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JOHN A. BINGHAM AND THE STORY OF AMERICAN LIBERTY: THE LOST CAUSE MEETS THE “LOST CLAUSE”

*Michael Kent Curtis**

I. INTRODUCTION: OUR STORY

We tell and retell stories. Individuals have stories and so do families. The stories tell us who we are and how we fit in the widening concentric circles of the individual, the family, the community, the nation and the world.¹

Nations have stories too. Ours is a story about the American Revolution against monarchy and aristocracy, a revolution based on the faith that all people are created equal and endowed by their Creator with certain unalienable rights. The revolution espoused the ideal that legitimate governmental power comes only from the consent of the governed.

In the old world, kings were sovereign. In America, the sovereign was “the people.” That ideal appeared in the preamble of the Constitution—a preamble that declared (somewhat inaccurately) that the Constitution came from “we the people” and was designed to assure liberty and justice. Though we often fall short of them, ideals matter. The Bill of Rights to the Constitution, added in 1791, also stated ideals;

* Michael Kent Curtis, BA University of the South; MA University of Chicago; JD University of North Carolina. Professor of Law, Wake Forest University School of Law. © Michael Kent Curtis. Thanks to Ronald Wright, Malcolm B. Futhey, III, Sandy Levinson, Dan Farber, Miles Foy, William Ross, and Michael Perry for very helpful comments on an earlier draft of this article. I owe special thanks to Malcolm Futhey for reading many drafts of this article and providing his remarkably insightful suggestions. I also want to thank research assistants Matthew Thomas, Charles Alexander Castle, and Malcolm Futhey for their very fine help with research. The mistakes and misconceptions are my own. The reference to the “lost clause” in the title of this piece is borrowed from Akhil Reed Amar. Akhil Reed Amar, *Lost Clause*, NEW REPUBLIC, June 14, 1999, at 15.

1. JEROME BRUNER, *ACTS OF MEANING* (1990); SAM KEEN, *TO A DANCING GOD* 83-105 (1970).

it declared and protected basic liberties of the people. With the end of the Civil War, slavery was abolished. In 1919 women got the vote. At any rate, according to our story, the United States is a democracy that protects basic rights of its citizens.

As far as I can recall, that was pretty much the American story I learned in public schools in Galveston, Texas, in the 1950s. Of course, the dominant Texas story had some peculiarities that did not fit too well with the larger story. According to the version I recall, greedy Yankees and ignorant blacks subjected the South to a period of misrule after the Civil War—from which, somehow or other, the South was rescued. If my high school history book told me just how the rescue was effected, I do not recall.

The Texas story was supplemented by others I heard. The Civil War, my grandmother assured me, was not about slavery. It was about states' rights.

But there was a troubling dissonance between the old story and the world of the 1950s and 1960s. Blacks were seeking integrated education, the right to vote, and the right to equal treatment in employment and in places of public accommodation. By the eighth grade, I was a strong supporter of the decision in *Brown v. Board of Education*. But, of course, critics of the decision said it violated states' rights.

Around this time, my older cousin Walter (a Yankee from New York) came to visit. I remember my grandmother telling him, "You know Walter, the South won the first and last battles of the Civil War." Walter replied, "Yes grandmother, but the North won the war."

My grandmother had left out a crucial Southern victory. Though I did not know it at the time, Civil War and Reconstruction history had long been a battleground. The Southern elite lost the Civil War, but for many years it won the battle for American history.

The post Civil War battle over history was not simply about the past—it never is. If the Southern slaveholding elite had led the South into a ruinous war to defend their financial stake in a discredited institution, recognition of that fact would have helped to fuel first the Southern Republican and then the Populist revolt against the old order. For the ante-bellum Southern elite, the decision to rewrite history made practical sense. The Commissar in George Orwell's book *1984* put the issue succinctly: "Who controls the past controls the present. Who controls the present, controls the future."

Supporters of the old Southern elite launched a massive propaganda

campaign.² They purged schools and public libraries of offending books, and they monitored teachers too. They attempted to purify colleges and universities. They gave public speeches and organized youth groups where children were taught catechisms about states rights and happy slaves.³ The revisers had substantial success in the South and to a remarkable degree in the North as well.

The Southern revisionist history of the Civil War—that it was about states’ rights, not slavery—was grossly distorted. In the years before the Civil War, congressmen argued again and again about slavery. States’ rights had merely a supporting role, appearing on the stage when useful, disappearing when inconvenient. When states’ rights suited the needs of slaveholders, they argued states’ rights. When states’ rights interfered with the slaveholder agenda, appeals to states’ rights were abandoned.⁴ So states’ rights disappeared from the stage when Northern state laws provided due process protections for blacks living in the North who were claimed as fugitive slaves. Similarly, Southern politicians ignored Northern states’ free speech rights in their demands that Northern states suppress abolitionists and extradite abolitionist editors for trial in the South or change their state laws and constitutions to suppress abolitionist “agitation.” On these occasions, Northerners were more likely to invoke states’ rights.

The most telling evidence that slavery—not states’ rights—was the cause of the Civil War comes from speeches by Southern leaders advocating or justifying secession. Jefferson Davis, who became the Confederate President, said excluding slavery from the territories would make “property in slaves so insecure as to be comparatively worthless” and in effect would “annihilate property worth thousands of millions of dollars.”⁵ In March 1861, Alexander Stephens, Vice President of the Confederacy, said the nation had been founded on the false idea that all men were created equal. The Confederacy, he said, was “founded upon exactly the opposite idea.” The foundation of the Confederacy was the “great truth that the negro is not equal to the white man; that slavery. . .

2. Fred Arthur Bailey, *Free Speech and the Lost Cause in the Old Dominion*, 103 VA. MAG. OF HIST. AND BIOGRAPHY 237-924 (April 1995).

3. *Id.* at 244-58.

4. For a discussion of the use of states’ rights by both Northern and Southern states (when convenient), see Paul Finkelman, *States Rights, North and South* in AN UNCERTAIN TRADITION (Kermit Hall and J. Ely eds., 1989).

5. 5 JEFFERSON DAVIS, CONSTITUTIONALIST: HIS LETTERS, PAPERS AND SPEECHES 72 (Dunbar Roland ed., Miss. Dept. of Archives and History, 1923). James McPherson, *Southern Comfort*, NEW YORK REVIEW OF BOOKS, April 12, 2001 at 28.

is his natural and moral condition.”⁶ The commissioners sent from the first seceding states to encourage other Southern states to join them justified secession based on the threat to slave property.⁷ Of seventeen reasons Mississippi gave for leaving the Union in its January 9, 1861, “Declaration of Causes of Secession,” at least sixteen related to slavery.⁸ The final one warned of the loss of property worth “four billions of money.” After the Civil War, Jefferson Davis, Alexander Stephens and others sang a different tune: the war was about states’ rights, not slavery.

Of course, the stories we tell are important. Often, however, the most significant stories are the ones we repress, ignore, or forget—the elephant in the living room no one talks about. For many years, the nation ignored how slavery and the Southern racial caste system had undermined the nation’s ideals of equality, liberty, and democracy. We have celebrated the Framers of the original Constitution and of the Bill of Rights. But for years our national story largely ignored our second group of framers who gave the nation the new birth of freedom in the post Civil War amendments. Most of us have never heard of the old time Republicans who framed the Thirteenth, Fourteenth, and Fifteenth Amendments, people like John A. Bingham of Ohio, Jacob Howard of Michigan, and James Wilson of Iowa. They struggled to put liberty and equality on a more secure constitutional foundation. But for many years, they and their efforts were generally ignored, and when not ignored they were often attacked.

To the extent that it told the story of Reconstruction at all, the dominant view until the 1950s tended to be critical of the Republicans in Congress from 1866-1873 and critical of the Republican Southern state governments established during Reconstruction.⁹ These views were expressed, for example, in studies coming out of Columbia University in New York City. In 1914, Professor J. G. de Roulhac Hamilton contended that Reconstruction in North Carolina was an episode when “selfish politicians, backed by the federal government, for party purposes attempted to Africanize the State and deprive the people through misrule and oppression of most that life held dear.”¹⁰

6. *Speech of Alexander Stephens*, AUGUSTA DAILY CONSTITUTIONALIST, Mar. 30, 1861, cited in McPherson, *supra* note 5.

7. CHARLES B. DEW, APOSTLES OF DISUNION: SOUTHERN SECESSION COMMISSIONERS AND THE CAUSES OF THE CIVIL WAR (2001).

8. Mississippi Declaration of Causes of Secession, Jan. 9, 1861.

9. See, e.g., RICHARD N. CURRENT, ARGUING WITH HISTORIANS 78-79 (1987); DAVID W. BRIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 395 (2001).

10. J. G. DE ROULHAC HAMILTON, RECONSTRUCTION IN NORTH CAROLINA (Vol. LVIII of *Studies in History, Economics and Public Law* edited by the faculty of Political Science of

In Louisiana, as elsewhere in the South, the end of Reconstruction and the triumph of the “Redeemers” was facilitated by violence and intimidation aimed at blacks and Republicans. In his 1939 biography, *Mr. Justice Miller and the Supreme Court (1862-1890)*, published by the Harvard University Press, Charles Fairman referred to the Republican government supported by blacks and whites as the “carpetbag government.” According to Fairman, when that government was removed, “self government was restored in Louisiana.”¹¹

Of course, some told a very different story about Reconstruction.¹² By the 1960s, during the Second Reconstruction, historians generally began to look again at the First, and to reconsider the conventional wisdom.¹³

Still, the Southern story had a pervasive effect and reconsideration of it was slow to penetrate the world of legal scholars or the marble palace of the law.¹⁴ For many years, Charles Fairman’s discussion of whether the Fourteenth Amendment was designed to require states to obey the Bill of Rights was treated by most scholars as historically, if not legally, definitive.¹⁵ Fairman was quite critical of John Bingham—the principle author of Section one of the Fourteenth Amendment and of other Republicans in the Thirty-ninth Congress.¹⁶ The major scholarly criticism of Fairman’s article¹⁷ was ignored. Fairman devoted no significant attention to the more than thirty years of attempts to suppress anti-slavery speech that preceded the framing of the Fourteenth Amendment.

Columbia University) (1964 reprint of 1914 edition).

11. CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT (1862-1890)* 180 (1939).

12. See, e.g., W. E. B. DuBois, *BLACK RECONSTRUCTION* (1935); VERNON L. WHARTON, *THE NEGRO IN MISSISSIPPI* (1947, 1965). For an overview of historians treatment of constitutional issues connected with the Civil War and Reconstruction, see Michael Les Benedict, *A Constitutional Crisis in WRITING THE CIVIL WAR: THE QUEST TO UNDERSTAND 154-73* (James M. McPherson and William J. Cooper, Jr. eds. 1998).

13. E.g., KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965). The most comprehensive recent study is ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* (1998).

14. For a thoughtful discussion, see PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION* 11-13, 115-116 (1999).

15. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2-3* (1986) [hereinafter CURTIS, *NO STATE SHALL ABRIDGE*]. See also, e.g., NOEL T. DOWLING & GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW 730* (1965) (omitting Crosskey’s response to Fairman).

16. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 *STAN. L. REV.* 5 (1949).

17. William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 *U. CHI. L. REV.* 1 (1954).

In 1964, the Supreme Court wrote its great decision in *New York Times v. Sullivan*,¹⁸ protecting the right to criticize Southern segregationist officials. But when the Court looked for a paradigmatic historical event to support its decision, it cited only to the repudiation of the Sedition Act.¹⁹ It did not cite the suppression of anti-slavery and Republican speech in the South before the Civil War or the connection between these events and Section one of the Fourteenth Amendment.²⁰ Of course, the libel suit against the *New York Times* was based on state law, not federal law. The Fourteenth Amendment was the precise source of the free press protection at issue in the *New York Times* case. The advertisement supporting Martin Luther King that produced the suit was part of the continuing struggle against the legacy of slavery. Why did the Court fail to cite such pertinent history? There may be several reasons, but certainly one is crucial. The battle for free speech and other civil liberties for opponents of slavery and Republicans had been largely forgotten. Of course, the effect of that struggle on shaping the Fourteenth Amendment was also forgotten.

The majority opinion in the 1873 *Slaughter-House Cases* ignored the struggle for civil liberty for opponents of slavery. Instead, the Court pictured the Fourteenth Amendment as *merely* a response to Black Codes passed by the Southern states after the Civil War. As the Court reported them, those acts simply denied blacks the right to contract, to own property, etc.²¹ The *Slaughter-House* Court gave examples of the privileges and immunities of citizens of the United States that the Fourteenth Amendment protected against the states. Typically, these had little to do with the struggle to protect civil liberties for critics of slavery or with the problems facing black and white Republicans during Reconstruction. According to the Court, the clause meant that citizens had the right to go to and return from the seat of government, to visit the sub-treasuries, and to be protected on the high seas and in foreign lands. The Court also mentioned the rights to assemble and petition, rights it soon limited to assembling to petition the national government.²² The

18. 376 U.S. 254 (1964).

19. *Id.* at 273. See also *Brief of the New York Times*, 58 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 41-51 (original) 444-54 (Philip B Kurland; Gerhard Casper, eds. 1975). See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 243, 307 (1998); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 299, 412 (2000) [hereinafter, CURTIS, FREE SPEECH].

20. See CURTIS, FREE SPEECH, *supra* note 19, at chapters 5-13 and 16.

21. *Slaughter-house Cases*, 83 U.S. 36, 70 (1872).

22. 83 U.S. at 78-80. Recently some scholars have suggested that the majority opinion in

Court's story of the Fourteenth Amendment—a story that leaves out the struggle for civil liberty in the years before the Civil War—was reiterated by prominent legal scholars.²³

The lingering effects of our national amnesia and of the Southern elite's story of Reconstruction can be seen in 1977. In that year, the Harvard University Press published Raoul Berger's book *Government by Judiciary*, which received wide public attention.

The Supreme Court in the period from 1872-1900 had interpreted the Constitution so as to undermine the first Reconstruction. The Warren Court, however, interpreted the Constitution to support the Second Reconstruction. Raoul Berger was harshly critical of many of its decisions, including those of the Warren Court and its predecessors applying guarantees in the Bill of Rights to the states, "the incorporation doctrine." The name seems to come from the idea that liberties referred to in the Bill of Rights are incorporated by reference by general descriptions of constitutional rights in Section one of the Fourteenth Amendment.

Whether the rights in the Bill of Rights were merely limits on the federal government (as the old Court had typically held from 1876-1924), or were rights of American citizens that the states must also obey, was an issue in both Reconstructions. Unlike the old Court, beginning in the 1930s and reaching a high point during the Warren Court, the Court held most guarantees of the Bill of Rights were incorporated in the Fourteenth Amendment. Without application of free speech, press, petition, and assembly guarantees to the states, the Southern states could have done more to suppress the Civil Rights Movement's dissent against their racial caste system.

Raoul Berger attacked these incorporation decisions as unrelated to the intent of the framers of the Fourteenth Amendment, and he insisted original intent was *the* test for how the Constitution should be construed. Senator Jacob Howard of Michigan was a problem for Mr. Berger, because Howard introduced the Fourteenth Amendment to the Senate on behalf of the Joint Committee that drafted it. Senator Howard clearly said that the Amendment's "privileges or immunities of citizens of the United States" included the guarantees of the Bill of Rights; the Fourteenth Amendment clearly said that "no state shall . . . abridge" these privileges or immunities. So Berger sought to discredit Howard as

Slaughter-house is consistent with requiring states to obey most guarantees of the Bill of Rights.

23. E.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). For a critical review of approaches to Reconstruction history, see generally, PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION* (1999).

unrepresentative. To do so, he cited Benjamin Kendrick, one of the historians who followed the Southern elite's approach to Reconstruction history. Mr. Berger wrote, "Howard, according to Kendrick, was 'one of the most . . . reckless of the radicals,' who had 'served consistently in the vanguard of the extreme Negrophiles.'"²⁴ Similarly, Mr. Berger launched verbal attacks against John A. Bingham of Ohio—the primary author of Section one and the subject of this symposium. Berger's attacks were designed to show that statements by Bingham supporting the intent to apply the Bill of Rights to the states by the Fourteenth Amendment were also unreliable. Bingham, he said, was "muddled," "inept,"²⁵ veered "as crazily as a rudderless ship" and was "unable to understand what he read."²⁶ Finally, Berger asserted that there was "no inkling" that the North had become dissatisfied with the protections the states afforded to Bill of Rights liberties from 1789 to 1866.²⁷

As a matter of historical fact, this last assertion is simply, utterly, grossly, and demonstrably wrong. But Mr. Berger's pronouncement is a powerful witness for another proposition. Its publication in a 1977 book from the Harvard University Press brilliantly illuminates the lingering effects of the successful repression of the story of the clash between slavery on one side and liberty and democracy on the other. Berger's book shows how most Americans had long forgotten a crucial part of their history—that slavery (and the caste system that replaced it) threatened Bill of Rights liberties such as free speech, free press, free exercise of religion, freedom from unreasonable searches, and freedom from cruel and unusual punishments. Many had also forgotten that Southern states targeted speech and press on behalf of Lincoln's Republican party for suppression.²⁸ In sum, *Government by Judiciary* shows how utterly many had also forgotten that slavery and the caste system that was its legacy threatened the most basic requirements for democratic government.

Of course, the Republicans who framed the post Civil War

24. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 147 (1977) (hereinafter *GOVERNMENT BY JUDICIARY*).

25. *Id.* at 145, 219.

26. Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L. J. 435, 460 (1982).

27. *GOVERNMENT BY JUDICIARY*, *supra* note 24, at 182.

28. CURTIS, *FREE SPEECH*, *supra* note 19, at Chapters 12 and 13. See also, e.g., CLEMENT EATON, *THE FREEDOM OF THOUGHT STRUGGLE IN THE OLD SOUTH* (revised ed. 1964) (focusing on events in the Southern states); RUSSELL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860* (1949); W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860* (1968).

amendments had not forgotten the suppressions of civil liberty in the interest of slavery that rocked the nation from 1835-1860. There are many actors in this long forgotten story. One of the most important is John A. Bingham, congressman from Ohio.

So I will discuss John A. Bingham's understanding liberty under the Constitution. Bingham was a Nineteenth Century human being. Like others from the Nineteenth Century, not all of his ideas met Twenty-first Century standards. There are respects in which he has "failed to keep up with the times as a result of being dead."²⁹

Bingham was not perfect. But, of course, neither were other founders who have been enshrined in the pantheon of constitutional heroes. Far more than most, Bingham made substantial and enduring contributions to constitutional liberty. Bingham has important things to teach us. Had we been able to follow more consistently where Bingham was trying to lead, we might have had a freer and more democratic nation in the years after the Civil War.

The tide of public attention is turning.³⁰ A growing group of

29. The phrase comes from Russell Baker.

30. A number of legal studies have focused on the historical background of the fourteenth amendment with regard to guarantees of civil liberty. Typically these have built on prior work and offered new evidence and interpretation as well. For an early scholarly study, see HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908, 1965). For two pioneering studies of anti-slavery influence, see HOWARD J. GRAHAM, *EVERYMAN'S CONSTITUTION* (1968) and JACOBUS TENBROEK, *EQUAL UNDER LAW* (enlarged ed., 1965). Both examined anti-slavery origins of the fourteenth amendment. Crosskey built on their insights and added powerful additional research and analysis in William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). Analysis of the issue was further advanced in Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) and Robert J. Kaczorowski, *Searching for the Intent of the Framers of Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73). RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860* (1976) provides an excellent survey of the rise of the political anti-slavery movement. For a very important study of early anti-slavery legal thought, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

My own work was heavily influenced by Crosskey and my understanding of the subject evolved over time. See 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); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); 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). For a critique of Mr. Berger's work, see Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). For an overview of this period of American Legal History and significant additional analysis of the meaning of the first section of the fourteenth amendment, see HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 386-438 (1982). See also Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235 (1984). A broad history and critical analysis of the incorporation issue appears in NO STATE SHALL ABRIDGE, *supra* note 15. A very important and

scholars is focusing on Bingham. In March of 2000, the Library of Congress held a symposium on John Bingham that was broadcast on C-Span. In 2002, the University of Akron School of Law devoted this symposium and an issue of its law review to John Bingham. Soon, perhaps John A. Bingham will return to the great story of American liberty after long years of exile. Perhaps in 2006, there will be a John A. Bingham postage stamp commemorating the framing of the Fourteenth Amendment, or a posthumous congressional medal, or some other token of recognition.

There are many places one might start the story of John A. Bingham and constitutional liberty. I will start with two speeches Bingham made in the House of Representatives in 1856. Both grew out of the controversy in Kansas.

II. JOHN BINGHAM AND THE FIREEATERS

In 1854, Congress repealed the Missouri Compromise banning slavery north of thirty-six degrees, thirty minutes. Under the Kansas Nebraska Act, each territory was to decide for itself whether to accept or reject slavery. Kansas erupted into civil war between pro and anti-slavery factions. The repeal of the Missouri Compromise had created a

insightful article by Akhil Amar added still more evidence and fresh interpretation. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) and was followed by his luminous book, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998). An important article by Richard Aynes is a powerful answer to the *ad hominem* attacks on Bingham which, unhappily, have been too prominent in discussion of the incorporation issue. See Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). See also, Richard Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995). For important scholarship denying application of the Bill of Rights to the States under the fourteenth amendment, see RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989) and WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988). Scholars who have concluded that incorporation was intended have included writers of all political persuasions. In addition to Professor Avins, the most recent "conservative" to support incorporation is EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990). Most students of the subject who have studied it in detail have concluded that some form of application to the states of all constitutional guarantees of personal liberty was probably intended by the framers of the fourteenth amendment. These include Flack, Crosskey, Avins, Curtis, Hyman and Wiecek, Kaczorowski, Maltz, Amar, and Aynes. Berger and Nelson deny any incorporation. Fairman, TenBroek, Guminski, and Graham opt for some form of selective incorporation. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN L. REV. 5 (1949); Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765 (1985). For a lively popular history of the fourteenth amendment, see HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* (rev. ed. 1978). There are many important more recent works, but for the moment I will stop here.

new political party, the Republican party, almost overnight. Kansas was a central issue for Republicans, whose party had been formed to oppose extension of slavery into the territories. Debate over Kansas dominated the Congress.

In 1856, the Congress debated the admission of Kansas to statehood under a pro-slavery government installed by the John Tyler administration. Kansas had two “elected” state governments—a pro-slavery one supported by the Administration and a free state one elected by a majority of the voters of the state. Democrats favored admitting Kansas to the Union under its slave state Constitution. Republicans wanted to admit Kansas as a free state, under a free state constitution.

Charles Sumner, the abolitionist Senator from Massachusetts, made a speech on the “Crime Against Kansas.” In his oration, Sumner referred to a speech by South Carolina’s Senator Andrew P. Butler’s in favor of the slave state government. Sumner described Butler as a “Don Quixote” who had chosen “the harlot, Slavery” as “his mistress to whom he has made his vows.”³¹ Sumner’s speech caused an uproar. Even some Republicans had reservations about his rhetoric.

Two days after Sumner’s speech and shortly after the Senate ended its session for the day, Congressman Preston Brooks, a cousin of Andrew Butler, came to the floor of the Senate. Brooks beat Sumner (his legs trapped under his bolted down Senate desk) over the head thirty times with a gold topped cane. Finally, Sumner wrenched the desk free from the floor and then collapsed, his head covered with blood.

Southerners cheered Brooks. In his congressional speech against the attack on Sumner, a disgusted Bingham quoted the *Richmond Enquirer* of June 2, 1856, which said:

[i]n the main the press of the South applauded the conduct of Mr. Brooks without condition or limitation. Our approbation is . . . entire and unreserved. . . . [The act was] good in conception, better in execution, and best of all in consequence. These vulgar Abolitionists in the Senate are getting above themselves. . . . They have grown saucy. . . . They must be lashed into submission.³²

Bingham saw the attack on Sumner as an attack on constitutional liberty. The Constitution provided in Article I, Section six that “for any speech or Debate in either House, [senators or representatives] shall not be questioned in any other place.” Bingham rejected the claim that the

31. JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 150 (1988).

32. CONG. GLOBE, 34th Cong. 1st Sess. 1580 (1856). [Hereinafter citations to the Congressional Globe will be in the form: GLOBE, *supra* note 32, 34(1) 1580 (1856)].

privilege applied only during an actual session of the Senate and that in any case it did not reach Brooks' assault. For him, "The freedom of speech and the security of person are upon trial to-day. These great rights underlie and are essential to all representative government. [W]ithout their observance there can be no free Constitution and no free people."³³

The attack on Sumner was an assault on "the great privilege of the people, . . . the freedom of speech and debate in their legislative assemblies, and the absolute immunity of their representatives from outrage, or insult, or menace in their exercise thereof."³⁴

In addition, all the people, including Senators and Representatives, had a right "to be secure in their persons" under the Fourth Amendment.³⁵ For Bingham, Brooks was guilty not only of assault and battery, but also an act of contempt against the Congress.

While a majority report from a House committee favored disciplining Brooks, the minority report held that the constitutional power to punish a member for disorderly behavior was limited to behavior that disrupted an actual session of the House or Senate. Furthermore, Brooks' defenders said the speech and debate protection was limited to "proper and legitimate" speeches, and Sumner's speech was neither. As Bingham saw it, the minority was reading the Constitutional protection as follows:

Each House may punish, or by a vote of two thirds *expel*, a member for disorderly behavior committed while the House is *in session* . . . [and] The Senators and Representatives, for *any proper and legitimate* speech or debate in either House, shall not be *legally* questioned in any other place. . . . but neither House may punish . . . any member or person for illegally questioning, when neither House is *actually sitting*, any Senator or Representative for any speech or debate. . . .

In other words, by this new version of the Constitution, this House is powerless to punish any of its members who may choose, within an hour after the close of its session of each day, to question a fellow member for words uttered in debate, by waylaying him, and clubbing him until he is literally senseless and drenched in blood.³⁶

According to Bingham, Brooks confessed his crime against the people when he said his purpose was to punish Sumner for words

33. GLOBE, *supra* note 32, at 34(1) 1577 (1856).

34. *Id.* at 1578.

35. *Id.*

36. *Id.*

spoken in debate in the Senate.³⁷ The attack was part of a larger attack on freedom of speech. Without “free representative government, free speech, and free men” that nation would be “a world without a sun.”³⁸

The proposal to expel Brooks got 121 yes votes to 95 no votes; short of the constitutionally required two-thirds. All but one of the Southern representatives voted no. Brooks resigned, ran for re-election, and won.³⁹

Earlier, in March of 1856, Bingham had spoken in Congress on the Kansas contested election and expressed his concern with free speech and constitutional liberty. Two delegates each claimed to be the one true representative to Congress for the government of Kansas. The defenders of the pro-slavery government insisted that the candidate representing the slave state government was named in accordance with laws passed by the pro-slavery territorial assembly. The free state claimant, they said, was estopped to challenge the Territorial laws.

This claim led Bingham to examine other laws passed by the pro-slavery Assembly. The Kansas laws made it a felony punishable by death to carry slaves belonging to another out of the territory “with intent to effect the freedom of such slave.” Similarly, the death penalty was provided for those who “aid[ed] in *persuading*” such an act. Aiding or harboring an escaping slave in the territory was a five year felony.⁴⁰

The Kansas Assembly’s laws also targeted those expressing anti-slavery views. It was a felony “to print, or circulate, or publish, or aid in printing, circulating or publishing” in the Territory “any book, paper, pamphlet, magazine, handbill, or circular, containing any sentiment *calculated to induce* slaves to *escape* from the service of their masters.” Similarly the pro-slavery territorial assembly had made it a felony for free persons, “by speaking or writing, to assert that persons have not the right to hold slaves” in the Territory.⁴¹ By targeting anti-slavery speech, Kansas was following a trail blazed by the slave states. The slave states had laws punishing speech that (if it reached slaves) would tend to make them discontent. The fact that the speech was directed only to white citizens and reached no slaves was no defense.⁴²

37. *Id.* at 1580.

38. *Id.*

39. DAVID M. POTTER, THE IMPENDING CRISIS 221 at n. 44 (1976). GLOBE, *supra* note 32, at 34(1) 1349, 1627-1628; GLOBE, *supra* note 32, at 34(1) App. 831-833, 34(1) 1863.

40. GLOBE, *supra* note 32, at 34(1) Appendix 124, col. 1 (Mar. 6, 1856) (emphasis in original).

41. *Id.* at App. 124, col. 1 & 2 (emphasis in original).

42. *See* State v. Worth, 52 N.C. 488 (1860); CURTIS, FREE SPEECH, *supra* note 19 at chapter 13.

Bingham insisted the territorial legislation was void because “it is not constitutional to restrict the freedom of speech within the Territories of the United States.” Quoting John Milton, he said that “any territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States ‘to know, to argue, and to utter freely, according to conscience,’” was void because it violated “that provision of the Constitution which declares that the Congress . . . shall not pass any law abridging the freedom of speech or of the press.”⁴³ Since Congress could not abridge freedom of speech, neither could its creature, the territorial assembly. Bingham was dismayed by the Kansas gag laws. He said:

Congress is to abide by this statute, which makes it [a] felony for a citizen to utter or publish in that Territory “*any sentiment calculated to induce slaves to escape from the service of their masters.*” Hence it would be [a] felony there to utter the strong words of Algernon Sidney, “resistance to tyrants is obedience to God;” a felony to say with Jefferson, “I have sworn upon the alter of my God eternal hostility to tyranny in every form over the mind and body of man;” a felony to utter there, in the hearing of a slave, upon American soil, beneath the American flag, the words of flame which shook the stormy soul of Henry, “Give me liberty or give me death;” a felony to read in the hearing of one of those fettered bondmen the words of the Declaration, “All men are born free and equal, and endowed by their Creator with inalienable rights of life and liberty;” . . . a felony to harbor a slave escaping from his thralldom; a felony to aid freedom in its flight. . . . Before you hold this enactment to be law, burn our immortal Declaration and our free-written Constitution, fetter our free press, and finally penetrate the human soul, and put out the light of that understanding which the . . . Almighty hath kindled.⁴⁴

Bingham concluded that the Kansas laws were unconstitutional in two respects: they abridged freedom of speech and of the press and deprived persons of liberty without due process of law. In contrast, he said the Constitution expressly provided that “‘Congress shall make no law abridging freedom of speech or of the press;’ and it expressly prescribes that ‘no person shall be deprived of life, liberty, or property without due process of law.’”⁴⁵

43. GLOBE, *supra* note 32, at 34(1) App. 124, col. 2.

44. GLOBE, *supra* note 32, at 34(1) App. 124 (col.2-3) (emphasis in original).

45. *Id.* at App.124, col.3.

III. BINGHAM, DUE PROCESS AND SLAVERY IN THE TERRITORIES

Bingham, like other Republicans, read the Due Process Clause to outlaw slavery in the national territories. New states beyond the original thirteen were “equal in respect of all the great and essential rights of a free Commonwealth, in respect of all rights sanctioned by the Constitution and consonant with its spirit” and equally had the right to “secure to each and every person therein the absolute enjoyment of the rights of human nature.”⁴⁶ But new states formed “under and by virtue of the Constitution may [not] enslave its own children, and sell them like cattle.”⁴⁷

Bingham was a highly regarded lawyer.⁴⁸ His constitutional arguments creatively wove together clauses of the Constitution and English and American constitutional history.

The original states and new states were not equal in “the right to do wrong,” in the “privilege to trample on the rights of humanity.” As Bingham saw it, constitutional protections for slavery were the unique possession of the original slave states.⁴⁹ This view dovetailed with his view (and that of the Republican party)⁵⁰ that slavery in the territories deprived the persons held as slaves of their liberty without due process of law.

Bingham noted that the Constitutional Convention had rejected a provision for admission of new states on the same terms with the original states. Before that, when the Continental Congress had provided for admission of new states from the Northwest Territory, it required the new states to adhere to certain unalterable conditions. These included perpetual guarantees of jury trial, habeas corpus, a provision that the governments must be republican, a prohibition on taking private property for public use without compensation, and finally a ban on slavery. These provisions, he pointed out, were reenacted by the first Congress under the new Constitution.⁵¹

Bingham supported his citation to the general provisions of the Northwest Ordinance with a specific case. The Act to allow Ohio to

46. GLOBE, *supra* note 32, at 34(3) App. 136, col.2-3 (Jan. 13, 1857).

47. *Id.* at App. 136, col.3.

48. In 1866, the *New York Times* referred to Bingham and James Wilson as “among the most learned and talented” members of the House. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 120-21.

49. GLOBE, *supra* note 32, at 34(3) App. at 136, col. 3.

50. NATIONAL PARTY PLATFORMS 1840-1956 at 27 (compiled by Kirk H. Porter and Donald B. Johnson (1956).

51. GLOBE, *supra* note 32, at 34(3) at App.137, col.2-3.

form a constitution and to be admitted into the Union allowed its people to form a state government “provided the same shall be republican, and not repugnant to the [Northwest] ordinance.”⁵² These limitations on Ohio and other states continued after their admission. So Bingham concluded that similar limits “may and should be imposed by Congress” on territories.⁵³

Representatives of slave states insisted that the states had equal rights in the territories (which were common property of all the states). Therefore, slave owners had a right to bring their slaves into all the national territories. In contrast, Bingham insisted that the territories belonged to the nation, not to the states. The equal right of states to establish their institutions within the territories was impossible. “The slaveholding states assert that men are property; the non-slaveholding states assert that men are not property, and cannot and shall not be made property!”⁵⁴

At any rate, Bingham said slavery in the territories violated the letter and spirit of the Constitution:

You may call the State which enslaves and sells its own children, and manacles the hand which feeds and clothes and shelters it, *republican*; but truth, and history, and God’s eternal justice will call it despotism. . . . I deny the constitutional right of any class of men . . . to establish such a government within the national Territories, under and by force of the national Constitution, because such a Government is subversive of the great objects for which that Constitution was ordained and violative of its spirit. . . .

[T]he absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life. The Constitution also provides that no title of nobility shall be granted by the United States, nor by any State of the Union. Why this restriction? Was it not because all are equal under the Constitution; and that no distinctions

52. *Id.* at App.138, col.1.

53. *Id.* at App. 139, col.1.

54. *Id.* at App.139, col.1.

should be tolerated except those which merit originates. . . . It is an announcement of the equality and brotherhood of the human race.⁵⁵

Read quite literally, the Due Process Clause supports Bingham's claim. At least, it does so if one accepts the idea that deprivation of liberty requires a judicial process—which no slaves had enjoyed before being deprived of liberty. The due process claim also assumed that a better justification for deprivation of liberty would be required than the fact that one was descended from victims of kidnaping. Blacks were held in slavery in the Kansas territory, but their enslavement and that of their ancestors had never been the result of a due process hearing or based on crime. Instead, slavery originated in the forcible seizure of Africans, and the system was perpetuated by force.

IV. BINGHAM ON CONSTITUTIONAL PROTECTIONS FOR AMERICAN CITIZENS—INCLUDING FREE BLACKS.

Again in 1859, Bingham discussed the effect of the Due Process Clause in the territories. He spoke against a bill to admit the Oregon territory as a state. This time, however, Bingham addressed the protection he believed the Due Process Clause afforded to *free* blacks in the national territories.

Bingham believed that the people of Oregon had an inherent right to form a constitution and seek admission as a state, even without an enabling act from Congress. The right was inherent in their constitutional right to petition and in the idea of republican government. While the people of the Oregon territory had the right to frame a constitution for themselves, “they must so exercise that right as not to embody in their constitution provisions repugnant to the Constitution of the United States, violative of the rights of citizens of the United States.”⁵⁶ That, as Bingham understood it, was exactly what Oregon had done. The Oregon constitution forbade free blacks to enter Oregon or to remain there, to maintain court actions, or to own property in the state.

“I know, sir,” Bingham said, “that some gentlemen have a short and easy method of disposing of such objections as these.” These gentlemen assumed, “that the people of the State, after admission, may, by changing their constitution, insert therein every objectionable feature which, before admission, they were constrained to omit.” Bingham denied that new states had the right to infringe on the Constitution and

55. GLOBE, *supra* note 32, at 34(3) App. 140, col. 1.

56. GLOBE, *supra* note 32, at 35(2) 982, col.1 & 2 (1859).

the rights of citizens. But he thought the Constitution failed to provide any mechanism for enforcement of the citizens' rights. As a result, he did not deny that states might exercise the power to violate basic rights of citizens in the Bill of Rights. He knew that many assumed that the new state had "the sole power over persons and property within its territorial limits" and might pass laws "however odious and unconstitutional."⁵⁷

Bingham challenged the assumption. "[A]ny State constitution, or State law, which conflicts with the Constitution of the United States and impairs any right, political or personal, guaranteed thereby" was void because it violated the Supremacy Clause. "To the right understanding of the limitation of the Constitution of the United States upon the several States, it ought not to be overlooked that, whenever the Constitution guarantees to its citizens a right, either natural or conventional, such guarantee is in itself a limitation upon the States. . . ."⁵⁸

To a great degree, that is the law today. But how did Bingham understand it to be the law in 1859? In 1859, the Fourteenth Amendment (ratified in 1868) did not exist, and the Supreme Court's broad acceptance of the incorporation doctrine was not yet a gleam in the eye of Justice Black. That doctrine grew from a judicial acorn in 1925 to an oak by the end of the 1960s, but it had limited judicial support in 1859.⁵⁹

First, Bingham assumed that "[a]ll free persons born and domiciled within the jurisdiction of the United States, are citizens of the United States from birth." Bingham supported this assertion with citations from text writers such as Rawle and Chancellor Kent.⁶⁰ But, Bingham noted, the Constitution did not merely protect citizens. "[N]atural and inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive word 'person,' as contradistinguished from the limited term 'citizens.'" Here Bingham cited the text of "the fifth article of

57. *Id.* at 982, col.2.

58. *Id.* at 982, col.3.

59. It did have some. *E.g.*, *Nunn v. State*, 1 Ga. 243 (1846); *Campbell v. State*, 11 Ga. 353 (1852). *See, e.g.*, Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1118-1121 (2000) [hereinafter Curtis, *Historical Linguistics*]; William W. Crosskey, *Charles Fairman, Legislative History, and the Constitutional Limits on State Authority*, 22 U. CHI. L. REV. 1, 141-42 (1954); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 24 & 25 n. 36 (second printing, 1987). *See also*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 169, 154-55, 177, 189 (1998), for a luminous discussion.

60. GLOBE, *supra* note 32, at 35(2) 983, col.1.

amendments . . . that ‘no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.’” He continued: “And this guarantee applies to all citizens within the United States.” The Supremacy Clause was a limit “upon State sovereignty—simple, clear and strong. No State may rightfully . . . impair any of these guaranteed rights. . . . They may not rightfully or lawfully declare that the strong citizens may deprive the weak citizens of their rights, natural or political. . . .”⁶¹

Bingham has still not explained exactly how he thinks the rights of citizens enumerated in the Constitution limit the states. The answer is coming.

One of Bingham’s objections to the Oregon constitution was that it allowed aliens to vote, a provision he thought unconstitutional. But that was not his main objection.

But, sir, there is a still more objectionable feature than alien suffrage in this Oregon constitution. That is the provision . . . which declares that large number of the citizens of the United States shall not, after the admission of . . . Oregon, come or be within said state: that they shall hold no property there and that they shall not prosecute any suits in any of the courts of the state; and that the legislature shall, by statute, make it a penal offense for any person to harbor any of the excluded class of their fellow-citizens who may thereafter come or be within the state. . . . I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, . . . from the enjoyment therein of the “privileges and immunities of citizens of the United States.

At this point Bingham cited Article IV, Section two: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States.” He insisted that the “citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to ‘all privileges and immunities of citizens in the several States.’” These were “[n]ot the rights and immunities of the several states.” They were not “those constitutional rights and immunities which result exclusively from State authority or State legislation.” Instead they were “all privileges and immunities of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is ‘the privileges and immunities of citizens of the United States in the

61. *Id.* at 983, col.3.

several States' that it guaranties."⁶²

Bingham insisted that,

the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life, and liberty and property, and their due protection in the enjoyment thereof by law; and therefore I hold this section for their exclusion from that State and its courts, to be an infraction of that wise and essential provision of the national Constitution to which I before referred to wit: "The citizen of each states shall be entitled to all privileges and immunities of citizens in the several states."⁶³

As Bingham interpreted the Privileges and Immunities Clause of Article IV, it protected all rights of citizens of the United States in every state. When, in 1791, the nation added the Bill of Rights to the Constitution, new privileges and immunities or rights were created and these after acquired privileges and immunities, Bingham thought, were protected by the broad language of the original clause of Article IV.⁶⁴

Bingham rejected the claim that these rights were limited to whites. He pointed to a proposed "whites only" amendment to the Articles of Confederation that had been voted down in the Continental Congress. South Carolina had proposed to limit to white citizens the protection of the privileges and immunities provision in the Articles of Confederation (the predecessor of Article IV), but the proposal had been rejected.⁶⁵ The refusal to limit the privileges of citizens under the Articles to whites was followed by the Constitution's declaration that the new body politic was made up of "the people of the United States." This meant "all the free inhabitants of the United States, whether white or black, not even excepting, as did the Articles of Confederation, paupers, vagabonds, or

62. GLOBE, *supra* note 32, at 35(2) 984, col.1. By 1871, when the protection for privileges and immunities of citizens of the United States was in Section one of the Fourteenth Amendment, Bingham seemed to accept the orthodox judicial interpretation of Article IV privileges. Globe, *supra* note 32, at 42(1) App. 84, col. 2-3. Bingham subsequently introduced a bill to give corporations the protection of the privileges of guaranteed by the Constitution to the citizens of the several states—apparently, Article IV privileges. *Id.* Presumably the bill was an attempt to give them pretty much what they now enjoy under the Court's interpretation of the Dormant Commerce Clause. See, GLOBE, *supra* note 32, at 41(1) 396.

63. GLOBE, *supra* note 32, at 35(2) 984, col.3.

64. William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

65. GLOBE, *supra* note 32, at 35(2) 984, col.3.

fugitives from justice.”⁶⁶ In addition, he noted that free blacks had voted in a number of the states at the time of the Constitution, adding further support to his claim that they were citizens of the United States.⁶⁷

After the ratification of the Constitution, all “free inhabitants, irrespective of age, or sex, or complexion, and their descendants, were citizens of the United States. No distinctions were made against the poor and in favor of the rich, or against the free born blacks and in favor of the whites.” As a result, “[t]his government rests upon the absolute equality of natural rights amongst men.” Political rights, he admitted, were a different matter.⁶⁸

Bingham protested “against the attempt to mar that great charter of our rights, almost divine in its conception and in its spirit of equality, by the interpolation into it of any word of caste, such as white, or black, male or female. . . .” The Constitution rested on the rock of the “equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil. . . . The charm of that Constitution lies in the great democratic idea which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or State may rightfully take away. . . .”⁶⁹

The Supreme Court had held to the contrary in the *Dred Scott* case, but Bingham had a low opinion of that decision and at any rate did not consider it binding on his independent duty to construe and uphold the Constitution.⁷⁰ Judicial decisions were binding on the parties to a case, but they could not preclude the right of the people’s representatives to seek to enforce the Constitution as they understood it. On another occasion, Bingham noted that judges could abuse their power. The English “judicial monster,” Judge Jeffreys, Chief Justice of the King’s Bench, “could boast a judicial massacre of three hundred and twenty victims.” (Jeffrey’s was the judge who presided over the conviction of Algernon Sidney, later a hero to American Revolutionaries, for writing a book supporting republican government. Jeffries is widely regarded as one of the worst judges in English history.) The experience of such past judicial abuses precluded excessive deference to decisions of judges by

66. *Id.*

67. *Id.*

68. GLOBE, *supra* note 32, at 35(2) 985, col.1. These would, of course, include the right to vote and hold office.

69. *Id.* at 985, col.2.

70. GLOBE, *supra* note 32, at 36(1) 1839. *See also* GLOBE, *supra* note 32, at 40(2) 483, col.2. (1868).

the people's representatives. "With such an example before us, we, the lineal descendants of those who witnessed and avenged Jeffreys's judicial crimes, are not to be told that the judiciary are, at pleasure, and by the assumption of power, to bind the conscience and dispose of the liberties and lives of the people!"⁷¹

A slim majority in the House voted to admit Oregon. The bill had already passed the Senate, so Oregon was admitted.⁷² The Civil Rights Act of 1866 and then the Fourteenth Amendment ratified in 1868 prohibited racist laws of the sort contained in the Oregon Constitution.

V. THE FIREEATERS REVISITED: FREE SPEECH ON THE EVE OF THE CIVIL WAR

The controversy over slavery was a dispute about the deeper meaning of our national story. It was a struggle for the nation's soul. Would the American constitutional system protect slavery or guarantee liberty? The dispute was intense because slavery undermined liberty and liberty threatened slavery. As slaveowners saw it, protection of the slave system required suppression of dissent, search and destroy missions aimed at anti-slavery publications, and whipping and prison for those who criticized the system.

The dispute was intense in January of 1860, on the eve of the Civil War. Nearly half of the Republicans in the House of Representatives had endorsed a project to publish an abridged version of an anti-slavery book by Hinton Helper. The book was to be a Republican campaign document for the election of 1860.

In his book, Helper advocated abolition of slavery by democratic action at the state level. He called on white Southerners to follow the example of the Northern states and to eliminate slavery state by state. Helper said change should be achieved by free speech and the ballot, by the force of argument, not force of arms. But if slaveholders and "their cringing lickspittles" used violence to suppress anti-slavery speech, Helper said the advocates of emancipation should fight back. There were, he pointed out, three non-slaveholders to each slaveholder, "not counting the negroes who in nine cases out of ten would be delighted to cut their masters throats."⁷³ The Southern elite and their Northern allies were outraged by the book.

John Sherman, the Republican candidate for Speaker, had endorsed

71. GLOBE, *supra* note 32, at 36(1) 1839, col.3 (1860).

72. GLOBE, *supra* note 32, at 35(2) 1010 and 1011.

73. CURTIS, FREE SPEECH, *supra* note 19, at 271-74.

the plan to publish an abridged version of Helper's book. As a result, the battle over who would be Speaker of the House in 1859-1860 erupted into a battle over Helper's book, slavery, abolition, and the recent John Brown raid. Southern representatives contended (quite inaccurately) that Brown's raid was implicitly condoned by the course of action advocated by the book. They also claimed that Republican endorsers were accessories to John Brown's crime. Several suggested that like Brown, these Republican endorsers should be hung. Certainly no endorser should be elected Speaker.⁷⁴ One prominent Republican endorser was John Bingham.

Congressman William Smith of Virginia insisted that Bingham, as one of the endorsers, deserved "the detestation and scorn and indignation of every party and every man in the American Union." At this point the report in the *Congressional Globe* noted "applause in the galleries." In response to Congressman Smith's attack, Bingham asked Smith if he repudiated "the self evident truths of the Declaration, that all men are created equal; that they are endowed by their Creator with certain unalienable rights, among which are the right to life, liberty, and the pursuit of happiness. . . ." Bingham's question was pertinent. The Helper book reprinted anti-slavery statements from Thomas Jefferson, from Southerners of the Founding generation, and from Virginians in their 1832 state debate over ending slavery. Smith responded: "the gentleman refers to the sentiments of distinguished revolutionary men, and asks me if I repudiate them. Sir, many of those sentiments, of course, I repudiate. [Derisive laughter from the Republicans.] Many of those sentiments are false in philosophy and untrue in fact."⁷⁵ By this time a number of Southern congressmen had explicitly disowned the Declaration's assertion that all men are created equal.⁷⁶

Bingham had said the Framers repudiated the use of the term slavery. Smith asked if the fugitive slave clause did not disprove the claim. "What was it there for? Tell me; tell me. Speak. I demand that you. . . stand up here and respond to my question." Bingham rejoined, "Whenever the gentleman addresses me as his peer I will respond; but I wish him to know that I am not his slave." Smith rejoined, "I would make you do better if you were. [Laughter.] You would get what you need."⁷⁷

74. *Id.* at chapter 12.

75. *GLOBE*, *supra* note 32, at 36(1) 436, col.3.

76. *E.g.*, *CURTIS*, *FREE SPEECH*, *supra* note 19, at 296 (Statement of Senator James Chestnut); *cf.* also the statement of Alexander Stephens, in McPherson, *supra* note 5.

77. *GLOBE*, *supra* note 32, at 36(1) 437, col.1.

As Bingham noted, Southerners and some Northern Democrats were attempting “to arraign and condemn sixty of their peers here as the aiders and inciters of treason, insurrection, and murder; and this, too, without giving the accused a hearing, without testimony. . . .” It was, he said, an attempt “to enforce mob law on this floor,” a reference to the Northern mobs that had tried to silence opponents of slavery in the decades before the Civil War.⁷⁸

Bingham’s free speech concerns were part of the common faith of the Republican party. In the debate over Helper’s book, Republicans in the Senate voted for a resolution that upheld the right of free speech on slavery and all topics of state and national concern: “[F]ree discussion of the morality and expediency of slavery should never be interfered with by the law of any State, or of the United States; and the freedom of speech and of the press on this and every other subject of domestic and national policy, should be maintained inviolate in all the States.”⁷⁹

For Bingham, free speech was a central part of the controversy over slavery. President Buchanan and his party blamed sectional strife on the Republicans. Bingham responded that “sectional strife will never be allayed” by “the attempt, here or elsewhere, either by national or by State legislation, to enact sedition laws, by which to fetter the conscience, or stifle the convictions, of American citizens.”⁸⁰ Again and again, Bingham noted the denials of free speech and press that accompanied slavery. “Mr. Underwood was driven away from the State of Virginia” because “as a citizen of the State, he insisted on the right of discussing this [slavery] question among her people, and dared to attend the Republican convention” of 1856 in Philadelphia. Similarly, a large pro-slavery mob had assembled to prevent citizens from holding a Republican party meeting in Wheeling, Virginia.⁸¹ Bingham said these events proceeded from mercenary considerations. “It is the wealthy men of the South who have their investments in slaves, who ostracize the friends of emancipation. . . .” These men feared that “if free speech is tolerated and free labor protected by law,” it “would bring into disrepute the system of slave labor, and bring about, if you please, gradual emancipation, thereby interfering with the profits of these gentlemen.”⁸²

By 1860, Southern states were treating anti-slavery speech as criminal. Bingham noted that it had not always been so. In the 1830s,

78. GLOBE, *supra* note 32, at 36 (1) 1837, col.1 (1860).

79. CURTIS, FREE SPEECH, *supra* note 19, at 286-87.

80. GLOBE, *supra* note 32, at 36 (1) 1837, col.2.

81. GLOBE, *supra* note 32, at 36(1) 1861, col.2.

82. *Id.* at 1861, col.3.

Maryland, Kentucky, and Virginia had openly debated abolishing the institution, but faced with the danger of emancipation, the Southern elite renewed sectional strife.⁸³ “[T]o maintain as a finality . . . [the fugitive slave law of 1850] this sectional party attempted to muzzle the press, and stifle the lowest whisper of the national conscience. . . .”⁸⁴

In January 1861, Bingham spoke in the House against a compromise measure proposed in an effort to avert civil war. Bingham feared that one provision would be construed to allow for federal extradition for trial in the Southern states of those who spoke or wrote against slavery or aided those who had—and whose words reached or were uttered in the South. This was no idle concern. In North Carolina, Daniel Worth, a minister who distributed copies of the *Helper* book, had been convicted of a felony and sentenced to prison. After Worth’s trial, the North Carolina legislature changed its law against “incendiary documents” to provide capital punishment for the first offense. Nor was North Carolina satisfied with prosecuting local “agitators.” A North Carolina grand jury had called for the extradition of Northern Republican endorsers of the *Helper* book.

In response to the danger that the federal government might legislate for extradition, Bingham denied “that citizens of the United States are to be made liable, by force of Federal law, for merely political offenses against the States.” Why? “Because it is written in the Constitution that Congress shall make no law abridging the freedom of speech or the freedom of the press.” As a result, Congress could not provide for the rendition of a person who had taught a South Carolina slave to read nor could it enforce the extradition of a person who had published “an article against slavery, contrary to the statutes of that state.”⁸⁵

For Bingham, suppression of free speech was part of a larger attack on liberty in the interests of slavery. Bingham summarized what he saw as the aggressions of the slave power:

[T]he repeal of laws for the protection of freedom and free labor in the Territories; the conquest of foreign territory for slavery; the admission into the Union of a foreign slave state; the rejection by this sectional party of the homestead bill; the restriction of the right of petition; the restoration of fugitive slaves at national expense; the attempt to reward slave pirates for kidnapping Africans; the attempt to acquire Cuba, with her six hundred thousand slaves; the attempt to fasten upon an

83. *Id.* at 1837, col.3.

84. *Id.* at 1839, col.1

85. *GLOBE*, *supra* note 32, at 36(2) App. 84, col.1 (1861).

unwilling people a slave constitution; the attempt to enact a sedition law, thereby restricting the freedom of the press and the freedom of speech, in direct violation of the Constitution . . .; and the attempt, by extra-judicial interference to take away from the people and their Representatives the power to legislate for freedom and free labor in the Territories.⁸⁶

From the 1850s to the eve of the Civil War, Bingham saw himself defending basic American values under attack from the slave power—the interrelated values of equality and basic constitutional rights. Soon, however, the battle against the slave power entered a new, revolutionary, and bloody phase.

VI. JOHN BINGHAM DURING THE CIVIL WAR

When the war came, Bingham and his Republican colleagues had the chance to put their anti-slavery convictions into action. In April of 1862, John Bingham spoke in favor of a statute that abolished slavery in the District of Columbia. By abolishing slavery in the District, Bingham thought the Congress was making good on the promise of the Due Process Clause of the Fifth Amendment.

Bingham noted that the Magna Charta of England differed widely from “the broader and wiser provision of our own American Magna Charta.” The English provision “only protected from unjust seizure, imprisonment, disseizen, and banishment those fortunate enough to be known as FREEMEN.” In contrast Bingham said, “our Constitution, the new Magna Charta. . .rejects in its bill of rights the restrictive word ‘freeman,’ and adopts in its stead the more comprehensive words ‘no person.’ thus giving protection to all, whether born free or bond.”⁸⁷ (As noted earlier, Bingham thought the Due Process Clause prevented slavery in the territories and the District of Columbia where the power of the national government was exclusive.)

The American Constitution provided that “‘no person shall be deprived of life, or liberty, or property without due process of law.’ This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century. . . .”⁸⁸

The barons of England demanded the security of law for themselves; the patriots of America proclaimed the security and protection for *all*. [A]ll men are equal before the law. No matter upon what spot of the

86. GLOBE, *supra* note 32, at 36(1) 1840, col.2-3 (1860).

87. GLOBE, *supra* note 32, at 37(2) 1638, col.2 (1862).

88. *Id.*

earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor; no matter whether wise or simple; no matter whether strong or weak, this new Magna Charta to mankind declares the rights of all to life and liberty and property are equal before the law. . . .⁸⁹

Bingham noted that this provision unfortunately had been ignored for sixty years in the Capital where the United States government had exclusive jurisdiction. Now, however, "no person, no human being, no member of the family of man shall, . . . under the sanction of the Federal authority . . ., be deprived of his life, or his liberty, or his property, but by the law of the land . . . the law of the whole people of United States. . . ."⁹⁰ Bingham said that the Due Process Clause was in keeping with the spirit of the Declaration's proclamation that all men are created equal. The Declaration, in turn, was a reiteration of the Gospel's proclamation that God had "made of one blood all nations to dwell on the face of the earth."⁹¹

In this speech Bingham also reiterated his ellipsis theory. The Privileges and Immunities Clause of Article IV protected "all privileges and immunities of citizens of the United States in the several States. . . . The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law."⁹² Article IV, Bingham pointed out, protected the privileges and immunities of citizens *in* the several states, not *of* the several states.⁹³ The result was a body of national constitutional privileges and immunities belonging to every citizen in every state.

Dred Scott notwithstanding, Congress voted to abolish slavery in the nation's capital. The House approved the Senate bill to free all slaves in the District, and Lincoln signed the emancipation act on April 16, 1862.⁹⁴

In times of war, traditional liberties are imperiled. On at least one occasion, Bingham worked to limit broad government power in the interest of the liberty of the citizen. The Lincoln administration had suspended the writ of habeas corpus. People were detained without a

89. *Id.* at 1638, col.2-3.

90. *Id.* at 1638, col.3.

91. *Id.* at 1639, col.3.

92. *Id.* at 1639, col.2.

93. *Id.*

94. GLOBE, *supra* note 32, at 37(2) 1648.

statement of charges. On July 7, 1862, Bingham reported a bill from the Judiciary Committee on the subject. It affirmed the suspension of the writ, but required the administration to furnish a list of the names of prisoners. It also required that prisoners who were held where the federal courts were functioning should be charged before the end of the term of the grand jury or released on taking an oath of allegiance.⁹⁵ Bingham noted that the power to suspend the writ was subject to great abuse, however the bill was worded. But he said that the bill was important both for the protection of the executive and the protection of the rights of the citizen.⁹⁶ On the other hand, when some of Lincoln's generals suppressed anti-war speech, Bingham does not seem to have joined the Republicans who protested the suppression.

VII. THE FOURTEENTH AMENDMENT AND A NEW BIRTH OF FREEDOM

With the end of the Civil War, the defeated Southern states ratified the Thirteenth Amendment abolishing slavery. After ratification, the Southern states insisted they should be restored to representation in Congress—with the increased political power that came from the abolition of the Three-fifths Clause. Under the constitutional rule after passage of the Thirteenth Amendment, Southern blacks, though disfranchised, would count as whole people for purposes of representation. The rebels who had lost the war might win the peace, riding to political victory on the backs of disfranchised blacks. Bingham was a member of the Joint Committee that had been appointed to consider conditions for re-admission, including constitutional amendments. Like most Republicans, he insisted further constitutional guarantees were necessary before Southern states could be re-admitted to Congress.⁹⁷

On January 25, 1866, Bingham defended one proposed guarantee, a constitutional amendment to modify the apportionment of representatives among the states. The proposal under discussion became section 2 of the Fourteenth Amendment. In its final form, it proportionally reduced the representation of states that excluded any portion of their adult male population from voting for any reason except rebellion or other crime.

The provision faced strong opposition from those who sought to secure the ballot to newly freed slaves. They claimed it legitimized

95. GLOBE, *supra* note 32, at 37(2) 3105, col.3-3106, col.1.

96. *Id.* at 3106, col.1.

97. GLOBE, *supra* note 32, at 39(1) 429, col.1 & 2.

disfranchisement of the black men of the South. Bingham rejected the claim. The amendment was a penalty for disfranchisement, he said, not permission to do it.⁹⁸

Bingham said no issue was more important than the basis of representation would come before Congress unless it was “the great question whether the Constitution shall be so amended as to give to Congress power by statute law to enforce all of its guarantees!”⁹⁹ Bingham prefaced his statement about enforcing all constitutional guarantees with an example of the abuses he wished to correct. He hoped that “amendments will be sent out to the people by which the Congress may upon their ratification be empowered to provide by law that hereafter no State shall make it a crime for a man, whether he be black or white, a citizen of the Republic, to learn the alphabet of his native tongue and his rights and duties.”¹⁰⁰ Southern states, of course, had made it a crime to teach slaves to read.

On February 26, 1866, Bingham introduced the proposed amendment of which he had spoken (the February 26th version). It gave Congress power to secure to the citizens of each State all privileges and immunities of citizens in the several states and to all persons in the several States equal protection in the rights of life, liberty, and property. Because of the Supremacy Clause, Bingham said, states did not have the right, though they had exercised the power, to deprive citizens of their constitutional rights. “[T]his immortal bill of rights embodied in the Constitution rested for its execution and enforcement hitherto on the fidelity of the States.” The states, however, had “violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.”¹⁰¹

Bingham’s proposal faced several objections. Congressman Hale of New York believed that the equal protection provision would allow Congress to legislate on all subjects heretofore reserved to the states, with the simple limit that the legislation must be equal. Hale thought it could allow Congress to make the property rights of married women equal to those of men—an issue he thought should be reserved for the

98. *Id.* at 432, col.1-3.

99. *Id.* at col. 3.

100. *Id.*

101. GLOBE, *supra* note 32, at 39(1) 1034, c.1-2. Some have claimed Bingham’s references to “the Bill of Rights” meant not the Bill of Rights but only the due process clause and the privileges and immunities clause of Article IV. The claim is a mistake. *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 102. Note also Bingham’s reference to enforcing all the guarantees of the Constitution, most of which are contained in the Bill of Rights. *Id.*

states. Furthermore, Hale said the Bill of Rights cited by Bingham was a limit on state and federal legislation, not a source of power. Bingham agreed that *under current law* the Bill of Rights was a limit on power, not a source of power. But, unlike Hale, Bingham was aware of the Supreme Court's decisions holding that the guarantees of the Bill of Rights did not limit state power.

Bingham interrupted Hale to ask for a single decision requiring states to allow the most basic form of due process. Had not the nation been "dumb in the presence of" state laws that closed the courts of the state to some American citizens denying them the right to prosecute a suit. (Here Bingham was referring to laws like the Oregon law he had opposed.) Hale said that he assumed, somehow or other, that the Constitution protected the liberties of American citizens, but admitted that he might be mistaken.¹⁰²

In a later speech, Bingham summarized his proposal. It was "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."¹⁰³

Bingham quoted the two provisions of his proposed amendment. His critics, he said, "admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty or property without due process of law." But they were opposed "to the enforcement of the bill of rights, as proposed" because of the reserved rights of the states. Bingham denied that any state had reserved to itself the right, "under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States" or to impose any burden on him contrary to the constitutional injunction "that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States."¹⁰⁴ Bingham recognized that states had exercised the power to deny these protections to citizens. But unlike others, Bingham thought that Congress lacked the ability to correct these abuses without a constitutional amendment.

Bingham said he had been asked if he could cite a decision showing that "the power of the Federal Government to enforce in the United

102. GLOBE, *supra* note 32, at 39(1) 1064, col. 3.

103. *Id.* at 1088, col.3.

104. *Id.* at 1089, col.1.

States courts the bill of rights under the articles of amendment to the constitution had been denied.”¹⁰⁵ Bingham had not been given the chance to answer the question—specifically whether the Constitution was adequate as it stood to protect the liberties of the citizen.¹⁰⁶ Though unable to discuss the question further during Hale’s speech, Bingham answered it in a speech he made the very next day.

Bingham said the federal government could not enforce Bill of Rights liberties against the states. To prove the point he cited *Barron v. Baltimore* and *Livingston v. Moore*. In those cases, the Supreme Court had held the guarantees of the Bill of Rights were merely limits on the federal government and did not limit the states. “Is the bill of rights,” Bingham asked, “to stand in our Constitution hereafter . . . a mere dead letter?” While the government could protect “the personal liberty and all the personal rights of the citizen on the remotest sea,” it lacked the power “in time of peace to enforce the citizens’ rights to life, liberty, and property within the limits of South Carolina” after the state was readmitted.¹⁰⁷

As Bingham (and other leading Republicans saw it) Congress should have the power to protect citizens’ constitutional rights. Bingham insisted the power was insufficient under the existing Constitution. “A grant of power . . . is a very different thing from a bill of rights.” Would anyone say “that the bill of rights confers express legislative power on Congress to punish State officers for . . . flagrantly unjust violations of the declared rights of every citizen and every free man in every free State?”¹⁰⁸

Republican critics of Bingham’s proposed amendment expressed two concerns. The first was the fear that the amendment would allow Congress to legislate on every imaginable subject, preempt all state laws, and substitute the laws of Congress instead. The second was that Bingham’s mere grant of power failed to secure fully the rights Bingham was trying to protect. As Giles Hotchkiss put it, “we may pass laws here to-day, and the next Congress may wipe them out. Where is your guarantee then?”¹⁰⁹ Hotchkiss wanted an express limit on the states that hostile legislation could not override.¹¹⁰

105. *Id.* at 1089, col.3.

106. *Id.* at 1064, col.3 (Bingham, Hale, and Eldridge).

107. *Id.* at 1090, col.2.

108. GLOBE, *supra* note 32, at 39(1) 1093, col.3.

109. *Id.* at 1095, col. 2.

110. *Id.* at 1095 col.1-2.

VIII. THE CIVIL RIGHTS BILL: CONGRESSIONAL POWER ASSERTED

On February 28, 1866, the first version of Bingham's amendment was postponed, and Congress turned to the Civil Rights Bill. That bill was a response to Black Codes passed by the Southern states. These codes denied blacks rights to contract, own property, testify against whites, live in towns, or even travel without permission from their employers. In short, the Codes attempted to replace slavery with serfdom. Some of the codes also had provisions that directly limited rights of blacks to assemble, to speak, to preach and to bear arms. They also inflicted cruel and unusual punishments on the transgressors.¹¹¹

The Civil Rights Act, as finally passed, made all persons born in the United States and subject to its jurisdiction citizens of the United States. It gave all citizens the same rights to contract, testify, and own property as enjoyed by white citizens. It also guaranteed them the full and equal benefit of all laws and provisions for the security of person and property as enjoyed by white citizens.¹¹² The phrase "laws for the security of person and property" had long been understood to encompass guarantees such as those in the Bill of Rights.¹¹³ A number of

111. 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 279-81 (Walter L. Fleming ed., 1906). 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, 30-31 (1996).

112. Act of April 9, 1866, 14 Stat. 27.

113. *Dred Scott*, 60 U.S. 393, 449-50; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 72. In *Dred Scott*, Taney noted that Congress could make no law respecting the establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech and of the press, or the right to bear arms. These powers, he said, limit the power of the federal government over the "person or property" of the citizen.

These powers, and others, in relation to rights of person. . . are in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

Dred Scott, 60 U.S. at 450.

In the 1827 edition of his *Commentaries*, Kent notes that "[t]he right of personal security is guarded by provisions which have been transcribed into the constitutions of this country from Magna Charta, and other fundamental acts of the English Parliament, and it is enforced by additional and more precise injunctions." Kent proceeds to list guarantees such as grand jury indictment, the protection against double jeopardy, the provision that no person shall be compelled to be a witness against himself, and the guarantees of speedy and public trial, confrontation, compulsory process, right to counsel, and against ex post facto laws. Kent explicitly noted the dual nature of laws and provisions for the security of person. "[T]he personal security of every citizen is protected from lawless violence, by the arm of government, and the terrors of the penal code; and. . . it is equally guarded from unjust and tyrannical proceedings on the part of government itself, by the provisions to which we have referred." See, GLOBE, *supra* note 32, at 39(1) 1117 and 1118,

Republicans read the provisions of the Civil Rights Act to protect the Bill of Rights liberties of American citizens in the states.¹¹⁴

In spite of Bingham's view that Congress lacked the constitutional power to pass the Civil Rights Bill, several distinguished Republican lawyers in the House disagreed. They thought congressional power to enforce the Bill of Rights did provide a source of power to pass the Civil Rights Bill. One of these was James Wilson, chair of the House Judiciary Committee. Wilson found congressional power to pass the Civil Rights Act in the due process clause of the Fifth Amendment.¹¹⁵ He and other congressmen also relied on the power to enforce the Thirteenth Amendment.

Ironically, Bingham opposed passage of the Civil Rights Bill. He insisted that a constitutional amendment was necessary. "I do not," he said, "oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and spirit the bill of rights as embodied in that Constitution. I know that enforcement of the bill of rights is the want of the republic."¹¹⁶ But, he said, under current law, protection of these rights was reserved to the states.¹¹⁷ Bingham said he agreed with Wilson "in an earnest desire to have the bill of rights in your Constitution enforced everywhere."¹¹⁸ But, he insisted, Congress simply lacked the power without a constitutional amendment. Bingham would make similar objections in 1867 to passage of a bill to forbid cruel and unusual punishments in the states. He insisted that Congress needed to wait until the Fourteenth Amendment was ratified.

col.3 (Rep. Wilson) and 1757, col.3 (Sen. Trumbull) both citing Chancellor Kent. JAMES KENT, I COMMENTARIES ON AMERICAN LAW Lecture XXIV, 599-648 (New York: William Kent, 1854). Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 923, 932 (1986) (citing Kent). The references to the 1827 edition appear in JAMES KENT, II COMMENTARIES ON AMERICAN LAW, Section XXIV, Of the Absolute Rights of Persons, at 9-11 (1827).

114. CURTIS, *supra* note 19, at 373-74; GLOBE, *supra* note 32, at 39(1) 2332, col. 3 (Sen. Dixon) ("Congress has given us, in the civil rights act, a guarantee for free speech in every part of the Union."); *cf.* also *Id.* at 2465, col. 1 (Rep. Thayer); *Id.* at 2468, col. 1 (Rep. Kelly, suggesting that the provisions of section one—which include requiring states to accord due process—may already be in the Constitution); *Id.* at 2539, col. 3 (Rep. Farnsworth—all provisions in section one are in the Constitution already—which would include the due process clause as a limit on the states—except for equal protection). CURTIS, NO STATE SHALL ABRIDGE, *supra* note 30, at 72, 104. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 245 (1998); STEPHEN P. HALBROOK, THE FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 31 and 60 (citing N.Y. EVENING POST, Apr. 7, 1866 at 2 col. 1(1998).

115. GLOBE, *supra* note 32, at 39(1) 1294, col.2 & 3 (Wilson).

116. *Id.* at 1291, col. 1.

117. *Id.* at 1291.

118. *Id.*

Bingham continued to defend the February 26th version of his amendment against federalism concerns. He said his amendment was not designed to replace the states. It was simply designed to “punish all violations by State officers of the bill of rights, but leaving those officers to discharge their duties” in a way consistent with the oath to obey the Constitution.¹¹⁹

In addition to his belief that Congress lacked the constitutional power to pass it, Bingham objected to the Civil Rights Bill because it failed to protect the due process rights of aliens. “Can such legislation be sustained,” he asked, “by reason and conscience?”¹²⁰ If the Supreme Court was right, and the Bill of Rights did not limit the states, at least it limited the federal government and protected aliens.¹²¹

IX. SECTION ONE OF THE FOURTEENTH AMENDMENT

Bingham was nothing if not persistent. When his proposed amendment was postponed, he re-wrote it in its present form (except for the citizenship clause that was added by the Senate.) When the Joint Committee rejected it, Bingham came back again. After several close votes, the Joint Committee eventually endorsed Bingham’s proposed revised language: “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.”

On May 10, 1866, in his final speech to the Congress before the vote on the Fourteenth Amendment, Bingham explained that it would allow congress to do by congressional enactment what it had never been able to do. Congress would be able to “protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”¹²² The power was needed because many flagrant “violations of the guaranteed privileges of citizens of the United States” had occurred, and the national government could not provide a remedy. For example, “[c]ontrary to the express letter of your Constitution, ‘cruel and unusual

119. *Id.* at 1292.

120. *Id.* at 1292, col. 1.

121. *Id.*

122. *Id.* at 2542 col.2-3.

punishments' have been inflicted under State laws. . . ."¹²³

In 1867, the Fourteenth Amendment had not yet been ratified by the necessary number of states. Appalled by degrading punishments being inflicted in some of the former slave states, Representative John Kasson of Iowa introduced a bill to prevent cruel and unusual punishments. He said it was the duty of the Congress "to take early action to prevent what is now both cruel and unusual from becoming simply cruel and usual." According to Kasson, his bill applied "to all the States of the Union. It protects both whites and blacks. . . ."¹²⁴ Kasson said the bill was "using the power conferred by the Constitution to protect personal rights in this country." He did "not think there can be any reasonable doubt of the power of Congress to protect personal rights guaranteed by the Constitution." In support of his proposition he noted that the "Constitution says that the citizens of one State shall have all the privileges and immunities of citizens in any other State, and I think Congress has the right to protect our citizens in the enjoyment of these rights."¹²⁵

Once again, John Bingham pointed out decisions holding the Bill of Rights limited the powers of Congress, but not the powers of the states. Bingham favored doing what could be done to prevent cruel and unusual punishments. He said that when "the pending constitutional amendment will become part of the supreme law of the land," Congress would be empowered "to enforce every one of those limitations so essential to justice and humanity." His next response may have been influenced by the fact that blacks were the main victims of these degrading punishments. As quoted in the report in the *Globe*, Bingham referred to the amendment "by which no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution."¹²⁶

In July of 1868, the Secretary of State proclaimed that the necessary number of states had ratified the Fourteenth Amendment. Section one of the Amendment is Bingham's great achievement. It embodied his passionate concern for liberty and equality. From the 1930s to the 1960s, and continuing to this day, the Fourteenth Amendment has become a major vehicle for protection of both values.

The amendment established basic legal principles. In the 1930s and later, the Court began applying the principles, translating them into the

123. *Id.* at 2542 col.3.

124. *GLOBE*, *supra* note 32, at 39(2) 810, col. 3.

125. *GLOBE*, *supra* note 32, at 39(2) 811, col. 1.

126. *Id.* at 811, col.2.

world of the twentieth century. Of course, the later application did not always follow the way Bingham or his contemporaries thought the provisions would be applied. Examples include segregation and application of the equal protection clause in a way that would have voided laws from the 1860s that restricted the legal rights of married women.¹²⁷ The world had radically changed. Even the Constitution itself had undergone significant changes after 1868, by prohibiting denial of the right to vote based on race or sex. What appeared rational to many in 1866 looked arbitrary and unreasonable to most in 1954 or in the 1970s.

X. RECONSTRUCTION

Passage of the Fourteenth Amendment had not solved the continuing conflict between liberty and the legacy of slavery. In March of 1871, the House was considering a bill to enforce the Fourteenth Amendment against Ku Klux Klan violence. The Klan was using political terrorism against black and white Republicans as part of a plan by self styled "Redeemers" forcibly to eject Republicans and their black allies from political power in the Southern states.¹²⁸ As Bingham saw it, the issue was the "enforcement of the Constitution on behalf of the whole people . . . on behalf of every individual citizen of the Republic in every state and Territory to the extent of the rights guaranteed to him by the Constitution."¹²⁹

Critics of the legislation, including some prominent Republicans, suggested that the change in the constitutional language from Bingham's February 26th version¹³⁰ to the "no state shall" version meant that congressional enforcement power was now limited to state action.¹³¹ By this theory congressional power could reach state officers who were depriving citizens of constitutional protections, but not the "private" Klansmen who were inflicting a reign of terror on Republicans. In this case, however, Republican state office holders were not the problem. They were among the victims. The problem was the Klan.

127. GLOBE, *supra* note 32, at 39(1) 1063, 1064, col. 1-2; *Id.* at 1089, col. 3; *Id.* at 1292, col. 3; *Id.* at cf., 1294, col. 2.

128. *E.g.*, PAUL ESCOTT, MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850-1900, 151-170 (1985); VERNON L. WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890 (1965); ERIC FONER, RECONSTRUCTION, : AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 425-59 (1998).

129. GLOBE, *supra* note 32, at 42(1) App. 81, col.2. (1871).

130. The prototype gave Congress power to enforce privileges and immunities and equal protection in the rights of life, liberty and property.

131. GLOBE, *supra* note 32, at 42(1) App.114-116 (Farnsworth), App. 150-54 (Garfield).

Bingham insisted that the equal protection clause meant that no state could deny to any person within its jurisdiction “the equal protection of the Constitution of the United States, as that Constitution is the supreme law. . . .”¹³² He insisted that Section one plus the enforcement clause of Section five provided ample congressional power to reach both state actors and private conspirators.

In explaining why he changed the form of the amendment, Bingham said that he had re-read *Barron v. Baltimore*.

In reexamining the case of *Barron*, . . . , after my struggle in the House in February, 1866, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: “Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.”¹³³

Acting on that suggestion, Bingham said he imitated the limitations on the states in Article I, Section 10. He used the “no state shall” language Marshall had suggested would indicate an intent to apply the Bill of Rights to the states. Though some thought the privileges or immunities protected by the Fourteenth Amendment included all common law and other rights previously protected solely by the states, Bingham had a more limited conception. Bingham continued: “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.” Bingham then read, word for word, the first eight amendments.¹³⁴ By the force of the Fourteenth Amendment, Bingham said, “no State, hereafter can . . . ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament. . . .”¹³⁵

Bingham said the states had denied basic constitutional rights to United States citizens, and, prior to the Fourteenth Amendment, American citizens had no remedy. “They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no

132. *Id.* at App. 83, col.2.

133. GLOBE, *supra* note 32, at 42(1) App. 84, col.1.

134. *Id.* at App. 84, col.2.

135. *Id.* at App. 84, col.3.

remedy. They restricted freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy.”¹³⁶

How did Bingham respond to the state action argument? Bingham insisted that Congress had power to legislate for “the better enforcement of all powers vested by the Constitution in the Government of the United States, and for the better protection of the people in the rights thereby guaranteed to them against States and combinations of individuals.”¹³⁷ According to Bingham, the Thirteenth, Fourteenth, and Fifteenth Amendments “vest in Congress power to protect the right of citizens against States, and individuals in States, never before granted.”¹³⁸ He pointed out that the Constitution differed from the Articles of Confederation in that it gave Congress power to act directly on individuals.¹³⁹

What, he wondered, “would this Government be worth if it must rely upon states to execute its grants of power, its limitations of power upon States, and its express guarantees of rights to the people?” States had concurrent power to protect citizens’ basic rights, but “must we wait for their action? Are not laws preventive, as well as remedial. . .? Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?”¹⁴⁰

Bingham was making three interrelated arguments. First, he argued that the Fourteenth Amendment required states to obey the guarantees of the Bill of Rights. Second, he argued that the basic rights in the Bill of Rights were now rights of American citizens that Congress could protect. Third, it could now protect basic rights such as free speech, not only against state action but against private conspiracies such as those of the Ku Klux Klan.

The Court soon ruled against him on all counts.¹⁴¹ In a series of decisions, the Court denied that the Fourteenth Amendment required states to obey the guarantees of the Bill of Rights and insisted that congressional enforcement power was limited to state action and did not

136. GLOBE, *supra* note 32, at 42(1) 85, col.2.

137. *Id.* at 82, col.3.

138. *Id.* at 83, col.1.

139. *Id.* at 85, col.1.

140. *Id.* at 85, col.2.

141. *E.g.*, United States v. Cruikshank, 92 U.S. 542 (1876); Walker v. Sauvinet, 92 U.S. 90 (1876); Hurtado v. California, 110 U.S. 516 (1884) (refusing to apply the liberties in the Bill of Rights to the states); *Cruikshank*, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629 (1883) (state action requirement).

reach private action. As to application of the Bill of Rights, the Bingham position, though not his analysis, has now mostly won the day. But the Court continues to limit congressional power to enforce the Fourteenth Amendment to state action.¹⁴²

XI. BINGHAM AS A CONSTITUTIONAL DRAFTSMAN

Since Bingham's plan to require states to obey guarantees of the Bill of Rights failed to be accepted by the Supreme Court for many years, one natural response is to find Bingham wanting. The draftsman, not the Court, must be at fault.

Several things are worth noting in Bingham's defense. First, the use of the words "privileges" and "immunities" made textual sense as a collective phrase to describe individual constitutional rights, including those in the Bill of Rights. In the years from 1830 to 1866 it was quite common to describe basic rights in the Bill of Rights as privileges or immunities that belonged to all American citizens.¹⁴³ A modern dictionary also suggests that the word privileges would include basic constitutional rights.¹⁴⁴ Leading Republicans often used the words in that way. A number also interpreted Article IV the way Bingham read it—as protecting privileges and immunities [constitutional rights] belonging to citizens of the United States in all the states.¹⁴⁵

Second, Bingham did use the "no state shall" formula that *Barron* had suggested would have indicated an intent to apply the Bill of Rights to the states. In that respect, Bingham's proposal was similar to James Madison's unsuccessful amendment to the Constitution designed to protect free speech, free press and the rights of conscience against the states. Madison's proposed amendment passed the House, but failed in the Senate, so it never made it into the Bill of Rights. Like Madison, Bingham crafted his prohibition in the words of Article I, section 10's limits of the states. Like Madison, he used the words "no state shall." One can even cite Madison as using the word "privilege" as Bingham did. In a 1789 speech in favor of his proposal to require the states to

142. See, e.g., *United States v. Morrison*, 529 U.S. 598, 620 (2000).

143. Curtis, *Historical Linguistics*, *supra* note 59, at 1110-32.

144. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 5 (1995) defines abridge as "reduce . . . lessen, diminish, or curtail . . ." *Id.*, and "privilege" as "a right, immunity, or benefit enjoyed by a particular person or a restricted group of persons" or "the rights common of all citizens under a modern constitutional government." *Id.* at 1074.

145. E.g., GLOBE, *supra* note 32, at 36(1) App. 205, col. 2 (1860)(Owen Lovejoy) 38(1) 1202 (1864) (James Wilson); GLOBE, *supra* note 32, at 39(2) 811, col. 1 (1867)(John A. Kasson). See generally, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 34-56; Curtis, *Historical Linguistics*, *supra* note 59, at 110-24.

respect the rights of free press and conscience, Madison described the rights as “invaluable privileges.”¹⁴⁶ Bingham used the same word to describe constitutional rights listed in the Bill of Rights, including rights listed by Madison in his unsuccessful effort to place additional constitutional limits on the states.

Third, as Bryan Wildenthal has shown, in the years after ratification of the Fourteenth Amendment and before the Court rejected application of the Bill of Rights to the states under the privilege or immunities clause, application was widely accepted by both Southern Democrats and Republicans.¹⁴⁷ Finally, the Court might have, but did not, examine the congressional debates with their strong evidence of intent to apply the guarantees.¹⁴⁸

Bingham might have followed “no state shall . . . abridge” with “rights in the Bill of Rights” instead of “privileges or immunities of citizens of the United States.” From his perspective, the problem, was that the privileges or immunities were only “chiefly” set out in the Bill of Rights. There were also others. For a Court committed to the idea that there were no rights of American citizens in the Bill of Rights (just limits on federal power), a collective reference to the rights in the Bill of Rights might also have been treated as an empty set. In retrospect, the safest course might have been to specify each and every right states were forbidden to abridge. But that prolix provision is born from the wisdom of hindsight.

Scholars looking at the incorporation issue have raised technical legal issues. If the Fourteenth Amendment incorporated the First, then, by one view, it really is a form of gibberish. “No state shall abridge the guarantee that Congress shall make no law.” Of course, what the Fourteenth Amendment incorporates by reference are the privileges and immunities of free speech, free press, freedom to assemble and petition, and free exercise of religion. It does not incorporate the prohibition against the denial of these rights by Congress. In the First Amendment, these privileges and immunities are, at the very least, secured against the

146. The amendment passed the House but was defeated by the Senate. Free speech was added to Madison’s original proposal by the House. Madison argued for his amendment (number 14 on his list) because the “State Governments are as liable to attack the invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against.” 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1032, 1113, 1122 (Bernard Schwartz, ed. 1971).

147. Brian 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).

148. This statement is intensely controversial and scholars continue to wrangle over the significance of the congressional debates.

action of Congress. In the Fourteenth Amendment, a new security is thrown around these rights—the guarantee that “no state shall” abridge them.

A second technical legal argument relates to the freedom of speech and press as understood in 1791, when the states ratified the First Amendment. If the First Amendment meant merely to protect against prior restraint, the argument asserts, then the phrase incorporated by reference in the Fourteenth Amendment could mean no more. “Water can rise no higher than its source.” It is highly dubious that the Blackstone “no prior restraint” vision of freedom of the press was the vision of 1791.¹⁴⁹

But even if it were, it does not follow that the words should have the meaning attributed to them in 1791. First, assume that the Fourteenth Amendment had explicitly provided that no state shall abridge freedom of speech or press. Would we insist that the words must be given their 1791 meaning even though it is quite clear that was not how they were understood in 1868? Not if we followed the idea that constitutional provisions reflect at the least the decisions of “we the people” at the time of their enactment. Not if we looked at the “original” 1868 meaning of words for guidance. By 1868, the idea that free press was merely a protection against prior restraint had virtually disappeared from general discussion.

Instead of writing out a long list of all privileges and immunities explicit or implicit in all the constitutional guarantees, John Bingham used the device of incorporation by reference. In theory, constitutional provisions come from “we the people” and judges often say they are to be interpreted to effectuate the popular will. If we follow ideas of popular sovereignty, then the words would mean at least what they meant to people in 1868, not what they meant to some judges in 1798 or even to “the people” in 1791. The other approach says, “well of course we know what you meant to say, but it doesn’t count because you failed to use exactly the right words.” Meaning is a search for purpose and purpose should be understood contextually. The “we know what you meant but you didn’t use just the right words so what you said does not work” approach exalts form over substance. It constrains constitutional interpretation by a series of arbitrary rules unrelated to the purposes the amendment sought to advance.

Those who proposed and ratified the Fourteenth Amendment

149. See, e.g., CURTIS, *FREE SPEECH*, *supra* note 19, at chapters 1, 2, and 3 and authorities cited.

understood freedom of speech and press to include freedom from prior restraint *and* freedom from subsequent punishment. That is what should count. (The evidence for that hypothesis is much stronger than the evidence for the contrary hypothesis.) The attacks on free speech, free press, and freedom of religious expression the Republicans had been complaining about were subsequent punishments (and private violence), not prior restraints.

Bingham's claim of power to reach private conspiracies looks weak today, though it was aimed only at conspiracies designed to punish the exercise of constitutional rights. In good part, that is so because Bingham's theory contradicts long established Supreme Court doctrine forged *after* the ratification of the Fourteenth Amendment. Bingham believed that the rights in the Bill of Rights belonged to American citizens, an understanding he thought had been recognized by the references to the rights in the national Constitution. He saw that *Barron* stood in the way of that vision because it held the Bill of Rights did not limit the states. But with *Barron* eliminated and the Fourteenth Amendment ratified, Bingham thought the rights were established. By this view the negative "no state shall . . . abridge the privileges or immunities of citizens of the United States" language implicitly recognized that Americans had such privileges and protected the underlying rights of American citizens set out in the Bill of Rights.

As Bingham and many understood it, the Fourteenth Amendment proclaimed constitutional rights including those privileges and immunities in the Bill of Rights to be rights of citizens of the United States. Since Congress had the power to enforce the amendment under Section five, it could legislate to protect citizens against private attacks designed to deny Americans their rights.

Federalism concerns shared by Bingham and others would still have required some implicit limits on federal power. Congress could only reach actions motivated by the specific intent to deprive citizens of constitutional rights. The states would retain concurrent power to punish the violations, unless the state remedy contradicted the federal one.

Implying a right from limitations on state power was hardly unprecedented. Nor was the next step, concluding that the Constitution mandated or at least authorized protection of the right, even against private persons. That seems to be the lesson from two Supreme Court cases, *Prigg v. Pennsylvania* and *Ableman v. Booth*. Both decisions read the Constitution very broadly to protect rights of slave owners.¹⁵⁰

150. See CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 81, 106, 159-61, and 235 n. 49

In *Prigg v. Pennsylvania*,¹⁵¹ the Court held that slave owners had a constitutional right to seize “slaves” in free states and take them back to a slave state without any judicial process at all.¹⁵² The right was treated as implicit in the essentially negative language of the Fugitive Slave Clause. “No [slave] held to service or labor in one State under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such [slavery] but shall be delivered up on the Claim of the [slave owner].” In free states all people were presumed to be free. The Court’s decision implied, from the prohibition on state laws in the fugitive slave clause, a slaveholder’s right to recapture his “slave” without any judicial process. For Americans of African descent, the *Prigg* decision had potentially heavy costs. The slaveholder’s right of recapture found in *Prigg* stripped blacks in the North of protection implicit in the presumption of freedom.¹⁵³

The Court’s reading of the power provided by the Fugitive Slave Clause went further. In *Ableman v. Booth*,¹⁵⁴ the Court suggested that the fugitive slave law of 1850—a law that punished *private* persons for assisting escaping slaves—was constitutional in all respects.¹⁵⁵ Both

(discussing *Prigg* and state action problems).

151. 41 U.S. 539 (1842). *Prigg v. Pennsylvania* held that slave owners had a constitutional right to seize “slaves” in free states and take them back to a slave state without any judicial process at all. *Id.* at 613. This was so even though in free states all people were presumed free; in slave states mere color gave rise to a presumption of slavery. *Id.* at 576. In effect, the Court’s decision, stripped blacks of the presumption of freedom.

As the Court saw it, any delay in the right of the alleged slave owner, including the delay required for a due process hearing, was intolerable. *Id.* at 612-613. So slave owners could capture and remove “slaves” with no process at all. But what if the black person being dragged away was not a slave? Pennsylvania had argued that whether the person was a slave was the very issue that needed to be decided. *Id.* at 576-77. A rule allowing private parties to seize “slaves” without a judicial hearing to determine status threatened free blacks. *Id.* It was an unreasonable seizure in violation of the Fourth amendment. *Id.* A government-authorized removal without a hearing deprived the “person” who was seized of liberty without due process. *Id.* Pennsylvania also argued that the language of the Fugitive Slave Clause which required that true slaves be “delivered up” on the “claim” of the slaveholder presupposed a judicial determination of status. *Id.* at 574-575. *Ableman v. Booth*, 62 U.S. 506 (1858) said the fugitive slave law of 1850 which punished private interference with the right was constitutional in all respects.

152. *Prigg*, 41 U.S. at 613.

153. *Id.* at 576. For a complimentary perspective, see, e.g., Rebecca Zeitlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Meaning of Equality*, 62 U. PITT. L. REV. 281, 326 (2000); Akhil Reed Amar, *The Supreme Court, 1999 Term*, 114 HARV. L. REV. 26, 70 (2000).

154. *Ableman v. Booth*, 62 U.S. 506 (1858).

155. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, sec. 7 (1850). “[T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.” *Ableman*, 62 U.S. at 526 (1858).

Prigg and *Ableman* established that Congress had the power to protect rights inferred from restrictive constitutional provisions. Indeed, during the debate on the Civil Rights Bill of 1866, James Wilson, Chairman of the House Judiciary Committee, cited *Prigg* as authority for Congress' power to pass the bill based on the due process clause. If a constitutional right implied a remedy for slave owners, he said, certainly the law must do at least as much for the newly freed slaves.¹⁵⁶ If the bar on state legislation in the Fugitive Slave Clause implied a right for slave owners—a right Congress could enforce against private persons—why should the Fourteenth Amendment not be read to imply rights such as free speech that Congress could protect against private persons?

Again and again in 1866, Republicans had insisted that allegiance and protection are reciprocal. To many it seemed clear that the nation must have the power to protect basic rights of its citizens from whom it could demand the ultimate sacrifice. In the years before the Civil War many opponents of slavery had been victims of mob violence, violence that was denounced again and again as a violation of the basic privilege of free speech secured to all citizens by the national Constitution.¹⁵⁷ In 1866, Republicans insisted on the need for protection of the rights of citizens. Some cited the New Orleans and Memphis riots against blacks and Republicans to show the need for the amendment.¹⁵⁸

Many insisted on a new far more protective concept of American citizenship. "If the cry 'I am a Roman citizen' protected the Roman in his mongrel republic," asked Senator Nye in a speech in California after the thirty-ninth Congress had adjourned, "with what redoubled force does the cry that I am an American citizen protect me."¹⁵⁹ Congressman Woodbridge of Vermont made a similar claim. The Fourteenth Amendment was designed "to cement the Union, [so] that any of us can go into any State in the Union with the declaration 'I am an American citizen' with the same consciousness of protection as of old it was sufficient for any citizen of the Roman empire to say 'I am a Roman citizen'."¹⁶⁰ Congressman James Wilson defended the amendment as necessary to protect free speech. Northern boys "must have the same liberty of speech in any part of the South as they always have had in the North. . . . [N]o more cross road committees to wait upon liberty loving men. . ."—a reference to mob violence often inflicted on opponents of

156. GLOBE, *supra* note 32, at 39(1) 1294.

157. See, e.g., CURTIS, FREE SPEECH, *supra* note 19, at 229-39, 281-88.

158. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 159.

159. *Id.* at 142.

160. *Id.* at 143.

slavery.¹⁶¹

Still, much of the discussion in 1866 explicitly referred to the need to protect against state action and state inaction.¹⁶² The first version of the Bingham amendment, the one that gave Congress power to secure to all persons, equal protection in the rights of life, liberty, and property, had been criticized because it seemed to some to allow Congress to legislate directly on all subjects and to preempt all state laws.¹⁶³

Before the Court rejected congressional power to reach private attacks on Bill of Rights liberties, a federal circuit decision held rights in the Bill of Rights *were* rights that Congress could protect against private conspiracies. Since the Bill of Rights limited both the federal government and the states under the Fourteenth Amendment, the rights were secured to the citizen and could be protected by the federal government against private attacks. Though issued by a circuit judge, much of the decision had in fact been written by Supreme Court Justice Joseph P. Bradley. So it represented the view of not just one judge, but of two.¹⁶⁴

In the case of the Fourteenth Amendment, Bingham finally persuaded the Congress to accept his proposal. Bingham was less successful in his effort to change the proposed language of what became the Fifteenth Amendment.

XII. JOHN BINGHAM AND THE RIGHT TO VOTE

In January of 1869, Congress was considering a constitutional amendment dealing with the right to vote. The amendment, as finally ratified, provided that the right of United States citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. John Bingham advocated a different approach. Basically, his proposal prohibited states from abridging or denying the franchise to male citizens of the United States who were over twenty-one years of age and of sound mind. Bingham

161. *Id.* at 145.

162. *See, e.g., id.* at 53-54, 62.

163. GLOBE, *supra* note 32, at 39(1) 1063-65 (Rep. Hale); 1082 (Sen. Stewart); 1083, 1087 (Rep. Davis). GLOBE, *supra* note 32, at 42(1) at App. 151 (Garfield) (1871); Hale, a Republican, had opposed the prototype of the Fourteenth Amendment; but in 1875, he insisted that the final version of the amendment was not limited to state action and could reach private conduct. GLOBE, *supra* note 32, at 43(2) 479-480 (1875). Garfield voted for the final bill which did reach certain private action. *See* GLOBE, *supra* note 32, at 42(1) 808.

164. *United States v. Hall*, 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871 (No. 15,282)). The Court's reasoning was suggested by Justice Bradley in response to a letter of inquiry by Judge Woods. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 15, at 172.

left the states with only a few additional powers to regulate suffrage. They were allowed to establish a residency requirement of not more than one year, and states could disfranchise those who had been convicted of treason or other infamous crimes as well as those who engaged in rebellion *in the future*.¹⁶⁵ Bingham objected to allowing disfranchisement of all who had served in the Confederate army.

Recognizing that the much broader protection might not succeed, on February 20, 1869, Bingham later sought to add additional limitations to the proposal to forbid discrimination based on race, color, or previous condition of servitude. As a fall back position, Bingham proposed that “the right to vote and hold office shall not be denied or abridged by States on account of race, color, *nativity, property, creed*, or previous condition of servitude.” Still he indicated that he preferred something like his earlier broader protection.¹⁶⁶ Bingham did not succeed with either proposal.

Bingham’s preferred version of the amendment would have protected the right to vote more broadly than the Fifteenth Amendment as it was enacted. It would have done so because it would have prevented any restrictions beyond those allowed. The poll tax, literacy tests, tests of the ability to read and understand the state constitution and similar methods used in the 1890s in early 1900s to disfranchise blacks and some poor whites would have been more obviously unconstitutional.

Whether any constitutional provision would have protected the right to vote against a faction determined to eject their opponents from power “peaceably if we can, forcibly if we must”¹⁶⁷ is doubtful—unless of course the people of the nation regained and maintained the will to protect the right to vote.

XIII. CONCLUSION

I began this essay with a reflection on our national story, the stories we tell, the stories we ignore, and the stories we have repressed. For nations as well as individuals, recognizing and accepting the darker side of our experience is important for transformation.

American history reveals a gap between ideals and practice. We have had slavery, the denial of the vote to those men without sufficient property, gender discrimination and the denial of the vote to women,

165. GLOBE, *supra* note 32, at 40(3) 638, 728 (1869).

166. *Id.* at 1426, 1427, col.1.

167. VERNON L. WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, 187 and generally chapter 13 (1947, 1965).

political terrorism, mistreatment of workers, and a racial caste system. The large darker side of our national experience is illuminated by the efforts of John Bingham.

Stephen A. Douglas and Chief Justice Roger Taney both confronted the tension between the Declaration of Independence and slavery. Both Taney and Douglas interpreted the words of the Declaration in light of the slaveholding practice of some of the signers and Founders and in light of the clauses of the Constitution that recognized slavery.¹⁶⁸ They insisted that the Declaration's signers were not hypocrites. Since Jefferson and other signers held and continued to hold slaves, when they wrote all people are created equal they could not have meant the declaration to be read literally. According to Taney and Douglas, what they actually meant was that all white men are created equal.¹⁶⁹

In contrast to Douglas and Taney, another common approach to the gap between ideals and practice *is* simply to reject the framers as hypocrites. The same approach can be applied to more recent framers—such as those of the Fourteenth Amendment. Like all human beings, many also failed to live up fully to their ideals—for example on issues like womens' rights and integration. They also have “failed to keep up with the times as a result of being dead.”

Another approach is to recognize the radical idealism of the American Revolution, the Declaration, and of the later Fourteenth Amendment, and to acknowledge that its authors naturally fell short of fully realizing their ideals. Lincoln read the Declaration as setting out the basic purposes of the nation, as a charter of freedom. But he admitted that its authors had not instituted the equality they espoused for blacks. Indeed, he pointed out that they had not even established it for all white men. The Declaration was a statement of national ideals. Like all statements of ideals, it represented a goal to be pursued. It was a statement of ethical aspirations rather than a description of current

168. CREATED EQUAL: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, 62-63 (Paul M. Angle, ed. 1958) (Douglas on the Declaration). Taney in *Dred Scott* makes the same claim:

The general words above quoted [“all men are created equal”] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Dred Scott v. Sandford, 60 U.S. 393, 410.

169. *Id.*

practice. Here is Lincoln's numinous explication:

I think the authors of that notable instrument [the Declaration of Independence] intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable exactness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors every where. The assertion “that all men are created equal” was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find for them at least one hard nut to crack.¹⁷⁰

John Bingham made similar contributions. Bingham was a student of the history of liberty and of the United States Constitution. As a result, he could and did situate his efforts in the larger story of Anglo-American liberty. Because he was a student of the Constitution, Bingham recognized, as many of his colleagues initially did not, why a constitutional amendment was needed to secure for American citizens Bill of Rights liberties against the states. He also saw how the amendment would greatly reinforce the claim of constitutional power to pass the Civil Rights Bill, a recognition that distinguished him from many of his colleagues. Bingham cherished the vision of the Constitution that secured basic rights equally to all citizens regardless of wealth, race, sex, nationality, or religion. Though at first, in common

170. ABRAHAM LINCOLN, SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN DOUGLAS DEBATES (1832-1858) 398-99 (Library of America ed. 1989).

with others at that time, he did not see the right to vote as fundamental, his later statements show that he, like the nation, was moving in that direction. Still, as Bingham understood it, the basic protections of the due process clause extended to all—citizens and foreigners; to people of all colors, black, yellow, or white; and to women as well as men. He failed to understand the full implications of his constitutional ideals of equal protection for gender discrimination—but so did many others at the time.¹⁷¹

In the apparently endless debates about the purposes of the Fourteenth Amendment, scholars argue about whether the amendment was intended as a limited guarantee of equality under state law or as a protection of national rights of American citizens set out in the Constitution. (Of course, the arguments are not mutually exclusive.) For Bingham the ideas of equality and basic national rights of American citizens throughout the republic were mutually reinforcing. As he saw it, the Due Process Clause, which extended its protections to all persons, both protected basic rights and, because it did so for all, it secured equality. Similarly, provisions granting basic rights to all citizens, secured substantial equality.

Bingham read the Constitution and the Bill of Rights as statements of legal ideals. He recognized many of the shortcomings of contemporary practice. And Bingham, as much as anyone, worked to bring those ideals closer to reality. Though sometimes subjected to judicial abuse, the Fourteenth Amendment's equal protection and due process clauses have been important protections for the liberties of American citizens. The Court has recently breathed new life into the privileges or immunities clause of the Fourteenth Amendment,¹⁷² though it remains to be seen whether it will eventually read it as Bingham, many of his colleagues, and many of their contemporaries did—to protect basic constitutional rights of all citizens.

The abolitionist William Lloyd Garrison rejected the Constitution as an agreement with hell and a covenant with death and publicly burned it.¹⁷³ But Bingham saw its ideals and its promises. He also saw clearly how the ideals had been compromised as a result of slavery. But because he appreciated and cherished the ideals, Bingham was well positioned for the work of extending them.

In one way, it is easy to understand why the story of John Bingham

171. GLOBE, *supra* note 32, at 39(1) at 1063, 1089 (discussing the rights of married women).

172. *Sanez v. Roe*, 536 U.S. 489 (1999).

173. *E.g.*, HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* 313, 445 (1998).

was ignored for so long. Again and again and again, Bingham's story intersects with what had been omitted parts of our national narrative and illuminates the dark recesses of the national shadow—suppressions of free speech and civil liberty in the interests of slavery; rejection of the ideals of the Declaration by people who became leaders of the Confederacy and the new South; denials of basic rights to African Americans by the Southern state governments Andrew Johnson installed right after the Civil War; use of political terrorism against blacks and Republicans during Reconstruction; the Supreme Court's rejection of the Fourteenth Amendment's basic protection of constitutional rights of all Americans in every state; the destruction of Reconstruction statutes, and denials of the right to vote to blacks; and the perversions of the Fourteenth Amendment's guarantees to protect corporate empires from democratic regulation.

I know very little about how John Bingham felt when he saw the wreck the United States Supreme Court was making of his handiwork. How did he react when the Court rejected application of the liberties in the Bill of Rights to the states and treated the privileges or immunities clause as mostly meaningless? These decisions were reached, at least in part, in the interest of preserving the rights of the states. What did he think when the Court pulled the teeth out of Reconstruction statutes designed to enforce constitutional rights, privileges, and immunities of American citizens against state or private attack? These had been written to protect the rights, privileges, and immunities of citizens of the United States. When the Court found that there were very few of these and that they did not include any rights in the Bill of Rights,¹⁷⁴ the statutes lost much of their effect. What did he think about the conversion of the Fourteenth Amendment from a protection for all constitutional rights for all citizens to a bulwark of corporate power against the protests of farmers and workers? Here we have a bit more information. Bingham later wrote that the amendment had been designed to protect natural persons, not corporations.¹⁷⁵ That seems quite reasonable, particularly since the first sentence of Section one refers to persons "born or naturalized in the United States."

In one way, the neglect of Bingham's story is understandable. It does not fit well with the story often told, or with the story of the

174. *E.g.*, *United States v. Cruikshank*; 92 U.S. 542 (1876). The Court's subsequent revival of the incorporation doctrine also revived some of these remaining statutes. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961).

175. Erving Beauregard, "John A. Bingham and the Fourteenth Amendment," 40 *THE HISTORIAN* 67, 69 (1987). Unfortunately the correspondence cited appears to have been lost. *Id.*

Supreme Court as the consistent guardian of our liberties.

In another way, the neglect is quite hard to understand. After all, Bingham's story is a central part of the story of American liberty: the struggle against slavery and its legacy; the struggle for equality; and for free speech and press and other basic constitutional rights.

We continue to struggle to understand the meaning of our American experience. The current controversy over how to understand the Lost Cause and the Lost (Privileges or Immunities) Clause¹⁷⁶ of the Fourteenth Amendment shows the presence of the past. Not too long ago, Gale Norton, now President Bush's Secretary of the Interior, spoke about the meaning of the Civil War and events that followed it. She noted that with the defeat of the Confederacy "we lost too much. We lost the idea that states were to stand against the federal government gaining too much power over our lives." John Ashcroft, now Attorney General, expressed similar sentiments. He said "traditionalists must do more" to defend the Southern heritage. "I've got to do more."¹⁷⁷

Recently, in *United States v. Morrison*, the Supreme Court reiterated the state action requirement and expressed its approval of decisions that destroyed the effort, based on the Fourteenth Amendment, to enforce Reconstruction statutes against private suppression of the exercise of rights protected by the Bill of Rights. Like its predecessors during and after Reconstruction, the Court in 2000 was motivated in good part by a legitimate concern for federalism. And in fairness to the Court, the historical record on the state action subject is puzzling and contradictory. The Court's approach to the state action problem has some support in text and history, though it over looked evidence supporting a contrary interpretation. Many in 1866, including John Bingham,¹⁷⁸ described the amendment as prohibiting denial of basic rights by states. But the Court reaffirmed its prior decisions in sweeping terms. In *United States v. Morrison*, the Court repeated once again

[T]he time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no

176. The reference to the "lost clause" comes from Akhil Amar. Akhil Reed Amar, *Lost Clause*, NEW REPUBLIC, June 14, 1999, at 15.

177. Quoted in James M. McPherson, *Southern Comfort*, NEW YORK REVIEW OF BOOKS, April 12, 2001 at 28.

178. GLOBE, *supra* note 32, at 39(1) 1088-89, 2542 (Bingham on the amendment as giving Congress power to prohibit unconstitutional state actions).

shield against merely private conduct, however discriminatory or wrongful.”¹⁷⁹

The Court said that Congress had exceeded its Section five power in the Reconstruction statutes because such laws were “directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.”¹⁸⁰ *Morrison*'s reasoning may suggest that, indeed, Congress had no power to protect Republicans in the South from private attacks designed to punish them for their decision to associate with the Republican party and espouse its doctrines. It further suggests that such a sweeping dictum was essential to preserve the role of the states. The actual issue, however, was much narrower. Did the Fourteenth Amendment allow Congress to pass statutes such as the anti-KKK acts? These laws were limited to punishing private action *taken for the purpose* of denying basic liberties, including those in the Bill of Rights. The laws also reached private action denying equal protection of the laws. The conspiracies were designed to punish American citizens because of their political expression, beliefs, and affiliation. The Court could have upheld such laws while still rejecting an essentially unlimited power under Section five to preempt any and all state laws.

Some prior Court decisions make *Morrison* somewhat less troublesome. The Court had broadly interpreted the Thirteenth Amendment and has held it has no state action requirement.¹⁸¹ As a result, the federal government could today protect blacks from private race-based attacks. Under *Morrison* and prior cases, a claim to federal protection for Socialists, Republicans, Catholics, Unitarians, or Democrats subjected to private attack because of their beliefs would have little chance of success.

The vision of Republicans passing legislation to combat the Ku Klux Klan was broader. In 1871 discussing a bill to enforce the Fourteenth Amendment, Senator Edmunds explained that the bill did not reach things like a private conspiracy growing out a neighborhood feud. “[B]ut if . . . it should appear that this conspiracy was formed against this man because he was a Democrat, . . . , or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . this section could reach it.”¹⁸² Much of the violence

179. *United States v. Morrison*, 529 U.S. 598, 621.

180. *Id.* at 621.

181. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Compare, Griffin v. Breckenridge*, 403 U.S. 88 (1971); *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983).

182. *GLOBE, supra* note 32, at 42(1) 567, col. 2-3 (1871).

against blacks was based on their decision to support first the Republican and later the Populist party.

In *Morrison*, the Court also paid homage to the judges who had excised Bill of Rights liberties from the Fourteenth Amendment and destroyed much of the congressional effort to protect white and black Republicans in the South.

The force of the doctrine of stare decisis behind these [state action] decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.¹⁸³

John Bingham also appreciated the virtues of a federal system and the role of the states. But, understandably, he was more fully aware of the abuses of civil liberty states and mobs had practiced in the years before the Civil War. So there is considerable tension between the Bingham story and the Court's traditional understanding of Fourteenth Amendment history. There is even more tension between Bingham's story and the "Southern heritage" story of a Civil War over states' rights.

Constitutional declarations of rights depend to an important extent on popular adherence to the ideals they declare. That is at least one reason why forgetting the story of John Bingham and his colleagues has been such a loss. A more complete account of our national story would help us better to understand our national values and the struggles to preserve them. The values of the judges who interpret them also matter.

Bingham's story and his setbacks remind us that the struggle for liberty is never finally won. But there is a second moral to Bingham's story, to the story of the Second Reconstruction's realization of many of the ideals of the first, and to the story of how most guarantees of the Bill of Rights were eventually applied to the states as Bingham planned. Though the battle for liberty is never finally won, the battle is also never finally lost.

183. *Morrison*, 529 U.S. at 621.