) [hereinafter 2 NICHOLAS, *ESSAYS* (1865)] (describing himself, in dedicating his book to the great British liberal philosopher John Stuart Mill—whose views, rather implausibly, Nicholas likened to his own—as having written on politics for "the last twenty-five years"); *id.* at 13–14 (ch. 1, an address drafted for, but apparently not delivered at, the 1864 Democratic National Convention, and apparently published in part in Oct. 1864); *id.* at 28–32 (same, a subsection headed "The Negro Question," strongly opposing the Thirteenth Amendment); *id.* at 46–52 (ch. 2, "The Irrepressible Conflict," an essay published in July 1864); *id.* at 153–54 (ch. 14, "Amendment of the Constitution. Letter to a Member of the Kentucky Legislature," published Feb. 11, 1865); *id.* at 197–232 (ch. 20, "The Dred Scott Case—Reviewed March, 1857," discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)); S.S. NICHOLAS, *CONSERVATIVE ESSAYS, LEGAL AND POLITICAL*, VOLUME THREE 22, 24, 27 (Bradley & Gilbert [Louisville, Ky.] 1867) [hereinafter 3 NICHOLAS, *ESSAYS* (1867)] (ch. 2, "Report of Joint Congressional Committee," an essay published June 14, 1866, the day after Congress proposed the Fourteenth Amendment, attacking it as a "sham" and a power grab, and criticizing "the New England party in Congress"—not the rebellious South—for "reckless violation of the Constitution, and . . . insane effort to destroy [its] very foundation"). The second (1865) volume is available in the University of Michigan's "Making of America" digital library at <http://name.umdl.umich.edu/ABJ5498>. The University of Michigan Library's Scholarly Publishing Office also reprints that volume. I was fortunate enough to find and purchase a rare original copy of the third (1867) volume. All four volumes—published in 1863, 1865, 1867, and 1869—are available on microfilm in 19TH-CENTURY LEGAL TREATISES (Research Publications 1992).

²⁶⁸ 2 NICHOLAS, *ESSAYS* (1865), *supra* note 267, at ix–x (dedication); *id.* at 19–23 (ch. 1, draft address to the 1864 Democratic Convention, subsections headed "The Constitution" and "Martial Law").

²⁶⁹ Kaczorowski, *Revolutionary* (1986), *supra* note 95, at 932 n.349 (citing 3 NICHOLAS, *ESSAYS* (1867), *supra* note 267, at 47–52, and JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 145–52 (Houghton, Osgood, 1868)); *see also* KACZOROWSKI, *POLITICS* (1985), *supra* note 97, at 22 n.15. I am

the cited essay, entitled "The Civil Rights Act." It was possibly published some time during 1866, after Congress passed the Act on April 9, overriding President Johnson's veto. Nicholas referred to the veto and override, and generally argued that Congress lacked constitutional power to adopt the Act. This essay was published (or republished) in an 1867 book.²⁷⁰

The essay offered a standard assertion of the *Barron* doctrine: "The bill of rights, or what are termed the guaranties [*sic*] of liberty, contained in the Federal Constitution, have none of them any sort of application to or bearing upon the State governments, but are solely prohibitions or restrictions upon the Federal Government." More interestingly, however—and vindicating Kaczorowski's citation, without which I would never have heard of Nicholas—he then said:

The recent attempt in Congress to treat them as guaranties against the State governments, with an accompanying incidental power to enforce the guaranties, is a surprising evidence of stolid ignorance of Constitutional law, or of a shameless effort to impose upon the ignorant. The protection of the civil and political rights of the inhabitants of every State, within its own bounds, were amply cared for by its people in their State constitution. The Federal Government was looked to or depended upon for no such purpose, except in the solitary and specified instance where a rightful State

not aware of any prior reference to Nicholas by Fairman, Morrison, Crosskey, Avins, Berger, Curtis, Amar, Aynes, Maltz, Lash, Halbrook, Bybee, Gingras, Boyce, Thomas, or any other modern scholar of the incorporation debate, though Aynes cited (only as to Pomeroy) the same Kaczorowski footnote. Aynes, *Bingham* (1993), *supra* note 10, at 91 n.223. I will discuss Pomeroy and revisit Nicholas in a forthcoming article on the 1867–73 period.

²⁷⁰ The essay (Chapter 4) is undated, but obviously postdates final passage of the Act. See 3 NICHOLAS, ESSAYS (1867), *supra* note 267, at 53 (referring to the veto and override); see generally *id.* at 47–54; see also *supra* Part III (p. 1552 & n.143). Chapter 4 follows essays on the Fourteenth Amendment (ch. 2, "Report of Joint Congressional Committee," June 14, 1866) and the "Freedmen's Bureau Bill" (ch. 3, Feb. 1, 1866) and precedes an essay published in 1865, which is then followed by two more published in 1866. Chapter 4's possible reference to the Fourteenth Amendment in its final or near-final form, as I discuss in the text, suggests it may have been written around or after May or June of 1866. Of the twelve essays collected as chapters in the 1867 volume, at least nine seem to have been previously published elsewhere. Chapters 4 and 12 are undated, but it appears that Chapters 1–3, 6–7, and 11 were published in 1866, Chapter 5 in 1865, Chapter 8 in 1867 (possibly published for the first time in the book; it is a Kentucky Senate Resolution dated Jan. 1867), and Chapters 9–10 in 1867 (apparently first published separately from the book, in March and May 1867). See 3 NICHOLAS, ESSAYS (1867), *supra* note 267, at 3, 5, 22, 36, 47, 55, 69, 75, 82, 103, 119, 126, 139. From all this, I would infer that Chapter 4 was probably first published during 1866, most likely no earlier than May 1866 and quite likely before the fall elections. Nicholas would certainly have wanted to influence those elections. I have not located any other record of precisely when, where, or how widely the essay was published.

government might chance to be overthrown by some power above the control of its people, as evinced in the clause guaranteeing to each State a republican form of government. With that single exception, the people felt themselves amply competent to protect their liberty, and all civil or political rights within the bounds of their respective States, and would have indignantly spurned anything which even looked like a leaning upon the Federal Government for protection. They manifested abundant jealousy of everything which had even a tendency to afford the Federal Government a pretext for intermeddling with the domestic State affairs, as between them and their State governments. To soothe that jealousy, to quiet that fear of Federal encroachment, the first ten amendments of the Constitution were made, and among which it was expressly declared that "The powers not *delegated* to the United States by the Constitution, nor *prohibited* by it to the States, are *reserved* to the States respectively, or to the people."²⁷¹

The essay's title and general subject, at first glance, would suggest that Nicholas, in writing of the "recent attempt in Congress," referred to the Civil Rights Act. But the above language better fits a discussion of the Fourteenth Amendment. It occurs in the midst of a lengthy paragraph discussing constitutional grants of federal power and limits on state power. It would have been perfectly normal to discuss both Act and Amendment in the same essay, given their close relationship. The Amendment—in the forms debated in May 1866 and proposed by Congress in June 1866—did indeed seek to guarantee certain rights, in Section 1, "with an accompanying incidental power to enforce [them]" in Section 5. The Civil Rights Act also guaranteed and enforced certain rights, but not with a separate "accompanying" power to enforce them. The Act did both at once. It was an exercise of Congress's enforcement power under the Thirteenth Amendment. It may have required power that Congress only gained later upon ratification of the Fourteenth Amendment—Bingham, Nicholas, and others certainly thought so. Nicholas may have written this essay after the Amendment passed Congress in June 1866, or perhaps while it was still being debated in Congress.

If Nicholas referred to the Amendment, his essay indicates a crystal-clear understanding of the Bingham-Howard incorporationist design. If Nicholas referred to the Civil Rights Act, he seemed to read it as also seeking to substantively nationalize the Bill of Rights—a surprisingly well-supported theory, as other scholars have discussed and as I will pursue in a forthcoming article.²⁷² In any event, the essay strongly suggests that well-informed

²⁷¹ 3 NICHOLAS, ESSAYS (1867), *supra* note 267, at 48–49 (quoting U.S. CONST. amend. X) (emphases added by Nicholas).

²⁷² See *supra* note 223; Part VII.A (p. 1588 & n.260). As Thomas perceptively notes, Nicholas's reference to Congress proceeding in "stolid ignorance of Constitutional law" may be read to suggest that he referred to the Act, but may also simply reflect his

Democrats during 1866–67—even far from Washington, D.C.—were fully aware that Republicans in Congress intended, one way or another, to apply the Bill of Rights to the states. It matters not a whit whether Nicholas referred to the Act or the Amendment. Everyone agrees the Amendment was designed, at least in part, to constitutionalize the Act.²⁷³

Nicholas's writings also suggest that the Republican goal of nationalizing the Bill of Rights, while not supported by most Democrats, was very far from the Democrats' foremost concerns. The above-quoted language was Nicholas's only mention of the issue that I have found so far. His language suggests he found the goal merely meddlesome and unnecessary. This brief reference was in the midst of a series of essays hammering vehemently *ad nauseum* on other issues that clearly engaged far stronger passions, such as opposition to citizenship and voting rights for Blacks, support for granting amnesty to former Confederates, and restoring White-dominated Southern state governments.²⁷⁴

Indeed, Nicholas's comment, in the above-quoted passage, that the Republican plan was "a shameless effort to impose upon the ignorant" suggests—intriguingly—that he recognized that nationalizing the Bill of Rights might be a politically popular idea. He, and possibly other Democrats, may have seen it as a cleverly appealing diversion from more divisive and controversial Republican policies expressly aimed at racial and sectional issues. In an essay first published on June 14, 1866, the day after Congress

evident anger over Republican departures—whether in the Act or the Amendment, or both—from what he viewed as proper "foundational constitutional principles." Thomas, *Riddle* (2007), *supra* note 5, at 1648. Even if Nicholas was referring to the Amendment in this particular quoted passage, the very beginning of the essay indicates he understood the Act to also guarantee substantive rights, not just equality. He asserted that the Act "attempts to *define* and even *enlarge* the civil rights of *all persons* residing within the several States, in contravention of the constitutions and laws of those States." 3 NICHOLAS, *ESSAYS* (1867), *supra* note 267, at 47 (first two emphases in original; the third emphasis is mine). By the way, as the foregoing language indicates, Nicholas viewed the Act, despite its enactment over Johnson's veto, as a mere "attempt." Thus, one could not cite his use of "attempt" in his later discussion (quoted in the text) to argue that he must then have referred to the Amendment, which of course remained a mere "attempt" until ratified in 1868. Nicholas may have viewed the Act as an "attempt" because he hoped it would eventually be struck down as unconstitutional in the event the Amendment was not ratified. All in all, I remain in doubt whether he meant to refer to the Act or the Amendment in the quoted passage. But, as noted in the text, that makes no difference.

²⁷³ The Amendment did so in two ways: by removing any doubts about Congress's power to pass the Act, and by writing the Act's essential protections into the Constitution. See, e.g., CURTIS, *NO STATE* (1986), *supra* note 10, at 71–83; BERGER, *GOVERNMENT* (1997), *supra* note 7, at 161–70. The Nicholas essay certainly proves that the incorporation theory was understood outside the East Coast during 1866–67. Cf. Thomas, *Riddle* (2007), *supra* note 5, at 1634 & n.30.

²⁷⁴ See, e.g., 3 NICHOLAS, *ESSAYS* (1867), *supra* note 267, at 5–68, 82–118, 126–38.

sent the Fourteenth Amendment to the states for ratification, Nicholas—now clearly commenting on the Amendment itself—stated:

The first section is uncalled for, and comparatively inoperative except as to the citizenizing of the negro, and except for the after clause [Section 5] giving Congress the power to enforce the article by appropriate legislation, or, in other words, to harass the States by Congressional intrusion within what should be exclusive State jurisdiction, according to the original theory of the Constitution. The other matters are already well provided for in the State constitutions, where they appropriately belong, and need no aid from the Federal Government.²⁷⁵

As we have seen, Bingham's incorporationist speeches of February 28 and March 9, 1866, were apparently widely distributed in pamphlet form during that year—the former under a subtitle that could hardly have been more direct and emphatic. In light of that, the newspaper coverage, and the Nicholas essay, it is abundantly clear that Gingras erred in denying “any significant evidence” that the incorporationist design “was known and understood in the states.”²⁷⁶

While the Bingham-Howard view was reported, however, there does not seem to have been much published commentary focusing on the issue. The *New York Times*, for example, gave prominent front-page coverage to Congress's final passage and submission of the Amendment to the states, quoting it in full and reprinting part of the eloquent closing speech by Thaddeus Stevens. But there was no mention of incorporation. The focus was on unrelated political issues.²⁷⁷ The *Times* followed up the next day with an editorial praising Stevens for acquiescing in the Amendment despite its failure to fulfill his hopes regarding Black voting rights and disenfranchisement of former rebels. Noting that the Amendment would be “most keenly discussed” in the South, the *Times* asserted that its terms were “not unreasonable” and briefly summarized Section 1 as “simply protect[ing] the civil rights of all classes.” The *Times* predicted—accurately, as it turned out—that any serious objections would focus on the other sections.²⁷⁸ “Civil

²⁷⁵ *Id.* at 22, 31–32 (ch. 2, “Report of Joint Congressional Committee”).

²⁷⁶ Gingras (1996), *supra* note 198, at 66; *see also id.* at 71; Thomas, *When* (2001), *supra* note 31, at 204 (making a similar argument that the ratifying states lacked sufficient notice and thus could not have knowingly “ceded” their “sovereignty” in regard to incorporation); *id.* at 154–55, 208–10. Thomas now recants this argument to some extent. *See* Thomas, *Riddle* (2007), *supra* note 5, at 1632 & n.21; *see generally id.* at 1631–33. For my discussion of Bingham's pamphlets, *see supra* Part IV (p. 1558).

²⁷⁷ *See Washington News*, N.Y. TIMES, June 14, 1866, at 1; *Thirty-Ninth Congress*, N.Y. TIMES, June 14, 1866, at 1.

²⁷⁸ *Editorial* (June 15, 1866), *supra* note 169, at 4.

rights” may have been widely understood to encompass, at a minimum, rights guaranteed by the Bill of Rights.²⁷⁹

There was a lot more vague commentary along these lines during the ratification struggle—all of it, to my knowledge, at least consistent with the incorporation theory, and some pointing in favor of it. *Harper's Weekly* stated in December 1866 that the Amendment would empower the United States “to declare who are its citizens, and to define and defend their civil rights,” so that “no other power whatever shall presume to deprive its citizens of civil rights.”²⁸⁰ *Harper's* added a month later that the Amendment, by contrast with mere repealable legislation, was essential because “[t]he fundamental rights of all the people of the United States can not be safely or wisely left to the passion or party-spirit of any State or section of the Union. A citizen has a right to be equally safe every where in the country”²⁸¹ The *Atlantic Monthly* briefly summarized the Amendment in September 1866, declaring that Section 1 “simply ordains . . . that the civil rights of all persons shall be maintained.”²⁸²

The issue of nationalizing freedom of speech deserves special attention. A great deal of commentary in Congress and across the country, leading up to the Civil War and the ratification of the Fourteenth Amendment, focused on longstanding grievances over the brutal repression of free speech by slave states.

The abolitionist orator and former slave Frederick Douglass, writing in the *Atlantic Monthly* in January 1867, condemned the “principle of slavery” as follows:

Freedom of speech and of the press it slowly but successfully banished from the South, dictated its own code of honor and manners to the nation, brandished the bludgeon and the bowie-knife over Congressional debate, sapped the foundations of loyalty, dried up the springs of patriotism, blotted out the testimonies of the fathers against oppression, padlocked the pulpit, expelled liberty from its literature, invented nonsensical theories about

²⁷⁹ See, e.g., CG (39:2) 117 (Dec. 13, 1866) (Rep. Hamilton Ward, R-N.Y.), *quoted and discussed in* HALBROOK, FREEDMEN (1998), *supra* note 10, at 60: “We have a good civil rights bill in the Constitution as it stands. The freedom of the press, of speech, and protection to life, liberty, and property are secured thereby” See also, e.g., *supra* p. 1592 (quoting the Nicholas essay, equating Bill of Rights guarantees with “the civil and political rights of the inhabitants of every State”); note 223 (discussing the Civil Rights Act of 1866); CURTIS, NO STATE (1986), *supra* note 10, at 71–83 (same).

²⁸⁰ *The Amendment at the South*, HARPER'S WEEKLY, Dec. 1, 1866, at 754.

²⁸¹ *The Amendment Essential*, HARPER'S WEEKLY, Jan. 5, 1867, at 2.

²⁸² E.P. Whipple, *The Johnson Party*, ATLANTIC MONTHLY, Sept. 1866, at 374, 378.

master-races and slave-races of men, and in due season produced a Rebellion fierce, foul, and bloody.²⁸³

Bingham, as a freshman member of Congress in 1856, angrily denounced as unconstitutional a Kansas territorial law punishing antislavery speech.²⁸⁴ Indeed, the catchy slogan of John C. Frémont's 1856 Republican presidential campaign was "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont."²⁸⁵

Radical Ohio Republican James M. Ashley, while leading the fight for the Thirteenth Amendment in the House of Representatives in January 1865, declared that slavery had not only "forced this terrible civil war upon us," but had "trampled upon the national Constitution," "silenced every free pulpit within its control," and "made free speech and a free press impossible."²⁸⁶ By the end of the Civil War, such sentiments had spread well beyond radical visionaries. Representative Green Clay Smith of Kentucky, a conservative Unionist who would become a strong ally of President Johnson, echoed them strongly. Smith also spoke in favor of the Thirteenth Amendment, even though he represented what was then still a slave state and confessed that his earlier views might have been different. But he now agreed that the "glorious" goal of the Civil War was not just freedom from slavery, but the freedom of speech that slave states had denied to antislavery advocates. Protect that, he proclaimed, and "the war has not been in vain," but would achieve "the great principle of the freedom of man."²⁸⁷

During the crucial election campaign of 1866, Carl Schurz—the important German-American Republican activist, later Senator from Missouri and Secretary of the Interior—framed the issue as restoring "a Union based upon universal liberty, impartial justice and equal rights . . . a Union on every square foot of which free thought may shine out in free utterance." President Johnson, Schurz charged, would restore "a Union in a part of which the rules of speech will be prescribed by the terrorism of the

²⁸³ Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, ATLANTIC MONTHLY, Jan. 1867, at 112, 117.

²⁸⁴ CG (34:1) app. 124 (Mar. 6, 1856).

²⁸⁵ See CURTIS, NO STATE (1986), *supra* note 10, at 32; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 235, 379 n.9.

²⁸⁶ CG (38:2) 138 (Jan. 6, 1865); see also BENEDICT, COMPROMISE (1974), *supra* note 72, at 27 (Ashley a "consistent radical"); Michael Vorenberg, *James Mitchell Ashley*, 1 ANB, *supra* note 1, at 680.

²⁸⁷ CG (38:2) 237 (Jan. 12, 1865); see also BENEDICT, COMPROMISE (1974), *supra* note 72, at 186 (Smith a Unionist supporter of Johnson, though voting for the Fourteenth Amendment); BDC, *supra* note 1, at 1930 (Johnson appointing him Governor of Montana Territory).

mob, and free thought silenced by the policeman's club and the knife of the assassin"²⁸⁸

Harper's Weekly in May 1867 reported a Southern speaking tour by Senator and future Vice-President Henry Wilson—a supporter of Bingham's incorporation doctrine²⁸⁹—noting that “attempt[ing] to express his views” would have endangered his life before the Civil War. “[H]e could not have safely claimed the most fundamental right of every man in a free government When slavery struck at the tongue it instinctively aimed at the strongest weapon of liberty. . . . Perfect liberty of speech is the cardinal security of free institutions”²⁹⁰

Even Fairman—the greatest scholarly critic of the incorporation doctrine generally—conceded the powerful evidence supporting incorporation of free speech rights.²⁹¹ Exhaustive studies by Curtis and others have confirmed that conclusion with overwhelming force.²⁹² Berger, by contrast, remained

²⁸⁸ EPPS, *DEMOCRACY REBORN* (2006), *supra* note 94, at 251; *see also id.* at 12, 34–38, 65–73, 84–85, 88, 250–51, 259–61 (generally discussing Schurz); Hans L. Trefousse, *Carl Schurz*, 19 ANB, *supra* note 1, at 447 (same); EPPS, *DEMOCRACY REBORN* (2006), *supra* note 94, at 81 (noting the threat of postwar Southern hostility to free speech).

²⁸⁹ *See* CG (42:1) app. 256 (Apr. 13, 1871) (Sen. Wilson, R-Mass.) (“I concur entirely in the construction put upon that provision of the fourteenth amendment by Mr. Bingham, of Ohio, by whom it was drawn.”). Wilson apparently referred to CG (42:1) app. 81–86 (Mar. 31, 1871), when Bingham restated at length his incorporationist views. *See also* Aynes, *Bingham* (1993), *supra* note 10, at 81. Wilson served as Vice-President under President Ulysses S. Grant from 1873 to Wilson's death in 1875. Richard H. Abbott, *Henry Wilson*, 23 ANB, *supra* note 1, at 579.

²⁹⁰ *A Sign of the Times*, HARPER'S WEEKLY, May 4, 1867, at 274.

²⁹¹ *See* Fairman, *Original* (1949), *supra* note 7, at 75–77, 96–97, 116–20, 134–35, 139. Thomas also now seems to concede there is evidence that free speech rights, at least, were incorporated. *See* Thomas, *Riddle* (2007), *supra* note 5, at 1638, 1643, 1646.

²⁹² *See generally, e.g.*, CURTIS, *NO STATE* (1986), *supra* note 10, at 26–41, 131–53, 217; CURTIS, *FREE SPEECH* (2000), *supra* note 10; CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* (Harper & Row, rev. ed. 1964) (originally published, Duke Univ. Press 1940); RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860* (Michigan State College Press 1949); *see also, e.g.*, Avins, *Incorporation* (1968), *supra* note 9, at 17–22; Farber & Muench (1984), *supra* note 95, at 252–53; MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 117; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 159–62, 184, 231–57. *See also, generally*, the following additional works by 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 (1993); *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785 (1995); *Resurrecting* (1996), *supra* note 10; *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 (1997); *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. &

astonishingly oblivious to such evidence. He asserted in 1977—and restated in 1997 with no qualification, despite Curtis having repeatedly pointed out his profound error in this regard—that there was “no inkling that [between 1789 and the end of the Civil War] the North had become dissatisfied with the protection [Bill of Rights guarantees] were given by the States.”²⁹³

There is some evidence that Bingham, at least, tried to campaign on the general theme of nationalizing the Bill of Rights. We have seen the pamphlets of his speeches distributed during 1866.²⁹⁴ During a congressional debate in January 1867, he reasserted with crystal clarity that the pending Amendment would reverse the *Barron* doctrine and apply to the states what he described at one point as the “personal rights . . . of the first ten articles of amendment,” and a bit later as “all the limitations for personal protection of every article and section of the Constitution.”²⁹⁵ No one during this debate,

MARY BILL RTS. J. 105 (1998); *Historical Linguistics* (2000), *supra* note 10; *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231 (2000).

²⁹³ See BERGER, *GOVERNMENT* (1977), *supra* note 7, at 212; Curtis, *Bill of Rights* (1980), *supra* note 10, at 50–54 (pointing out Berger’s error); Curtis, *Further Adventures* (1982), *supra* note 10, at 91 (same); CURTIS, *NO STATE* (1986), *supra* note 10, at 26–41, 131–53, 217 (exhaustively reviewing the evidence); BERGER, *GOVERNMENT* (1997), *supra* note 7, at 212 (repeating this error without qualification or acknowledgment, despite providing detailed supplemental notes on many other points).

Bybee acknowledged some of the evidence of Civil War-era Republican concerns over state violations of free speech and related rights. See Bybee (1995), *supra* note 14, at 1578–79. But he nevertheless took the remarkably counterfactual position—at war with the overwhelming weight of historical evidence, and, despite his claims, not supported by constitutional text—that First Amendment rights were generally the *least* likely or eligible of all Bill of Rights guarantees to be applied to the states by the Fourteenth Amendment. See *id.* at 1577–1616. Bybee’s textual argument was based on his notion that the First Amendment, unlike the rest of the Bill of Rights, does not really guarantee any “rights,” “liberties,” or “privileges” of the people, individually or collectively, but is merely a “disability” limiting the power of the federal government. See *id.* at 1552–57, 1564. But why, one might ask, is it not both, like the rest of the Bill of Rights? Cf. *supra* note 176 (noting Bybee’s anachronistic reliance in this regard on Hohfeldian hairsplitting). As he conceded, see Bybee (1995), *supra* note 14, at 1581, Bingham and other Reconstruction Republicans—showing more common sense—repeatedly recognized that the First Amendment does, in fact, guarantee personal rights, citing its express language. For example, it guards against “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Needless to say, in any proper analysis of the meaning of the Fourteenth Amendment, the understanding of Bingham and his colleagues carries more weight than that of Bybee or Hohfeld.

²⁹⁴ See *supra* Part IV (p. 1558); p. 1595.

²⁹⁵ CG (39:2) 811 (Jan. 28, 1867); see generally *id.* at 810–12; see also *supra* note 111 (discussing this debate); *infra* Part VIII (p. 1618–19) (same). But see Boyce (1998), *supra* note 60, at 1006–07 (erroneously claiming that Bingham never clearly stated, during 1866–68, the goal of incorporating the first eight amendments). For additional

on a proposed anti-whipping bill—the participants included Hale, Bingham’s nemesis in February 1866²⁹⁶—even hinted at any disagreement with Bingham’s stated view of what the Amendment would accomplish when ratified. The only dispute—reflecting the *Barron*-contrarian views held by many Republicans—was whether Congress *already, before ratification*, had the power to enforce against the states the Eighth Amendment’s ban on “cruel and unusual punishments.”²⁹⁷

Overall, however, the evidence from the ratification struggle seems vague and scattered when it comes to supporting any strong public awareness of nationalizing the *entire* Bill of Rights. It was not widely framed in those terms as a prominent issue. Republican proponents, apart from Bingham, did not seem to tout it in any systematic or explicit way. At the same time, there does not appear to be any record of Democratic opponents using incorporation of the Bill of Rights as an explicit argument *not* to ratify the Amendment. What we mostly have is silence—except for the congressional debates, the news coverage of them, and some additional commentary outside Congress, such as the Nicholas essay. To that extent, the scholars skeptical of the incorporationist understanding have a fair point.²⁹⁸

The fourth issue noted above—to the extent there is silence outside Congress, which default presumption should govern—is basically interpretive rather than empirical. It is an issue on which reasonable people may—and probably always will—disagree. In a sense, this issue, unlike that regarding Congress’s understanding, does indeed devolve into a classic lawyer’s quibble over who has the burden of proof.

Silence during the ratification struggle could, in theory, cut either way. Nationalizing the entire Bill of Rights may not have been widely discussed in those terms on the campaign trail because it was simply an uncontroversial “no-brainer” on which almost everyone agreed, even Democrats. Or was it such a political loser that even most Republicans shied away from reminding anyone what Bingham and Howard had plainly said? But if so, why did Democrats not exploit such a weakness? The “no-brainer” hypothesis seems more plausible, though the truth may lie somewhere in between.

scholarly discussions of these Bingham comments, see AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 183; HALBROOK, FREEDMEN (1998), *supra* note 10, at 62–64; Aynes, *Bingham* (1993), *supra* note 10, at 70 n.72. I have not, however, found any evidence of coverage of this debate in the *New York Times*, the only newspaper I have been able to research. Thus, Bingham’s statements may have received little attention outside Congress.

²⁹⁶ See *supra* Part III (pp. 1540–42 & n.111).

²⁹⁷ See generally CG (39:2) 810–12 (Jan. 28, 1867); see also *supra* Part VI (p. 1569 & n.199) (discussing Republican *Barron*-contrarian views).

²⁹⁸ See, e.g., Thomas, *When* (2001), *supra* note 31, at 184–85, 204–10.

Thomas, in 2001, pointed out the fact—mysterious to him—that “opponents of the Amendment did not adopt the incorporation theory and use it against the Amendment.”²⁹⁹ But he drew the opposite conclusion I would from this “dog that didn’t bark.”³⁰⁰ Thomas used it to support his argument that the states must have lacked the awareness or fair notice necessary to knowingly yield to the doctrine in ratifying the Amendment.³⁰¹ But (forgive me), if indeed the dog failed to bark, it was equally true that the cat was out of the bag. Bingham and Howard said what they said, in full sight and hearing of their colleagues, including all those Democrats ready to fan out across the country. Indeed, Bingham apparently beat them to the punch by circulating his key speeches around the country. They were on the front page of the *New York Times*.³⁰²

Thomas, in 2001, ultimately fell prey to the circular “logic” of Fairman, Berger, and other modern anti-incorporationists. They generally assumed as a premise that incorporation must or would have been viewed at the time as a “controversial” and “radical” idea. Some—outdoing any known Democratic opponent in the 1860s—even called it a “menace” and a “Trojan horse.”³⁰³ Then they argued, in circular and counterfactual fashion, to the conclusion that most people simply could not have been aware of it. Otherwise, they were at a loss to explain the actual lack of controversy. It had to be controversial, but there was no controversy, so nobody knew about it.³⁰⁴

²⁹⁹ *Id.* at 199–200.

³⁰⁰ *See id.* at 199 & n.223 (citing the classic Sherlock Holmes story, *Silver Blaze*).

³⁰¹ *See id.* at 199–204; *see also id.* at 154–55, 208–10.

³⁰² *See supra* Part IV (pp. 1557–58); Part VI (p. 1564).

³⁰³ Modern anti-incorporationist writings (though not Thomas’s) have frequently featured such anachronistically overwrought arguments. *See, e.g.,* Fairman, *Original* (1949), *supra* note 7, at 137 (likening incorporation to “bring[ing] a wooden horse into the Constitution” and a “fraud on the nation”); Fairman, *Reply* (1954), *supra* note 136, at 155 (claiming it would have been viewed as a “menace” from which Democrats would “have made political capital”); BOND, *NO EASY WALK* (1997), *supra* note 263, at 252 (claiming that “[h]ad the amendment’s opponents suspected that . . . [it] was a Trojan horse for the Bill of Rights, they would have attacked it venomously”—but not, apparently, as “venomously” as have the modern anti-incorporationists!); *see also* BERGER, *FOURTEENTH* (1989), *supra* note 7, at 49–55, 77–78; BERGER, *GOVERNMENT* (1997), *supra* note 7, at 171, 176, 179–80. *Cf. supra* Part VI (p. 1573) (noting the lack of evidence that *anyone* in 1866–68 viewed incorporation as a “radical” idea); note 219 (discussing the notably less hostile views on incorporation of the rabidly reactionary 1860s Democrat Samuel S. Nicholas); pp. 1590–95 (same).

³⁰⁴ *See, e.g.,* Fairman, *Original* (1949), *supra* note 7, at 82–83 (arguing that “surely—if the Amendment was really supposed to incorporate the Bill of Rights—one would expect to find a marked reaction,” and that “if we found . . . complete inaction, it would be very hard to believe the . . . Amendment was understood to have that effect”),

A more logical approach, in accordance with Occam's Razor—seeking the simplest and most direct explanation of known facts—would view the lack of controversy as evidence that, well, incorporating the Bill of Rights was not that controversial. If it had been, Democrats *would* have seized upon it as a negative campaign slogan. But they did not. We have seen in the Nicholas essay what one fervent and well-informed Democrat said about incorporation. He made vociferous arguments on many other issues. But the harshest he chose to get about incorporation, when he briefly mentioned it, was essentially to complain that it was *unnecessary*—an effort to trick the ignorant and perhaps, at worst, a “pretext” for federal “intermeddling” in state affairs.³⁰⁵

Of course, I am simplifying a bit here. The lack of controversy may also indicate that incorporation, for various reasons, simply never loomed large in the public mind. While the Nicholas essay is intriguing, it is far from clear how many people read it or shared his understanding, just as it is fair to ask how many Americans were closely following the Bingham and Howard speeches in Congress.³⁰⁶ Sometimes, the more attention an idea gets, the

quoted in AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 198. *But see* AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 198–204 (discussing the fallacy of Fairman's argument). Thomas tried to take an evenhanded approach to the “controversy” issue. He recognized that Fairman simply “assum[ed]” that incorporation was “controversial,” while asserting, as if to balance things out, that Crosskey and Amar made “the opposite assumption” that it was “noncontroversial.” *See* Thomas, *When* (2001), *supra* note 31, at 204. But these were not competing “assumptions.” Fairman and the other modern anti-incorporationists have offered no historical evidence to support their view—or to support the existence of any actual controversy focusing expressly on incorporation of the Bill of Rights. (Indeed, they have *emphasized* the actual *lack* of controversy.) Thus, their view that incorporation, if known, *would have been* controversial, is indeed merely an assumption. But for incorporationist scholars like Crosskey, Curtis, Amar, Aynes, me, and others, the view that incorporation was not controversial is not an “assumption” at all. It is based on undisputed historical facts—that incorporation was publicly proposed, and discussed at least to some extent, yet did not become a political football or stir up dispute. I would qualify the latter statement by noting that it did not stir up dispute as the idea was framed by Bingham and Howard—as nationalizing the protection and enforcement of the Bill of Rights. As discussed below in the text, there was in fact controversy and dispute—framed in classically federalist terms without mentioning the Bill of Rights—about the extent to which the Amendment might lead to undue federal interference with state laws and judicial systems.

³⁰⁵ *See supra* pp. 1592–93. For useful discussions of Occam's Razor, see, for example, Alan Baker, *Simplicity*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2004), <http://plato.stanford.edu/archives/win2004/entries/simplicity>; “Occam's Razor,” Wikipedia, http://en.wikipedia.org/wiki/Occam's_Razor (last visited Nov. 27, 2007).

³⁰⁶ Not many, I would tend to think. *But see* EPPS, DEMOCRACY REBORN (2006), *supra* note 94, at 89–90:

more controversy it generates, the controversy in turn generates more attention, and so forth. For whatever reasons, such a feedback loop never got started with the notion of nationalizing the Bill of Rights. And why should it have? In the context of all the profound and tumultuous changes of Reconstruction, it may have seemed like motherhood and apple pie. As Amar asked, cutting to the heart of the matter: “Who wants to campaign against the Bill of Rights?”³⁰⁷

There are, of course, some rather obvious likely reasons why incorporation did not get much attention. As we have seen, the political plate for both Republicans and Democrats was already full to overflowing with issues that (for them) were far more pressing and contentious—especially Black voting rights, and whether and how to restore full political rights to rebel states and individuals. Thomas made the very sound point that the general issue of fair and equal treatment for Blacks—and Unionists of any race—tended to dominate the discussion.³⁰⁸ Possibly, the Republican tendency noted earlier in Congress—to hash out issues in private party caucuses, then just shut up and vote—may also have prevailed in the state ratification debates.³⁰⁹

Most people, even lawyers, may simply not have foreseen or thought carefully about the substantial legal changes that we now see as the

Americans in the mid-nineteenth century devoured political news. In a culture that had no mass entertainment and no professional sports, politicians were among the most recognizable public figures. Newspapers across the country devoted many columns to summaries or transcriptions of their speeches, which ordinary people read and debated among themselves in homes that had no radio or television. In such an environment, the daily *Congressional Globe* (the Congress’s official record of its debates) was the equivalent not only of today’s C-SPAN but even to some extent of ESPN. Just as members of Congress today tailor their speeches for the audiences watching on TV, members of the Thirty-ninth Congress often delivered long addresses aimed as much at public opinion as at persuading their colleagues.

³⁰⁷ AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 205.

³⁰⁸ See Thomas, *When* (2001), *supra* note 31, at 203 (arguing that “Howard’s and Bingham’s comments [were] lost in a sea of concern about ensuring that States treat blacks and Union loyalists fairly”); see generally *id.* at 180–216. As I suggested earlier, however, that focus on equal rights is perfectly consistent with an incorporationist understanding of the Amendment. See *supra* note 223; Part VII.A (p. 1588 & n.260).

³⁰⁹ See *supra* Part VI (pp. 1571–72); Part VII.A (pp. 1586–87); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 204, 372 n.79 (citing CURTIS, NO STATE (1986), *supra* note 10, at 6, 223 n.53, which in turn cited Crosskey, *Fairman* (1954), *supra* note 9, at 104). The cited page by Crosskey does not, however, assert or support this point, plausible though it may be. Crosskey simply noted the general paucity of the surviving records of the ratification debates.

inevitable consequences of nationalizing the Bill of Rights.³¹⁰ But there is nothing new or remarkable about that. Many changes in the law bring unforeseen consequences and may trigger “buyer’s remorse.”³¹¹ That does not vitiate their legal force or meaning.

There is one final twist to this mystery of the missing controversy: Maybe the dog *did* bark. One point Thomas discussed was that Secretary of the Interior Orville H. Browning published widely, in the fall of 1866, a letter denouncing the proposed Amendment.³¹² The Browning letter predicted the Amendment, especially the Due Process Clause, would “subordinate the State judiciaries to Federal supervision and control” and “annihilate the[ir] independence . . . in the administration of State laws.” Indeed, he said, “all State laws . . . will be equally open to criticism, interpretation and adjudication by the Federal tribunals, whose judgments and decrees will be supreme and will override the decisions of the State Courts”³¹³ Browning specifically noted that the Amendment would authorize federal court claims by state criminal defendants.³¹⁴ As Joseph James observed, this letter was “especially significant because it had the specific approval of President Johnson and his chief advisers from both North and South. . . . In view of modern developments, [Browning’s] words were almost prophetic.”³¹⁵

³¹⁰ See *supra* note 43; p. 1590 & n.265; *infra* pp. 1606–07.

³¹¹ See, e.g., EPPS, *DEMOCRACY REBORN* (2006), *supra* note 94, at 252 (noting the “buyer’s remorse” that some Northern states felt after initially ratifying the Amendment).

³¹² Thomas, *When* (2001), *supra* note 31, at 207–08; see also BOND, *NO EASY WALK* (1997), *supra* note 263, at 4, 126, 194–95; CURTIS, *NO STATE* (1986), *supra* note 10, at 151–52; JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT 74–77* (Mercer Univ. Press 1984) [hereinafter JAMES, *RATIFICATION* (1984)]; Fairman, *Original* (1949), *supra* note 7, at 78, 99.

³¹³ The letter was published in numerous papers. The quotations in the text are taken from the *Cincinnati Commercial* of October 26, 1866, as quoted in JAMES, *RATIFICATION* (1984), *supra* note 312, at 75; see also Thomas, *When* (2001), *supra* note 31, at 207–08 & n.268.

³¹⁴ See Thomas, *When* (2001), *supra* note 31, at 208 (quoting Browning’s discussion of a hypothetical state murder prosecution, in which federal courts might interfere just as the death penalty was about to be imposed). Bond suggested that if incorporation had “been understood at the time, the critic[s] surely would have reinforced [their] argument[s] with some pointed illustrations, which the incorporation doctrine would have readily provided.” BOND, *NO EASY WALK* (1997), *supra* note 263, at 237. Browning’s letter shows that critics did in fact provide pointed illustrations, as forceful and appealing as—and very similar to—any that one can imagine deriving from the incorporation theory. And they had no need to explicitly invoke the Bill of Rights to do so.

³¹⁵ JAMES, *RATIFICATION* (1984), *supra* note 312, at 77; see also CURTIS, *NO STATE* (1986), *supra* note 10, at 152.

To be sure, Browning never referred specifically to incorporation of the entire Bill of Rights. He “focused on the due process clause,”³¹⁶ the one Bill of Rights guarantee expressly incorporated into the Amendment. Some anti-incorporationists, naturally, have emphasized this point.³¹⁷ But is it really so significant? And does it even cut the way they think? “Due process of law”—also phrased as “the law of the land”—was widely understood during that era to encompass, at a minimum, most or all of the criminal and civil procedural guarantees of the Bill of Rights.³¹⁸ There is little reason to think the thrust of

³¹⁶ CURTIS, NO STATE (1986), *supra* note 10, at 152.

³¹⁷ See, e.g., BOND, NO EASY WALK (1997), *supra* note 263, at 195; Thomas, *When* (2001), *supra* note 31, at 207–08. But Thomas now seems to agree that the Browning letter may weigh in favor of an incorporationist understanding of the Amendment. See Thomas, *Riddle* (2007), *supra* note 5, at 1648–49, 1656. Fairman quoted the Browning letter without suggesting that it weighed especially strongly against an incorporationist understanding. See Fairman, *Original* (1949), *supra* note 7, at 78. He did note it was “a major feature in the electoral canvass of 1866.” *Id.* at 99. Fairman made the latter comment while discussing Browning’s later stance, in 1870, during an Illinois debate on whether to abolish that state’s grand jury guarantee. Browning strongly favored keeping the grand jury, without ever suggesting that it might already be guaranteed by the Amendment. Fairman’s point—well taken, as far as it went—was that this, together with similar omissions by others, points against a prevailing incorporationist understanding in 1870. See *id.* at 98–100; AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 198–99 (discussing Fairman’s analysis). Indeed, while there is ample pro-incorporation evidence from the 1867–73 period (mostly overlooked by Fairman), there is also evidence (much of it referenced by Fairman) suggesting widespread oblivion of any such theory during that time. I will discuss all that in forthcoming articles. As suggested in AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 372 n.71, one might argue that Browning’s personal failure to invoke the Amendment in 1870 deserves little weight. A diehard opponent, having failed to defeat the Amendment, might want to minimize its scope. But that is insignificant on the overall issue. Plenty of other people also failed to invoke incorporation when one would think they would have. Would Browning have knowingly passed up such tempting support for his 1870 argument? I doubt it. On that point I agree with Fairman. The broader issue is whether such silence, overall, refutes the incorporation theory. For Amar’s persuasive argument why it does not, see *id.* at 197–206, 373 n.92.

³¹⁸ See *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 173, 199–202; CURTIS, NO STATE (1986), *supra* note 10, at 166, 174; Crosskey, *Fairman* (1954), *supra* note 9, at 6–7; Curtis, *Historical Linguistics* (2000), *supra* note 10, at 1083–84; Dripps (1996), *supra* note 29, at 1566–67; Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1471–72. See, in particular, AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 200–01, 371 nn.57–58 & 65, citing *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857) (opinion of Lemuel Shaw, C.J.). In *Jones*, the Massachusetts Supreme Judicial Court construed the “law of the land” clause in the Massachusetts Constitution to have the same meaning as “due process of law,” and held that the clause implicitly required grand jury indictment

Browning's objection would have changed if he had explicitly attacked incorporation of the entire Bill of Rights. One can easily imagine tactical reasons *not* to so frame the issue. What would that have accomplished? It would simply have aligned him against the motherhood-and-apple-pie symbolism of the Bill of Rights. One can imagine Bingham thinking: "Bring it on!"

Like modern rightwing critics of "judicial activism," Browning may have preferred not to campaign openly against the Bill of Rights—though it must be conceded that he may well not have been aware of the incorporation theory. Like modern critics, he and other opponents of the Fourteenth Amendment may have preferred to campaign against allegedly excessive federal power—against "government by [federal] judiciary," especially as invoked by accused criminals.³¹⁹

Thomas argued, in 2001, that "[i]f Browning had thought incorporation was a theory to be taken seriously . . . he would surely have raised that as an even more draconian invasion of [state authority]."³²⁰ But if Browning and other opponents did not take incorporation seriously, they were not paying much attention to the congressional debates on the Amendment they were fighting. Browning's "prophetic" letter, taken by itself, could be read to suggest he understood and took very seriously indeed the overall incorporationist design of the Amendment.³²¹ In any event, given the prevailing understanding of the Due Process Clause that was undeniably part of the Amendment, there was little reason to think total incorporation would have been much more "draconian."

For example, opponents (in theory) could have invoked the prospect that the Amendment would enforce the right to grand jury indictment against the minority of states not guaranteeing that right during 1866–68. But they had no need to invoke total incorporation of the Bill of Rights to make that

for "infamous" crimes—even though the state constitution, unlike the federal Fifth Amendment, did not specify any such right to grand jury. *See Jones*, 74 Mass. at 340–47.

³¹⁹ *See* BERGER, GOVERNMENT (1977), *supra* note 7 (quoting Berger's title). As noted in the text, I do not claim Browning actually made a conscious choice in this regard. Given his later failure to invoke the incorporation theory when it seems he should have, *see supra* note 317, he personally may well have been unaware of it. My point is that his letter, as written, served most or all of the likely needs of anyone who may have desired to use the incorporation doctrine or its likely impact as grounds to attack the Amendment.

³²⁰ Thomas, *When* (2001), *supra* note 31, at 208; *see also supra* note 314 (discussing Bond's similar argument). *But see supra* note 317 (noting Thomas's reconsideration on Browning).

³²¹ *But see supra* notes 317, 319 (and my concession in the text).

argument. It was already directly available and strongly supportable under the Amendment's Due Process Clause.³²²

There does not seem to be any evidence that anyone raised the grand jury issue during ratification, though general arguments along the lines of Browning's letter might be thought to implicitly encompass it along with other concerns. But Browning himself would *not* have thought the grand jury issue was a strong or even desirable argument to make against the Amendment. He made clear just a few years later that he greatly valued the grand jury and fervently opposed the idea of states abandoning it.³²³ Modern anti-incorporationists, from Justice Frankfurter in 1947 to Merkel in 2006, have anachronistically touted the grand jury as a killer argument against incorporation.³²⁴ But Browning's example teaches us that for every American who might have been swayed against the Amendment by such a hypothetical argument, there may well have been one or two or more who would have viewed it as an added reason to *support* the Amendment.³²⁵

³²² See the sources cited *supra* note 318. The Supreme Court did not reject the argument that the Due Process Clause encompassed grand jury indictment until almost twenty years later, and even then over a powerful dissent. See *Hurtado v. California*, 110 U.S. 516 (1884); *id.* at 538 (Harlan, J., dissenting); Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1469–75; see also *id.* at 1476–78 & n.104 (noting that nearly two-thirds of the 37 states in 1866–68 already guaranteed grand jury indictment, and that apart from the grand jury issue there appeared to be congruence, for the most part, between the federal Bill of Rights and state constitutional guarantees). I actually understated in 2000 the extent of state constitutional grand jury rights in 1866–68. Surveying only the facial language of state constitutions, and overlooking *Jones* despite Amar's citation of it, see *supra* note 318, I mistakenly listed Massachusetts as a state that did not guarantee the right. This was, I would note, a mistake that went against my overall argument.

³²³ See *supra* note 317.

³²⁴ See, e.g., *Adamson v. California*, 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring); Fairman, *Original* (1949), *supra* note 7, at 82–84, 115–16, 134, 137–38; Merkel, *Cultural* (2006), *supra* note 40, at 691 & n.90 (citing Fairman); see also *supra* note 43; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 200 (noting “Fairman’s anachronistic hostility to grand juries”).

³²⁵ Some simply may not have cared, or may have overlooked the issue. Fairman touted the fact—as if it supported his view—that Michigan, Senator Howard's home state, abolished the grand jury before the Civil War when Howard was state attorney general. See Fairman, *Original* (1949), *supra* note 7, at 115–16, 134. *But see* Wildenthal, *Road to Twining* (2000), *supra* note 3, at 1479–80 (pointing out that this actually tends to refute the significance of the grand jury issue). Howard did not mention the grand jury in his otherwise fairly extensive—though avowedly non-exhaustive—recitation of Bill of Rights guarantees that the Amendment would apply to the states. Some might argue that suggests he intended (without explanation) to exempt the grand jury. But he also failed to mention several other specific guarantees, while generally embracing all “rights . . . secured by the first eight amendments.” See *supra* Part V (p. 1561). I tend to think he either overlooked the issue, did not think it was important, or both. One might

Browning's stated concern was not with the precise metes and bounds of the Due Process Clause, but with *federal* courts having the power to interpret and apply it in *state* cases. Many other opponents of the Amendment, in many states, picked up and echoed this classic federalist concern about interference with state laws and judicial systems.³²⁶ Recall that Nicholas—who we *know* was fully aware of the Republican goal of incorporation—chose to frame his objections by claiming that the rights protected by Section 1 “need no aid from the Federal Government.” Just like Browning, Nicholas argued that the Amendment's overall effect would be “to harass the States . . . within what should be exclusive State jurisdiction.”³²⁷ All of this confirms Amar's perceptive observation: “[O]ne would expect that opposition . . . would find expression in the idiom of federalism . . . [a]nd this is exactly the kind of rhetoric that one does find during ratification.”³²⁸

If one were to argue that Browning and other opponents should have invoked the prospect of federal protection of substantive Bill of Rights liberties other than criminal procedural guarantees, the answer is obvious. We have seen the centrality of Republican concerns over free speech—a point Thomas now acknowledges.³²⁹ Campaigning to allow states to continue suppressing speech or other basic liberties, without federal protection, would have been a distinctly losing argument in 1866. It would only have inflamed Republican supporters of the Amendment.

Campaigning explicitly against nationalizing the Bill of Rights would have been, as Amar and I have suggested—and as I think the linguist George Lakoff would agree—a classic “framing” mistake.³³⁰ The Democrats of

speculate that he wanted to *reverse* the abandonment of the grand jury by Michigan and other states, but I am not aware of any evidence of that, and I tend to doubt it. I intend to research the issue further in connection with a forthcoming biographical article on Howard.

³²⁶ See JAMES, RATIFICATION (1984), *supra* note 312, at 106, 151, 189, *cited in* CURTIS, NO STATE (1986), *supra* note 10, at 152, 254–55 nn.109–11; BOND, NO EASY WALK (1997), *supra* note 263, at 22, 39, 56–57, 87, 102, 126, 150, 173–74, 194–95, 216–17, 236–38; Bond, *Ratification* (1984), *supra* note 263, at 98–99; Bond, *Original* (1985), *supra* note 263, at 458–60.

³²⁷ See *supra* p. 1595.

³²⁸ AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 205.

³²⁹ See Thomas, *Riddle* (2007), *supra* note 5, at 1638, 1643, 1646; *see also supra* pp. 1596–99.

³³⁰ See *generally* GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE (Chelsea Green 2004). This book summarized for a popular audience, especially political liberals with whom Lakoff allies himself, ideas that he developed earlier in a lengthy academic work. See *generally* GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (Univ. Chicago Press, 2d ed. 2002). Lakoff's liberal politics are irrelevant to the value of his concept of “framing”

1866–68 were too smart and politically savvy to make that mistake. If there is a puzzle here, it is really, as Maltz suggested, that *Republicans* did not follow Bingham’s cue and emphasize more strongly the need to nationalize the Bill of Rights. Perhaps they were too caught up with the other issues mentioned earlier. The “bloody shirt” was perhaps a more potent rallying cry for some. But the Bill of Rights was the “better angel” of Reconstruction—the issue with the greatest potential to unite all Americans across divides of race and section.³³¹

C. *Weighing the “Sounds of Silence”*³³²

Let us proceed, in any event, on the stipulation that there was, essentially, silence out in the country on the incorporation issue, during ratification. Focus again on the fourth issue noted earlier: Which default presumption should then govern? One view is that a constitutional amendment, in the absence of irrefutably plain text, can only properly be interpreted a certain way if there is affirmative evidence that both Congress *and* the ratifying states understood and embraced that meaning. This view is sometimes applied with great specificity to individual provisions and issues.

issues. Indeed, a central theme of his work is that liberals need to better emulate the highly skilled use of framing employed by conservatives. An example of framing leaps readily to mind from America’s experiences with controversial foreign wars, whether in Vietnam forty years ago or Iraq today. Opponents of such military interventions typically try to frame the issue as whether to persist in fighting an unwise or unjust war that is killing American soldiers and many other people. But when opponents seek to cut funding for such wars, supporters of maintaining or even escalating them often seek to reframe the issue as whether to “support our troops”—suggesting that funding cuts would somehow endanger them. Opponents in turn may try to reframe the debate back in their favor, by pointing out the obvious fact that continuing to fund and conduct the war may pose a far greater danger to the troops (and others). Which side wins a debate is often dependent on which frame takes hold in people’s minds.

³³¹ See MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 117 (discussing the “puzzling anomaly” of the Republican failure to campaign more systematically on the basis of nationalizing the Bill of Rights, a puzzle that led Maltz, while generally supporting the incorporation theory, to classify it as “not proven beyond a reasonable doubt”). “Waving the bloody shirt” refers to the tactic, familiar during that era, of exploitatively invoking the deaths of Union soldiers during the Civil War. See, e.g., FONER, *RECONSTRUCTION* (1988), *supra* note 80, at 487 n.46. President Lincoln’s First Inaugural Address appealed famously to “the better angels of our nature.” See, e.g., JAMES A. RAWLEY, *ABRAHAM LINCOLN AND A NATION WORTH FIGHTING FOR* 43 (Univ. Neb. Press 2003) (originally published, Harlan Davidson 1996).

³³² I borrow part of Amar’s section heading here. See AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 197. I assume Amar was inspired by the Simon & Garfunkel song. I also embrace the gist of Amar’s argument, *see supra* notes 317–18, and seek to build upon it here.

Under this view, the mere fact that voters and politicians generally endorsed an amendment would not support reading one of its provisions a certain way, unless there was specific, affirmative evidence that they embraced that particular reading of that particular provision.

Not surprisingly, anti-incorporationists have tended to adopt this general view of the Fourteenth Amendment, or treat it as an implicit assumption. So have some scholars outside the context of the incorporation debate. It is a perfectly legitimate, though highly debatable, philosophy. It raises fundamental theoretical issues about original intent or understanding in relation to text, *whose* intent or understanding matters, and how specific that intent or understanding must be. It also highlights another issue: How good is the textual, as opposed to the historical, argument for the incorporation doctrine?

David Kyvig and Richard Aynes have suggested that in construing the Fourteenth Amendment what matters is the intent of the congressional framers, *not* the state ratifiers. That conflicts to some extent with the view taken by some other scholars. Gingras, for example, argued that “in the case of a constitutional provision, the ratifiers’ understanding is what counts most.”³³³

The Supreme Court in *Maxwell v. Dow*, a 1900 case rejecting the incorporation doctrine, offered a rare comment of its own on this subject. While not clearly defining the relative weight of congressional as compared to ratifier understandings, the Court stated, as to congressional history, that “[i]n the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by . . . three fourths of the States”³³⁴

Kyvig, in his study of constitutional amendments throughout American history, noted an interesting feature of Republican strategy on the Fourteenth Amendment. They deliberately framed and presented it as a package deal—all or nothing, take it or leave it as a whole.³³⁵ Sections 1 and 5, as we have

³³³ Gingras (1996), *supra* note 198, at 42 (citing two other scholars); *see also id.* at 71. Aynes has remarked to me that he does not necessarily disagree with Gingras’s view as a general matter. With regard to amendments not presented in omnibus, multi-part form like the Fourteenth, Aynes suggested he might well agree with Gingras and others who would give more weight to the ratifiers’ understanding. I myself, however, would not. While I think the argument for privileging the congressional understanding is especially strong in the case of the Fourteenth Amendment, I think the basic logic behind doing so applies to any constitutional amendment, for reasons discussed below in the text.

³³⁴ *Maxwell v. Dow*, 176 U.S. 581, 602 (1900).

³³⁵ *See* DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995* 166–67 (Univ. Press Kan. 1996).

seen, focused on guaranteeing and enforcing basic rights. But Sections 2, 3, and 4 received a lot more attention and aroused much more controversy. They dealt with vital political issues. Section 2 concerned whether the apportionment of House seats to Southern states would reflect a full counting of the freed slaves. Each slave had been treated as three-fifths of a White person for apportionment purposes. But since most states still denied Blacks the vote, the Unionist states with small Black populations faced the bitterly ironic threat that emancipation might actually strengthen the political influence of White-supremacist states, recently in rebellion, with large Black populations. Section 3 concerned the exclusion of rebels from political office, and Section 4 dealt with the Union and Confederate debts. Combining these disparate elements into a single Amendment was a “depart[ure] . . . from earlier amending practice,” a “political tactic . . . [d]esigned to enlist the broadest possible coalition of support, . . . [and] increas[e] the likelihood of congressional adoption and state ratification”³³⁶ It aroused a lot of criticism. But, as history records, it worked.³³⁷

Kyvig suggested that this approach “shifted critical decisionmaking from the ratifiers to the initial adopters” in Congress.³³⁸ Aynes elaborated that “it is possible . . . the framers knew, or at least feared, that one or more of the separate sections . . . would not command the necessary support from state legislatures. This knowledge led them to link the provisions together to gain a result that the legislatures themselves may not have intended.” Aynes suggested that might explain “why states would vote to ratify the Fourteenth Amendment and then not conform their state constitution[s] to comply with its provisions.” Perhaps some states “did not want to ratify the whole package but did so as the lesser of two evils”—the greater evil being complete rejection of the Amendment and the devastating impact that would have had on basic Republican priorities. Perhaps “the *framers* of the amendment intended to produce consequences that the *ratifiers* did not intend.”³³⁹ Aynes concluded, provocatively, that “[w]hile the full picture

³³⁶ *Id.* at 166; see also U.S. CONST. amend. XIV, §§ 2–4.

³³⁷ See KYVIG (1996), *supra* note 335, at 169–76; see also CURTIS, NO STATE (1986), *supra* note 10, at 185 (noting that the “Amendment . . . was a compromise that contained a number of independent provisions,” and that the state ratification debates “involved weighing pros and cons” affecting Republican political imperatives); AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 202–04 (offering a similar observation); Crosskey, *Fairman* (1954), *supra* note 9, at 111–12 (same).

³³⁸ KYVIG (1996), *supra* note 335, at 167.

³³⁹ Aynes, *Unintended* (2000), *supra* note 10, at 131 (emphases in original); see also *id.* at 123–32; Aynes, *Unintended* (2006), *supra* note 10, at 320 (restating the quoted language almost verbatim, in an article revising and updating his 2000 chapter); *id.* at 309–21.

should include the view[s] of both the framers and the ratifiers, . . . the work of the framers . . . should trump any contrary views held by individual ratifiers.”³⁴⁰

That is, of course, a convenient conclusion for an incorporationist like Aynes—or me—given that the evidence for incorporation is far stronger in Congress than in the state ratification debates. And it raises troubling theoretical issues. Conceding that this was the chosen tactic of the 1866 Congress, and that it “worked” in a brute-force sense, should it properly govern our interpretation of the Amendment? Was this a *legitimate* tactic? Did it spawn a *legitimate* interpretive rule, as Kyvig and Aynes suggested?

That, in turn, opens up the perennial question whether any of the three Reconstruction Amendments were properly ratified at all, given the arguable coercion of ratifying Southern states and the questionable legal status of their legislatures. That fascinating issue is beyond the scope of this Article, though I find convincing John Harrison’s conclusion that the Reconstruction Amendments were indeed lawfully added to the Constitution.³⁴¹

My best answer to the dilemma is that, at some point, we simply have to decide whether an amendment is to be honored as written. Conceding that Congress broke some eggs to make the Fourteenth Amendment omelette, it is part of the Constitution. Unless one rejects it altogether as an illegitimate usurpation, it should be enforced with full regard for how it was understood by those who wrote it. In the end, I agree with Kyvig and Aynes that we properly may—indeed, must—privilege the understanding of the Congress that proposes an amendment over silence, or even contrary views, on the part of ratifying state legislatures.

That is *only* proper, to be sure, if Congress’s understanding is clearly, publicly, and candidly conveyed to the country, and reasonably reflected in the text of such an amendment, so that the states are at least on fair notice. Only then can such an understanding fairly be deemed part of the original *public* meaning. An amendment cannot properly be given a meaning the ratifying states *could not* have known about. But it can, I think, be given a meaning that some or perhaps even most ratifying states did not specifically

³⁴⁰ Aynes, *Unintended* (2000), *supra* note 10, at 131–32; accord Aynes, *Unintended* (2006), *supra* note 10, at 321.

³⁴¹ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001). For a contrary view, contending that the lawfulness of the Fourteenth Amendment cannot be justified within the formal constitutional framework, see BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–119 (Harv. Univ. Press 1998). For a view supporting Harrison’s, from a constitutional theorist of conservative Democratic bent who lived through the Reconstruction era, see FRANCIS WHARTON, *COMMENTARIES ON LAW* 693–96 (§ 593) (Kay & Brother 1884) (facsimile reprint, Gaunt 2001). See also AMAR, *AMERICA’S CONSTITUTION* (2005), *supra* note 10, at 364–80 (generally agreeing with Harrison).

endorse, or may not have clearly understood or even thought much about. We need not require proof of specific, affirmative confirmation at the state level. We need only require proof of fair public notice and legal ratification.³⁴²

Ratification is a simple yes-or-no decision. If a state legislature feels strongly enough that a proposed amendment is unacceptable, because of disagreement or uncertainty over its meaning or for any other reason, the only proper and effective way to express that position is by simply refusing to ratify. A state cannot ratify with qualifications or reservations like a nation ratifying an international treaty. This view is confirmed by that taken in 1865 by Samuel S. Nicholas, who—opposing ratification of the Thirteenth Amendment—declared it well understood, “as every lawyer knows, that the [state] legislature has no power to make a conditional ratification. All it can do is to say yes or no.” A conditional ratification “would only enable the abolition Congress to consider the condition as mere surplusage, and treat the ratification as unconditional, which they would certainly do.”³⁴³

Thus, if the states have been put on fair notice of Congress’s understanding of an amendment and ultimately choose to ratify it—for whatever reasons—it should be interpreted in light of a fair reading of its text

³⁴² Thomas expresses agreement with this metric. See Thomas, *Riddle* (2007), *supra* note 5, at 1632–33. He also suggests that I “flinch” in applying it. See *id.* at 1634. Not surprisingly, I disagree. See Wildenthal, *Reply* (2007), *supra* note 5, at 1664–66. Somewhat relatedly, Kurt Lash suggests—in one of several very helpful comments in reviewing this Article, see *supra* note 64—that by privileging the congressional understanding in this manner, I may have returned, in effect, to the old “framers’ intent” approach to originalism. As discussed in the Introduction, *supra* pp. 1527–29, I agree with the general modern rejection of that approach and its replacement by a focus on original public meaning. I concede I may be skating close to the line of a subtle distinction here. There is some tension and overlap. This Article certainly devotes a lot of attention to the views of key framers like Bingham and Howard. But as I seek to emphasize in the text, I do not and would not privilege the *intentions alone* of the congressional framers above the original public understanding of what the Fourteenth Amendment meant. Rather, I argue that the *publicly expressed* views and intentions of the framers are exceptionally valuable *evidence* of the overall original understanding—the best evidence we have, more valuable and more authoritative than the views (or silence) of state ratifiers. Of course, as Lash also suggests, there is some risk of focusing more on congressional as compared to ratifier understandings, simply because we have more evidence about the former. This is analogous to the risk, acknowledged *supra* note 168, of focusing more on the *New York Times* as compared to other historical newspapers, due to ease of modern access. Lash and others may well have more to say about all this. I certainly do not pretend to have resolved all the issues.

³⁴³ 2 NICHOLAS, *ESSAYS* (1865), *supra* note 267, at 153 (ch. 14, “Amendment of the Constitution. Letter to a Member of the Kentucky Legislature,” pub. Feb. 11, 1865); see also *supra* Part VII.B (pp. 1590–95) (discussing the later Nicholas essay bearing on incorporation).

and Congress's publicly expressed understanding of its meaning. These factors should override any contrary, possibly self-serving, views expressed at the state level. They should certainly override mere silence—and nothing more than silence, essentially, has been shown during ratification in opposition to the incorporationist reading of the Fourteenth Amendment.

Practical considerations support this view. Ratification is a collective process, requiring approval by at least three-fourths of the states. What if one state conditioned its ratification on rejecting or modifying part of Congress's understanding—or even part of the explicit text? One might argue that *should* bind Congress, and courts construing the amendment, if that state happened to provide the decisive ratification, right on the cusp of three-fourths approval. But why should that particular state be so privileged? What if one, several, or all of the other states conditioned *their* ratifications on *accepting* Congress's understanding—or on imposing some *other* condition? Once one state ratifies conditionally, are all later ratifications deemed to incorporate that state's condition? Only if the other states are on notice of it? Even if they are on notice, could they not properly choose to reject the other state's view and rely instead on Congress's understanding or the plain text? Do they have to expressly say so? Could a decisive state's condition be undone by an additional state providing an alternative decisive ratification?

None of this is meant to suggest that evidence from the state ratification debates, or otherwise outside the proposing Congress, is irrelevant. The issue is the proper hierarchy or weight of evidence. My point is simply that understandings at the state level, or uncertainties in that regard, are not authoritative. They cannot properly be used to refute an understanding otherwise well supported by the text and the congressional evidence. But evidence of understandings outside the proposing Congress—even evidence postdating ratification³⁴⁴—may certainly have some relevant weight. Such evidence may tend to undermine a given reading of an amendment. It may suggest a lower likelihood that the proposing Congress itself entertained—or clearly conveyed to the country—such a reading. Or it may bolster a given reading. It may tend to corroborate the purported textual or congressional basis for such a reading.

I would not quarrel with the basic approach suggested by the anti-incorporationist *Maxwell* Court:

The safe way is to read [a constitutional amendment's] language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was

³⁴⁴ For my suggestions on how to weigh the significance of post-ratification evidence, see *supra* note 57.

adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.³⁴⁵

In the final analysis, the plain text and the proposing Congress's publicly expressed understanding must surely have priority over state ratification evidence. And understandings expressed in ratifying state legislatures should not necessarily rank next in the hierarchy. Other evidence from outside Congress, depending on its context and intrinsic character, might deserve greater weight. For example, the reporting of a prestigious, nationally known newspaper allied with the governing party in Congress, like the *New York Times* during Reconstruction, might deserve greater weight than potentially idiosyncratic views in some state legislatures.

Of course, a myriad of factors affect the absolute and relative value of any historical evidence bearing on constitutional interpretation. The foregoing merely sketches some of my views. Readers will ultimately have to evaluate for themselves the evidence discussed throughout this Article, along with my interpretations and arguments.

VIII. TEXT AND BEYOND

As many scholars have noted, the greater difficulty, from the standpoint of the original understanding, is not *supporting* incorporation of the Bill of Rights in the Fourteenth Amendment, but *limiting* incorporation to the Bill of Rights. Scholars as diverse as John Hart Ely and Earl Maltz have argued that it is virtually impossible to limit the Amendment's Privileges and Immunities Clause to rights expressly guaranteed in the constitutional text.³⁴⁶ Some have argued that the Amendment embraces a wide and uncertain range of natural or common law rights.³⁴⁷ Justices Stephen J. Field and Joseph P. Bradley,

³⁴⁵ *Maxwell v. Dow*, 176 U.S. 581, 602 (1900).

³⁴⁶ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28 (Harv. Univ. Press 1980); MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 113.

³⁴⁷ See generally, e.g., CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 47–67, 207–30 (Hein 1997); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 60–68 (Princeton Univ. Press 2004); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 1–85 (Yale Univ. Press 1999) (originally published, Putnam 1997); BOND, *NO EASY WALK* (1997), *supra* note 263, at 255–57; Trisha Olson, *The Natural Law Foundations of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995); 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 (1998); Douglas G.

dissenting in the *Slaughter-House Cases* of 1873, are probably the most famous judicial exponents of that view.³⁴⁸ Harrison, among others, has argued that the Privileges and Immunities Clause refers to various state-law rights of state citizenship, though he argued that the Clause *protects* only *equal* enjoyment of such rights.³⁴⁹

There is certainly some support for broader readings in the congressional history. Howard's May 1866 speech is the most famous example. He sweepingly suggested—before “add[ing]” the Bill of Rights to the mix—that constitutional privileges and immunities “cannot be fully defined in their entire extent and precise nature.”³⁵⁰ A broad natural-rights reading is also consistent with the antislavery legal theories that deeply influenced Reconstruction Republicans. Such theories emphasized the primacy of “natural” or “God-given” principles of justice over laws and constitutions written by mere humans. They drew upon a long tradition of natural-rights thinking in Anglo-American jurisprudence.³⁵¹ William Royall argued in 1878 that

[n]inety-nine out of every hundred educated men, upon reading [the Amendment's Privileges and Immunities Clause] over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it

Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351 (1997) [hereinafter D. Smith, *Natural Law* (1997)]; Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of “Higher” Law*, 3 TEX. REV. L. & POL. 225 (1999) [hereinafter D. Smith, *Fundamental Rights* (1999)].

³⁴⁸ 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., joined by Chase, C.J. and Swayne and Bradley, JJ., dissenting); *id.* at 111, 124 (Bradley, J., joined by Swayne, J., dissenting); *see also id.* at 124 (Swayne, J., dissenting).

³⁴⁹ *See generally* Harrison, *Reconstructing* (1992), *supra* note 89; *see also* CURRIE, SUPREME COURT: FIRST HUNDRED (1985), *supra* note 70, at 347–50 (suggesting such a reading); *supra* Part VII.A (p. 1588 & n.260) (discussing my forthcoming article dealing with this issue).

³⁵⁰ CG (39:1) 2765 (May 23, 1866); *see also, e.g.*, Curtis, *Resurrecting* (1996), *supra* note 10, at 68–69.

³⁵¹ On antislavery theories, *see generally*, for example, NYE (1949), *supra* note 292, at 177–96; Olson (1995), *supra* note 347; D. Smith, *Natural Law* (1997), *supra* note 347; D. Smith, *Fundamental Rights* (1999), *supra* note 347; and sources cited *supra* note 95. A classic study of natural-rights theories in Anglo-American jurisprudence—though not discussing the antislavery movement—is Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928).

is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear.³⁵²

But there is also some support for a narrower reading of the Clause, one tied to textually guaranteed rights. Ely, Maltz, Aynes, and others have gone too far in suggesting a *complete* lack of evidence for such a textualist reading. One scholar recently went so far as to make the categorical—but demonstrably mistaken—assertion that “[t]here is *no* contemporaneous historical support whatsoever for the proposition that the privileges and immunities clause was intended to apply only to rights expressly protected . . . in the original Constitution and not to any other rights deemed fundamental.”³⁵³

Bingham himself, despite his own grounding in natural-rights antislavery ideology, provides the best foil to Howard in this regard. While Bingham’s language was often broad and flowery, he was fairly explicit and consistent in linking his conception of “privileges” and “immunities” strictly to textual constitutional guarantees. We have seen his repeated invocations of the Bill of Rights, a classic textual expression of fundamental rights. And not unlike the textualist approach taken years later by Justice Black, Bingham arguably viewed the Bill of Rights as a ceiling as well as a floor.

In Bingham’s very first speech introducing the original version of Section 1, in February 1866, he directed “the attention of the House to the fact that the amendment proposed stands in the very words of the Constitution.” Referring to his *Barron*-contrarian view, he reiterated that the Amendment would not impose on the states “any obligation which is not now enjoined upon them by the very letter of the Constitution.”³⁵⁴ In his lengthy and crucial remarks two days later, he described the proposal as designed “to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.’”³⁵⁵

³⁵² Royall (1878), *supra* note 78, at 563.

³⁵³ David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 368 (2003) (emphasis in original); *see also id.* at 368–70 & n.210 (citing some of the same Bingham speeches quoted in the text, and acknowledging but dismissing his 1871 speech); *see also infra* note 376. Aynes likewise asserted that “Bingham, the 39th Congress, the ratifying legislatures, and antislavery theorists never suggested that the privileges or immunities of U.S. citizens were confined to the rights recognized in the first eight amendments.” Aynes, *Bingham* (1993), *supra* note 10, at 104; *see also* William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 MCGEORGE L. REV. 569, 601 (2005) (quoting Aynes’s assertion with approval).

³⁵⁴ CG (39:1) 1034 (Feb. 26, 1866).

³⁵⁵ *Id.* at 1088 (Feb. 28, 1866) (apparently quoting WILLIAM SHAKESPEARE, *OTHELLO* act 1, sc. 3); *see also id.* at 1089 (describing *Barron v. Baltimore*, 32 U.S. (7

Upon House passage of the near-final Amendment in May 1866—with the Privileges and Immunities Clause in its final form—the example Bingham chose to explain its necessity was state punishment “[c]ontrary to the express letter of [the] Constitution.”³⁵⁶ He reiterated that the goal of Section 1 was simply to stop “unconstitutional State enactments That is the extent that it hath, no more”³⁵⁷ And in January 1867, as we have seen, Bingham stated that the Amendment would reverse the *Barron* doctrine so as to prohibit the states from violating what he described at one point as the “personal rights . . . of the first ten articles of amendment” and a bit later

Pet.) 243 (1833), as “exactly what” he wanted to overturn with the Amendment); *id.* at 1090 (referring to “the existing amendments” as being what *Barron* rendered inapplicable to the states); *supra* Part III (p. 1541).

Boyce argued that Bingham, in referring to the Bill of Rights as guaranteeing that “all shall be protected alike in life, liberty, and property,” and in repeatedly referring to “equal protection” or equal rights generally, was “thus including in the ‘bill of rights’ an extratextual right of equal protection.” Boyce (1998), *supra* note 60, at 981 n.366 (citing CG (39:1) 1089 (Feb. 28, 1866)). But when Bingham talked about “all alike” enjoying protection of life, liberty, and property, he was plainly referring to the Fifth Amendment’s explicit textual guarantee that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” A substantive guarantee extending to all persons obviously ensures that “all alike” are equally protected to that extent. *See supra* note 260; MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 4, 157–58; Curtis, *Blueprint* (1990), *supra* note 142, at 834–35; Curtis, *Resurrecting* (1996), *supra* note 10, at 55.

Furthermore, Bingham strongly suggested that he regarded this concept of equal protection or equal rights as necessarily implied—as indeed it is—by all textual guarantees of constitutional rights, liberties, privileges, or immunities. For example, Bingham declared: “What does the word immunity in your Constitution mean? Exemption from unequal burdens.” Later on the same page, he referred to “the equal right of all citizens of the United States in every State to all privileges and immunities of citizens.” CG (39:1) 1089 (Feb. 28, 1866). At most, Bingham was drawing a limited and direct inference or implication from plain text—as even the most rigorous textualists would concede is often necessary. This explains very easily why Bingham said—as quoted in the text above—that his proposal “stands in the very words of the Constitution,” despite the fact, as Fairman meticulously noted, that it was “not literally true” that the “equal protection” language was already there. Fairman, *Original* (1949), *supra* note 7, at 24; *see also* BERGER, FOURTEENTH (1989), *supra* note 7, at 129 (denouncing what Berger thought was Bingham’s “glaring inexactitude” in this regard); BERGER, GOVERNMENT (1997), *supra* note 7, at 160 (lambasting Bingham’s alleged “sloppiness” in this regard); *id.* at 182 (reiterating this criticism).

Some might interject at this point that such statements by Bingham support an “equal rights only” reading of the Amendment. I agree that they support a general focus on equal rights, but would disagree with the “only” aspect, for reasons I have suggested and which I will pursue in a forthcoming article. *See supra* note 223; Part VII.A (p. 1588 & note 260).

³⁵⁶ CG (39:1) 2542 (May 10, 1866); *see also supra* Part III (p. 1554).

³⁵⁷ CG (39:1) 2543 (May 10, 1866).

as “all the limitations for personal protection of every article and section of the Constitution.”³⁵⁸

In 1871, explaining in retrospect his development and understanding of the Amendment, Bingham analogized Section 1 to the express textual limits on state power in Article I, Section 10.³⁵⁹ He explained that “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,” which he then quoted verbatim. One might think his qualifier “chiefly” suggested a supratextual scope. Kurt Lash has so argued. But in context, Bingham seemed to refer to the other textual rights just mentioned, which were guaranteed in the original Constitution before it was amended to add the Bill of Rights. Bingham seemed to confirm the latter reading later on the same page, referring to “all the privileges and immunities of citizens of the United States, as guarantied [*sic*] by the amended Constitution and expressly enumerated in the Constitution.” He then asked: “Do gentlemen say that by so legislating we would strike down the rights of the State? God forbid.”³⁶⁰ Congress was then debating the Ku Klux Act of 1871,³⁶¹ which Bingham supported, to enforce the Fourteenth and Fifteenth Amendments. He thus used the textually limited scope of the Fourteenth Amendment precisely in order to defend it against the perennial charge that it unduly invades state prerogatives.

What, indeed, can the plain text of the Fourteenth Amendment Privileges and Immunities Clause tell us? Is it really so hopelessly vague and open-ended, as so many have so long contended? In a law school paper written in 1988, I reinvented the wheel by coming up with a simple, four-step syllogism capturing the logic of incorporating the Bill of Rights—and *only* the Bill of Rights and other textual constitutional guarantees—via that Clause: (1) It undeniably restricts state power with regard to some class of rights (hint: read the Clause). (2) It had to accomplish something; therefore, the rights protected must have been ones the states were previously free to violate as far as the Constitution was concerned (hint: see *Barron*). (3) The words “privileges or immunities of citizens of the United States” indicate that those rights were already guaranteed in some sense to U.S. citizens (hint: see the

³⁵⁸ CG (39:2) 811 (Jan. 28, 1867); *see also supra* note 111; Part VII.B (pp. 1599–1600).

³⁵⁹ CG (42:1) app. 83–84 (Mar. 31, 1871).

³⁶⁰ *Id.* at app. 84. *But see* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 468 & n.36 (2001) (citing Bingham’s use of “chiefly” to support the argument that the Privileges and Immunities Clause was understood to encompass nontextual liberties outside the Bill of Rights).

³⁶¹ 17 Stat. 13 (Apr. 20, 1871).

Bill of Rights). (4) *Ergo*, the “privileges or immunities of citizens of the United States” that “[n]o State shall . . . abridge” must be those that simultaneously meet criteria (2) and (3). It should not take Holmesian abilities—either those of Oliver Wendell, Jr., or Sherlock—to fill in that blank.

Justice John Marshall Harlan the elder suggested this textual logic in 1900, as did Justice Black in 1968—over the dissent of Harlan’s grandson.³⁶² Amar offered a beautifully detailed demonstration of it in his 1992 article and 1998 book, as did Curtis in articles published in 1996 and 1998.³⁶³ All of us in the twentieth and twenty-first centuries, however, were beaten to the punch by Charles Pence’s marvelously laconic 1891 article. Pence noted that “[t]he language employed” in the Clause “is apt and proper to effect th[e] purpose” of incorporating the Bill of Rights. “There were no other privileges or immunities of citizens of the United States . . . which stood in need of such protection,” he pointed out. “The only privileges or immunities within its view are such as are recognized and allowed by the constitution. Its only effect is to make them what they should rightfully be—the secure possession of every citizen.”³⁶⁴

IX. THE DUAL-CITIZENSHIP THEORY

The foregoing textual logic is, of course, a double-edged sword. On the one hand, it supports total incorporation of the Bill of Rights as a minimum floor meaning of the Privileges and Immunities Clause. But on the other hand, it suggests the Clause’s meaning may be subject to a textual ceiling, defined by the scope of constitutionally specified rights belonging to “citizens of the United States.” In this sense, it relies on the concept of dual citizenship—federal vs. state—also implied by the immediately preceding Citizenship Clause. To be sure, undue weight should not be placed on the Citizenship Clause. It was added belatedly by the Senate, after the Privileges and Immunities Clause was drafted and passed by the House, mainly to erase any doubts about the citizenship of the freed slaves. But that still leaves the

³⁶² *Maxwell v. Dow*, 176 U.S. 581, 606, 612 (1900) (Harlan, J., dissenting), *overruled by Duncan v. Louisiana*, 391 U.S. 145 (1968); *see also Duncan*, 391 U.S. at 165–66 (Black, J., joined by Douglas, J., concurring); *id.* at 174–75 n.9 (Harlan, J., joined by Stewart, J., dissenting).

³⁶³ *See Amar, Bill of Rights* (1992), *supra* note 10, at 1218–26; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 163–74; Curtis, *Resurrecting* (1996), *supra* note 10, at 19–26; Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen’s Paper*, 66 GEO. WASH. L. REV. 1269, 1271–73 (1998).

³⁶⁴ Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 550 (1891); *see also id.* at 540; AMAR, *BILL OF RIGHTS* (1998), *supra* note 10, at 375 n.117 (praising Pence’s analysis).

express qualification regarding U.S. citizenship set forth in the Privileges and Immunities Clause itself.³⁶⁵

The *Slaughter-House* Court relied heavily—to its great infamy—on dual-citizenship analysis to limit the scope of the Privileges and Immunities Clause.³⁶⁶ A remarkably wide spectrum of scholars has condemned that reading. Even Berger, in his 1977 and 1997 books, criticized the Court’s reasoning, asserting that “[t]he notion that by conferring dual citizenship the framers were separating said rights of a citizen of the United States from those of a State citizen not only is without historical warrant but actually does violence to their intention.”³⁶⁷

Chester Antieau, a scholar at the opposite extreme from Berger and a much harsher critic of *Slaughter-House*, favored a very broad natural-rights reading of the Amendment. Antieau conceded the apparent limiting effect on the Privileges and Immunities Clause of the words “of citizens of the United States.” But he argued that this phrasing was an unintended “tragedy.” It was “inconceivable,” Antieau felt, “that Bingham and the other proponents of the Amendment would have willingly denied federal protection of such rights to the millions of legal aliens . . . in the United States”³⁶⁸ Berger, though taking a far narrower view of the Amendment than Antieau, also dismissed its distinction between “citizens” and “persons” as “*not* carefully considered” and “rais[ing] a number of perplexing problems.”³⁶⁹

With regard to dual citizenship, I am wary of differing with Berger on a rare point where he seemed to take a more expansive view of the Amendment—especially where he is supported by many other scholars with whom I tend to agree more, such as Curtis and Aynes.³⁷⁰ Berger, Curtis, Aynes, Antieau, Harrison, and many others have certainly been correct in criticizing the *Slaughter-House* Court’s undue reliance on the Citizenship

³⁶⁵ See *supra* note 1; Part II (p.1532 & n.73).

³⁶⁶ See, e.g., Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1096–99.

³⁶⁷ BERGER, GOVERNMENT (1977), *supra* note 7, at 46; see also *id.* at 37–51. Accord BERGER, GOVERNMENT (1997), *supra* note 7, at 65; see also *id.* at 57–69.

³⁶⁸ ANTIEAU (1997), *supra* note 347, at 49; see also, e.g., *id.* at 56–61 (arguing that the Privileges and Immunities Clause protects a broad range of natural rights); *id.* at 62 (condemning *Slaughter-House* for its limited, dual-citizenship reading of the clause).

³⁶⁹ BERGER, GOVERNMENT (1977), *supra* note 7, at 215 (emphasis in original); see also *id.* at 215–20. Accord BERGER, GOVERNMENT (1997), *supra* note 7, at 240; see also *id.* at 240–44.

³⁷⁰ See, e.g., CURTIS, NO STATE (1986), *supra* note 10, at 175 (excoriating the *Slaughter-House* dual-citizenship analysis); Aynes, *Constricting* (1994), *supra* note 10, at 634–52 (same); Aynes, *Unintended* (2006), *supra* note 10, at 297–300 (same); Harrison, *Reconstructing* (1992), *supra* note 89, at 1414–15 (also criticizing that analysis, though less harshly).

Clause. But the fact is, some sort of dual-citizenship analysis not only makes perfect textual sense, it does have some—though admittedly not consistent—support in the congressional history.³⁷¹ Antieau's and Berger's views stated above are, in any event, flatly contradicted by that history. Bingham and his colleagues considered very carefully the precise language of the Amendment, including the use of "citizen" or "person" in different clauses. They used "person" in the Due Process and Equal Protection Clauses—but not the Privileges and Immunities Clause—precisely to include aliens.³⁷²

Bingham drew a sharp distinction between the rights of national and state citizenship in his 1871 speech during the Ku Klux Act debate, referring to "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State."³⁷³ A few days later, Bingham engaged in a colloquy with his fellow Ohio Republican, Representative, and future President James A. Garfield. Bingham objected to Garfield's suggestion that the "substance" of the Amendment's Privileges and Immunities Clause was the same as the old Article IV Privileges and Immunities Clause. Bingham pointed out the different wording of the two clauses, quoting the Amendment's reference to "privileges or immunities of

³⁷¹ See Avins, *Incorporation* (1968), *supra* note 9, at 16 (arguing that the *Slaughter-House* Court "arrived at the right conclusion via the wrong route," and that the Citizenship Clause should not be relied upon to interpret the Privileges and Immunities Clause); see also *id.* at 12–17 (discussing some of the congressional history, which contains some statements cutting against the dual-citizenship theory). By the "right conclusion," Avins apparently meant the Court's holding that the Amendment "protected only the privileges of national citizenship." *Id.* at 16. Avins did not take a clear position on whether the *Slaughter-House* Court thereby meant to reject incorporation of the Bill of Rights. Avins himself supported incorporation. *Id.* at 26. In fact, the *Slaughter-House* majority opinion was at worst ambiguous on the incorporation issue, which was irrelevant to the decision. At best, it was arguably supportive. The notion that the Court rejected the incorporation theory in *Slaughter-House* is a surprisingly persistent myth. See Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1063–67, 1094–1125; see generally Wildenthal, *How I Learned* (2001), *supra* note 2. I would not now contend that the *Slaughter-House* majority affirmatively embraced the incorporation theory, a point I now think I argued too enthusiastically in the foregoing articles. But it still remains clear, in any event, that the *Slaughter-House* Court did not affirmatively reject that theory either.

³⁷² Antieau, in support of his reading, cited only a handful of vague statements outside Congress by Bingham and Thaddeus Stevens, which did not clearly distinguish between the different clauses of the Amendment. See ANTIEAU (1997), *supra* note 347, at 50. For support of my point in the text, see, for example, AMAR, BILL OF RIGHTS (1998), *supra* note 10, at 169–73; CURTIS, NO STATE (1986), *supra* note 10, at 107; MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 96–102; Crosskey, *Fairman* (1954), *supra* note 9, at 76–77; Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1113 & n.272. See also *supra* Part V (p. 1563) (quoting Howard's explicit distinction in this regard).

³⁷³ CG (42:1) app. 84 (Mar. 31, 1871).

citizens of the United States.” He argued that Article IV, in contrast with the Amendment, was “always interpreted . . . to mean only privileges and immunities of citizens of the States, not of the United States.”³⁷⁴

Bingham had not turned more conservative in the five years since he drafted the Amendment. He was a strong supporter of the boldly far-reaching 1871 Act, which even some Republicans (including Garfield) feared might overrun constitutional limits.³⁷⁵ In any event, his earlier views of the Amendment were perfectly consistent, and indeed corroborate this point. In May 1866, for example, with the Amendment’s Privileges and Immunities Clause in its final form, Bingham indicated that voting rights would remain generally governed by state law and were not covered by the Clause. He noted, however: “The franchise of a Federal elective office is . . . clearly one of the privileges of a citizen of the United States” Why? It was “provided for and guaranteed [*sic*] in your Constitution.” A moment later, Bingham similarly noted “this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of [*sic*] the guarantees of the Constitution, by this amendment a remedy might be given”³⁷⁶ Likewise, Bingham stated in January 1867: “I deny . . . that the citizens of the United States are entitled as such to the privilege of voting in any State. That is the privilege of the citizens of an organized State, and . . . nobody else”³⁷⁷

³⁷⁴ *Id.* at app. 152 (Apr. 4, 1871); see also Avins, *Incorporation* (1968), *supra* note 9, at 12–13 (quoting and discussing this comment); CG (42:1) app. 84 (Mar. 31, 1871) (Bingham) (“Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the [F]ourteenth [Amendment] . . . ?”); Curtis, *Resurrecting* (1996), *supra* note 10, at 70 (quoting Bingham’s March 31 statement). Whether Bingham’s 1871 statements indicate some shift in his views on Article IV, as compared to 1866 or earlier, is an interesting question that I will discuss in my forthcoming article mentioned *supra* Part VII.A (p. 1588 & n.260). But as discussed in the text, his reading of the Amendment that he himself drafted did not change.

³⁷⁵ See FONER, *RECONSTRUCTION* (1988), *supra* note 80, at 454–56.

³⁷⁶ CG (39:1) 2542 (May 10, 1866). *But see* Bogen (2003), *supra* note 353, at 369 n.210 (erroneously stating that Bingham “did not articulate this distinction”—which Bogen conceded he stated in 1871—“between the privileges of citizens of a state and of the United States during the adoption debates”). See also *supra* Part VIII (p. 1617 & n.353).

³⁷⁷ CG (39:2) 454 (Jan. 14, 1867); see also Avins, *Incorporation* (1968), *supra* note 9, at 17 n.82 (quoting and discussing this comment). Avins, having discussed this and one of the other Bingham statements I discuss here, see *supra* note 374, correctly concluded that “there was a clear dichotomy in Bingham’s speeches between the privileges of national citizenship and the privileges of state citizenship, and it was only the latter [*sic*; Avins clearly meant to say the ‘former’] that he intended to protect.” *Id.* at 17; see also *id.* at 12–17.

As Maltz noted, this distinction between rights of national and state citizenship was also expressed by other congressional Republicans at the time. They included two of Bingham's Ohio colleagues who also played influential roles in Reconstruction civil rights legislation: William Lawrence, who later echoed Bingham's incorporationist views, and Samuel Shellabarger.³⁷⁸ Even Harrison conceded, in a footnote, that Bingham "sometimes spoke as if the . . . Clause protected rights of national citizenship as opposed to rights of state citizenship."³⁷⁹ Harrison nevertheless claimed that Bingham "agreed that [Fourteenth Amendment] privileges and immunities . . . included rights defined by state law."³⁸⁰ But the speeches Harrison cited dealt only with the Article IV Clause. None were from the 1866 debates on the Fourteenth Amendment. Nor did Harrison address Bingham's 1867 or 1871 statements. In the latter of those, as noted, Bingham expressly distinguished the Article IV and Fourteenth Amendment Clauses on this very point.

Howard's speech in May 1866, though often viewed as supporting an extremely broad, supratextual reading of the Clause, likewise indicated the dual-citizenship limitation. He said the Clause "relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States."³⁸¹ While that also suggested a contrast with foreign citizens, Howard went on to echo Bingham's exclusion of voting rights. And he did so even more categorically, despite his own stronger personal support for Black suffrage. Howard declared that Section 1 "does not give . . . the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution." Why not? Because "[i]t has always been regarded . . . as the result of positive local law . . ."³⁸² In other words, it was, at most, a privilege of state, not national, citizenship.

Oddly enough, Berger's 1989 book contradicted his own above-quoted view on dual citizenship expressed in 1977 and 1997. Berger in 1989 noted

³⁷⁸ See Earl M. Maltz, *Brown v. Board of Education*, in WILLIAM N. ESKRIDGE, JR. & SANFORD LEVINSON, *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 207, 208–09, 214 nn.9–10 (New York Univ. Press 1998) (quoting CG (39:1) 1836 (Apr. 7, 1866) (Rep. Lawrence); *id.* at app. 293 (July 25, 1866) (Rep. Shellabarger)); Christine Doyle, *William Lawrence*, 13 ANB, *supra* note 1, at 289; William A. Kinnison, *Samuel Shellabarger*, 19 ANB, *supra* note 1, at 787; BDC, *supra* note 1, at 1426, 1899. On Lawrence's incorporationist statements, made in 1871 and 1874, see Wildenthal, *Lost Compromise* (2000), *supra* note 2, at 1123, 1145 n.432.

³⁷⁹ Harrison, *Reconstructing* (1992), *supra* note 89, at 1418 n.134.

³⁸⁰ *Id.* at 1418; *see also id.* at 1418–19.

³⁸¹ CG (39:1) 2765 (May 23, 1866).

³⁸² *Id.* at 2766; *see also* MALTZ, *CIVIL RIGHTS* (1990), *supra* note 10, at 99–100; MALTZ, *FOURTEENTH* (2003), *supra* note 191, at 70–71.

with *approval* the distinction between national and state citizenship adopted in *Slaughter-House* in 1873 and *United States v. Cruikshank* in 1876. He suggested that distinction was supported by the congressional history.³⁸³ Odder still, Berger in 1989 criticized Bingham because, claimed Berger, “[t]hat distinction eluded Bingham.”³⁸⁴ Berger’s derision of Bingham was apparently so great that he could not even grasp when he and Bingham were in agreement.

CONCLUSION

The dual-citizenship theory, by itself, does not tell us precisely *which* national citizenship rights the Reconstruction Republicans meant to protect. There is no doubt they generally desired to greatly augment the national protection of American citizens. But at the same time, as scholars have demonstrated, most were also adamant about preserving the basic features of the traditional federal system with its separate spheres of state power and state citizenship.³⁸⁵ There is, of course, disagreement on this issue. Some scholars have argued that the Reconstruction Amendments heralded a more “revolutionary” conception of national citizenship rights and Congress’s power to enforce and even create such rights.³⁸⁶ As Michael Zuckert and

³⁸³ See BERGER, FOURTEENTH (1989), *supra* note 7, at 96–98; The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876).

³⁸⁴ BERGER, FOURTEENTH (1989), *supra* note 7, at 96 n.27. This was not the only case in which Berger lost track of his own argument. See *supra* note 245.

³⁸⁵ See, e.g., MALTZ, CIVIL RIGHTS (1990), *supra* note 10, at 39–40, 106–09; BRANDWEIN (1999), *supra* note 116, at 4–8, 57–58, 135–36; see generally, e.g., HYMAN, MORE PERFECT (1973), *supra* note 95, at 433–90; BENEDICT, COMPROMISE (1974), *supra* note 72; Benedict, *Preserving* (1974), *supra* note 95.

³⁸⁶ See generally, e.g., Kaczorowski, *Revolutionary* (1986), *supra* note 95; Kaczorowski, *To Begin* (1987), *supra* note 95. Several scholars have recently studied Congress’s power to create and enforce rights of national citizenship. See REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (New York Univ. Press 2006); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717 (2003); Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485 (2004); see also, e.g., James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421 (1999); James W. Fox, Jr., *Re-Readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002); James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & CIV. RTS. L. REV. 453 (2004); William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional*

Pamela Brandwein have perceptively suggested, we can find truth in both views if only we escape the simplistic way the question is usually posed and seek a more nuanced understanding of Republican goals.³⁸⁷

In any event, the evidence regarding the original understanding of the Fourteenth Amendment, as discussed in this Article, seems sufficient to support the inference that it nationalized the Bill of Rights. The incorporation theory enjoys especially strong support in certain key respects, notably as to freedom of speech. The 1866 congressional debates strongly and explicitly support the theory. But it appears to have been far less discussed—and possibly far less well understood—outside Congress during 1866–67. This Article concedes the uneven and incomplete nature of the surviving evidence from 1866–67, and that more work is required—especially to explore the early understanding of the Amendment during the years after 1867.

The evidence from 1866–67 seems sufficient to have provided a legitimate basis for judges, politicians, lawyers, scholars, commentators, and the American people generally, to read the Amendment in the ensuing years as nationalizing the Bill of Rights. But did they, in fact, so read it? If so, to what extent? If not, why not? I will try to answer those questions in forthcoming articles.

Canon, 87 MINN. L. REV. 153 (2002). For a helpful historical background study, see Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681 (1997).

³⁸⁷ See Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 PUBLIUS: THE JOURNAL OF FEDERALISM, No. 2, at 69, 71–72 (1992); BRANDWEIN (1999), *supra* note 116, at 57–58.