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Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment

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RESURRECTING THE PRIVILEGES OR IMMUNITIES CLAUSE AND REVISING THE *SLAUGHTER-HOUSE CASES* WITHOUT EXHUMING *LOCHNER*: INDIVIDUAL RIGHTS AND THE FOURTEENTH AMENDMENT†

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I. INTRODUCTION

The decision in the *Slaughter-House Cases* liquidated the Privileges or Immunities Clause of the Fourteenth Amendment. The Clause has never been resurrected.[1] On the larger question of national protection for civil liberties, the decision no longer means what it says because much of the damage done by *Slaughter-House* has been corrected under the Due Process Clause. Though the *Slaughter-House* decision has been much criticized, it has never been overruled.

The *Slaughter-House Cases* faced a question that was at the heart of the American experiment. It was a question that had been raised in

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[1] 83 U.S. 36 (1872).

the Declaration of Independence, finessed in the Constitution of 1787, deferred in the Bill of Rights, hotly debated as slavery became a central national issue, and answered by the Reconstruction Amendments, particularly the Privileges or Immunities Clause of the Fourteenth Amendment. The question examines our constitutional soul. Was the Constitution a system designed to protect slavery or guarantee liberty? While it recognized the inevitable death of slavery, the *Slaughter-House Cases* left the protection of liberty much as it had been under a Constitution construed to protect slavery.

Ultimately, attempts to justify the contorted construction of the Privileges or Immunities Clause in the *Slaughter-House Cases* (or to offer some modern equivalent protective of state power to invade Bill of Rights liberties) fail to come to grips with the constitutional and historical context of the Fourteenth Amendment. A look at text, context, history, ethical aspirations, precedent and constitutional structure suggest that the Fourteenth Amendment's Privileges or Immunities Clause was designed to make the Constitution what its preamble promised—a guarantee of liberty.

But burying this aspect of *Slaughter-House* while reviving the Privileges or Immunities Clause has its own perils, particularly today when many see the Unregulated Market as an ultimate good and the dollar is winning the battle between man and the dollar. Our own era bears a striking resemblance to the Gilded Age and the Roaring Twenties, eras in which the original vision of the Fourteenth Amendment was buried and replaced with an interpretation that did much to make it a Magna Carta of corporate power. Can we resurrect the Privileges or Immunities Clause and revive *Slaughter-House* without exhuming *Lochner*,[2] a case that too often left the worker and the small business person to be regulated by massive combinations of corporate power? Too often *Lochner*'s legacy treated democratically enacted limits on concentrated economic power as impermissible. The picture is complex, of course. For concentrated power can also use regulation to disadvantage the less politically powerful.

These questions are not theoretical. In December 1995, the Institute of Justice, a free market legal foundation, convened a conference to consider overruling *Slaughter-House.* In calling the conference, the Institute quoted Justice Scalia on the "urgent" need to find protection for economic liberties in the Constitution. For many, revival of *Lochner* is a fond hope. Here again, a look at the broader historical context of

[2] 198 U.S. 45 (1905).

the Fourteenth Amendment suggests that, far from enacting *Lochner*, the Amendment's vision of liberty does not require replacing one system of concentrated economic power with another.

This article looks more intensively at the *Slaughter-House Cases* and it examines recent scholarship suggesting that the Privileges or Immunities Clause was primarily a prohibition against certain forms of discrimination.[3] In addition, it looks in more detail at the idea of resurrecting *Lochner*'s "liberty of contract" under the rubric of the Privileges or Immunities Clause. Further, it makes some observations on the role of original intent or original meaning. Finally, it makes suggestions about private attacks on free speech rights and the doctrine of state action. In the end, I conclude that the Fourteenth Amendment and its Privileges or Immunities Clause were designed to protect basic constitutional liberties; left a broad sphere for state power; prohibited (under the Equal Protection Clause) racial and similar discrimination in many rights conferred by state law; should not be read to outlaw worker safety, maximum hours, or the minimum wage; and should allow federal protection of individual rights against certain types of private attack.

The liquidation of the Privileges or Immunities Clause and development of the state action doctrine occurred at about the same time.[4] The state action doctrine suggested that much private conduct aimed at destroying Bill of Rights liberties like freedom of speech and press was beyond the reach of the federal government. As to both private attacks on Bill of Rights liberties and state violations of Bill of Rights

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[3] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, Ch. 8 (1977); DAVID CURRIE, THE CONSTITUTION AND THE SUPREME COURT: THE FIRST HUNDRED YEARS, 342–51 (1985); WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); *cf.* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). For my prior efforts, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1985) [hereinafter CURTIS, NO STATE SHALL ABRIDGE]; Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter Curtis, *A Reply to Professor Berger*]; Michael Kent Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter Curtis, *Further Adventures*]; Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982) [hereinafter Curtis, *The Fourteenth Amendment*]; Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517 (1984). For a recent spirited attack on application of privileges in the Bill of Rights to the states, see Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law, "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1571–92 (1996).

[4] *See* United States v. Cruikshank, 92 U.S. 542 (1875); Slaughter-House Cases, 83 U.S. 36 (1872).

liberties, the Supreme Court initially found that the Fourteenth Amendment had not changed things very much.

The destruction of the Privileges or Immunities Clause and the development of an excessively broad state action doctrine had a profound impact on American history. They represented a one-two punch that did much to eliminate the Fourteenth Amendment as an effective protector of individual rights and democracy. Both were motivated in part by considerations of federalism, and in both cases the judicial solution was far broader than necessary.

The story of the Fourteenth Amendment is part of the great story of liberty. It reveals important patterns. It shows how guarantees like those in the Bill of Rights have functioned holistically to protect political freedom and how the absence of those guarantees has repressed political liberty. It is a story well worth telling, particularly today, when study of the history of liberty is neglected and when guarantees are likely to be dismissed as mindless technicalities. For individuals, for families, and for nations, the stories we tell about our past are important ways of understanding our identity.[5] The best understanding comes from looking at the bleaker as well as the brighter side of our natures.

Today a striking phenomenon is reductionism—the attempt to explain law by a single method, such as the theory that law is merely economics, or the idea that the Constitution is to be understood based on the narrowest reading of original intent or meaning. In fact, legal decisions reflect a combination of methods. The task of the lawyer or the judge is constructive—to give the best possible account of the Constitution considering text, context, history, precedent, structure and ethical aspirations, and also to use this understanding to resolve particular controversies.[6] Often the most accurate, purely historical explanation recognizes cross currents and confusion—although, because of their own tradition, the needs of the human mind, and the demands of tenure, few historians write in this way. The human mind imposes patterns on an unruly world. Because of their different purposes, seeing history as cross currents and confusion is not viable for judges or political leaders. Usually they must provide a coherent meaning, though coherence often comes at a cost.

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[5] *See generally* JEROME BRUNER, ACTS OF MEANING (1990); *see also* SAM KEEN, TO A DANCING GOD 83–105 (1990) (providing another discussion of story-telling).

[6] *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). *Cf.* RONALD DWORKIN, LAW'S EMPIRE (1986); Phillip Shaw Paludan, *Hercules Unbound: Lincoln, Slavery, and the Intention of the Framers*, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE 1, 6–7 (Donald Neiman ed., 1992).

Obviously, the idea that judges must construct constitutional meaning from diverse sources and give the best interpretation has its risks. It is tempting instead to look, for example, for the most specific indication of original intent or for the plain meaning of the text and to follow only that. So if the galleries of the Senate were segregated when the Fourteenth Amendment was passed, if Congress seemed to accept segregated schools in the District of Columbia, and if many states accepted segregation, state-imposed racial segregation could be constitutionally acceptable. Since the First Amendment says Congress shall make no law abridging freedom of speech, presidents and judges could abridge free speech.

Often the nation and its judges have rightly rejected such a narrow approach. Framers and ratifiers of constitutional provisions have broad goals as well as specific understandings of how to apply their goals to concrete facts. Like the rest of us, they often have inconsistent purposes.

So, for example, the framers of the Fourteenth Amendment wished to confer civil equality on Americans of African descent, at least with reference to fundamental rights and interests. But many did not see state-imposed racial segregation in education as incompatible with that goal.[7] If a court finds the goals of civil equality and racial segregation in conflict, it must make a choice. It is tempting to pick the specific view (segregation) over the general (civil equality), but such a choice is not necessarily true to the framers' intent.

A purely historical interpretation based on the understanding of 1866 cannot always account for changes in the constitutional structure since that time. For many framers of the Fourteenth Amendment in 1866, the right to vote, then denied to all women and most American men of African descent, was not a fundamental right or interest of the

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[7] *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (citing 1 KENT'S COMMENTARIES 199 (1827)) on the Civil Rights Bill, before amendment:

> What do [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities . . . . What are civil rights? I understand civil rights simply to be the absolute rights of individuals, such as—"The right of personal security, the right of personal liberty, and the right to acquire and enjoy property. Right itself in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of proscribed law."

citizen[8] or within the equality the Amendment secured.[9] Senator Jacob Howard said it was not "regarded as one of those fundamental rights lying at the basis of all society and without which people cannot exist except as slaves subject to despotism."[10] With the passage of the Fifteenth Amendment (prohibiting denial of the right to vote based on race), the Nineteenth (based on sex), and the Seventeenth (direct election of Senators), there is strong reason to treat the right to vote as fundamental.

The Constitution is a set of basic instructions from the people to their agents in the judicial, legislative and executive branches.[11] In the law of agency, when specific instructions conflict with general purposes of the employer or principal, the agent is sometimes expected to follow broader goals—a reasonable interpretation of what the principal would want, rather than the principal's more specific instructions.[12] That such cases are rare does not mean departure from more specific instructions is never appropriate. Judges are agents interpreting the commands of the sovereign people enshrined in the Constitution. But looking from the specific to the general has its obvious dangers. Perhaps the best that can be said is that to the extent that text, context, intent, history, structure and ethical considerations point in the same direction, we can be more confident that a decision is correct.

II. THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS

A. *The Original Constitution and the Addition of a Bill of Rights*

The original American Constitution of 1787 said that it was designed to secure the blessings of liberty.[13] It contained some important

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[8] *See id.* (statement of Rep. Wilson).

[9] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

[10] *Id.*

[11] *See* THE FEDERALIST No. 78 (Alexander Hamilton). "[I]n other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *Id.* The agency conception is a metaphor which highlights some of the aspects of the relation and hides others.

[12] *See* RESTATEMENT (FIRST) OF AGENCY § 33 (1958). "P, the owner of a factory running on half time for lack of orders, before leaving for his vacation, directs his purchasing agent to 'put in our usual monthly coal supply of 1000 tons.' The following day a large order comes in which will immediately put the factory on full running time." *Id.* at 115–16, illus. 2. If P cannot easily be reached, "[i]t may be found that A is authorized to purchase sufficient coals to keep the factory running, this depending upon whether or not P can easily be reached, the amount of discretion usually given to A, the condition of P's bank balance, and other factors." *Id.*

[13] U.S. CONST. preamble.

guarantees of liberty such as the provision against ex post facto laws, the provision for habeas corpus,[14] and the clause limiting treason so that simple political opposition to those in power could not be prosecuted as treason.[15] It divided power between federal and state governments and within the federal government. Divisions of power are an important mechanism for limiting its abuses.

But the document of 1787 contained basic imperfections. It recognized the existence of slavery,[16] and it gave slavery enhanced political power through the clause that counted slaves as three-fifths of a person for purposes of representation in the federal House of Representatives.[17] (At least that is so if one assumes slaves should not have been counted at all in the basis of representation.) The three-fifths provision also increased the power of the slave states in the electoral college. The Constitution of 1787 protected the traffic in kidnapped and enslaved human beings until 1808,[18] required Northern states to return escaped slaves,[19] and committed the federal government to helping end domestic violence in the states.[20] In the nineteenth century, many Americans understood this to be a commitment to put down slave rebellions.

The framers of the Constitution of 1787, like most of us, had inconsistent goals. They wanted liberty and union, protection for liberty and protection for the institution of slavery. Time would prove these to be impossible combinations.

The framers left a Bill of Rights out of the Constitution. When challenged on that score in the ratification process, they responded with a collection of arguments. They insisted, somewhat inconsistently, that the Constitution already contained guarantees of liberty (a sort of virtual Bill of Rights) and that the federal government lacked the power to perform the invasions of liberty feared. (It had no delegated power to interfere with the liberty of speech and press, for example.)[21] They warned that guarantees of liberty were dangerous because a limitation on power implied the existence of power, much as the provision that the government cannot take property for public use

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[14] U.S. CONST. art. I, § 9 (bill of attainder, ex post facto laws, habeas corpus); *id.* § 10 (bill of attainder, ex post facto laws).

[15] U.S. CONST. art. III, § 3, cl. 1.

[16] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3; U.S. CONST. art. IV, § 4 (protection of states against domestic violence).

[17] U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 2.

[18] U.S. CONST. art. I, § 9, cl. 1.

[19] U.S. CONST. art. IV, § 2, cl. 3.

[20] U.S. CONST. art. IV, § 4.

[21] *See* THE FEDERALIST No. 84 (Alexander Hamilton); Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 649 nn.10–11 (1996).

without paying for it suggests that it can take property if it does pay for it. And they argued that listing rights was dangerous because it would imply that those rights not listed did not exist, an argument at odds with the idea that the Constitution already contained a virtual Bill of Rights.[22]

The final argument against a Bill of Rights was based on popular sovereignty. Bills of rights were devices needed to limit the power of the King in favor of popular rights. In the United States, the people were sovereign, and since the people would not invade their own rights, a Bill of Rights was superfluous.[23] A quick historical flashback will show why this argument is extraordinarily hollow. Fortunately, it did not prevail.

American revolutionaries were the heirs of the English revolutionaries of the seventeenth century and of those in England who followed the tradition that they established.[24] The radical wing of English revolutionaries fought for religious toleration, broader suffrage, representation in Parliament in accordance with population, and fought against monopolies. Parliament was not sovereign, they insisted; the People were sovereign, and Parliament was simply the agent of the sovereign people. "We are your Principalls," one petition to Parliament explained, "and you our Agents. . . . For if you . . . shall assume, or exercise any Power, that is not derived from our Trust and choice thereunto, that Power is no lesse then usurpation."[25] The oligarchy that ruled England after the successful revolution against King Charles I felt threatened by the ideas of these proto-democrats.[26] In brilliantly loaded language, the oligarchs named the proto-democrats the "Levellers." Their charge was that political democracy would lead inevita-

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[22] *See, e.g.*, JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 640 (Adrienne Koch ed., 1966) (Sherman); THE FEDERALIST No. 84 (Alexander Hamilton); 2 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 1025, 1034 (Bernard Schwartz ed., 1971) (Jackson) [hereinafter 2 THE BILL OF RIGHTS]; William Van Alstyne, *Congressional Power and Free Speech: Levy's Legacy Revisited*, 99 HARV. L. REV. 1089, 1094–97 (1986) (book review).

[23] *See* THE FEDERALIST No. 84 (Alexander Hamilton) (alluding to this argument but not expressing it in so bald a form).

[24] *See* David Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131, 204–08 (1992) (discussing views of Radical Whigs).

[25] Richard Overton, *A Remonstrance of Many Thousands of Citizens (1646)*, *in* TRACTS ON LIBERTY IN THE PURITAN REVOLUTION 1638–1647 1, 3 (William Haller ed., 1934).

[26] *See* Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMM. 359, 377–86 (1991) [hereinafter Curtis, *The Levellers*]. For excellent discussions, see HENRY NOEL BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION (1961); JOSEPH FRANK, THE LEVELLERS (1955); PAULINE GREGG, FREE-BORN JOHN: A BIOGRAPHY OF JOHN LILBURNE (1961).

bly to equal division of property. The oligarchs also turned weapons the King had used against Puritans and Parliamentarians against the proto-democrats. So the parliamentary oligarchs used against the Levellers the very weapons the King had used against them: sedition laws, treason laws reaching verbal attacks on government, broad power to search, compelled self-incrimination and denials of other criminal procedure guarantees. Eventually, the oligarchs suppressed the Levellers.[27]

The Levellers invented (or at least espoused) what would become some basic American ideas of liberty and popular sovereignty. They proposed a written constitution that contained a list of powers denied to government, something like a bill of rights. Because this constitution came directly from the people, its authority would limit parliamentary power. The sovereign people were the principal, Parliament was the agent, and the constitution, *the Agreement of the People*, was a set of limiting and binding instructions the people gave their agents. These fundamental instructions, in turn, could not be changed by their agents in Parliament.[28] Ideas of popular sovereignty contributed to the gradual transformation of formal political power in America, and the right to vote progressively expanded.

Their emphasis on agency principles and their own experience with parliamentary power led the Levellers to simple but profound insights, insights that showed the hollowness of suggestions that popular governments have less need for bills of rights. The Levellers saw the basic problem with all agency relations—the danger that the agent will use the power given by the principal to the advantage of the agent and the disadvantage of the principal.[29] As they put it in explaining the need to limit the power of government, the Levellers had "by woeful experience found the prevalence of corrupt interests powerfully inclining most men once entrusted with authority, to pervert the same to their own domination, and to the prejudice of our Peace and Liberties."[30] Put another way, the claim that the people actually rule is a legal fiction—useful, instructive, partially true, but still a legal fiction. For the governors and the governed are different, and the power the people give to the governors may be used to the disadvantage of the

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[27] *See* Curtis, *The Levellers*, *supra* note 26, at 375–89.

[28] *See id.*

[29] *See id.* at 367–68, 387.

[30] *An Agreement of the Free People of England*, *in* THE LEVELLER TRACTS (1647–1653) 323 (William Haller and Godfrey Davies eds., 1960).

people themselves.[31] Like all metaphors, the claim that the people rule highlights one aspect of the truth, while leaving others in darkness.[32]

While the Levellers were suppressed, many ideas remarkably similar to those of the Levellers were carried on by a small group of Radical Whigs. The Radical Whigs, in turn, transmitted many of these ideas to American revolutionaries.[33]

The attacks on the United States Constitution of 1787 came in part from those concerned about the lack of protection for individual rights. But attacks also came from those concerned with preserving the power of the states, and one of the chief reasons for that concern was fear that the federal government might grow sufficiently powerful to threaten slavery.

James Madison, of course, led the fight for a bill of rights in the first Congress. A bill of rights, Madison said, would give legitimacy to principles of liberty, help the people to internalize these values, and provide a basis for rallying against abuses of power. It would also give new power to the courts. Madison announced, with excessive optimism, that "courts of justice" would form "impenetrable barriers" against violations of the liberties in the Bill of Rights.[34]

Madison also wanted some guarantees of liberty to be directed against the power of the states. Specifically, he wanted protection for the "invaluable privileges" of free press, freedom of conscience and trial by jury.[35] The proposal to limit the states' power in the interest of liberty, a proposal Madison said was the most valuable part of his guarantees of liberty, passed in the House but was defeated in the Senate.[36]

In spite of Federalist assurances that the federal government lacked power over speech and press, assurances that were re-enforced by the First Amendment, it was not long before Federalists in Congress exercised this allegedly non-existent and specifically prohibited power. They made it a crime to make false and malicious criticisms of the Federalist President, John Adams, or of the Congress. The law did not protect Vice-President Thomas Jefferson, Adams' likely opponent in

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[31] *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 282–84 (1988); Curtis, *The Levellers*, *supra* note 26, at 367–68, 371–74, 387–93.

[32] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3–13 (1980).

[33] *See generally* Mayer, *supra* note 24. For the Leveller legacy, see Curtis, *The Levellers*, *supra* note 26, at 387–93.

[34] 2 THE BILL OF RIGHTS, *supra* note 22, at 1030–31. *See generally* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1990).

[35] 2 THE BILL OF RIGHTS, *supra* note 22, at 1032–33, 1113, 1145.

[36] *Id.*

the upcoming presidential election.[37] Federal prosecutors (appointed by Adams) enforced the law. Soon Jeffersonian newspaper editors and a Jeffersonian congressman were jailed for suggesting that Adams was given to ridiculous pomp and favored a standing army.[38]

There seems to be a pattern emerging here—the use of laws, including sedition laws and other laws aimed at political expression, the use of police, courts and the criminal justice system, to destroy or hobble political opponents. Laws aimed at speech and press have extraordinary potential for political abuse.

Of course, reality is paradoxical. Criminal laws are necessary to protect basic rights. Protections against self-incrimination, unreasonable search and seizure, jury trial and the other criminal procedure guarantees of the Bill of Rights simply reflect a recognition, at least as old as the Levellers, that the useful and necessary power to enforce criminal laws also contains inherent threats to liberty and needs to be carefully confined. The limits have costs, but the history of liberty shows that jettisoning the guarantees has costs as well.

B. *Slavery and Abolition Shatter a Constitutional Consensus*

1. The Controversy over Slavery

The pattern of using the criminal justice system and laws aimed at speech and press to silence political opponents reappeared in the political battle over slavery. State laws to silence opponents of slavery were not subject to federal judicial review. This was so because, in 1833, as agitation against slavery began to convulse the nation, the Supreme Court ruled that guarantees of liberty in the Bill of Rights did not limit the states.[39]

In the mid-1830s abolitionists launched a massive attack on the continued legitimacy of slavery. They demanded immediate emancipation, though they admitted that Congress lacked power over slavery in the Southern states. The Southern slave-holding elite, meanwhile, insisted on increased security for slavery. Proposed security devices in-

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[37] Act for the Punishment of Certain Crimes, 1 Stat. 596 (July 14, 1798).

[38] *See, e.g.*, United States v. Cooper, 25 F. Cas. 632 (C.C.D. Pa. 1800); United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800); United States v. Lyon, 15 F. Cas. 1183 (C.C.D. Vt. 1798). *See generally* LEONARD LEVY, THE EMERGENCE OF A FREE PRESS (1985); JOHN MORTON SMITH, FREEDOMS FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1966); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); David M. Rabban, *The Ahistorical Historian, Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 785 (1985).

[39] Barron v. Baltimore, 32 U.S. 243 (1833).

cluded more slave states, opening all federal territories to slavery, banning from the mails anti-slavery literature sent to Southern states, banning anti-slavery publications directed to slave holding states, extraditing Northern abolitionists to the South to face trial for anti-slavery statements sent to the South and suppressing abolition societies and literature in the North.[40]

In the North, most of these proposed restrictions were not achieved.[41] This was so because many Northerners held a broader and more general view of free speech and press. They believed that abolitionists could not be suppressed without delegating dangerous discretion to suppress speech to public officials. A substantial block of Northern public opinion agreed, at least, that abolitionism was an evil and the nation would be better off without it. How to get rid of abolitionist speech without also undermining state and federal guarantees of free speech and press was a more puzzling problem, and most Northerners concluded that the puzzle was insoluble.[42] Rooting out anti-slavery speech and press was hobbled by provisions for free speech and press and for jury trials, by provisions against compulsory self-incrimination, by provisions limiting search and seizure powers of government, and by the federal system.

Why was it that so many Northerners and Southerners alike were initially so hostile to abolition? There were two basic rationales. One fear was that anti-slavery expression would eventually reach slaves and lead to slave revolts, which the entire nation would be obligated to quell. A second fear was that anti-slavery agitation would make slavery a political issue, create sectional parties and eventually lead to civil war.[43] For the Southern slave-holding elite, abolition threatened their wealth and power. They responded by suppressing anti-slavery expression. But, as Francis Lieber warned John C. Calhoun, a system that refused to tolerate criticism was one that admitted it was based on violence. Such a system could only come to a violent end.[44]

By the 1850s, escalating Southern demands to protect and expand slavery had produced a great political realignment. The Republican party opposed the extension of slavery to new territories, insisting that

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[40] *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 Nw. U. L. Rev. 785, 796–817 (1995) [hereinafter Curtis, *Curious History*].

[41] *See id.* at 866.

[42] *See id.* at 786–849.

[43] *See id.* at 802–04.

[44] *See id.* at 846; Freedom of the Press from Hamilton to the Warren Court 179 (Harold L. Nelson ed., 1967).

slavery in any federal territory was an unconstitutional deprivation of liberty without due process of law. Republicans rejected slavery as barbarism and demanded free speech and free press on the subject.[45]

The Southern slave-holding elite, and many Southerners who followed it, found Republican ideas just as evil and criminal as those of the abolitionists.[46] In truth, Republicans shared many premises with abolitionists, although they reached different conclusions. Like the abolitionists, Republicans believed that slave-holding was evil, that it should be banned from federal territories, that slavery in the states was beyond the immediate power of the federal government, and that open discussion of the issue in the South would lead to state-by-state abolition. Most abolitionists, however, were committed to racial equality, a position many Republicans approached more gradually.[47]

2. Irreconcilable Differences: The Liberty Model vs. the Slavery Model

So, from the 1830s to the 1850s, two different models of the Federal Constitution emerged: the liberty model and the slavery model. Advocates of the liberty model read the Constitution as *ultimately* committed to the goals of liberty and equality in life, liberty and the pursuit of happiness. For them, the Constitution was infused with the purposes of the Declaration of Independence. Supporters of the liberty model differed on how quickly those goals could and should be achieved, as well as on the extent to which the Constitution was an actively anti-slavery document.

Advocates of the slavery model saw the Constitution as a compact between North and South, requiring the North to protect the institution of slavery where it existed and to allow it at least to compete with free labor for dominance in the territories.[48] Protection for slavery required at least some extra-territorial effects for slave codes. These included banning the reading and discussing of anti-slavery petitions in Congress. Advocates of the slavery model believed that abolitionists, and later, Republicans, should not be permitted to make anti-slavery arguments in the South and, many said, not in the North either—be-

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[45] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at ch. 2.

[46] *See* CONG. GLOBE, 36th Cong., 1st Sess. 281 (1860) (statement of Rep. Pryor); *id.* at 17 (statement of Rep. Clark); *id.* at 69 (statement of Rep. Davis); *id.* at 524 (statement of Rep. Hindman).

[47] *See* Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1140–51, 1168 (1993) [hereinafter Curtis, *The 1859 Crisis*].

[48] *See* Curtis, *Curious History*, *supra* note 40, at 808, 842, 860–61.

cause newspapers from one section of the nation circulated in the other.[49]

Some attempted a middle course: attempting to protect the South from anti-slavery literature without banning it in the North. Amos Kendall, Postmaster General for Andrew Jackson, explained that in many ways states were as independent as before the Constitution was formed, and slavery was one of these areas of state independence:

> No state obtained by the union any right whatsoever over slavery in any other State, nor did any State lose any power over it, within its own borders . . . . Nor have the people of one State any more right to interfere with this subject in another State, than they have to interfere with the internal regulations . . . of a foreign nation. If they were to combine and send papers among the laboring population of another nation, calculated to produce discontent and rebellion, their conduct would be good ground of complaint . . . .[50]

As Kendall saw it, the Constitution showed that one of its purposes was to secure more perfect control over slavery to the Southern states. Kendall did not claim the Constitution authorized the federal government to suppress speech in the North to protect slavery, for anti-slavery expression was legal there. But he was sure that, because of the requirement that states be protected against domestic violence, abolitionist literature should be kept out of mail sent to the South. "[T]he United States have no right, through their officers or departments, knowingly to be instrumental in producing, within the several states the very mischief which the constitution commands them to repress."[51]

Both those who saw the Constitution as a charter of liberty and those who saw it as a compact that promised protection for slavery could point to parts of the text of the Constitution and the history of the nation to support their cases.[52] The Constitution had enfolded within it radically divergent tendencies.

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[49] *See id.* at 796–863.

[50] WASH. GLOBE, Dec. 14, 1835, at 2 (Report of Postmaster Kendall to first session of 24th Congress).

[51] *Id.* at 3.

[52] For protections of slavery, see, for example, U.S. CONST. art. I, § 2, cl. 3 (slaves swell slave state representation in the House); *id.* art. II, § 1, cl. 2 (the electoral college); *id.* art. IV, § 2, cl. 3 (fugitive slaves); *id.* art. IV, § 4 (protection against slave rebellions—"domestic violence"). For protections of liberty, see, for example, *id.* preamble (to secure blessings of liberty); *id.* art. I, § 6, cl. 1 (protection for speech and debate in Congress from being questioned "in any other place");

Protection for slavery required eradication of guarantees of political liberty, implicit in popular sovereignty and explicitly contained in state and federal constitutional guarantees for speech and press. It required that a major political issue be kept off the agenda. Protection for liberty required freedom to criticize slavery and to take political steps for its eradication. Once slavery became a major political issue, the Jeckyl-and-Hyde nature of the constitutional arrangement became apparent. Lincoln was right in his "house divided" speech: the nation could not endure half slave and half free,[53] for slavery undermined liberty, and liberty undermined slavery.[54]

The Declaration of Independence was a central founding document of the American nation. The dispute over the nature of our constitutional arrangement focused in part on the meaning of the Declaration. Those who saw the Constitution as a compact requiring protection of slavery insisted that the Declaration in fact meant "all [white] men" are created equal and are entitled to basic rights. Otherwise, they insisted, slave holding founders like Jefferson would be hypocrites.[55]

Lincoln read the Declaration as setting out the basic purposes of the nation, as a charter of freedom. Here is his 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

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id. art. I, § 9, cl. 2 (writ of habeas corpus may only be suspended in cases of rebellion or invasion); *id.* art. III, § 2, cl. 3 (jury trial in criminal cases); *id.* art. III, § 3 (limited definition of treason); *id.* art. IV, § 4 (republican government); *id.* amend. I (freedom of speech, press, religion, and petition); *id.* amend. IV (protection against unreasonable searches and seizures); *id.* amend. V (criminal procedure guarantees including privilege against self-incrimination); *id.* amend. VI (right to counsel, local trial, speedy and public trial, confrontation and right to present defense witnesses); *id.* amend. VII (civil jury trial); *id.* amend. VIII (bail and no excessive fines or cruel and unusual punishments).

[53] 1 ABRAHAM LINCOLN, SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN DOUGLAS DEBATES (1832–1858) 426 (Library of America ed. 1989).

[54] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at ch. 2; Curtis, *The 1859 Crisis, supra* note 47, at 1141–77; Walter F. Murphy, Slaughter-House, *Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 17–20 (1987); Paludan, *supra* note 6, at 1–22.

[55] *See, e.g., Speech of Stephen Douglas at Springfield, July 17, 1858, in* CREATED EQUAL: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 62–63 (Paul M. Angle ed., 1958).

> 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.[56]

In the 1830s and in following years, the constitutional paradigm was that of the semi-sovereign state. The federal government had power to pursue common objectives, but the great mass of day-to-day governmental power was exercised by the states, sovereign within their domain. Slavery could be explained by the semi-sovereign state paradigm. It was one of the matters reserved to the states. As against state and local governments (except for a few federal limitations, which did not include the Bill of Rights), citizens of states and visitors from other states got just as much liberty as state constitutions and laws provided. How could Southern states arrest and jail people for criticism of slavery? The problem was simply solved by the paradigm of the semi-sovereign state.[57]

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[56] LINCOLN, *supra* note 53, at 398–99.

[57] *See* Letter from Postmaster General Amos Kendall to Samuel L. Gouveneur, Esq. Postmaster, New York, *in From the New York Times*, WASH. GLOBE, Sept. 1, 1835, at 2.

> When those states became independent they acquired a right to prohibit the circulation of such [abolitionist] papers within their territories; and their power over the subject of slavery and all its incidents, was in no degree diminished by the

With the founding of the Republican party, the semi-sovereign state paradigm came under increasing strain. Here, after all, was a national political party that was not allowed to campaign in one half of the nation. As the Civil War approached, southern slaveholders intensified demands to prohibit circulation of speeches by Congressional Republicans in the South. Slavery was the overriding political issue of the day, but one party was forbidden to speak or write about it in much of the South.[58] Laws limiting speech and political advocacy were enforced by searches and seizures, and by the machinery of the criminal justice system—at least when critics were not silenced by mobs.[59]

In 1859 and 1860, Republicans used Hinton Helper's anti-slavery book *The Impending Crisis* as a campaign document in the North, and a number of Republican congressmen endorsed a proposed abridgement of the book and contributed funds for its printing.[60] Southerners who circulated the book were indicted, tried and convicted. In December 1859, a grand jury in Wilson County, North Carolina, branded *The Impending Crisis* treasonous to North Carolina and called on New York Republican Governor Edwin Morgan to deliver Republican endorsers of the book "to indictment and punishment," including himself.[61] Of course, no trial followed the indictment because the defendants were beyond the power of the court. Other Republican endorsers of Helper's allegedly incendiary book included John Bingham and others

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> adoption of the Federal Constitution. It is still as undivided and sovereign as it was when they were first emancipated from the dominion of the King and Parliament of Great Britain. In the exercise of that power, some of those States have made the circulation of such papers a capital crime; others have made it a felony . . . and perhaps there is no one among them which has not forbidden it under heavy penalties.

Id.

[58] *See* Curtis, *The 1859 Crisis*, *supra* note 47, at 1141–64.

[59] As the RALEIGH WEEKLY STANDARD announced, after a University of North Carolina chemistry professor was driven from the state after his support for the Republican presidential candidate John C. Fremont became public, "[W]e now say, after due consideration . . . that no man who is avowedly for John C. Fremont for President ought to be allowed to breathe the air or tread the soil of North Carolina." *Mr. Hedrick Once More*, RALEIGH WKLY. STANDARD, Nov. 5, 1856, at 1.

[60] Curtis, *The 1859 Crisis*, *supra* note 47, at 1143.

[61] See Governor Seward, Irrepressible Conflict, Speech (Oct. 25, 1858), *in Collection of Anti-Slavery Propaganda in the Oberlin College Library*, at 2 (Microfiche Reprint SLB 1255) (1964); *Text Book of Revolution*, N.Y. HERALD, Nov. 28, 1859, at 1; N.Y. WKLY. TRIB., Dec. 24, 31, 1859, *in* EARL SCHENCK MIERS, INTRODUCTION TO HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH 13 (1963).

who later sat on the Joint Committee that framed the Fourteenth Amendment.[62]

In these circumstances, opponents of slavery and, later, Republicans began arguing that free speech and press and other constitutional privileges were national rights that American citizens carried with them wherever they went—even to Raleigh, North Carolina, or Charleston, South Carolina. Southern laws suppressing political criticism of slavery were despotism, they argued, and violated American citizens' right or

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[62] *See* Curtis, *The 1859 Crisis*, *supra* note 47, at 1174. My work on the meaning of the Fourteenth Amendment has built on the work of those who have studied the question and the general background of slavery and civil liberties. Deeply researched studies on freedom of speech about slavery to which I am indebted include CLEMENT EATON, FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (1940), which focuses on events in the Southern states, RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860 (1972) and W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830–1860 (1968). For two fine studies that bear directly on the *Worth* case, see Clifton H. Johnson, *Abolitionist Missionary Activities in North Carolina*, 40 N.C. HIST. REV. 295, 295–301 (1963) and Noble J. Tolbert, *Daniel Worth: Tar Heel Abolitionist*, 39 N.C. HIST. REV. 284, 284–90 (1962).

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. See RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837–1860 (1976) for an excellent survey of the rise of the political antislavery movement. For a very important study of early antislavery legal thought, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977). Pioneering works on incorporation of the Bill of Rights in the Fourteenth Amendment are Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) and William Winslow Crosskey, *Charles Fairman, "Legislative History" and Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

My own work was heavily influenced by Crosskey and my understanding of the subject evolved over time. *See generally* Curtis, *A Reply to Professor Berger*, *supra* note 3; Curtis, *The Fourteenth Amendment*, *supra* note 3; Curtis, *Further Adventures*, *supra* note 3. 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 two important recent articles on incorporation, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) and Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). For a book that finds a strong case for incorporation of the Bill of Rights, but that reads the Fourteenth Amendment narrowly on other issues, see EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–69 (1990).

For important scholarship denying application of the Bill of Rights to the States under the Fourteenth Amendment, see generally RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989), NELSON, *supra* note 3, and Jonathan Lurie, *The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases, 1870–1890*, 28 AM. J. LEGAL HIST. 295 (1984). For an analysis close to that of Charles Fairman (finding that some "absolute" liberties like those in the Bill of Rights were protected, but not all), see generally James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985) and James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89 (1984). *See also* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE FOURTEENTH AMENDMENT (forthcoming).

"privilege" to free speech.[63] General searches for anti-slavery publications, compelling self-incrimination, etc., were equally affronts to the Constitution.

The Thirteenth, Fourteenth, Fifteenth and, later, the Nineteenth Amendments altered the constitutional plan in accordance with the liberty-equality blueprint, a progression that the institution of slavery had made impossible.[64] After the adoption of the Fourteenth Amendment, the question of what the Fourteenth Amendment meant moved to the Supreme Court. In the *Slaughter House Cases*[65] the Court said there was less to the Fourteenth Amendment than met the eye.

C. *Section One of the Fourteenth Amendment: A New Birth of Freedom?*

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[66]

There are well recognized methods of interpreting the Constitution.[67] We can look at the text, the plain or ordinary meaning of the words used. We can look at the text contextually to see how similar words are used elsewhere in the Constitution. We can delve into the history giving rise to the provision. We can look at prior precedent. We can explore the Constitution's overall structure, how it is to work as a whole—as an organism or a machine. Finally, we can consider wise public policy, including moral and ethical concerns.

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[63] *See* Curtis, *The 1859 Crisis*, *supra* note 47, at 1147–59.

[64] For a careful analysis of the post-Civil War constitutional amendments in light of the original Constitution and federalism, see generally Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 PUBLIUS 69 (1992) and Michael P. Zuckert, *Completing the Constitution, The Thirteenth Amendment*, 4 CONST. COMMENTARIES 259 (1987). *See also* Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENTARY 123 (1986). For a very fine exposition of the two approaches described here, see Walter F. Murphy, *supra* note 54, at 17–20.

[65] 83 U.S. 36 (1872).

[66] U.S. CONST. amend XIV, § 1.

[67] My colleague, Professor Wilson Parker, first introduced me to these methods of legal

There is, of course, little consensus about the weight to be given to text, structure, history and precedent when they point in different directions. When the tests point in the same direction, the case for a particular interpretation is strong. Each approach can be seen as a vector, and the correct decision as the resultant force. The incorporation issue is an example of how these methods of analysis can be used. I will start with an argument for application of constitutional guarantees of liberty to the states.

1. Textual Analysis

a. *The Amendment as Explicated by a Modern Dictionary*

After making persons born in the nation citizens, the Fourteenth Amendment provides "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[68] Pretty clearly, the "no state shall" words are designed to limit what states can do. The semi-sovereign state is obviously to be limited in some respect. The Fourteenth Amendment says states may not "abridge." According to *Webster's Dictionary*, "abridge" means "reduce . . . lessen, diminish, or curtail."[69] So the states are to face new restrictions: they cannot reduce, lessen, diminish or curtail "privileges or immunities of citizens of the United States."[70] "Privilege," according to *Webster's Dictionary*, is "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."[71] This seems to fit. The restricted group seems to be "citizens of the United States." The rights common to all citizens of the United States included at least all the privileges and immunities in the Bill of Rights, together with those set out elsewhere, such as Hamilton's virtual bill of rights in the original Constitution—protection against ex post facto laws, bills of attainder, the right of habeas corpus, and the limited definition of treason, etc.

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analysis when I began teaching Constitutional Law. At that time I began to apply them to teach students about the Fourteenth Amendment incorporation debate. For an elegant use of this type of analysis as a method of understanding the incorporation issue, see Amar, *supra* note 62. I am indebted to Professor Amar's article as well as to Wilson Parker. For a discussion of these methods, see generally PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) and CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[68] U.S. CONST. amend. XIV, § 1.

[69] RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 49 (1991).

[70] U.S. CONST. amend. XIV, § 1.

[71] RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1074 (1991).

So a textual analysis seems simple enough. Privileges encompass rights and immunities, and the rights described are those common to all citizens of the United States, including at least those set out in the Constitution. (In the case of free speech and press the privileges or immunities have a rights dimension and a lack of power dimension—lack of power to pass laws abridging free speech or press.) Whatever may have been the case before (and the provision suggests that a change was intended), the Privileges or Immunities Clause commands that no state can lessen, diminish or impair these rights, privileges or immunities.[72]

This reading assumes the existence of basic Anglo-American liberties declared, but not simply created, by the Constitution. The original Constitution and Bill of Rights recognized and declared these liberties and as a matter of positive law prohibited government from abridging them.[73] Initially, some of the positive prohibitions were aimed only at the federal government (as was the case with the Bill of Rights), some only at the states and some at both the states and the federal government (as was the case with ex post facto laws).[74]

The prohibitions have a reflex character.[75] The Fourth Amendment declaration that the right of the people to be free from unreasonable searches and seizures shall not be violated, for example, both recognizes or declares a right and contains a positive prohibition—originally directed only at the federal government. A correlative of the

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[72] *See* Curtis, *A Reply to Professor Berger*, *supra* note 3, at 48; Curtis, *Further Adventures*, *supra* note 3, at 89–91 (1982). The point that the most natural reading of the words "privileges or immunities" is that they are equivalent to rights (including those in the Bill of Rights) has often been made. *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 2; Richard Aynes, *Constricting the Law of Freedom*, 70 CHI.-KENT L. REV. 627, 631 n.23 (citing Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. U. L. REV. 536, 540 (1891) (noting that first eight amendments are privileges and immunities) and Russell W. Galloway, *Slaughtering* Slaughter-House, 7 CAL. L. REV. 16, 18 (1987)); Michael Conant, *Anti-Monopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter-House Cases *Re-Examined*, 31 EMORY L.J. 785, 819 (1982); Crosskey, *supra* note 62, at 10; *see also* Amar, *supra* note 62 (offering particularly elegant textual analysis).

[73] The Resolution of Congress March 4, 1789 transmitting the proposed amendments to the states described them as "declaratory and restrictive clauses." THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE 20 (1991); *see* Curtis, NO STATE SHALL ABRIDGE, *supra* note 3, at 24, 91; Amar, *supra* note 62, at 1205–12; *cf.* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 37 (1954–55).

[74] U.S. CONST. art. I, §§ 9–10.

[75] *See* Patterson v. Colorado, 205 U.S. 454, 464 (1907) (Harlan, J., dissenting). "[T]he First Amendment, although in form prohibitory, is to be regarded as having a reflex character and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship . . . ." *Id.* (citing Civil Rights Cases, 109 U.S. 3, 20 (1883)).

right to be free from unreasonable searches and seizures is the government's duty not to search and seize unreasonably. Although the Fourth Amendment recognized a "right of the people," it did not apply a correlative duty to the states. The declaration that Congress shall make no law abridging freedom of speech, freedom of the press and the right of the people to assemble and petition, both assumes or declares rights (freedom of speech and press and the right of the people to petition) and specifically declares that Congress lacks power to abridge them.

One could, and some do, argue that the First Amendment is merely a congressional disability.[76] The result, when it comes to incorporating the Amendment as a limit on the states, is that there is nothing to incorporate since states could hardly force Congress to pass a law abridging freedom of the press.[77] This argument focuses merely on the denial of power and ignores the recognition of an American right to free speech, press and petition that the denial of power was designed to secure. It also ignores the possibility that lack of power to pass laws directly aimed at communication concededly within freedom of speech and press—such as political speech—can be seen either as a privilege or an immunity.

The purpose of the First Amendment, of course, was to protect freedom of speech, assembly, petition and of the press. Freedom of the press was, as the Continental Congress recognized in 1774, a "right" that promoted the communication of thoughts among subjects and checked abuses of governmental power.[78] The colonists drew on the Radical Whig tradition. *Cato's Letters* recognized free speech and press as "great Bulwark[s] of Liberty."[79]

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[76] *See* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1589 (1995). A very similar argument was expressed in 1866 by Democratic opponents of the Civil Rights Bill to explain why the bill could not be justified as enforcing the Bill of Rights. As to the Bill of Rights, Representative Michael Kerr explained, "[t]hey are not guarantees at all, except to protect the States against the usurpations of the Congress and the General Government." CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866) (statement of Rep. Michael Kerr). For a thoughtful discussion of incorporation and the religion clauses, see Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) and Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

[77] Bybee, *supra* note 76, at 1589.

[78] Address to the Inhabitants of Quebec (1774) *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 223 (Bernard Schwartz ed., 1971) [hereinafter 1 THE BILL OF RIGHTS].

[79] JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL & RELIGIOUS 101 (Da Capo, 6th ed. 1971) (1755).

The American constitutional arrangement recognized the privileges *and* made federalist provisions for their protection. The First Amendment protected the privileges in the case of federal action. As against state action, protection for the constitutionally recognized American privileges of "freedom of speech and of the press," the right of the people to assemble and petition, and free exercise of religion at first depended on state laws and constitutions.

In introducing the Bill of Rights in the first Congress, Congressman James Madison proposed that no state shall violate the equal right of conscience or freedom of the press. Every government, he insisted, "should be disarmed of powers which trench upon those particular rights."[80] Madison thought of the rights as existing; he did not propose creating a right of free press against the states. He saw the proposal as providing "security" for the rights. As to the argument that such a proposal was unnecessary, because some states protected the right to free press, Madison responded that there was no good argument against a "double security," and he implored his colleagues to join him in "obtaining the security" for these rights.[81] Madison's perspective was consistent with the American understanding that governments existed to secure natural rights. In the end, the Senate did not concur in Madison's plan for explicit limits on the states.[82] No security was provided to protect the right of free speech and press from state action. But the basic recognition of the existence of Americans' "invaluable privileges" or rights of freedom of religion, assembly, petition, speech and of the press remained.[83]

The first Congress, in transmitting the Bill of Rights to the people of the states, described the amendments as "declaratory and restrictive clauses."[84] As to the First Amendment, it declared an American right of free speech, press, assembly, petition and free exercise of religion but only restricted or provided security against federal action. Although legally unenforceable against the states, the declaration of Americans' First Amendment rights was not meaningless. It provided a rallying point for the people against state and federal abuses of power. The guarantees functioned in this way in the crusade against slavery.

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[80] 2 THE BILL OF RIGHTS, *supra* note 22, at 1033.

[81] *Id.*

[82] *See id.* at 1145–46.

[83] *Id.* at 1033.

[84] COMMISSION ON THE BICENTENNIAL OF THE CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE 20 (1991); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154 n.109 (1991).

Suppose the state of Virginia had first repealed its constitutional guarantees for free speech and press and then had made it a crime to advocate the election of anyone except incumbents or their chosen successors. Can anyone doubt that this action would have been protested as a violation of the right of Americans to freedom of speech and of the press? Would the answer that Americans had no such rights have been regarded as a satisfactory answer? It is true that the privilege would have been legally unenforceable, and the idea of an unenforceable right or privilege seems a contradiction in terms. But it is a mistake to assume that Americans of the 18th and 19th centuries shared our positivism. James Madison, for example, thought the Bill of Rights secured natural rights.[85] Free speech and press are examples of such rights.

In 1814 Thomas Jefferson wrote about a state court blasphemy prosecution for the sale of a book: "I am really mortified to be told that, *in the United States of America*, a fact like this can become a subject of inquiry, and of criminal inquiry too, as an offense against religion."[86] The prosecuting state was not Jefferson's Virginia. Jefferson did not contend that the prosecution was barred by the First Amendment, but he asked, "Is this then our freedom of religion?"[87] As his italicized "United States of America" and his reference to "our freedom of religion" indicate, for Jefferson there was a freedom of religion for Americans quite distinct from the question of whether state courts or state law respected it. The privilege was distinct from the remedy for its violation.[88]

In this light, as a textual matter, the Privileges or Immunities Clause of the Fourteenth Amendment is clear and simple. The American privileges of free speech, press, petition, assembly and religion (among others) would henceforth be legally protected, even if states attempted to abrogate them. The years before the Civil War had proved that the previous constitutional arrangement for protecting the privileges was inadequate. The Fourteenth Amendment did not create new

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[85] *Cf.*, 2 THE BILL OF RIGHTS, *supra* note 22, at 1029. One might argue, to the contrary of the understanding of "declaratory" set out above, that the absence of federal power over speech or press was all that was being declared.

[86] Letter from Thomas Jefferson to N.G. Dufief (Apr. 19, 1814), *in* THOMAS JEFFERSON, WRITINGS 1334 (Library of America ed., 1984).

[87] *Id.*

[88] On some occasions at least, Jefferson had a less protective view of libel of public officials and thought that while no federal remedy existed for such defamation, a remedy was available at state law. *See* LEONARD LEVY, THE EMERGENCE OF A FREE PRESS 340–41 (1985).

privileges. It created a new method of protecting old and inadequately secured privileges.

The use of the words "privileges" and "immunities" as equivalent to "rights in the Bill of Rights" and equivalent to denials of power is so natural and reasonable that the Supreme Court has used the phrase this way itself. It has done so even as it held that states could abridge some supposedly non-"fundamental" rights—or "privileges or immunities" as the Court described them—in the Bill of Rights.

For example, some of the *privileges or immunities* in the Bill of Rights, Justice Cardozo gravely explained in *Palko v. Connecticut*,[89] were so fundamental that states had to obey them under the *Due Process Clause*. Other privileges or immunities—at that time including jury trial, double jeopardy and the privilege against self incrimination—were less important, so states could disregard them.[90]

Raoul Berger has argued that a plain language argument is meaningless because we deal with legal provisions, not "street terms."[91] If one takes the idea of popular sovereignty seriously, this argument cannot stand. The common understanding of words by ordinary people should be at least part of what counts, for it is their will, reflected by framers and ratifiers, that ultimately legitimizes the Constitution.

Over the years I have asked a number of people who have not had a legal education what the words "privileges or immunities" mean in Section 1 of the Fourteenth Amendment. Almost all say that the privileges of citizens of the United States that no state can abridge would include rights in the Bill of Rights. Textual analysis suggests that many Bill of Rights guarantees are also protected from state action by the Due Process Clause.

Many guarantees of the Bill of Rights are process guarantees. They tell what sort of process is "due" or required. Under a textual analysis, the criminal procedure guarantees of the Bill of Rights (confrontation, grand jury indictment, compulsory process to obtain witnesses, public trial) are process guarantees that would be protected for all persons under the Due Process Clause, as well as for all citizens under the Privileges or Immunities Clause.[92]

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[89] 302 U.S. 319 (1937).

[90] *See id.* at 326.

[91] Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment, A Nine Lived Cat*, 42 OHIO ST. L.J. 435, 436–37 (1981).

[92] *See* Crosskey, *supra* note 62, at 6.

b. *Historical Linguistics*

"Well," you may say, "you are using a dictionary copyrighted in 1991 to explicate a provision written in 1868. This, to say the least, is a bit of an anachronism." Granted, but an older dictionary yields similar results.[93] But there is another answer, what Michael Conant calls historic linguistics.[94]

Consider the great documents in the history of liberty. From the Levellers, through the Declarations of the Continental Congress, through debates on whether the Constitution should have a bill of rights, through the 1830s and up to the Civil War and during Reconstruction debates, the word "privilege" or the words "privileges or immunities" often appear as synonyms for rights of the sort found in our Federal Bill of Rights. In the interest of time, I will list only three of a great many examples. William Blackstone uses the words in this way.[95] James Madison employs the word "privilege" this way in the debate over the Bill of Rights: "The freedom of the press and rights of conscience" are "choicest privileges of the people."[96] Later he describes the Bill of Rights as "securing the rights and privileges of the people."[97] When Madison, in the debate over the Federal Bill of Rights, insists that rights to free press, freedom of conscience, and to jury trial should limit the states, he refers to these rights as "invaluable privileges."[98] In 1864 Congressman James Wilson, chair of the House Judiciary Committee, complained that slavery had violated federal constitutional rights. Among other outrages, it had "denied the privilege of free discussion."[99] The historic usage is congruent with the contemporary usage.

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[93] An 1851 law dictionary included, among other definitions of privilege, "a right peculiar to some individual or body." 2 A NEW LAW DICTIONARY AND GLOSSARY 828 (1851).

[94] Conant, *Anti-monopoly*, *supra* note 72; *see also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 64–65 (exploring use by William Penn and Americans of the Revolutionary generation); *id.* at 75–76 (exploring use of privileges and immunities by Blackstone to encompass liberties set out in English antecedents of American Bill of Rights).

[95] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 74–76. For more use of historical linguistics, see *id.* at 64–65. For application of the same methods to the Civil Rights Act, see, for example, *id.* at 71–77.

[96] 2 THE BILL OF RIGHTS, *supra* note 22, at 1028.

[97] *Id.* at 1096.

[98] *Id.* at 1033.

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

2. Contextual Analysis

As used here, a contextual analysis looks at the use of the same or similar words elsewhere in the Constitution to illuminate how they are used in the clause under consideration. When the Constitution seeks to prevent states from abridging rights or privileges or immunities, how does it do so elsewhere? It uses the "No state shall" form in Article I, Section 10. "No state shall . . . pass any ex post facto law . . . ." So the Fourteenth Amendment uses the very same language used by the original Constitution to set limits on the states, and as Akhil Amar has noted, uses the word "abridge" as used in the First Amendment, this time applying it to states.[100]

3. Precedent

The precedents of *Barron v. Baltimore*[101] and *Dred Scott v. Sandford*[102] provide an understanding of the Fourteenth Amendment's purposes. *Barron* held that the guarantees of the Bill of Rights did not limit the states and that had the Framers intended such a limit they would have prefaced the guarantees with the "no state shall" form. John Bingham, primary drafter of Section 1, later explained that *Barron* provided his rationale and blueprint for using the "no state shall" form.[103] *Dred Scott* held that all Americans of African origin were tainted by slavery and could not be citizens of the United States. They were entitled to none of the Constitution's rights or privileges. The drafters designed the provisions that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside" and that "[n]o state shall make or enforce any law abridging the privileges or immunities of citizens of the United States" to overrule both aspects of *Dred Scott*—that blacks could not be citizens and were entitled to no constitutional privileges or rights—and also to overrule *Barron's* holding that the guarantees of the Bill of Rights did not limit the states.[104]

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[100] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 161; Amar, *supra* note 62, at 1218, 1219–20.

[101] 32 U.S. 243 (1833).

[102] 60 U.S. 393 (1856).

[103] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 161.

[104] *See* Crosskey, *supra* note 62, at 4–6.

4. History: Liberty and Equality

a. *Bill of Rights Denials and Racial Discrimination*

Two basic themes dominate the history of the Fourteenth Amendment, and the themes are closely intertwined. The first was the problem of slavery and the status of the newly freed slaves. The second was protection for civil liberties of American citizens. Slaves were not entitled to guarantees of federal or state bills of rights. Indeed, according to Chief Justice Taney's opinion in the *Dred Scott* case, even free blacks suffered from the taint of slavery and could not be citizens of the United States. Since all constitutional privileges, Taney said, including rights in the Bill of Rights, belonged only to citizens, free blacks received none of the protections for liberty set out in the Constitution.[105]

Parallel to the citizenship, liberty, and equality problems of blacks were the attacks on the civil liberties of whites who opposed slavery. As we have seen, Southern state laws in effect made criticism of slavery a crime. Republicans could not campaign in the South, and a Republican campaign book produced indictments for Southerners who circulated it and a North Carolina indictment for some Northern Republicans who endorsed it. Endorsers of the book included over sixty Republican congressmen. Among this group were members of the Joint Committee who later reported the Fourteenth Amendment and, notably, John Bingham, primary author of Section 1.[106]

Criminal procedure protections of the Bill of Rights were important to Republicans because they had been targets of contemplated Southern prosecutions. In this context, the suggestion that Republicans who passed the Fourteenth Amendment planned to return liberties like free speech and press, protection against unreasonable searches and seizures, the privilege against self-incrimination, or the immunity against cruel and unusual punishments to the unfettered discretion of the semi-sovereign states appears very unlikely. It is particularly unlikely since those Republicans who framed the Fourteenth Amendment explicitly recognized the obvious—that state constitutional guarantees for these rights could be changed from year to year.[107]

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[105] Dred Scott, 60 U.S. (19 How.) 393 (1856).

[106] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 27–56; Curtis, *The 1859 Crisis*, *supra* note 47, at 1143–45.

[107] Senator Howard noted:

> [The first eight amendments] do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying

Furthermore, at the time the Fourteenth Amendment was proposed, Congress had not required black suffrage, and it seemed that Southern states might be readmitted after ratifying the Fourteenth Amendment. If so, Republicans recognized, Republican control of Southern state governments would be doubtful at best. Guarantees of liberty are always of crucial importance to those not in power. Many Republicans suggested that under a proper interpretation, the Constitution prohibited states from violating guarantees of the Bill of Rights and other constitutional privileges even prior to the passage of the Fourteenth Amendment, and few, if any, challenged this interpretation.[108]

After the Civil War, Republicans in Congress complained that the South was repeating its pre-Civil War assault on individual rights, including free speech.[109] Both the prototype of the Fourteenth Amend-

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> out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard); *see* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 88–99; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866) (statement of Rep. Hotchkiss) (describing need for constitutional amendment limiting states and not merely granting Congress legislative power).

Some Republicans did not embrace a uniformly libertarian interpretation of "freedom of speech." During the Civil War Lincoln did exile a Democratic politician for making an anti-war, anti-draft, anti-black speech, and in the immediate aftermath of the war, for example, General Grant closed the *Richmond Enquirer* for uttering disloyal sentiments. Lincoln insisted that wartime was different and that such measures would not persist in peacetime. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 597–99 (1988); *see also Ex Parte* Milligan, 71 U.S. 2 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence) (quoting testimony of Major General Alfred H. Terry); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 40.

[108] *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at ch. 2.

[109] Petitions presented by lawmakers from citizens demanded protection for rights of speech, press, assembly, and the right to bear arms. *See* CONG. GLOBE, 39th Cong., 1st Sess. 337 (1866) (statement of Sen. Sumner); *id.* at 494 (statement of Sen. Howard); *see also id.* at 462 (statement of Rep. Baker) ("[T]he American citizen shall no more be degraded . . . by being required to surrender his conscience as a peace-offering to . . . an . . . aristocracy of class."); *id.* at 1617 (statement of Rep. Moulton) (complaining of outrages against Union men and freedmen—"[t]here is neither freedom of speech, of the press, or protection to life, liberty, or property . . . ."); *id.* at 1629 (statement of Rep. Hart) (insisting on need to ensure that rebel states have government that respects guarantees in Bill of Rights); *id.* at 1837 (statement of Rep. Clarke) (proclaiming need for "irreversible guarantees" of civil liberty including rights recognized and secured by the Constitution). Representative Ward complained that freedom of speech in the South, as of old, was a mockery. *Id.* at 783 (statement of Rep. Ward). For a fuller review, see CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 34–91. Professor Fairman seems (grudgingly to be sure) to

ment (which gave Congress power to secure privileges and immunities and equal protection) and the final version (which contained an explicit limit on state power) were justified as keeping states within their proper "orbits." The final version of the Fourteenth Amendment protected individual rights and secured equality.[110]

Senator Howard spoke for the Joint Committee that had produced the amendment. He clearly said that the privileges and immunities of citizens of the United States would include the rights in the Federal Bill of Rights, "the first eight amendments of the Constitution," as he put it.[111] Howard explained that the problem was that "these rights"—most of which he read or paraphrased from the Federal Bill of Rights—did not limit state legislation. States could violate the rights without any restraint "except by their own constitutions which may be changed from year to year."[112] The great object of Section 1 was to require the states "at all times to respect these great fundamental guarantees."[113] Congressman Bingham wrote the crucial words of Section 1. He explained that it would allow Congress to protect by national law the privileges and immunities of citizens and the inborn rights of persons when the same were denied or abridged by any state, and he gave the imposition of cruel and unusual punishments as an example of a violation of the privileges of the citizen showing the need for the amendment.[114]

The main author of Section 1, then, and the senator who presented it to the Senate on behalf of the Joint Committee, explicitly said it was designed to require states to respect the liberties of American citizens, including guarantees of the Bill of Rights, such as freedom of speech.[115] Protection for "all rights of citizens" and for liberty of speech and press were often mentioned in the congressional election of 1866, a sort of national referendum on the congressional plan for Reconstruction, of which the Fourteenth Amendment was a centerpiece.[116]

In the South, the newly freed slaves faced laws and ordinances restricting their liberties—the Black Codes. They were denied the

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acknowledge that freedom of speech was protected by the Fourteenth Amendment. Fairman opts for selective incorporation in accordance with the *Palko* approach. Fairman, *The Fourteenth Amendment*, *supra* note 62.

[110] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 69.

[111] CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard).

[112] *Id.* at 2766 (statement of Sen. Howard).

[113] *Id.* (statement of Sen. Howard).

[114] *Id.* at 2542 (statement of Rep. Bingham).

[115] *Id.* at 2765–66 (statement of Sen Howard); *id.* at 2542–43 (statement of Rep. Bingham); *see also* CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

[116] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 131–53.

rights to bear arms, to hold public meetings without prior approval, to hold unauthorized religious services, etc. For violation of these provisions they faced cruel punishments.[117] In addition, their freedom of movement was limited and they were often denied the rights to testify in cases to which whites were a party, to own property, to contract, etc.[118] Both Unionists and blacks also faced private violence with political purposes, just as opponents of slavery had faced private violence before the Civil War. Indeed, many Republican complaints about violations of free speech involved mob action, not state action. While the Black Codes have been cited as denying blacks equality, actually they typically denied both liberty and equality, and many of them denied Americans of African descent liberties referred to in the Bill of Rights.

The Civil Rights Act of 1866 has figured prominently in discussions of the meaning of the Fourteenth Amendment and it figures prominently in arguments against construing the Amendment as a charter of national privileges that no state can abridge. It is also related to claims for protection of economic liberty under the Fourteenth Amendment. For those reasons, sections which follow will discuss the Civil Rights Bill, arguments for it and its relation to the Fourteenth Amendment. Then I will consider arguments—based on structure and ethical considerations—for requiring states to obey fundamental privileges such as those in the Bill of Rights. In the argument against such application, I will look again at the debate surrounding the Civil Rights Act. The discussion of the Civil Rights Act took place before final debates on the Fourteenth Amendment and shows uncertainty on a number of points. In general, it is consistent with reading the amendment as encompassing privileges of citizens of the United States including those in the Bill of Rights. When understood in terms of Republican ideas, the Civil Rights Act, like the Fourteenth Amendment itself, supports national guarantees for both liberty and equality.

b. *The Civil Rights Act of 1866*

One Republican response to the problem of the "Black Codes" was the Civil Rights Act of 1866. After declaring persons born in the country to be citizens, it continued:

> Such citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and

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[117] *See* 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 279–81 (Walter L. Fleming ed., 1906).
[118] *Id.*

> enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.*[119]

One problem, of course, was exactly where in the Constitution Congress found the power to pass this statute. It was a major departure from the semi-sovereign state paradigm. Many Republicans argued that allegiance and protection were reciprocal. Just as the nation could claim the allegiance (and lives if necessary) of citizens, it had a duty to protect citizens' rights.[120]

One more textual source of power was the Thirteenth Amendment, seen by many Republicans as securing liberty to all citizens of the United States and allowing Congress to remove badges and incidents of slavery.[121] Democrats countered that many Northern states, though they banned slavery, had discriminated against free blacks. The Chairman of the House Judiciary Committee and others suggested that the power to pass the law could be found in congressional power to enforce the Bill of Rights, especially the Due Process Clause. Congressman James Wilson, Congressman William Lawrence, Senator Lyman Trumbull and others also pointed to the Privileges and Immunities Clause of Article IV, Section 2, but were met with the argument that it applied only to give out-of-state visitors the rights a state *generally* accorded to its own citizens.[122]

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[119] Act of April 9, 1866, 14 Stat. 27 (emphasis added).

[120] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson). *See generally* Richard Aynes, *Constitutional Responsibility and the Right Not to Be a Victim*, 11 PEPP. L. REV. 63, 75–84 (1984).

[121] *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

[122] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 71–81; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866) (statement of Rep. Thayer) (justifying Civil Rights Bill under power of Congress to enforce Bill of Rights, particularly Fifth Amendment); *id.* at 1833 (statement of Rep. Lawrence) (asserting that Civil Rights Bill's rights are incidental to Fifth Amendment right to due process and suggesting Fifth Amendment as source of power to pass Civil Rights Bill); *id.* at 1291 (statement of Rep. Bingham) (characterizing Civil Rights Bill as attempt to enforce guarantees of Bill of Rights but going on to assert that constitutional amendment is necessary for that purpose); *id.* at 1294 (statement of Rep. Wilson) (justifying Civil Rights Bill by power of Congress to enforce Bill of Rights); *id.* at 1270 (statement of Rep. Kerr) (denying power of Congress to pass Civil Rights Bill under its power to enforce Bill of Rights); *id.* at 474–75 (statement of Sen. Trumbull) (citing Article IV in conjunction with liberty protected by Thirteenth Amendment and Civil Rights Bill); *id.* at 1117–18 (statement of Rep. Wilson) (characterizing Article IV, Section 2 as guarantee of right to liberty); *id.* at 1835–36 (statement of Rep. Lawrence) (same); *id.* at 1269 (statement of Rep. Kerr) (denying power to pass Civil Rights Bill under Article IV, Section 2).

John Bingham pointed out that *Barron* held the Bill of Rights amendments did not limit the states nor, he insisted, did the Constitution provide for congressional enforcement of the Bill of Rights against state action. He insisted that a constitutional amendment was needed to allow Congress to enforce the Bill of Rights by passing the Civil Rights Bill.[123] Congress passed the Civil Rights Act, but to be sure about its power it also passed Bingham's protections in Section 1 and granted congressional power to enforce them in Section 5. It then reenacted the Civil Rights Bill after the ratification of the Fourteenth Amendment.[124]

c. *The Response of the Fourteenth Amendment to Threats to Equality*

The Fourteenth Amendment dealt with the problem of equality for Americans of African descent in two ways. Through the Equal Protection Clause, it prohibited both many racially discriminatory laws and racially discriminatory enforcement, as Senator Howard noted.[125] By making blacks citizens and guaranteeing all American citizens a bundle of fundamental rights under the Privileges or Immunities Clause, the Fourteenth Amendment ensured equality as to these rights. (If every citizen gets the rights, then they are equal in that respect). The guarantee of basic rights also provided a minimum standard of rights for all Americans. In addition to protecting absolute rights, some Republicans may have also read the original Privileges or Immunities Clause as overlapping with the Equal Protection Clause—securing some measure of equality at least with reference to fundamental interests under state law.[126]

As to the application of "absolute" (used here as opposed to equal but repealable) privileges of American citizens (including those in the Bill of Rights) as a limit on state action, statements by leading Republicans are relatively clear and crisp.[127] As to the nature of federal protection of rights other than federal constitutional privileges or the

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[123] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1093, 1291 (1866) (statement of Rep. Bingham) ("I am with him in an earnest desire to have the bill of rights in your Constitution enforced everywhere."); *id.* at 1292 (statement of Rep. Bingham) (asserting lack of Congressional power to pass the Civil Rights Bill—"I have advocated here an amendment which would arm Congress with power to . . . punish all violations by State officers of the bill of rights . . . .").

[124] *See* Enforcement Act of 1870, ch. 114, § 18 (1870).

[125] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

[126] *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1833–37 (1866) (statement of Rep. Lawrence) (interpreting Article IV, Section 2 prior to passage of Fourteenth Amendment).

[127] At least this is so once one recognizes that many did not accept Supreme Court pronouncements as a correct statement of the law.

effect of those privileges on state law rights to hold property, contract and testify, discussion in the Thirty-Ninth Congress is much less clear. The problems revolve around rights that had been traditionally protected by state law and that were protected against discrimination by the Civil Rights Act of 1866, such as the rights to contract and to testify.

The same areas of relatively greater clarity and uncertainty apply to the text of the Privileges or Immunities Clause. To read it as protecting existing "absolute" constitutional rights or privileges of American citizens that states will no longer be permitted to abridge is a relatively straightforward reading. To read it only (or partly) as a protection of rights that states may fully eliminate is, as a purely textual matter, less compelling, except to the extent that the clause incorporates other constitutional privileges or structural understandings that produce this effect. I will consider the conundrum of the Privileges or Immunities Clause of the Fourteenth Amendment and state law rights in a transitional section between arguments for and arguments against application of absolute national privileges to the states.

5. Structure

Arguments from structure focus on a holistic analysis of the Constitution—on how the Constitution must be construed to fulfill its overall design and purpose.[128] As we have seen, two models of constitutional analysis rose out of the struggle over slavery. One was the model of the constitutional compact designed to protect slavery. The concept of the Constitution as a compact securing slavery required strong, semi-sovereign states that were able to protect the peculiar institution from political criticism. The other was a liberty model. Federalism was an important value in the liberty model because it contributed to liberty.[129] But under the liberty model, semi-sovereign states needed to be restrained to keep them from destroying fundamental rights, like freedom of speech and freedom from unreasonable searches and seizures.[130]

In accordance with the Declaration, a basic purpose of government was to secure people their rights to life, liberty and the pursuit

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[128] *See generally* BLACK, *supra* note 67 (discussing structure and relationship as methods of judicial interpretation). For a thoughtful structural analysis of the problems raised by the post Civil War amendments, see Murphy, *supra* note 54.

[129] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (statement of Rep. Bingham); *id.* at 1832–33 (statement of Rep. Lawrence); *id.* at 1088 (statement of Rep. Woodbridge); *id.* at app. 99 (statement of Rep. Yates); *id.* app. at 257 (statement of Rep. Baker); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 42.

[130] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 42.

of happiness and their right to govern themselves. Keeping state government from destroying these values was therefore consistent with the proper role of state governments and entirely consistent with federalism. It did not undermine federalism to say that states could not do what no government should do.[131]

A basic purpose of the Constitution was to secure republican, or representative, government. The Constitution specifically provides that the United States "shall guarantee to every State in this Union a Republican Form of Government."[132] Laws like those of the Southern states before the Civil War, which had made it a crime to advocate peaceful legal change, were flatly inconsistent with the idea of republican government. Free speech is the system by which the people consider issues, set the political agenda, reach consensus and decide public policy. It is the essential means by which popular sovereignty is effected. (Many Southerners, of course, read the constitutional guarantees for slavery as an implicit limit on the republican government guarantee.)

The criminal procedure guarantees found in the Bill of Rights are also safeguards for republican government. This is so because of the unfortunate tendency of those in power to use the criminal justice system in an attempt to crush their political enemies—as was seen in the case of the Levellers, the Sedition Act prosecutions and the prosecutions for anti-slavery speech in the South before the Civil War. More recently, the Watergate tapes showed that President Nixon had planned prosecutions for his political enemies.[133] The motive for refusing to apply the Bill of Rights and broader, vaguer liberties to the states was also structural: a concern to preserve a version of federalism more like the sort which existed before the Civil War.

6. Ethical Considerations

The Declaration of Independence appealed both to equality and to basic rights. Indeed, protection of basic rights is essential for a functioning representative government and to preserve human dig-

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[131] *See id.* at 41.

[132] U.S. CONST. art. IV, § 4.

[133] J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 490 (1976); JONATHAN SHELL, THE TIME OF ILLUSION 188–92 (1975). It is worth recalling how we learned of a Nixon White House burglary of Daniel Ellsberg's psychiatrist's office—a burglary designed to get information to defame Ellsberg in the press so that he could be denied trial by an impartial jury—all because Ellsberg let the public know what was in the Pentagon papers. We learned about it, at least in part, because of the exclusionary rule. *See* PETER SCHRAG, THE TEST OF LOYALTY: DANIEL ELLSBERG AND THE RITUALS OF SECRET GOVERNMENT 329, 336 (1974).

nity. The states' ability to eliminate such rights altogether for American citizens (and the nation's inability to do anything about it) contradicted the evolving ethical premise of the American nation.

D. *The Conundrum of State Law Rights: What Was the Extent and Nature of Protection for These Rights Under the Privileges or Immunities Clause of the Fourteenth Amendment? More on the Civil Rights Act.*

1. In General

At this point it is useful to return to a detailed discussion of the Civil Rights Act. The Act is the focus of many arguments against protection for absolute rights under the Fourteenth Amendment and for a heightened federal protection for economic interests. The discussion that follows is a natural transition between arguments for and against application of absolute privileges as a limit on state power.

The nature of protection for state law rights of property and contract under the Privileges or Immunities Clause of the Fourteenth Amendment—as distinguished from the nature of the protection for such rights under the Civil Rights Act or under the Equal Protection Clause—is a difficult question. Typically, scholars who have attempted to answer it have attempted to do so by looking at the Civil Rights Act and the debates surrounding it, an act whose text and history are somewhat different from Section 1 of the Fourteenth Amendment read as a whole.

Many assume a correspondence between all the clauses of Section 1 of the Fourteenth Amendment, on one hand, and the Civil Rights Bill, on the other. They then attempt to move from that correspondence to a full understanding of *one* of Section 1's four clauses.

In reading what follows the reader should recall that many quoted discussions are about the Civil Rights Bill, not the Privileges or Immunities Clause of the Fourteenth Amendment. The thesis advanced here is simply that while most Republicans believed that racial discrimination in certain rights traditionally accorded by state law was not permissible, the pre-Fourteenth Amendment basis for this conclusion and its relation to the subsequently enacted clause that protected privileges or immunities of citizens of the United States is a matter of considerable confusion. And this is so even though it is relatively clear that leading Republicans believed that American citizens enjoyed "absolute" rights including those in the Bill of Rights, and that these rights would be among the privileges or immunities of citizens of the United States which no state may abridge.

From a review of the Civil Rights Bill debate I will conclude that Republicans believed in "absolute" rights that states should obey; that they believed that racial discrimination in rights such as the right to testify and to own property violated rights of American citizens of African descent; and that they wished to protect a large role for the states on matters like property, contract and testimony—provided that racial, caste or similar discrimination would not be allowed. Republican understanding of the relation of the Privileges or Immunities Clause of Article IV to contract and property rights of persons who were residents of a state is not clear. Many later read the Equal Protection Clause to outlaw racial and similar discrimination—including discrimination in substantive rights such as the right to hold property. Finally, many were entirely unwilling to totally federalize questions such as the right to hold property or to make contracts. For all these reasons, I conclude that locating the protection against racial and similar discrimination as to substantive rights under state law in the Equal Protection Clause, as the court has done, makes a good bit of sense and there is little reason to switch anti-discrimination analysis to the Privileges or Immunities Clause of the Fourteenth Amendment. I also conclude that while there is some support for a federal right to hold property, testify, etc. in the debates, federalization of state property or contract law was not supported by many who voted for the Fourteenth Amendment. For many leading sponsors of the Fourteenth Amendment, the equality to be guaranteed was limited, in the same sense that it did not inhibit broad state power to classify on what today we see as non-suspect grounds.

While clear and crisp statements by a number of leading Republicans indicated that states were obligated to respect fundamental absolute privileges of American citizens, including those in the Bill of Rights, the discussion is less clear as to the breadth of those protected rights (beyond, for example, liberties explicit in the constitutional text). The discussion is also less clear about the impact of the recognition of federally secured rights on federalism. To the extent that a limited group of rights was secured, restriction of state power would be correspondingly limited. To the extent that the Constitution directly guaranteed citizens the rights to life, liberty and property and these rights were both broadly interpreted and interpreted as "absolute," then Congress might essentially eliminate state power with preempting federal laws. (There was no Republican consensus in favor of such an approach.) John Bingham, for example, read an implicit guarantee of equal protection into the Due Process Clause but concluded that the equality required was limited and did not upset many

state classifications dealing with property—such as the rights of married women.

To confuse the picture further, before the adoption of the Fourteenth Amendment, Republicans often said both that the national government could protect the life, liberty and property of the citizen, and that matters of contract and property were essentially state law matters, subject to the reservation that states could not discriminate based on race or national origin in granting such rights.[134] The idea that property and contract were primarily state law matters represented, in the view of many Republicans, not a simple congressional policy choice, but a desirable constitutional mandate. The idea that economic liberties are part of the liberty protected by the Fourteenth Amendment, but that federal court scrutiny of regulations impacting such liberties would typically be quite permissive, would also be consistent with how many Republicans viewed the matter.

Some assume a total identity between rights in the Civil Rights Bill read as only a right to equality under state law, certain rights under state law, the Article IV Privileges or Immunities Clause and the Fourteenth Amendment's protections for privileges or immunities of citizens of the United States. In fact, things are much more complex.

2. Some Arguments Republicans Made for the Civil Rights Bill and Discussions of Article IV, Section 2

Senator Trumbull managed the Civil Rights Bill in the Senate. He referred to the discriminatory Black Codes and said, "The purpose of the [Civil Rights] Bill . . . is to destroy all these discriminations and to carry into effect the [Thirteenth] . . . amendment."[135] He then said that Congress could enforce the Thirteenth Amendment by securing liberty to the slave.[136] "[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude."[137] A law that did not allow a "colored person to hold prop-

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[134] *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 1837 (1866) (statement of Rep. Lawrence), *with id.* at 1151–55 (statement of Rep. Thayer), *and id.* at 1294 (statement of Rep. Shellabarger). "Now, Mr. Speaker, if this section did in fact assume to confer or define or regulate these civil rights, which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and people." *Id.* at 1293 (statement of Rep. Shellabarger).

[135] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

[136] *Id.* (statement of Sen. Trumbull).

[137] *Id.* (statement of Sen. Trumbull).

erty, to teach, does not allow him to preach is certainly a law in violation of the rights of a freeman" and could be declared void under the Thirteenth Amendent.[138]

Trumbull proceeded to consider the Privileges or Immunities Clause of Article IV, Section 2, which he identified with protecting migrants from other states in liberty and in "fundamental rights which belong to every free person."[139] Native born citizens of the state, Trumbull insisted, were much more entitled to these rights.[140] Rights of states were not invaded by the Civil Rights Bill because states which did not discriminate against nonwhite citizens as to the right to acquire property, to come and go at leisure, to enforce rights in the courts, and to inherit, etc., would be unaffected by these provisions.[141] "Each state," he said, "so long that it does not abridge the great fundamental rights belonging under the Constitution, to all citizens, may grant or withhold such rights as it pleases."[142]

Trumbull said he had cited cases under Article IV to show what were "rights of a citizen of the United States," including the right to liberty and to contract, to hold property and to maintain court actions. He admitted the decisions were limited to the rights that a citizen "in one state has on going into another State, and not to the right of the citizens belonging to the State."[143] But he thought that because judicial decisions under the Privileges or Immunities Clause had held "that the rights of citizens of the United States were certain great fundamental rights such as the right to life, to liberty, and to avail one's self of the laws passed for the benefit of the citizen to enable him to enforce his rights," that these rights would pertain to African-Americans made citizens pursuant to the Thirteenth Amendment.[144] The argument for equality in the right to contract, hold property and testify is sometimes more structural than bound to a particular clause, with particular clauses often being used to explicate the underlying structure of equality. Equality can be produced either by a guarantee of equality or by "absolute" rights, which are by their nature available to all—though the degree of judicial protection could vary dramatically depending on the nature of the right.

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[138] *Id.* at 475 (statement of Sen. Trumbull).

[139] *Id.* at 474 (statement of Sen. Trumbull).

[140] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull).

[141] *See id.* at 475–76 (statement of Sen. Trumbull).

[142] *Id.* at 1760 (statement of Sen. Trumbull).

[143] *Id.* at 600 (statement of Sen. Trumbull).

[144] *Id.* (statement of Sen. Trumbull).

3. The Bill of Rights as Providing Power to Pass the Civil Rights Bill

Congressman James Wilson managed the Civil Rights Bill in the House. He indicated that the Bill's prohibitions turned on racial discrimination.[145] He justified passage of the Bill under the Thirteenth Amendment.[146] If the state would practice the constitutional declaration of Article IV, Section 2's Privileges or Immunities Clause and enforce it as meaning the right to protection of the government, the enjoyment of life and liberty, and the protections set out in *Corfield*, there would be no need for the Civil Rights Bill.[147] Wilson had previously interpreted Article IV, Section 2's Privileges and Immunities Clause to include freedom of religious opinion, freedom of speech and freedom of the press.[148] He believed the rights in the Civil Rights Bill were encompassed or implied in the rights to life, liberty and property in the Federal Bill of Rights together with the rights necessary to make those rights meaningful. He insisted Congress could enforce guarantees of the Bill of Rights, specifically, the Due Process Clause, and that such power justified the Civil Rights Bill.[149]

"[C]itizens of the United States, as such," Wilson insisted, "are entitled to certain rights . . . [and] being entitled to those rights it is the duty of the Government to protect citizens in the perfect enjoyment of them."[150] He emphatically denied that "the little state of Delaware has a hand stronger than the United States; that revolted South Carolina may put under lock and key the great fundamental rights belonging to the citizen, and we must be dumb; that our legislative power cannot be exercised; that our courts must be closed to the appeal of our citizens."[151]

> What are the great civil rights to which the first section of the [Civil Rights] bill refers? I find in the bill of rights which the gentleman [John Bingham] desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are neces-

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[145] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson).
[146] *Id.* (statement of Rep. Wilson).
[147] *See id.* at 1117 (statement of Rep. Wilson).
[148] CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson).
[149] CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson).
[150] *Id.* (statement of Rep. Wilson).
[151] *Id.* (statement of Rep. Wilson).

> sary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.[152]

Representative Lawrence also cited the Due Process Clause from the Bill of Rights to establish the existence of "certain absolute rights which pertain to every citizen . . . and of which a State cannot constitutionally deprive him."[153] There were incidental rights necessary to the enjoyment of "absolute" rights—such as the right to make and enforce contracts and to have the benefits of laws for the security of person and property. He cited the Privileges or Immunities Clause of Article IV, Section 2 for the proposition that "citizens of each State" if they remove from one state to another "'shall be entitled to all privileges and immunities of citizens' of the United States 'in the' State to which they remove."[154] From this Lawrence concluded that "fundamental civil privileges" were "equal for all citizens."[155] For Lawrence and Wilson, the equality guaranteed by the Civil Rights Bill derived from equal entitlement of citizens to certain "absolute" rights—like due process—which the state must respect and cannot abrogate, from the fact that certain rights such as the right to testify are incidental to such rights and from the fact that the Privileges or Immunities Clause of Article IV implied equality in fundamental rights among citizens. Lawrence and Wilson read Article IV, Section 2 to support the equality of rights for blacks. For example, for people of different colors, there are certain rights states could not abrogate for anyone, like due process, and certain incidental rights they could not totally deny like the right to testify and bring court actions. Whether the equality comes from the national nature of the right shared by all or from a mere guarantee of equality is not always clear, but for Lawrence, Wilson and others the former seems, at least in part, to be the case. Leading Republicans often suggested that the degree of permissible state regulation of economic rights and other state law rights was large and federal judicial scrutiny quite limited, but some invasions of such rights—like those based on color—were so unreasonable as to be impermissible. In this respect, the views of these Republicans are similar to current law.

Denying Americans of African descent the right to testify and bring court actions denies due process in its most basic sense—the

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[152] *Id.* (statement of Rep. Wilson).

[153] *Id.* at 1833 (statement of Rep. Lawrence).

[154] CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

[155] *Id.* (statement of Rep. Lawrence).

right to invoke the protection of the laws, a right long associated with due process or its earlier equivalent, the law of the land clause of the Magna Carta.[156] In 1859, Congressman Bingham had objected to the admission of the Oregon Territory as a state because its constitution excluded free blacks from the state and denied them the right to sue in the courts of the state. This, Bingham had insisted, violated the right to "'privileges or immunities of citizens in the several states.' Not to the rights and immunities of the several States, not to those constitutional rights and immunities which result exclusively from State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States."[157] As American citizens, the persons excluded from Oregon were entitled to "all the privileges and immunities of citizens of the United States, amongst which are the rights to life, liberty and property, and their due protection in the enjoyment thereof by law."[158] Still, while Republicans made statements about federal power to protect life, liberty and property, several suggested that for Congress to define the right to testify or hold property, as opposed to prohibiting discrimination in these matters, would invade the rights of the states.[159]

Speeches like those of Representative Lawrence, Senator Trumbull and Representative Wilson are often difficult to understand. These men were lawyers, making a legal as well as a political case. But in attempting to secure liberty and equality for Americans of African descent, they faced difficulties. Some questions presented by the Civil Rights Bill, Representative Wilson candidly noted, "are not entirely free from difficulties. Precedents are in sharp conflict concerning them."[160] The old view of the semi-sovereign state, their own adherence to federalism and a mass of judicial precedent all raised obstacles which were particularly acute with reference to property law, rules of evidence and other matters traditionally within the sphere of the states. Precedent also blocked the way for protecting Bill of Rights liberties against states. Representative Lawrence relied on Article IV, Section 2 to establish the equal rights to testify, contract, etc., rights he seems to relate to the Due Process Clause. But he cited James Kent, who says that if citizens "remove from one State to another they are entitled to the privileges

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[156] *See id.* at 1292; CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham); Steven Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 558–59 (1991).

[157] CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. Bingham).

[158] *See id.* (statement of Rep. Bingham).

[159] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger).

[160] *Id.* at 1115 (statement of Rep. Wilson).

that persons of the same description are entitled to in the State to which the removal is made."[161] The language from Kent raised potential problems for Lawrence. For example, might not color be within Kent's qualification that a migrant was only afforded rights accorded to people of the same description? Lawrence insisted that permissible distinctions included age, sex and insanity, but not color. John Bingham expressed similar ideas in his discussion of the prototype of the Fourteenth Amendment, which allowed Congress to pass laws to secure equal protection in life, liberty and property. Equal protection, Bingham thought, was implicit in the Due Process Clause. Still, Bingham assumed that the mass of state law property distinctions, including those disadvantaging married women, could not be disturbed, but that racial discrimination could be reached.[162]

4. Confusion and Clarity

It is hardly surprising that the framers of the Fourteenth Amendment did not fully resolve all these difficulties—protection against discrimination for African-Americans, securing constitutional liberties to all Americans that states could not abridge, preserving the role of the states from total absorption by the federal government, and providing a neat explanation of how all this was to be done. They had done quite a lot in a few years. They abolished slavery, secured a strong measure of equality for Americans of African descent, and protected some basic constitutional liberties from state denial. They left some problems to the future—such as a theory of how the major objectives could be accomplished consistent with their determination to protect the basic role of the states with reference to many common law rights. The neat explanation suggested by some scholars that Republicans preserved federalism by fashioning the Privileges or Immunities Clause to protect against discrimination but not to secure any "absolute" rights that states could not abridge is one possible solution to the conundrum. But it is not one that fits the goals or statements of leading members of the Thirty-Ninth Congress or that has strong support in the historical record or in the text of the Fourteenth Amendment. Lawyers and judges must address the problems of individual rights, discrimination and federalism—recognizing that while many value

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[161] *Id.* at 1835 (statement of Rep. Lawrence).

[162] *See id.* (statement of Rep. Lawrence). For Bingham on property, due process and equal protection, see *id.* at 1089 (statement of Rep. Bingham). For Stevens, see *id.* at 1064 (statement of Rep. Stevens).

choices have been made by the framers, a resolution of all tensions is itself a value choice they did not make. There is no "only equality" lowest common denominator for the Privileges or Immunities Clause that accurately reflects the understanding of most of the framers. Nor is there any interpretation that can easily reconcile all the views Republicans expressed in the Thirty-Ninth Congress on questions such as the right to contract and own property.

But while some things are quite murky, others are comparatively clear. It is hardly surprising that immediately after the Civil War the nation, guided by the Republican party, chose the liberty model of the Constitution—federalism bounded by nationally guaranteed basic rights plus a guarantee of equality—over the semi-sovereign state model of a pro-slavery compact. Nor is it surprising that the Republicans rejected the alternative of a unitary government with the states immediately or potentially reduced to administrative units of the central government. Nor is there any indication of a plan to vest federal courts with generally supervisory power over all state social and economic legislation. Both slavery and the extreme version of states' rights were in bad repute after the carnage of the Civil War, and most Republicans still saw an improved federal system as protecting liberty.[163]

E. *Arguments Against Application of the Bill of Rights to the States—The Amendment as Only a Guarantee of Equality*

There are three basic arguments against incorporation of the Bill of Rights, and other guarantees of liberty, as limits on the states under the Privileges or Immunities Clause.

1. The Mere Equality or Anti-Discrimination Reading of the Privileges or Immunities Clause: A Contextual Argument

The first argument is that the Privileges or Immunities Clause and the Fourteenth Amendment were intended only to guarantee equality in whatever basic rights a state chose to give or withhold. By this view, states could abridge free speech so long as they did so equally for all.

The best argument for this position is one that relies on a contextual argument plus precedent. The phrase "privileges and immunities" appears in Article IV, Section 2. That clause, by the current orthodox view and by a widely held view in 1866, merely guaranteed out-of-staters

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[163] *See id.* at 1825, 1839, 2526, app. at 144; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 41.

equality of fundamental interests with in-staters. Fundamental interests are much broader than explicit constitutional guarantees of liberty and include the right to pursue the common occupations of life, to contract and to own property. By this proposed reading, the Privileges or Immunities Clause of the Fourteenth Amendment required equality in fundamental interests and rights that had their source in state law. But states could eliminate the rights so long as they did so for whites as well as blacks.

Many Republicans rejected a mere equality reading of Article IV, Section 2. These insisted on a reading of the original Privileges or Immunities Clause much like the one I suggest as the proper reading of the Fourteenth Amendment's Privileges or Immunities Clause—as including privileges and immunities explicit in the text. Some also apparently believed that the Privileges or Immunities Clause of Article IV encompassed a larger and less textual body of fundamental rights and interests belonging to citizens of the United States and which states could not simply eliminate. Some emphasized that the Constitution envisioned equality in basic state law rights to be enjoyed by all similarly situated citizens, though not all agreed on the textual source of the right to equality. As to the state law rights to own property and to contract, a measure of equality was required. As Representative Lawrence put it, "equality of civil rights is the fundamental rule that pervades the Constitution and controls all state authority."[164] Though some discrimination in connection with such rights was permitted, discrimination based on race, national origin or religion was not.[165]

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[164] CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

[165] *See id.* at 1835 (statement of Rep. Lawrence). On the issue of absolute and anti-discrimination rights, see CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866); CONG. GLOBE, 38th Cong., 1st Sess. 1202, 2290, 1369 (1864); CONG. GLOBE, 35th Cong., 2d Sess. 982–84 (1859). *See* Crosskey, *supra* note 62, at 11–20; Curtis, *A Reply to Professor Berger*, *supra* note 3, at 60–64; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1832–35 (1866) (noting that Civil Rights Act left questions of regulation of property and testimony to state law "subject only to the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws"). Many Republicans apparently interpreted Article IV, Section 2 as guaranteeing some absolute rights and not simply equality in rights states chose to allow to citizens. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (statement of Rep. Wilson). Wilson, however, emphasized that the Civil Rights Bill was aimed at guaranteeing equality of rights to blacks. *Id.* (statement of Rep. Wilson). Some Congressmen, no doubt, read Article IV, Section 2 more conventionally as limited to protection of out-of-staters from discrimination. Senator Trumbull assumed that American citizens had absolute rights which states could not take away, "the right to personal security, the right of personal liberty, and the right to acquire and enjoy property" and that "these [rights] are declared to be inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be." *Id.* at 1757 (statement of Sen. Trumbull). Still, Trumbull also emphasized that "[t]his [Civil Rights] bill in no matter interferes

By the "equality only" view, the Fourteenth Amendment's Privileges or Immunities Clause guaranteed in-state citizens equality only in those fundamental interests under Article IV, Section 2 which previously a state could not deny to out-of-staters if it granted them to its own residents—such as the right to contract, own property and institute court actions in state courts. Equality, by this view, was secured to those within the state. The state could deny rights provided it denied them to all its residents.

I find this argument unsatisfactory as a full explanation of the Fourteenth Amendment. Republicans were deeply concerned about denials of free speech, both those before the Civil War and those they saw recurring during Reconstruction. The orthodox reading of Article

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with the municipal regulations of any State which protects all alike in the rights of person and property. It could have no operation in . . . most States of the Union." *Id.* at 1761 (statement of Sen. Trumbull). Representative Lawrence insisted:

> Every citizen, therefore, has the absolute right to live, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Id. at 1833 (statement of Rep. Lawrence). States could deprive citizens of these rights by prohibitory laws or by failure to protect the citizen. *See id.* (statement of Rep. Lawrence). The examples of deprivations given by Lawrence included invidious class based discrimination, for example, against naturalized citizens. *Id.* (statement of Rep. Lawrence). Lawrence suggested that the question of direct national power to punish offenses against liberty was a question for another day. *Id.* at 1835 (statement of Rep. Lawrence). He insisted that "Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship." *Id.* (statement of Rep. Lawrence). Lawrence read Article IV as protecting some fundamental rights, though he cited a commentary indicating it secured "to citizens who remove from one state to another . . . the privileges that persons of the same description are entitled to in the State to which removal is made." *Id.* (statement of Rep. Lawrence). Distinctions of "sex, age, insanity, &c., are recognized as modifying conditions and privileges, but mere race or color, as among citizens, never can." *Id.* (statement of Rep. Lawrence). Constitutional privileges were of two kinds—"those that arose from state law and those . . . inherent in every citizen of the United States." *Id.* at 1836 (statement of Rep. Lawrence). Senator Trumbull denied that the Civil Rights Bill consolidated power and took it from the states. *Id.* at 475–76 (statement of Sen. Trumbull). It prohibited discrimination in the right to contract, hold property, etc. He admitted that cases under Article IV, Section 2 related entirely to "rights a citizen in one State has in going into another state, and not to the rights of citizens belonging to the State." *Id.* (statement of Sen. Trumbull). He insisted, however, that such rights were a reasonable way of ascertaining the right to freedom secured to slaves under the Thirteenth Amendment. *Id.* at 600 (statement of Sen. Trumbull). In short, he seems to have believed that after the Thirteenth Amendment a state could not secure fundamental interests of the Article IV, Section 2 sort to its own citizens but deny them to blacks. The liberty of the Thirteenth Amendment secured the same sort of equality to blacks that Article IV, Section 2 secured to out-of-staters. Today Article IV leaves states with broad power to classify citizens even if those classifications affect fundamental interests. But the classification can not be based on the fact that the person excluded from protection came from out of state.

IV guaranteed equality in certain basic rights and interests to *classes of persons*—in-staters and out-of-staters. But a state, by the equality argument, could deny basic rights if it denied them to all residents of the state also.

In the South, the ideal solution to the problem of speech about slavery was compelled silence. Although the slave holding elite preferred that no one discuss the problem, the next best thing was to punish antislavery expression. Those solutions, of course, treat in-staters and out-of-staters alike—no one can talk about the issue or engage in antislavery speech. They also treat all in-state residents equally in the sense that none can engage in the forbidden conduct. None can engage in antislavery speech. Silencing antislavery speech is formally equal for both whites and blacks—neither can attack slavery.

Of course, by another understanding, free speech could often be squeezed into an anti-discrimination analysis. If one defines those who want to talk about slavery and those who do not want any discussion of slavery as the two classes, a general law prohibiting discussion of slavery that applies to all citizens is in fact discriminatory. But the primary Republican complaint was not simply about discrimination. It was about the denial of the precious American right to free speech and press.

2. A Second Textual and Contextual Argument: Reading "Abridge" in Section 1 to Mean "Discriminate with Reference to." This Reading is Allegedly Compatible with the Use of "Abridge" in Section 2

The Fourteenth Amendment provides that no state shall abridge the privileges or immunities of citizens of the United States.[166] One argument that could support a mere equality reading of the amendment focuses on the words "abridge" and "privileges or immunities." This argument is that "abridge" means only to discriminate with reference to race or caste. So, racial discrimination with reference to free speech would be an abridgement, but a generally applicable state denial of free speech or infliction of cruel or unusual punishments would not be an abridgment. A privilege or immunity by such a reading is basically a right created by the state with respect to certain fundamentals: the right to contract, to own property, to freedom of movement, etc. But the state, the argument goes, could eliminate the right altogether. So, by this reading, what the Fourteenth Amendment is

[166] U.S. CONST. amend. XIV, § 1.

really saying is that no state may discriminate on certain proscribed bases with reference to certain fundamental matters which are otherwise entirely within the control of the states. To the extent that this is proposed as the exclusive reading of the word "abridge," it is a rather odd way to read the words, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

A model of this meaning of "abridge," the argument could continue, would be the second section of the Fourteenth Amendment which provides:

> when the right to vote [for President or Vice President, Members of Congress, state executives, judges, or legislators] . . . is denied to any of the male inhabitants of such state [who are United States citizens and twenty-one or older] . . . or *in any way abridged*, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[167]

The right to vote appears to be a "right whose substance is under the states' control,"[168] so this seems to be an example of a right the state could totally abrogate but not "abridge."

The historical context of Section 2 provides the classic instance of abridgment: restriction based on race . . . . The concept of abridgment reflects the Republican notion of equality, which distinguishes between laws that set out the content of rights and laws that take rights away from a class of individuals. The Fourteenth Amendment's concept of abridgement [sic] depends on the distinctions between laws that define rights and laws that determine who shall have them, such as a Black Code.[169]

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[167] *Id.* § 2 (emphasis added).

[168] Harrison, *supra* note 3, at 1420. Although I cite Mr. Harrison in connection with this argument, the argument set out is not intended to be identical to the one that he makes. Mr. Harrison's argument may amount to no more than saying a right may be diminished or abridged when it comes from the state legislature and can be repealed by it, and that the reduction of (for example) the right to contract for blacks would abridge the right. Rights like free speech that come from the Federal Constitution and are not subject to state legislative repeal, could also be abridged by caste legislation: one might give African-Americans more constricted free speech rights than whites. In short an "absolute" right could be abridged by caste legislation as well as by shrinking the right for everyone, as was the case with Southern laws passed before the Civil War against anti-slavery speech.

[169] *Id.* at 1421.

It is worth noting some qualification to this insight. Since the United States "shall guarantee to every State in this Union a Republican form of Government,"[170] it is doubtful that the states were free to take the right to vote away from everyone. Many Republicans in 1866 denied that states had such a right.[171]

Nor was the penalty for abridging the right to vote under Section 2 triggered only by racial discrimination or caste legislation. If a state denied African-American males the right to vote, the representation of that state in the House would be reduced proportionally. In that case, exclusion from the right to vote would be based on caste legislation. But almost any other basis for exclusion, from illiteracy to property qualifications to random selection, was penalized as well. States were not left to regulate the right to vote free from penalty: almost all limitations of manhood suffrage would trigger a penalty.

Nor is it clear that the penalty under Section 2 would not be triggered by total elimination of the right to vote. Suppose that, for example, a state abolished its state legislature and legislative elections. Suppose, instead, it placed the legislative function with the President of the state university who should choose "his" successor. There is a powerful argument that the state would then lose its representation in the House, because the right to vote has been denied to all males twenty-one years of age and older. A penalty triggered by the denial of the right to any seems triggered by the denial of the right to all. The interpretation is inconvenient because it would mean that the democratic rights of 1866 were a floor below which states could not fall. It is hard to evaluate as a matter of history because blatant violations of Section 2 have been systemically ignored throughout American history. But it is a natural reading of the text.

The term "abridge," in Section 2 then did not merely mean discriminate in reference to caste. "Abridge," according to Senator Howard, was simply an intensive form of the prohibition of any denial, so the concept reached partial denials as well as total denials.

> A State in the exercise of its sovereign power over the question of suffrage might permit one person to vote for a member of the State's Legislature, but prohibit the same person from voting for a Representative in Congress. That would be an abridgement [sic] of the right of suffrage; and that per-

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[170] U.S. CONST. art. IV, § 4.

[171] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham). "[S]uffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government." *Id.* at 1117 (statement of Rep. Wilson).

> son would be included in the exclusion, so that the representation from the state would be reduced in proportion to the exclusion of the persons whose rights were thus abridged.[172]

Some African-Americans and whites might be permitted to vote because they met an educational test that applied to all voters. Others, unable to pass the test, might be excluded. In that case, the state would be penalized by reduced representation only as to those blacks (and whites) who could not vote because they could not pass the test. One might see such an arrangement as defining the content of the right to vote, a right limited by literacy, or as excluding certain individuals—the illiterate.

Section 2 limits reduction of suffrage (a right created by state law or by an interaction of state law and the Federal Constitution), to a right specifically identified as the right to vote. As a general rule, to remain free of the penalty of reduced representation, states could not deny the right to males over twenty-one nor could they abridge the right. "Abridge" meant reduce by almost any means, not just by caste discrimination.

So in Section 2, as in the First Amendment, "abridge" meant diminish or lessen. Such a meaning of "abridge" is consistent with an absolute prohibition in Section 1 against state legislation that denied or abridged liberties such as free speech. Differences in Sections 1 and 2 do not turn on different meanings of the word "abridge."

3. A Mere Equality Argument from History: Statements by Framers and Arguments from the Civil Rights Act

A third mere equality argument against treating liberties in the Bill of Rights as limiting the states is historical. By this view, the evil the Privileges or Immunities Clause was designed to prohibit was discrimination against blacks in rights to contract, give evidence, own property, etc.—the rights in the Civil Rights Act read narrowly. Section 1 of the Fourteenth Amendment merely reiterated the protections of the Civil Rights Act, narrowly understood.

a. *Problems with the Argument Based on the Civil Rights Act*

This argument ignores the catch-all phrase in the Civil Rights Act giving all citizens "full and equal benefit of all laws and proceedings

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[172] *Id.* at 2767 (statement of Sen. Howard).

for the security of person and property, as is enjoyed by white citizens."[173] It fails to note that the phrase "laws for the security of person and property" can be and often had been used to cover constitutional liberties as well as common law or statutory rights. It had been used in *Dred Scott* and elsewhere as a shorthand summary of Bill of Rights liberties.[174] Framers of the Fourteenth Amendment cited Chancellor Kent for the proposition that the inalienable rights of citizens included the right to personal security, the right to personal liberty and the right to acquire and enjoy property. Kent explicitly equated the right to personal security and liberty with many guarantees included in bills of rights, rights he describes as "privileges." For Kent, many of these rights were enshrined in state law and in the Federal Constitution. In the 1827 edition of his *Commentaries,* Kent noted that "[t]he right of personal security is guarded by provisions which have been transcribed into the constitutions of this country from Magna Carta, and other fundamental acts of the English Parliament, and it is enforced by additional and more precise injunctions."[175] Kent proceeded 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."[176]

The argument that the Civil Rights Act's guarantee of full and equal benefit of all laws and proceedings for the security of person

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[173] 42 U.S.C. § 1981 (1994).

[174] *Dred Scott,* 60 U.S. at 449–50; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, 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. *Dred Scott,* 60 U.S. at 449. 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.

Id. at 450.

[175] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 9–11 (1827).

[176] *Id.* at 11; *see* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson)

excludes the guarantees of the Bill of Rights and is limited to rights under state law disregards the fact that many Republicans thought, contrary to *Barron v. Baltimore*, that a correct reading of the Constitution made liberties in the Bill of Rights a limit on the states even before passage of the Fourteenth Amendment.[177] The argument for limiting the Fourteenth Amendment to equality under state law also entirely ignores the suppression of free speech and other civil liberties in the South before the Civil War. And most of all, it misses the fact that virtually identical language appeared in the Freedman's Bureau Bill and that an amendment adding "including the constitutional right of bearing arms" to "full . . . benefit of laws for the security of person and property" was accepted by Senator Trumbull, the sponsor of the bill, with the remark that it did not change the meaning of the phrase.[178]

The point is simply this: we know that many Republicans thought that under the proper construction of the Federal Constitution states were or should be limited by the provisions of the Federal Bill of Rights. We know that Bill of Rights liberties were often described as provisions for the security of person and property. At the very least, for many Republicans, references to full protection under laws for the security of persons and property would include Bill of Rights liberties. For example, Senator Dixon, a Republican from Connecticut who eventually broke with the party over its failure to more promptly restore the rebellious states, said:

> One Congress cannot bring about the millennium . . . . For this time we have reason to be content; for we have put down armed resistance to the laws, and Congress has given us, in the civil rights act, a guarantee for free speech in every part of the Union. It is our own fault if, having thus secured the right to argue, we do not enlighten prejudice and mere opposition, and show that equal liberty is the best for all.[179]

(citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 199); *id.* at 1757 (statement of Sen. Trumbull) (also citing Chancellor Kent); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 923, 932 (1986).

[177] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 49–56; *see also* 2 J. HURD, LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 292, 342, 352–53 (photo. reprint 1968) (1858–62); Kaczorowski, *supra* note 174, at 932.

[178] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 72, 104.

[179] CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866) (statement of Sen. Dixon); *cf. id.* at 2465 (statement of Rep. Thayer); *id.* at 2468 (statement of Rep. Kelly) (suggesting that provisions of Section 1—which include requiring states to accord due process—may already be in Constitution); *id.* at 2539 (statement of Rep. Farnsworth) (suggesting that all provisions in Section 1 except equal protection are in Constitution already, which would include Due Process Clause as a limit on states).

It is a mistake to assume that Republicans would understand the phrase "security of person and property" as limited to common law and statutory rights under state law or even to such rights plus state constitutional rights. Furthermore, it is incorrect to interpret the phrase to exclude federal rights including those in the Bill of Rights. Of course, to enforce limits on the states based on the Federal Bill of Rights required a constitutional amendment, as John Bingham never tired of pointing out.

Finally, the historical argument based on the Civil Rights Act points out that some congressmen said that the Act covered the ground of Section 1. From such evidence, Lambert Gingras argued that while key framers intended to apply the guarantees of the Bill of Rights to the states, their purpose was not generally understood by their congressional colleagues or by the ratifiers.[180]

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[180] Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, XL AM. J. LEGAL HIST. 41 (1996). Mr. Gingras cites statements from Congressmen Wilson, Thayer, Windom and Raymond indicating that the Civil Rights Bill guaranteed equality and indicating that the Fourteenth Amendment incorporated the Civil Rights Bill. *Id.* at 56–60. At least Wilson and Thayer believed the states were already required to obey guarantees of the Bill of Rights. Mr. Gingras points out that Wilson read the word "immunity" as a guarantee of equality. *Id.* at 57. He believes several scholars supporting incorporation (including myself) have distorted meaning by omitting important sentences. For example, he says, "[t]o take another example, note how Curtis quotes a speech delivered on February 28, 1866, by Representative Frederick Woodbridge." *Id.* at 52. At this point, I include the full quote, putting the sentence I omitted in italics.

> What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, *and to every citizen in whatever State he may be that protection of his property which is extended to citizens of the State.*

CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge). To me the passage (from a debate on a prototype of Section 1) seems to indicate both congressional protection for both constitutional rights *and* equality under state law for protection of property. That makes quotation on the first point appropriate. That equal protection for property for blacks was also secured is not controversial, although some modern scholars locate the protection against racial discrimination and property rights in the Privileges or Immunities Clause. At any rate, the reader may reach his or her own conclusion. Thaddeus Stevens said the claim that the Bill and the Amendment covered the same ground was only partly true and that a bill was repealable by a majority. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Fessenden said that in the Joint Committee the Fourteenth Amendment was placed on entirely different ground from the Civil Rights Bill. *Id.* at 2896. The equality argument appears in two forms. One suggests the Fourteenth Amendment Privileges or Immunities Clause only guaranteed equality in certain privileges secured by state law. Another suggests that such an equality meaning was at least part of the meaning of the Privileges or Immunities Clause, but that the Clause also secured some

From statements about correspondence or identity between the Civil Rights Act and the Fourteenth Amendment, the reader is expected to read the Civil Rights Act as failing to include any of the guarantees of the Bill of Rights.[181] But for many Republicans who thought Bill of Rights guarantees already limited the states, the Civil Rights Act's guarantee of full benefit of laws for the security of person and property would have encompassed the provisions in the Bill of Rights. Because the Civil Rights Act included *none* of the guarantees of the Bill of Rights, the argument goes, neither did the Fourteenth Amendment.

But if the Civil Rights Act was the *exact* equivalent of Section 1, then somehow the Civil Rights Act included a prohibition of state denial of a federal standard of due process. The general phrase of the Civil Rights Act could include due process easily enough. Due process, after all, is simply a law or provision for the security of person and property. It requires more than equality under state law. But if one Bill of Rights guarantee meets this definition, why don't the rest? If the rest do, then the argument from the Civil Rights Bill against finding fundamental rights in the Fourteenth Amendment self-destructs.

Nor is it likely that most literally believed the Civil Rights Act and the Fourteenth Amendment were entirely identical. The Act only protected citizens while Section 1 protects both citizens—as to privileges or immunities—and persons—as to due process and equal protection.[182] Finally, as Dean Aviam Soifer has noted, the Civil Rights Bill refers to "*full* and equal benefit of all laws and proceedings for security of person and property."[183] A state law which prohibited public meetings of more than 100 people within a state would give state citizens equal benefit of the laws, including constitutional provisions, but would not give them full benefit of the right to free speech and

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absolute national privileges from violation by the states. *See* Harrison, *supra* note 3, at 1465. Harrison is apparently unsure whether these absolute guarantees actually imposed any new limits on the states. *Id.* at 1465.

[181] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866) (statement of Latham) ("[T]he 'civil rights bill' which is now law . . . covers exactly the same ground as this amendment. . . ."). If the two are exactly the same, then the Civil Rights Act prohibited states from denying any person due process of law. *See also id.* at 2535.

[182] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 104–05, 107. The point that the Civil Rights Act and the Fourteenth Amendment cannot be identical because the Act only covered citizens while the Amendment also protected persons was pointed out to me by Akhil Amar in a telephone conversation. For the reason for including persons as well as citizens in the Fourteenth Amendment and for Bingham's concern that the Civil Rights Act extended no protection to aliens, see, for example, *id.* at 107.

[183] Soifer, *supra* note 62, at 683–84.

freedom of assembly. Throughout the debates on the Civil Rights Bill, virtually every speaker spoke about liberty *and* equality. To collapse these statements into a mere equality of rights under state law leaves out half of what Republicans were asserting.

Still, cryptic remarks of some congressmen in 1866 can be read as indicating that the Privileges or Immunities Clause is merely a guarantee of equality. For example, Congressman Eliot, speaking in 1866, said:

> I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.[184]

There are indications that some congressmen who debated on the Fourteenth Amendment believed that the Privileges or Immunities Clause of Article IV, Section 2 had an equality component as well as an absolute rights component. What is far less clear is the nature of the equality component. For example, Congressman Bingham had the following to say in a debate on the prototype of the final version of Section 1:

> What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority . . . .[185]

Of course, guaranteeing absolute rights to all citizens ensures equality as to those rights. The Fourteenth Amendment also limited discrimination by state law under the Equal Protection Clause and, for American citizens from out-of-state at least, the inter-state privileges of Article IV, Section 2 would be among the privileges of citizens of the United States. The final version of the Fourteenth Amendment Privileges or Immunities Clause was changed from the prototype which had used the language of Article IV, Section 2. The

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[184] CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Rep. Eliot).

[185] *Id.* at 1089 (statement of Rep. Bingham).

new version protected "privileges or immunities of citizens of the United States."

b. *Recent Scholarship and the "Nothing but Equality" Reading of the Privileges or Immunities Clause*

Some claim that, except for equality, no new limitations were imposed on the states by the Fourteenth Amendment. The idea is that the amendment, supposedly like the Civil Rights Act, extended only to equality and did not give substantive protection.[186] This view is asserted in a recent book on the Fourteenth Amendment. The book has done much to sharpen our understanding of the issue:

> The simplest explanation, which was repeated continually during the congressional and state ratification debates, was that the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights. The *only* effect of the amendment was to prevent states from discriminating arbitrarily between different classes of citizens.[187]

The evidence offered, however, fails to support the assertion. Statements of the sort described are made in connection with the Civil Rights Act debate with reference to the right to contract, testify, etc. It is absolutely true that Republicans were unwilling to destroy state governments or the federal system.[188] They did not assume, however, that requiring states to obey basic protections for individual liberty like those in the Bill of Rights would destroy state governments or federalism. James Madison supported federalism and also advocated an explicit limit on state power in favor of freedom of the press and the rights of conscience. Application of the Bill of Rights to state and local governments has not annihilated federalism. In contrast to congressional power under the Commerce Clause, the Bill of Rights is a more discrete and easily contained limit on the power of the states. On the other hand, to the extent that Republicans believed the Amendment secured "absolute" rights to liberty and property, with no state action limit, and these terms are read

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[186] *Cf., e.g.*, NELSON, *supra* note 3, at 115, 117; Harrison, *supra* note 3, at 1388, 1393–97, 1412 & n.97–98.

[187] NELSON, *supra* note 3, at 115–18 (emphasis added), *cited with approval in* Harrison, *supra* note 3, at 1465 n.304.

[188] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1063–65 (1866) (statement of Rep. Hale); *id.* at 1095 (statement of Rep. Hotchkiss); *id.* at 1082 (statement of Rep. Stewart).

broadly, then the survival of state power would be essentially a political decision for Congress.

At any rate, one argument claims that Republicans were willing to embrace equality but not new "absolute" limits on the states in favor of individual rights.[189] (Here "absolute" is used simply to refer to rights states may not eliminate even if the elimination is general and equal.) To support the alleged unwillingness of Republicans to secure absolute rights rather than only equality, some insist that Republicans did not want to see state and local power substantially curtailed, citing statements from Republicans in the 39th Congress.[190] At first glance, these statements seem impressive indeed: Congressman Hale said there were "other liberties as important as the liberties of the individual citizen, and those [were] the liberties and rights of the States."[191] Congressman Woodbridge said that an earlier version of Section 1 "would not destroy the sovereignty of a state" or even "affect its sovereign rights."[192] John Bingham said that the amendment took from "no state any right that ever pertained to it."[193] Remarks by Representative Lawrence and Senator Howard allegedly provide further support.[194]

Placed in context, these statements do not support the nothing-new-but-equality argument or show Republican unwillingness to require states to obey absolute guarantees of liberty. In fact, they support the opposite conclusion. The quotation from Woodbridge that the amendment would not affect the sovereign rights of a state is taken from his speech about a prototype of the Fourteenth Amendment that gave legislative power to Congress but failed explicitly to limit the states. The prototype was one that Congressman Bingham repeatedly described as giving Congress the power to enforce the guarantees of the Bill of Rights.[195]

Woodbridge asked:

> What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which

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[189] The word "absolute" is slippery and has different meanings. Here I use it simply to refer to rights that may not be eliminated by a state even when the elimination applies to all within its jurisdiction. For example, an absolute federal standard of due process would outlaw trial by ordeal or without notice and the opportunity to be heard, even if such a trial were prescribed for all of a state's citizens or for all its citizens in certain types of cases.

[190] *See* NELSON, *supra* note 3, at 114.

[191] *Id.* at 115–18.

[192] *Id.* at 115 n.13.

[193] *Id.* at 115 n.14.

[194] *See id.* at 115 n.13; *see also* Harrison, *supra* note 3, at 1465 n.304.

[195] CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

> necessarily pertain to citizenship. It is intended to enable Congress by its enactments . . . to give to a citizen of the United States those privileges and immunities which are guarantied to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, *and* to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.
>
> Sir, is there anything anti-republican in this? . . . Is there anything that interferes with the sovereign power of a State that adheres to a republican form of government? Is there not rather in this a tendency to keep the States within their orbits and insure and secure forever to every citizen a republican form of government? There is nothing more . . . in this proposition.
>
> It does not destroy the sovereignty of a State, *if such a thing exists.* It does not even affect its sovereign rights, but *merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country.*[196]

The context of Woodbridge's remarks is widened by looking at contemporary usage of the phrases "republican form of government" and "privileges and immunities." Leading Republicans insisted that a republican government required states to respect rights set out in the Federal Bill of Rights.[197] They read the words "privileges or immunities" as including Bill of Rights liberties.[198]

The remarks by Representative Hale about the importance of the states' liberties also allegedly support Republican unwillingness to have states limited by "absolute" guarantees of liberty as opposed to guarantees of equality.[199] Hale spoke in the context of Bingham's prototype that allowed Congress to secure to all citizens equal protection in the rights to life, liberty and property. Hale's objections to this proposal related to congressional power to control the ordinary civil law of the states. He gave as an example the danger that Congress could, under Bingham's prototype, grant equal property rights to married women.[200] Hale considered such a change a serious violation of federalism. Con-

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[196] *Id.* at 1088 (statement of Rep. Woodbridge) (emphasis added).

[197] *See, e.g., id.* at 1629 (statement of Rep. Hart); *id.* at 1075 (statement of Sen. Nye).

[198] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson); *id.* at 2765 (statement of Sen. Howard).

[199] *See* NELSON, *supra* note 3, at 115.

[200] CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale).

gressmen Stevens did not agree that the provision allowing Congress to secure equal protection in the rights of life, liberty and property might allow Congress to secure equality as to property ownership to women, as well as blacks. He seems to have believed the equal protection power was limited to unreasonable classifications like race, and Stevens viewed the gender classification as reasonable.[201] The cited Hale speech actually shows that Hale's concern was not about absolute Bill of Rights liberties limiting the states, but was about congressional power to legislate on equality with reference to ordinary state civil law matters. While Hale was concerned about new legislative power being given to Congress, he was not disturbed that states would have to obey the "absolute" requirements of the Bill of Rights. Hale thought that the Bill of Rights *already* limited federal, state and local government. He insisted that courts would enforce the Bill of Rights, and nothing more was required.[202] John Bingham cited *Barron v. Baltimore* to Hale to prove that he was wrong in assuming that the liberties of the citizen were adequately protected by the existing Constitution as interpreted by the Court.[203]

The objections by Hale actually prove that his concern was different from the supposed Republican limited equality position. He was upset about guarantees of equality under an equal protection provision that he thought granted general legislative power over ordinary subjects of state civil law; he was not at all concerned with the idea that states should be required to obey the limits set out in the Federal Bill of Rights because he thought that was already the law.

Further support for the mere equality argument is allegedly found in a statement of Congressman Bingham, the main author of Section 1. Congressman Bingham is quoted as saying the amendment took "from no State any right that pertained to it."[204] Once again, the context gives a different impression. The amendment, Bingham insisted, provided:

> [T]he power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every

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[201] *Id.* (statement of Rep. Stevens).

[202] *Id.* at 1064–65 (statement of Rep. Hale); *see* Crosskey, *supra* note 62, at 32–33.

[203] CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866) (statement of Rep. Bingham).

[204] *See* NELSON, *supra* note 3, at 115 n.14.

> person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing to say that this amendment takes from no state any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy.[205]

Bingham did not accept a positivist view of law. He distinguished between the rights states had and the power they were allowed to exercise. The statement is consistent with Bingham's view that states were obligated to respect fundamental rights including Bill of Rights liberties, but that under the Constitution as interpreted the obligation was unenforceable.[206] Bingham had earlier cited *Barron v. Baltimore*, a case holding that the Bill of Rights does not limit the states, to support his claim of the need for an earlier version of the amendment.[207] His speech on the final version of the Fourteenth Amendment also referred to liberties in the Bill of Rights. The amendment was necessary, Bingham said, because of "flagrant violations of the guaranteed privileges of citizens of the United States" such as "cruel and unusual punishments" that had been inflicted under state law.[208]

Congressman Lawrence is also cited in recent scholarship for the proposition that Section 1 would not impair state sovereignty. He is cited again in support of the claim that the Fourteenth Amendment provided no absolute rights. In Lawrence's case, the citations are to his discussion of the Civil Rights Bill.[209] Lawrence noted that the Civil Rights Bill provided that all citizens would have the same rights to contract, sue, give evidence, and have full and equal benefit of all laws and proceedings for the security of person and property. The bill, Lawrence continued,

> does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine *subject only to the limitation that there are some inalienable rights, pertaining to*

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[205] CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

[206] *Id.* at 1090 (statement of Rep. Bingham).

[207] *Id.* at 1089–90 (statement of Rep. Bingham).

[208] *Id.* at 2542 (statement of Rep. Bingham).

[209] *See* NELSON, *supra* note 3, at 115 n.13.

every citizen, which cannot be abolished or abridged by State constitutions or laws.[210]

Legislative power existed "to protect, not to destroy, the inalienable rights of men." Citizens had "absolute rights," including the Fifth Amendment guarantee of due process. "Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen which are inherent, and of which a state cannot constitutionally deprive him."[211]

Congressman Lawrence's statement also refutes the claim it is cited to support: that subjecting states to "absolute" Bill of Rights liberties was incompatible with state sovereignty. Lawrence was consistent in his view that the Fourteenth Amendment imposed "absolute" limits on state power and required states to obey Bill of Rights guarantees "absolutely." Speaking in 1871, he insisted that the Due Process Clause and the Privileges or Immunities Clause both required states to provide civil jury trials in eminent domain proceedings.[212]

A major shortcoming in the mere equality argument is its assumption that "[p]rior to the drafting of the Fourteenth Amendment, no one doubted that states could legislate to restrict rights granted by God or inherent in the nature of a free society."[213] In a sense the statement is true. But in fact, many Republicans assumed that states were already required to respect the fundamental rights of American citizens prior to the drafting of the Fourteenth Amendment, though for some the constitutional obligation was not enforceable.[214] "Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States," said Representative James Wilson in 1864.[215] "With these rights no state may interfere without breach of the bond which holds the Union together."[216] Two years later, in 1866, Wilson was Chairman of the Judiciary Committee in the 39th Congress.

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[210] CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (emphasis added). Mr. Harrison relies on Professor Nelson's work. Harrison, *supra* note 3, at 1412 & n.102.

[211] CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence).

[212] 2 CONG. REC. 384–85 (1871) (statement of Rep. Lawrence). Lawrence continued to adhere to the view that the Seventh Amendment, properly interpreted, would have limited the states prior to the passage of the Fourteenth Amendment.

[213] NELSON, *supra* note 3, at 115.

[214] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1152, 1270 (1866) (statement of Rep. Thayer); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson); *id.* at 2290 (statement of Rep. Ingersoll) (showing little sympathy for free speech claims by supporters of "rebels"); CONG. GLOBE, 35th Cong., 2d Sess. 982–84 (1859) (statement of Rep. Bingham).

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

[216] *Id.* (statement of Rep. Wilson).

The claim that Republicans were willing to require states to treat citizens equally as to certain fundamental interests to contract, own property, etc., but found it intolerable that they should, for example, be required to obey absolute rights like those in the Bill of Rights, is refuted by the statements marshalled as prologue and support for the argument.

In 1871 Bingham explained that he followed Chief Justice Marshall's suggestion in *Barron v. Baltimore.* Marshall had said that if the framers had intended Bill of Rights guarantees to limit the states, they would have followed the example of the framers of the original Constitution and used the "no state shall" language of Article I, Section 10. So "imitating their example and imitating it to the letter," Bingham said, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."[217] Those privileges and immunities, Bingham said, "are chiefly defined in the first eight amendments to the Constitution."[218] He then read word for word each of the first eight amendments.[219]

> Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right to trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half the States of the Union . . . . [B]y the force of the fourteenth amendment 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 . . . .[220]

In his speech on the final version of the Fourteenth Amendment, Bingham said the Amendment made it possible to protect "by national law the privileges and immunities of all 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."[221] The amendment protected citizen and stranger from unconstitutional state enactments.[222]

Senator Howard indicated the Privileges or Immunities Clause was two-fold. It protected the type of fundamental interests described in

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[217] CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

[218] *Id.* (statement of Rep. Bingham).

[219] *Id.* (statement of Rep. Bingham).

[220] *Id.* (statement of Rep. Bingham). By 1871, Bingham seems to have bowed to Supreme Court interpretation and to have abandoned his abolitionist reading of the original Privileges and Immunities Clause. *See id.* (statement of Rep. Bingham).

[221] CONG. GLOBE, 39th Cong., 1st Sess. 2542–43 (1866) (statement of Rep. Bingham).

[222] *See id.* (statement of Rep. Bingham).

Corfield v. Coryell[223] and provided absolute protection for "the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution" such as "freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances . . . the right to keep and to bear arms . . . the right to be exempt from unreasonable searches and seizures . . . [the] right [of the accused] to be tried by an impartial jury" etc.[224]

> [These rights] do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking [of] private property for public use without just compensation [a reference to *Barron*] is not a restriction upon State legislation, but applies only to the legislation of Congress . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.[225]

These statements are a problem for the nothing-but-equality argument. One response deals with the problem head on. American states, the argument goes, in their state constitutions provided their citizens with most of the protections contained in the Bill of Rights including those mentioned by Jacob Howard in his presentation of the Fourteenth Amendment to the Senate.[226] But the southern states and a few others "had failed to give the rights to their black citizens."[227] Section 1, read only as securing equality, would allow Congress to legislate equality with respect to state constitutional guarantees "and thus enable Bingham to declare that Congress would have power to enforce the Bill of Rights."[228] Under Section 1 a state could still, by the reconstructed Bingham-Howard view, abrogate Bill of Rights protections so long as it did so for all its citizens. The amendment, the argument insists, did not impose the specific guarantees of the Bill of Rights on the states.[229]

Senator Howard, Congressman Bingham and most who spoke in the 39th Congress, however, had absolute protection for liberty plus

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[223] 6 F. Cas. 546 (C.C. Wash. 1823) (No. 3230).

[224] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

[225] *Id.* at 2765–66 (statement of Sen. Howard).

[226] *See* NELSON, *supra* note 3, at 118–19; Harrison, *supra* note 3, at 1465 n.304.

[227] NELSON, *supra* note 3, at 118.

[228] *Id.* at 118–19.

[229] *See id.* at 118; *cf.* Harrison, *supra* note 3, at 1465.

equality in mind. Howard read the privileges and immunities of citizens of the United States to include the rights in the Federal Bill of Rights, "the first eight amendments of the Constitution," as he put it.[230] Howard explained that the problem was that "these rights"—most of which he read or paraphrased from the Federal Bill of Rights—did not limit state legislation.[231] States could violate the rights without any restraint "except by their own constitutions which may be changed from year to year."[232] The great object of Section 1 was to require the states "at all times to respect these great fundamental guarantees."[233] The object was to protect these guarantees from being abridged by the states, not to ensure that abrogation of them would apply to all citizens. Like Howard, Bingham and others read the Privileges or Immunities Clause to protect national rights including those in the Bill of Rights.

A mere equality approach replaces substantial liberty with formalism. By the mere equality argument, a state that abrogated the right to jury trial for all its citizens would not violate Section 1. If the state bans all publications with the bad tendency to produce evil results, for example, it does not seem to have offended the equality rationale. If it prohibits all residential political signs, eliminates the public forum, or prohibits all persons from going door to door for political causes, it does not seem to have violated the equality rule—and certainly not one that merely forbids discrimination based on caste or race. The Due Process Clause itself seems to belie the suggestion that the Fourteenth Amendment was merely an equality provision. As a mere equality provision, the Due Process Clause would mean that states could not provide different processes, for example, based on color or caste, but any process generally applied would be sufficient. Generality is one aspect of due process—that the same law applies to all and that decisions are made according to law, not whim—but it is only one aspect. As Daniel Webster said in the most widely quoted pre-Civil War definition of law of the land under Magna Carta (the equivalent of due process):

> By law of the land is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and

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[230] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).
[231] *Id.* at 2765–66 (statement of Sen. Howard).
[232] *Id.* (statement of Sen. Howard).
[233] *Id.* (statement of Sen. Howard).

immunities, under the protection of the general rules which govern society.[234]

4. A Very Technical Argument About Rights of American Citizens

A third argument against applying Bill of Rights and other constitutional liberties to the states under the Fourteenth Amendment is technical. Americans may have thought that the Constitution guaranteed them freedom of speech or protection from unreasonable searches, but that is not the case. Actually, Americans had no federal constitutional right to free speech at all. They had simply a positive prohibition that the federal government would not abridge free speech or engage in unreasonable searches. The Fourteenth Amendment could not secure such rights against state denial by forbidding states from abridging privileges or immunities, because no such privileges of citizens of the United States existed. The discussion above about the declaratory nature of Bill of Rights guarantees is one response to this argument.[235] A second response is to ask whether such technical arguments are appropriately directed against protections of liberty which should be generously interpreted.[236] Should constructions designed to restrict guarantees of liberty be permitted to defeat popular understanding in a system allegedly justified by popular sovereignty?

The argument concedes that some Republicans were determined to secure absolute protection for Bill of Rights liberties, but, it tells us, if Republicans had such plans they used the wrong words. So, when in the Fourteenth Amendment Republicans protected the absolute privileges of Americans against state denial, they really protected only those federal constitutional privileges already protected against state denial. That is because, the argument insists, the privileges of citizens of the United States must be read not as a reference to the right referred to, but the right must be read as limited by the scope of protection accorded by the Constitution before the Fourteenth Amendment.[237]

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[234] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 581 (1819); Heyman, *supra* note 156, at 559.

[235] *See supra* notes 72–88 and accompanying text; *see also* United States v. Cruikshank, 92 U.S. 542, 551, 553 (1875) (where the declaratory nature of the rights did not prevent them from acting as an effective limit on the federal government).

[236] *See* Boyd v. United States, 116 U.S. 616 (1886) (finding that guarantees of liberty should be liberally construed and that strict, narrow, and technical constructions should be avoided). *Boyd* has been departed from both as to its holding and as to this proposition. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 407–09 (1976).

[237] John Harrison nicely sets this out as one of two possible readings. Harrison, *supra* note 3, at 1465–66.

This is a very odd way to read a guarantee designed to take existing privileges and expand the scope of the protection with reference to them. For example, the Fifth Amendment contains a provision that "no person . . . shall be . . . deprived of life, liberty, or property, without due process of law."[238] The Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty, or property, without due process of law."[239] The right is virtually the same as that referred to in the Fifth Amendment. What is added is new scope for the protection accorded to it. A privilege from the Fifth Amendment is protected against state action in the Fourteenth by use of the "[n]o state shall" formula. In the Privileges or Immunities Clause a similar operation has occurred, except that the rights to be protected by the clause have been referred to by the word "privileges" instead of quoting all the constitutionally guaranteed privileges. Such a list would be quite long and would include, at least, Bill of Rights guarantees, guarantees in the original Constitution, and, now, rights added after the Fourteenth Amendment. The "[n]o state shall" language expands the scope of the protection that previously existed for these privileges.

In light of the violations of civil liberties by the states before the Civil War, a wide Republican consensus that such violations infringed what should be rights of American citizens, the text of the Bill of Rights that assumed Americans had such rights, and statements by leading proponents that the amendment would require the states to obey the federal Bill of Rights, to hold privileges and immunities such as free speech and press unprotected is strict construction with a vengeance. It ignores the rule of construction urged by some decisions, but now apparently badly out of fashion, that guarantees of liberty should be liberally construed.

Some argue Section 1 protects only some Bill of Rights liberties—those that are fundamental or correspond to natural rights. These rights could include free speech, press, and freedom of religion. James Madison implies that some Bill of Rights liberties secure natural rights; others, like jury trial, he says, were essential to protect natural rights.[240] Both the Levellers, who were at the libertarian end of the spectrum, and Thomas Hobbes, who was at the statist end, agreed that the privilege against self-incrimination was a natural right.[241] Fundamental

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[238] U.S. CONST. amend. V.

[239] *Id.* amend. XIV, § 1.

[240] *See* 2 THE BILL OF RIGHTS, *supra* note 22, at 1029.

[241] THOMAS HOBBES, LEVIATHAN (Everyman ed., 1914) (1651), *in* JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 414 (George C. Christie and Patrick H. Martin eds., 1995); JOHN LILBURNE, A WORKE OF THE BEAST (1638), *reprinted in* 2 TRACTS ON LIBERTY IN THE

or natural rights formulations could include many basic Bill of Rights liberties.

Advocates of total incorporation of Bill of Rights liberties as limits on the states, those who argue for selective application, and opponents of any application read the historical record in different ways. They place different interpretations on contemporary general descriptions of what the amendment would do. Supporters of the amendment said it would protect all rights of citizens or all constitutional rights.[242] Opponents of application can point out, correctly, that if one disregards these general statements as too general to be of much use, and disregards statements that focus on particular guarantees like free speech as too specific to indicate general incorporation, then there are few statements saying the amendment will require states to obey the Bill of Rights. Those who advocate substantial or total incorporation read the general descriptions of what the Fourteenth Amendment will do in light of a broadly held Republican view that privileges and immunities in the Bill of Rights were liberties of American citizens that limited or should limit the states even prior to the passage of the Fourteenth Amendment. Some, like Congressman Bingham, believed the guarantees were morally binding but legally unenforceable, an interpretation that paralleled the way the Court had read some guarantees of Article IV.[243]

F. *Conclusion to Part II*

The Fourteenth Amendment was designed and should be understood to protect fundamental constitutional rights, including those in

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PURITAN REVOLUTION 1638–47, at 3, 7–8 (William Haller ed., 1934); Curtis, *The Levellers*, *supra* note 26, at 362.

[242] *See* CONG. GLOBE, 39th Cong., 1st Sess. 741, 868, 1032, 1586 (1866) (stating goals as to what new amendment should do); *id.* at 2542 (noting that amendment would allow Congress to protect by national law all privileges and immunities of citizens when they are denied by unconstitutional act of any state); *id.* (statement of Rep. Bingham) (mentioning specifically cruel and unusual punishments); *id.* at 3167 (statement of Rep. Windom) (suggesting that amendment will protect "all the rights of citizenship"); *id.* at 3201 (statement of Rep. Orth) (stating that all rights of American citizenship would be protected); *id.* at app. 255–56 (statement of Rep. Baker) (stating that amendment would protect citizen in rights thrown around him by supreme law of land); *id.* at 3038 (statement of Sen. Yates) (saying rights of citizens shall not be abridged by any state); *see* N.Y. DAILY TRIB., Sept. 4, 1866, at A col. 4 (quoting Andrew Hamilton at Southern Loyalist Convention, referring to "Constitutional rights of every citizen" and "rights of citizen enumerated in the Constitution" in call for convention of Southern loyalists); *see also* SPRINGFIELD DAILY ILL. ST. J., Sept. 21, 1866, at 2 col. 6 (referring to "constitutional rights" and making specific reference to free speech). *See generally* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 131–53.

[243] Kentucky v. Dennison, 65 U.S. 66 (1861); CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).

the Bill of Rights, from state denial. That is the best reading of the Fourteenth Amendment based on text, context, history, policy, and structure.

What about rights less explicit in the text, particularly those interests deemed fundamental for Article IV, Section 2 interstate privileges and immunities purposes—rights to contract, to own property, etc.? To the extent that equality in such interests is protected under privileges and immunities secured in Article IV, Section 2 or by a structural reading of the rights of Americans, equality in such rights would be one privilege of American citizens. Various views appear in the debates. In addition to racial classifications, other equally invidious ones, like national origin and religion, would be prohibited *by the Equal Protection Clause.*

As to the broader Article IV group of basic common law interests as absolute or relative privileges or immunities within the Fourteenth Amendment, Senator Howard says:

> [W]e may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington; and I will trouble the Senate but for a moment by reading what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States. It is the case of *Corfield v. Coryell,* found in 4 Washington's Circuit Court Reports, page 380. Judge Washington says: "The next question is whether this act infringes that section of the Constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States? The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue

> and obtain happiness and safety, subject nevertheless to such restraint as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise: to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) the better to secure the perpetuate mutual friendship and intercourse among the people of the different States of the Union."[244]

Howard seems to have thought of the protection of Article IV, Section 2 as encompassing more than a right of out-of-staters not to be discriminated against as to these fundamental interests. Some read the provisions of Article IV, Section 2 as including some absolute rights of the sort Justice Washington described, together with a right to equality with in-staters in other rights like the right to own property and to maintain court actions. For Judge Washington, of course, the rights or interests can be regulated for the general good.[245] Howard very clearly says that the Privileges or Immunities Clause of the Fourteenth Amendment would require states to ad-

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[244] CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866) (statement of Sen. Howard).

[245] *See id.* at 1629; CONG. GLOBE, 38th Cong., 1st Sess. 1202, 1369, 2990 (1864); CONG. GLOBE, 35th Cong., 2d Sess. 983–44 (1859). Each says, suggests, or implies that liberties in the Bill of Rights are privileges or immunities that American citizens carry with them wherever they go in the nation. *See* Crosskey, *supra* note 62 at 14; Curtis, *A Reply to Professor Berger*, *supra* note 3, at 61–64. On the equality in civil rights among members of the state, see, for example, CONG. GLOBE, 39th Cong., 1st Sess. 1833–37 (1866) (statement of Rep Lawrence).

here to the limits of the Bill of Rights in addition to those rights listed by Justice Washington.[246]

Speaking in 1871, however, Congressman Bingham suggested that the broad orthodox understanding of Article IV-type interests was different from what was protected by the Fourteenth Amendment:

> Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague [Mr. Shellabarger] has referred is only a construction of the second section, fourth article of the original Constitution, to wit, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own . . . .
>
> Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?
>
> Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half of the States of the Union.[247]

On the Bill of Rights point, Congressman Bingham, Senator Howard, and some who thought all state citizens were entitled to equality in *Corfield* type Article IV rights concurred. The privileges or immunities *of citizens of the United States* included privileges in the Bill of Rights.

There is no doubt that the Fourteenth Amendment secured some measure of equality to American citizens, including African-Americans, in state secured rights to hold property, to testify, etc. that were listed in the Civil Rights Act. The historical evidence that the Civil Rights Act refers only to rights that states created and could destroy is thin. So is

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[246] For Howard's statement on the Bill of Rights, see CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

[247] CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

evidence that the Privileges or Immunities Clause, rather than the Equal Protection Clause, was understood to be the only or even the primary source of protection for equality in these state law substantive rights. There is substantial evidence for protection for a set of fundamental national rights including Bill of Rights liberties. Still, in the *Slaughter-House Cases*,[248] the Privileges or Immunities Clause suffered a wound from which it has not yet recovered.

III. The Fourteenth Amendment in the Slaughter-House Cases

The story of the *Slaughter-House Cases* is a familiar one.[249] The Louisiana legislature created a corporation and authorized it to establish a slaughter-house in New Orleans and several additional counties. Butchers who had been slaughtering elsewhere could use the newly created slaughter-house on payment of a fee. But the slaughter-house was to be the only slaughter-house in the area. In this respect it was granted a monopoly. No other slaughter-houses were permitted in the counties in which the monopoly had been granted.

The measure was justified as a health measure and as an exercise of the police powers of the state. There is no doubt as to the health and environmental problems caused by the prior approach to slaughtering animals or as to the advantages of a new facility. In the nineteenth century, states had often given monopoly privileges to encourage capital investment in new enterprises. Butchers attacking the act claimed it violated the Thirteenth Amendment, and the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment. This article will focus only on the Court's destruction of the Privileges or Immunities Clause.

Justice Miller wrote for the Court. He began his discussion with a recapitulation of the history of the post-Civil War amendments. He insisted, curiously, that a very superficial investigation was all that was

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[248] 83 U.S. 36 (1872).

[249] A major recent re-evaluation of the *Slaughter-House Cases* appears in Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627 (1995). The most novel and powerful aspect of Dean Aynes' important analysis is his historical attempt to explain why the majority reached the conclusion it did. A full discussion of the Court's transformation of the Fourteenth Amendment including a fine discussion of the *Slaughter-House Cases* appears in W. W. Crosskey, Politics and the Constitution 1119–58 (1953). For a novel, but I think ultimately unpersuasive, suggestion that Miller in *Slaughter-House* did read the Fourteenth Amendment as incorporating the Bill of Rights, see generally Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and The Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739 (1984).

required. The "most cursory glance at these articles discloses a unity of purpose."[250] Again, he announced that:

> on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[251]

Justice Miller's "most casual" and "cursory" analysis finds the purposes of the Fourteenth Amendment in the abuses of the Black Codes. The newly freed slaves, he tells us, were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party.[252]

All of this is true enough, though it is radically incomplete, extremely "casual," and appallingly "cursory." Justice Miller leaves out the entire history of suppression of civil liberties of white opponents of slavery, including Republicans, in the South before the Civil War. Justice Miller tells nothing about the suppression of free speech or the fact that many in the South viewed Republican congressmen who had sponsored an anti-slavery book, including some who were later members of the committee that proposed the Fourteenth Amendment, to be felons. He fails to note that Black Codes abridged privileges including free speech, the right to hold religious meetings and the right to bear arms, and that there were complaints about such deprivations in the 39th Congress. He neglects to report that the slogan of the Republican party in 1856 and 1860 demanded free speech, free soil, free labor and free men.[253]

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[250] *Slaughter-House*, 83 U.S. at 67.

[251] *Id.* at 71–72.

[252] *See id.* at 70.

[253] *See* RICHARD SEWELL, BALLOTS FOR FREEDOM 284 (1976).

The failure to mention the history of suppression of free speech in the South is puzzling since the issue is raised in Justice Bradley's dissent:

> The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.[254]

Having completed his historical exegesis, Justice Miller proceeded to a constitutional one. The Fourteenth Amendment, he noted, made all persons born in the country and subject to its jurisdiction both citizens of the United States and of the states in which they reside. These distinct citizenships had different characteristics and different privileges attached to each. Only privileges or immunities of citizens of the United States were placed "under the protection of the Federal Constitution."[255] As Miller's opinion progressed, he announced that the great mass of civil rights and civil liberties are privileges and immunities of state citizenship. These he identified with the fundamental rights of Article IV, Section 2.

> [The Article IV, Section 2 Privileges or Immunities Clause] did not create those rights, which it called privileges and immunities of citizens of the States [sic]. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.
>
> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be

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[254] *Slaughter-House*, 83 U.S. at 123 (Bradley, J., dissenting).

[255] *Id.* at 74.

> the measure of the rights of citizens of other States within your jurisdiction.[256]

Justice Miller then asked a loaded rhetorical question:

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?[257]

Of course, the correct answer to that question is "No!" Most Republicans did not intend to eliminate or threaten all jurisdiction exercised by the states with preempting national laws. They did not intend to federalize the entire domain of state law and turn supervision of virtually all questions of state law over to federal courts. They thought the federal system had virtues, and they wanted to preserve its positive features and to rid it of what they saw as abuses.[258] Even on this point, however, candor demands recognition of ambiguity. There were some ardent nationalizers among Republicans.[259] Goals of individual

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[256] *Id.* at 77.

[257] *Id.*

[258] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088–89, 1292, 1832–33, 2526, 2904, app. at 99, app. at 257 (1866); *see also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 69, 95. Of the prototype, Representative Hale said: "I submit it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden and the law of Congress established instead." CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866) (statement of Rep. Hale). Hale was not upset with a plan that required states to obey the Bill of Rights, because he thought (mistakenly) that existing law already made the Bill of Rights a limit on the states. *Id.* (statement of Rep. Hale). For more on Hale's concern for federalism, see *id.* at 1065 (statement of Rep. Hale). Giles Hotchkiss had two objections to the prototype. It failed permanently to secure the rights it sought to protect, because it left the matter up to Congress, and what the present Congress passed a subsequent one could repeal. *Id.* at 1095 (statement of Rep. Hotchkiss). Second, he objected because he understood "the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject name, the protection of life, liberty, or property. I am unwilling that Congress shall have any such power." *Id.* (statement of Rep. Hotchkiss). He agreed with the object of the clause, "that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* (statement of Rep. Hotchkiss). Senator Steward suggested that the prototype would "obviate the necessity of . . . any more State Legislatures." *Id.* at 1082 (statement of Sen. Steward).

[259] *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1118, 1294 (1866) (statement of Rep. Wilson)

rights, non-discrimination, state rights, and popular sovereignty are in tension with each other.

Having proved to his satisfaction that Republicans did not intend to nationalize all law and all civil rights by the Privileges or Immunities Clause, Justice Miller unintentionally proceeded to imply that in fact the clause did nothing at all. He established this point in the course of an unsuccessful effort to show that, by his analysis, the clause had some independent meaning. "Lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its National character, its Constitution, or its laws."[260]

What, then, were the privileges or immunities so crucial to Americans of African descent, the persons for whom Miller incorrectly suggested the Amendment was exclusively fashioned? Behold the result: citizens could travel to Washington, D.C. to transact business with the national government; they had free access to the seaports, and to the sub-treasuries; they could demand the care and protection of the federal government when on the high seas or within the jurisdiction of a foreign government. They had the right to use the navigable waters. They had the right to peaceably assemble and petition the national government. In short, they had exactly the same bundle of enforceable privileges they would have had without the passage of the Fourteenth Amendment, or, for Americans of African descent, as they would have had if the Fourteenth Amendment consisted solely of the Citizenship Clause. I assume, as Republicans did, that African-

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(justifying Civil Rights Bill based on congressional power to enforce Thirteenth Amendment and also power to enforce Due Process Clause). Citizens had certain basic rights and Congress had the right to enforce the rights. Read broadly and with the assumption that this understanding was incorporated into the Fourteenth Amendment, this idea would make possible total pre-emption of state law. But, of course, we know that many Republicans would have found total federal power unacceptable. Wilson himself suggested that "the entire structure of [the Civil Rights Bill] rests on discrimination relative to civil rights and immunities." *Id.* at 1118 (statement of Rep. Wilson); *see also id.* at 1117 (statement of Rep. Wilson). The cross currents in the debates and multiplicity of views mean that a court cannot simply transcribe the original intent of the framers on the full extent of congressional power. Instead it must use the history of the Amendment constructively to create the best account possible. The construction that the Court has reached with reference to the Equal Protection Clause—that heightened scrutiny is reserved for racial classifications and others that are markedly similar—is a construction that is a reasonable interpretation of the broad and sometimes conflicting goals of the framers. As in the case of rights for women or racial segregation, the broad goals and the specific understandings of the framers are often in conflict, and such a conflict also means that courts must sometimes construct and cannot always simply transcribe the purposes of the framers.

[260] *Slaughter-House*, 83 U.S. at 79.

Americans became citizens by the passage of the Thirteenth Amendment.[261]

These privileges have some common characteristics. All of them are implied by the very nature of the federal government and can be derived by structural arguments, even before the passage of the Fourteenth Amendment. By this reading of "privileges or immunities of citizens of the United States," the Fourteenth Amendment added nothing to the Constitution as it existed before its enactment.

Second, significantly, most of these "privileges" hardly relate to pressing problems of the newly freed slaves. In the premier guarantee of Section 1, Republicans have protected newly freed slaves both on their trans-Atlantic cruises to Paris, and once they arrive in the French capital. As Justice Swayne noted in his dissent, the *Slaughter-House* majority performed a judicial miracle: they turned bread into a stone.[262] The miracle was performed in the name of federalism—holding "with a steady hand the balance between State and Federal power."[263]

The shortcoming of Justice Miller's *Slaughter-House* decision was not that it rejected the butchers' invitation that the Court set itself up under the Privileges or Immunities Clause as the supreme arbiter of the reasonableness of economic legislation,[264] an invitation the *Lochner* Court later accepted under the Due Process Clause. The great failure of the Court was that its rationale deprived the Privileges or Immunities Clause of its central core. It left protections of Bill of Rights liberties to the tender mercies of the very states that had so recently made mincemeat of them.

Very soon the *Slaughter-House* dissenting Justices once again exercised their proposed charter to judge the reasonableness of economic legislation. They did so in the case of Myra Bradwell, a married woman who had been denied admission to the Illinois Bar because of sex and marital status.[265] Mrs. Bradwell insisted that the Privileges or Immunities Clause protected her right to practice law.[266] The *Slaughter-House* majority, having deprived the Privileges or Immunities Clause of any significant meaning, quickly disposed of Mrs. Bradwell's claim by a citation to *Slaughter-House*.[267]

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[261] *See id.* at 78–80; CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866) (statement of Rep. Wilson).

[262] 83 U.S. at 129 (Swayne, J., dissenting).

[263] *Id.* at 82.

[264] See *Slaughter-House Cases* Brief for Defendants, *in* 6 LANDMARK BRIEFS 587–601.

[265] Bradwell v. Illinois, 83 U.S. 130, 130–31 (1872).

[266] *See id.* at 135.

[267] *Id.* at 139.

The matter was not so easy for the *Slaughter-House* dissenters. Three of the four *Slaughter-House* dissenters found it reasonable for a state to deny a woman, even a single woman, the right to practice law—a view they shared with some framers of the Fourteenth Amendment. Indeed, these *Slaughter-House* dissenters announced that it was positively desirable to keep women out of the profession. The Creator himself had set the rule: the "paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother."[268] Chief Justice Chase dissented alone and without opinion.[269] The concurring opinion in *Bradwell* suggests some of the uncertainty inherent in the *Slaughter-House* dissenters' broad view of the power to strike down economic state legislation under the Privileges or Immunities Clause.

IV. Evaluation of Slaughter-House

A. *The Majority*

If Justice Miller was partly wrong in his *Slaughter-House* decision, then what did the Privileges or Immunities Clause mean? It protected mainly rights, privileges, and immunities set out in the text of the Constitution itself.[270] These included basic rights such as free speech, press, freedom of religion, and the right to petition, and others such as the privilege against self-incrimination, the right to jury trial, and the immunity against cruel and unusual punishments. These basic rights were recognized, but not created by, the Bill of Rights and were protected by it against federal interference. The Fourteenth Amendment extended the protection against state interference.

These privileges set out in the Federal Constitution would include the prohibiton of state discrimination against non-residents as to fundamental rights and interests—the protection against discrimination set out in Article IV, Section 2. It also included the protection against ex post facto laws and other rights set out in the body of the original Constitution. For at least some Republicans, the Constitution, even before the Fourteenth Amendment, combined protection of these absolute national privileges together with some type of equality in basic

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[268] *Id.* at 141.

[269] *Id.* at 142 (Chase, J., dissenting without opinion).

[270] Courts of all persuasions have found some rights that are less explicit in the text, such as the right to travel. I believe that some acceptance of less textually explicit rights is necessary to effectuate the Constitution's purposes. Still, if such rights are too broadly construed, the doctrine of non-textual rights threatens the basic purpose of representative government. Much of the modern controversy in constitutional law is generated by this tension.

civil rights regulated by state law. This understanding overlaps with a core understanding many Republicans had of the Equal Protection Clause. Some probably envisioned a larger body of fundamental national interests, many of which were subject to broad state regulation.

Why should the framers use the words "privileges or immunities" instead of simply "rights in the Bill of Rights?" Why include pre-existing constitutional protections? The phrase "rights in the Bill of Rights" would leave out constitutional guarantees of liberty such as habeas corpus, the prohibition against ex post facto laws and the protection for migrants from one state to another under Article IV, Section 2. Court decisions had suggested that other provisions of Article IV, Section 2 represented obligations that were not enforceable against state officers.[271] By including in the Privileges or Immunities Clause

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[271] *See, e.g.*, Kentucky v. Dennison, 65 U.S. 66, 107–08 (1861) (holding that constitutional requirement to return fugitives from justice did not contain judicially enforceable limit on state officers), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987); Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding that state officers could not be compelled to enforce fugitive slave clause). The 1871 Report of the Judiciary Committee on the Memorial of Victoria C. Woodhull asking Congress to grant suffrage to women under the Privileges or Immunities Clause is (to say the least) puzzling but raises concerns as to whether limits in Article IV, Section 2 were enforceable against the states.

> The [Privileges or Immunities Clause of the] fourteenth amendment, does not in the opinion of the committee refer to privileges and immunities of citizens of the United States other than those privileges embraced in the original text of the Constitution, article 4, section 2. [Bingham and other Republicans had read this clause as making Bill of Rights guarantees at least a moral limit on the states.] The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as express limitations on the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.

H.R. REP. No. 22, 41st Cong., 3d Sess. (Jan. 30, 1871) (majority report presented by Rep. Bingham).

Two months later, Bingham spoke on a bill to enforce the Fourteenth Amendment against Klan terrorism. After saying that the privileges or immunities of the Fourteenth Amendment were chiefly set out in the Bill of Rights, Bingham said:

> [The decision of Justice Washington in *Corfield*] is only a construction of the second section, fourth article of the original Constitution, to wit, "The citizens of each State shall be entitled to all privileges or immunities of citizens in the several States." In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own . . . .
>
> Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provisions of the fourteenth article, that no state shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations.

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

constitutional rights beyond those in the Bill of Rights, the Fourteenth Amendment clearly gave Congress power to enforce these guarantees. Some of the abuses that came from slavery and continued after the Civil War involved discrimination against non-residents as to fundamental interests of the conventional Article IV type.

The interpretation of the Fourteenth Amendment suggested here is much like that held by many Republicans before the Civil War. They thought that the original Privileges or Immunities Clause had both an equality component for out-of-staters and separate protection for fundamental rights recognized by the Constitution and the Bill of Rights. They read the clause to say "the citizens of each state shall be entitled to all privileges and immunities of citizens [of the United States] in the several states."[272] Justice Bradley, in his *Slaughter-House* dissent, captured this aspect of the Amendment.

> It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens in a State; not of citizens of a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."
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> It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.
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> But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and

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[272] CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 60–61; *see* Crosskey, *supra* note 62, at 13–15.

> immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, ex post facto laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of habeas corpus, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of not being deprived of life, liberty, or property, without due process of law. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.[273]

Justice Bradley's analysis of Section 1 as applying Bill of Rights liberties to the states was later espoused by Justice Field,[274] Justice Brewer and Justice Harlan,[275] and much later by four twentieth century Justices of the Supreme Court—Justices Black, Douglas, Murphy and Rutledge.[276]

B. *Justice Field's Dissent*

In his *Slaughter-House Cases* dissent, Justice Field interpreted the Privileges or Immunities Clause, in good part at least, as an equality guarantee. Just as Article IV, Section 2 protected citizens of other states against arbitrary and discriminatory legislation with respect to fundamental interests such as those specifically listed in the Civil Rights Act, the Privileges or Immunities Clause extended a protection against discrimination in these rights to citizens of the same state.[277] To the

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[273] 83 U.S. at 117–18 (Bradley, J., dissenting).

[274] O'Neil v. Vermont, 144 U.S. 323, 337 (Field, J., dissenting).

[275] *See, e.g.*, Maxwell v. Dow, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting); Hurtado v. California, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting)

[276] Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

[277] *See Slaughter-House*, 83 U.S. at 100–01 (Field, J., dissenting).

extent that this interpretation reaches only discrimination as to common occupations of life based on color or on some equally suspect and arbitrary basis such as national origin or religion, it interprets the Privileges or Immunities Clause as Senator Howard, a leading framer of the Fourteenth Amendment, and others seem to have interpreted the Equal Protection Clause.[278] If one interpreted the Privileges or Immunities Clause only as containing a prohibition on discrimination based on race and closely analogous discrimination such as national origin, religion, and political affiliation, it would not be sufficient to void the slaughter-house monopoly.

Divergent statements in the debates leave unanswered questions. If one insists on a national body of fundamental economic interests

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> Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges . . . .

Id. For a modern attempt to read the Privileges or Immunities Clause as such a guarantee of in-state equality, see Harrison, *supra* note 3, at 1388, 1412 n.103.

[278] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?

Id. (statement of Sen. Howard). After quoting the Due Process and Equal Protection Clauses, which he saw as embodying the spirit of the Declaration of Independence, Senator Poland said:

> Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of . . . the civil rights bill. The power of Congress to do this has been doubted . . . . It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.

Id. at 2961 (statement of Sen. Poland).

beyond those in the Bill of Rights, or even on a right to general equality of all citizens in fundamental economic interests created by state law, then under the Enforcement Clause, the federal government could preempt most areas of state law. Most Republicans seemed quite unwilling to authorize this. On this point, it is simply impossible to fully harmonize all the conflicting strands of the debates. A limited, but not entirely textual, class of individual rights plus a limited right to equality probably comes as close as possible to capturing the major motivations of the framers to protect fundamental constitutional rights, outlaw racial and similarly invidious discrimination, and preserve a large role for the states.

1. A Critique of Recent Scholarly Support for Justice Field

John Harrison in an elaborate article argues that Field's analogy to Article IV, Section 2 was at least one, and perhaps the only, proper interpretation of the Privileges or Immunities Clause. He further suggests that the Equal Protection Clause did not proscribe racial classifications conferring and withholding substantive rights but instead referred to "the mechanisms through which the government secured individuals and their rights against invasion by others."[279] Elsewhere Harrison notes that it "is likely that the [Equal Protection] Clause also governs the content of protective laws."[280] "[O]ne way of depriving someone of the benefit of a law would be to pass another that took the benefit away . . . ."[281] Still, he suggests the Clause was focused on equality in protection of existing rights, not on entitlement to substantive rights such as the ownership of real property. That, as he sees it, was the work of the Privileges or Immunities Clause. There are parts of the framing debates that some read as consistent with this view of the Privileges or Immunities Clause.[282]

Still, a number of members of Congress in 1866 read "equal protection" to proscribe at least some irrational classifications in the allocation of substantive rights, such as those related to property. Many also read the Clause to require protection for existing fundamental rights and interests. The prototype of the Equal Protection Clause

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[279] Harrison, *supra* note 3, at 1435, 1450.

[280] *Id.* at 1448.

[281] *Id.*

[282] *See id.* at 1447; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham); *cf.* Phillip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 378–92; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 325–29 (1988); Earl M.

allowed Congress to secure "to all persons in the several states equal protection in the rights to life, liberty, and property."[283] Representative Hale objected that the Clause would allow Congress to provide what property rights should belong to married women. This, Hale insisted, should be a matter of state law. Thaddeus Stevens interrupted and disagreed with Hale. He accepted Hale's assumption that "equal protection" reached substantive rights like property. He seemed to believe, however, that the classification was not irrational. "When a distinction is made between two married people or two femmes sole, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."[284]

For Stevens, equal protection required that similarly situated people be treated equally. Blacks and whites were similarly situated with reference to property and contract rights; married women and men were not. Senator Howard said the Equal Protection Clause:

> abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits hanging a black man for a crime for which a white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.[285]

For a number of Republicans who spoke in 1866, equality of protection encompassed equality in substantive rights like the right to own property and to inherit. Indeed, at times Harrison notes a significant overlap between his reading of the Equal Protection and Privileges or Immunities Clauses. The greater the overlap, the greater the possibility that the interpretation of the Privileges or Immunities Clause limiting it to equality in substantive state law rights has reduced it to a purely redundant provision.[286] In light of all this history, the

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Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

[283] CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

[284] *Id.* at 1064 (statement of Rep. Stevens).

[285] *Id.* at 2766 (statement of Sen. Howard).

[286] *See id.* at 1064; *id.* at 2961 (statement of Sen. Poland); *see also id.* at 2459 (statement of Rep. Stevens) (summarizing first section as "prohibiting states from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws"). After emphasizing the word "equal" in the Equal Protection Clause with quotation marks, Stevens went on to describe Section 1. *Id.* at 2459 (statement of Rep. Stevens). Although it is not entirely clear, Stevens seems to have read the Equal Protection Clause as forbidding racial classifications with reference to a wide range of laws, including laws touching interests that are fundamental in

Court's current construction of the Equal Protection Clause as reaching some types of discrimination in allocation of substantive rights is quite reasonable.

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the Article IV sense. While he emphasized "equal" in his summary of Section 1 with quotation marks, in his statement that "the law which operates upon one man shall operate *equally* upon all," he again emphasized "equally," this time with italics. *See id.* at 2459 (statement of Rep. Stevens). Section 1, he said,

> allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same extent. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

Id. (statement of Rep. Stevens). One possibility is that the Equal Protection Clause "governs the administration or execution of the laws rather than their content. But if protection refers only to application and not to substance, the clause is not all encompassing and could not generate the Civil Rights Act of 1866." Harrison, *supra* note 3, at 1434. The problem is that in Congress in 1866 protection seems as often to have been spoken of as encompassing equality in the substance of the right (to contract or to own property) as in this more limited fashion. Representative Shellabarger insisted, except to the extent that it involved citizenship, that the Civil Rights Bill simply outlawed racial discrimination:

> It does not prohibit you from discriminating between citizens of the same race, or of different races, as to what their rights to testify, to inherit, &c., shall be. But if you do discriminate, it must not be "on account of race, color, or former condition of slavery." That is all. If you permit a white man who is an infidel to testify, so must you a colored infidel.
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> Self-evidently this is the whole effect of this first section. It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races. . . . It does seem to me that that Government which has the exclusive right to confer citizenship, and which is entitled to demand service and allegiance, which is supreme over that due to any State, may, nay, must protect those citizens in those rights which are fairly conducive and appropriate to the attainment of his "protection" as a citizen. And I think those rights to contract, sue, testify, inherit, &c., which this bill says the races shall hold as races in equality, are of that class which are fairly conducive and necessary as means to the constitutional end, to wit, the protection of the rights of person and property of a citizen.
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> . . . .
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> Who will say that Ohio can pass a law enacting that no man of the German race and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall make a contract in Ohio, or ever inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law . . . then you have the spectacle of an American citizen admitted to all its high privileges, and entitled to the protection of his Government in each of these rights, . . . and yet that citizen is not entitled to either contract, inherit or own property. . . . If each one of these rights is necessary to secure that which must, as we have seen, be within the powers of the Government, to wit, the securing of the "protection of an American citizen," then the bill is constitutional.

CONG. GLOBE, 39th Cong., 1st Sess. 1293–94 (1866) (statement of Rep. Shellabarger); *cf. id.* at 1088. The idea that States could deny aliens the right to own real property, by the understanding

Since all legislation classifies and much legislation affects property and contract, Justice Field's approach potentially opened a wide field of state economic regulation to judicial scrutiny. Since the Fourteenth Amendment gives Congress the power to enforce its provisions by appropriate legislation, state systems of classification would be subject to congressional revision and preemption. To the extent that judicially suspect classifications are limited to race and closely analogous groups like national origin, religion, political affiliation, and (today) gender and other invidious bases, the threat to the role of the states is greatly reduced. Today, with the greatly expanded effect of the Commerce Clause, in part as the result of an increasingly integrated national and international economy, broad federal power is commonplace. It was not commonplace in 1866.

2. Justice Field and *Lochner*

The majority in *Slaughter-House* viewed the statute as a plausible health measure. Justices Field and Bradley saw health as a pretext. They agreed that state police powers could limit economic rights, but reserved the right to judge the rationality of the statute for themselves.[287] In his insistence that laws regulating economic rights be generally applicable and in his willingness to subject claimed health benefits to searching scrutiny, Justice Field's dissent anticipates *Lochner* era jurisprudence. The immediate application by Justice Field was less extreme. To the extent that his decision could be limited simply to prohibiting state-granted monopolies in the common occupations of life, it reaches a desirable, though debatable, result.[288] To the extent that the reach is far broader, it delegates questions of reasonableness of much economic

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of 1866, but had to protect them in the right to life, etc., is said to support the limitation of the Equal Protection Clause to equality in matters other than substantive rights. For many in 1866, however, the problem was solved not by this distinction, but by the idea of reasonable classification. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Stevens); *id.* (statement of Rep. Hale); Harrison, *supra* note 3, at 1442–43; *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (suggesting that under Civil Rights Act States could deny married women right to testify and contract, but could not deny those rights to other races). The problem of reasonable classification recurs under an interpretation which limits equality in fundamental interests to the Privileges or Immunities Clause. One is then forced to explain why some Republicans in 1866 thought married women, who were citizens, could be denied the right to contract or own and control property. For Harrison on the "significant" overlap, see Harrison, *supra* note 3, at 1450.

[287] *Slaughter-House*, 83 U.S. 36, 87–88, 107, 109 (Field, J., dissenting); *id.* at 112 (Bradley, J., dissenting).

[288] *Cf.* Livingston v. Van Ingen, 9 Johns. 507 (N.Y. Ct. for Trial of Impeachments and Correction of Errors 1812).

legislation to the judiciary. As decisions from the *Lochner* era show, enthusiasm for what such a system produces depends on one's economic situation and whether one shares the ideology of the judge making the decision.

V. Cases Following Slaughter-House

The *Slaughter-House Cases* majority invoked the paradigm of the semi-sovereign state, modified to prevent denial of certain rights to blacks, and insisted that almost all a citizen's basic rights were created and protected by state law.[289] So, the majority, implicitly at least, rejected the idea that any Bill of Rights liberties limited the states. After all, it would hardly be necessary to dredge up "privileges" such as the right to visit seaports, to seek the protection of the federal government on the high seas and in foreign nations, to visit sub-treasuries, and to travel back and forth to Washington, D.C., if Bill of Rights liberties were examples of such privileges. In the cases that followed *Slaughter-House*, the implication became explicit.

A. United States v. Cruikshank *and the State Action Syllogism*

In *United States v. Cruikshank*,[290] the defendants were indicted for conspiring to deprive Americans of African descent of privileges or immunities allegedly secured by the Constitution, including the right to assemble and to bear arms. The Court cited the *Slaughter-House* decision to establish the limited nature of rights protected by the Federal Constitution. The federal government, the Court noted, "can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."[291] The right to assemble was not created by the Constitution. "It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection."[292]

The Court cited the rule of *Barron v. Baltimore*[293] as settled doctrine. Eight years after the ratification of the Fourteenth Amendment, the Court said it was "now too late to question" the idea that states were free to violate liberties in the Federal Bill of Rights.[294]

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[289] Slaughter-House Cases, 83 U.S. 36, 62–66, 71–72 (1872).
[290] 92 U.S. 542 (1875).
[291] *Id.* at 550.
[292] *Id.* at 550–51.
[293] 32 U.S. 243 (1833).
[294] *Cruikshank*, 92 U.S. at 552.

> The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.[295]

Had the indictment alleged a conspiracy to interfere with a petition to the national government, the Court said, federal power to protect the petitioners would have existed.[296] That would have been so even if the Fourteenth Amendment never had been enacted.

Consistent with this view, the federal government also lacked power to protect African-Americans in their right to bear arms.

> This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to [state police powers] . . . "not surrendered or restrained" by the Constitution of the United States.[297]

In short, contrary to the popular understanding and the understanding of leading Republicans in the 39th Congress, the argument claims American citizens did not possess any of the privileges or rights set out in the Bill of Rights as a protection against action of their states. The claim to protection against individual violence was weaker still. American citizens had no right to free speech, to free press, and no general right to assemble. They simply had a protection against federal interference with such rights, and would actually enjoy the rights if they happened to exist by state law and if the state chose not to terminate them. The pre-Civil War paradigm of the semi-sovereign state, free to deprive all its citizens of fundamental rights set out in the Bill of Rights, was resurrected largely intact by the Supreme Court.

Of course, overt racial discrimination, at least as to certain rights, was forbidden.[298] By 1896 the Court said that state-mandated racial

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[295] *Id.*

[296] *Id.* at 553.

[297] *Id.*

[298] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Ex parte* Virginia, 100 U.S. 339 (1879).

segregation of railroads did not violate any constitutional obligation of the states to its citizens.[299]

The idea that the federal government had to create a personal liberty before it could protect it is odd. By natural rights views widely held in the eighteenth and nineteenth centuries, governments did not create rights to free speech or press or the right to bear arms. Governments simply recognized them and were established to protect them. *Cruikshank* itself recognized that the federal government could protect the right to petition Congress—even though the right to petition was not created by the Constitution. This was so for structural reasons—the right was inherent in republican government.[300] The Constitution also provides that the United States shall guarantee to each state a republican form of government,[301] a fact not discussed in *Cruikshank*.

In any case, the *Cruikshank* Court adhered to the state action syllogism. The Fourteenth Amendment limits the power of the states; individuals are not states; therefore the federal government lacks power under the Fourteenth Amendment to reach private action.[302]

Power in the federal government to protect rights in the Bill of Rights against individual invasion raises the problem of a limitless federal jurisdiction that could fully absorb the powers of the states. If the federal government could enforce rights to life, liberty and property against all private invasions, the separate sphere for the states would disappear. A prototype of the Fourteenth Amendment had given Congress power to secure to all persons equal protection in the rights to life, liberty and property. It encountered substantial opposition because of the fear that it could make virtually the entire domain of state law subject to federal preemption.[303]

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[299] Plessy v. Ferguson, 163 U.S. 537 (1896).

[300] *See Cruikshank*, 92 U.S. at 552–53.

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.

Id.

[301] U.S. CONST. art. IV, § 4.

[302] For possible qualifications, see *Cruikshank*, 92 U.S. at 553–54.

[303] Of the prototype, Representative Hale said: "I submit it is in effect a provision under which

The framers of the Fourteenth Amendment wanted both to protect individuals' fundamental rights from invasion and also to preserve federalism. Accomplishing both objectives requires accommodation and judicial creativity, but accommodation would hardly have been beyond the power of a Court genuinely interested in preserving both individual rights and federalism. The Court could reasonably have held that only those private actions undertaken with the specific intent of depriving persons of constitutional rights would be within the power of Congress. For example, murder or burglary deprives a person of life or property without due process, but the object of the action is not to do so. In contrast, lynching a prisoner before trial to punish him for an alleged crime is specifically designed to deprive a person of a constitutional right. Again, assault or murder is ordinarily a matter of state law. An assault in 1872 in North Carolina, for example, for the purpose of punishing a person for espousing Republican party doctrine would be something Congress could make a federal crime. In such cases, the private party seeks to exercise what is exclusively a state power for the purpose of depriving a citizen of a constitutional right.[304]

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all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden and the law of Congress established instead." CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866) (statement of Rep. Hale). Hale was not upset with a plan to require states to obey the Bill of Rights, because he thought (mistakenly) that existing law already made the Bill of Rights a limit on the states. *Id.* (statement of Rep. Hale). On Hale's concern for federalism, see *id.* at 1065 (statement of Rep. Hale). Giles Hotchkiss had two objections to the prototype. It failed permanently to secure the rights it sought to protect, because it left the matter up to Congress, and what the present Congress passed a subsequent one could repeal. *Id.* at 1095 (statement of Rep. Hotchkiss). Second, he objected because he understood "the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, or property. I am unwilling that Congress shall have any such power." *Id.* (statement of Rep. Hotchkiss). He agreed with the object of the Clause, "that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another." *Id.* (statement of Rep. Hotchkiss). Senator Steward suggested that the prototype would "obviate the necessity of . . . any more State Legislatures." *Id.* at 1082 (statement of Sen. Steward).

[304] The state action question is complex, and the discussion here is incomplete. Of course, the Fourteenth Amendment debates highlight Republican concern with preserving Federalism. Advocates of a strong state action limit point to the change in the form of the Fourteenth Amendment from one giving Congress power to legislate generally to secure equal protection, etc., to one establishing citizenship, putting limits on states, and providing power to enforce these provisions. Even advocates of a stronger state action limit might concede that state inaction—failure to protect—might trigger congressional power.

Abolitionist legal theorist Joel Tiffany argued (before the Fourteenth Amendment) that the provisions of the Bill of Rights limited the states and that Congress had power to enforce the guarantees, if states by positive enactments had authorized a violation of basic rights. JOEL TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY 55–57, 85 (1849).

At the very least, the guarantee of republican government coupled with the First and Fourteenth Amendments should be sufficient to reach all private violence aimed at political speech, press, and association.

Something like this solution seems to have been reached on one occasion by Republicans in Congress who were concerned with Ku Klux Klan atrocities, constitutional limitations and preserving the role of the states. The Enforcement Act of 1871 punished those who "shall conspire together, or go in disguise upon the public highway or upon the premises of another *for the purpose*, either directly or indirectly, *of depriving a person* or any class of persons *of the equal protection of the laws, or of equal privileges or immunities under the laws.*"[305] By this approach, most crimes would have remained exclusively state matters. Those crimes specifically designed to deprive a person of constitutional rights would have been subject to both state and federal prosecution.

Nor should one conclude that such power would necessarily allow preemption of state laws protecting against private violence aimed at free speech. The nature of the federal system could broadly protect such traditional state activity from federal preemption, provided the state remedy did not seek to nullify the federal one.

B. *The Decimation of the Bill of Rights as Applied by the Fourteenth Amendment*

After the *Slaughter-House Cases*, rejections of Bill of Rights guarantees as limiting the states came thick and fast. The rights to bear arms and to assemble were rejected in *Cruikshank* as was the right to a civil jury trial in *Walker v. Sauvinet*,[306] grand jury indictment in *Hurtado v. California*,[307] and criminal jury trial in *Maxwell v. Dow*.[308]

Maxwell involved a gunfighter convicted of bank robbery by a jury of eight.[309] In an opinion written by Justice Peckham, the Court held the Sixth Amendment guarantee of jury trial required a jury of twelve in federal prosecutions, but the Sixth Amendment did not limit the states in a similar fashion.[310]

> Protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase "privileges and immunities" of citizens of the United States, which the states by reason of

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[305] Act of Apr. 20, 1871, 17 Stat. 13 (emphasis added).
[306] 92 U.S. 90 (1876).
[307] 110 U.S. 516 (1884).
[308] 176 U.S. 581 (1900).
[309] *Id.* at 582.
[310] *Id.* at 604.

> the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the Slaughter-House Cases and United States v. Cruikshank are all wrong, and should be overruled.[311]

Justice Peckham cited a host of cases rejecting application of the Bill of Rights to the states.[312]

As to Maxwell's due process challenge, the Court announced:

> [T]he Fourteenth Amendment was not designed to interfere with the power of a state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering process provided by the law of the state.[313]

The Court further announced that "due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government."[314]

As the Fourteenth Amendment shrank as a protection for liberties in the Bill of Rights, it grew as a protection for liberty of contract. In *Maxwell*, Justice Peckham had been extraordinarily solicitous to protect state power and the ability of the electorate to chart its own course by eliminating rights like jury trial and others set out in the Bill of Rights. Justice Peckham intoned:

> It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be . . . . [T]he people can be trusted to look out and care for themselves.[315]

C. Lochner: Slaughter-House *Revised and* Meyer: Slaughter-House *Rewritten*

But in *Lochner v. New York*,[316] Justice Peckham held that a New York law, limiting bakers to working ten-hour days and no more than sixty hours per week, violated liberty of contract protected by the Due

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[311] *Id.* at 593.
[312] *Id.* at 591–98.
[313] *Maxwell*, 176 U.S. at 603.
[314] *Id.*
[315] *Id.* at 604–05.
[316] 198 U.S. 45 (1905).

Process Clause. The New York legislature had justified the statute as a health measure. For Peckham, however, "limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual" unless the Court was satisfied of a substantial danger to health.[317] The very substantial evidence of health problems produced in Justice Harlan's dissent did not satisfy Justice Peckham.[318] In *Maxwell*, Justice Peckham had indicated that laws that did not operate on all alike, or that were partial or arbitrary, could violate the Fourteenth Amendment. He seems to have thought the *Lochner* case met this test.

Justice Peckham believed that the real motive for the legislation was to equalize bargaining power between employer and employee. In such a case, "the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."[319] Justice Peckham made no mention of the *Slaughter-House Cases* he had cited so extensively in *Maxwell*, or of dual sovereignty, or of the ability of the people to take care of themselves in the state legislative process.

Lochner used free labor rhetoric—the right of grown "men" to make contracts as they pleased and to decide whether and how to sell their labor. On a formal level, the rhetoric resonates with some antislavery free labor rhetoric. Contract rights had been denied to slaves, and abolitionists and later Republicans had complained about the denial. But by using the free labor logic to treat the individual laborer and the giant corporate enterprise as equal bargaining agents, the approach spawned by *Lochner* genuflected to the form of the free labor ideology while ignoring its substance. It provided the shell of the idea without the kernel.

One assumption behind *Lochner* era jurisprudence was that government redistribution of wealth was a constitutionally impermissible objective. Whatever merits this idea may have had have been undermined by the Sixteenth Amendment, giving Congress a broad power to levy a progressive income tax. This power is coupled with the power to spend to promote the general welfare. Furthermore, virtually any government action, including court decisions on "freedom of contract," channels the distribution of wealth.

The substantive liberty of contract the Court found in the Due Process Clause began to grow into a broader protection for per-

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[317] *Id.* at 61.

[318] *Id.* at 65, 70 (Harlan, J., dissenting).

[319] *Id.* at 64.

sonal liberties. In 1923, in *Meyer v. Nebraska*,[320] the Court struck down a Nebraska statute that made it a crime to teach the German language below the eighth grade in the public schools. The Court found the statute violated personal liberty, but it did not cite the as yet unincorporated First Amendment. The *Slaughter-House Cases*, which had insisted that citizens must look to state governments for protection of basic rights, was mustered into combat on behalf of a broad reading of individual liberty under the Fourteenth Amendment. It is one of the most extraordinary uses of precedent in the history of the Court:

> Without doubt, [liberty under the Due Process Clause of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[321]

D. Palko *and Selective Application of Bill of Rights Guarantees to the States*

By the time *Palko v. Connecticut* was decided, some liberties in the Bill of Rights, such as free speech and free exercise of religion, had been held to limit the states. Others, such as the right to a jury trial, the privilege against self-incrimination and the immunity from double jeopardy, had not. Justice Cardozo, with apparently unconscious irony, proceeded to explain why some, but not all, Bill of Rights liberties were protected from state action under the Due Process Clause of the Fourteenth Amendment.

> The exclusion of these *immunities and privileges* [jury trial, the privilege against self-incrimination, etc.] from the *privileges and immunities* protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

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[320] 262 U.S. 390 (1923).

[321] *Id.* at 399 (citing Yick Wo v. Hopkins, 118 U.S. 351 (1886) and Slaughter-House Cases, 83 U.S. 36 (1872)).

> We reach a different plane of social and moral values when we pass to the *privileges and immunities* that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech.[322]

The reader will recall that the Fourteenth Amendment also uses the words "privileges or immunities." It provides, "No state shall make or enforce any law which shall abridge *the privileges or immunities* of citizens of the United States."[323]

Justice Cardozo made no use of the *Slaughter-House Cases* and its progeny in *Palko*. This is hardly surprising. Decisions holding that citizens' liberties are a matter of state law and that the Fourteenth Amendment was not designed to modify the holding in *Barron v. Baltimore* do not fit well with a doctrine of selective application.

Still, *Slaughter-House* was cited in 1947 in *Adamson v. California*,[324] in which, by a bare majority, the Court rejected the claim that the privilege against self-incrimination limited the states. Justice Black and three other dissenting justices concluded that all the guarantees of the Bill of Rights should limit the states.[325] As Justice Black put it,

> I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continu-

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[322] Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (citations omitted).

[323] U.S. CONST. amend. XIV, § 1 (emphasis added).

[324] 332 U.S. 46, 51 (1947).

[325] *Id.* at 68, 124 (Black, J., dissenting).

> ous protection against old, as well as new, devices and practices which might thwart those purposes.[326]

In the years that followed, most guarantees of the Bill of Rights were held to limit the states under the Due Process Clause, and less and less attention was paid to the *Slaughter-House Cases.*

It is natural to assume that both the refusal to apply Bill of Rights limits to the states and the broad application of the state action doctrine were, at the time at least, inevitable readings of Section 1. By this view, criticisms of the Court are anachronistic.[327] Before *Slaughter-House,* however, some judges had found that Bill of Rights liberties limited the states under the Fourteenth Amendment and that the federal government had power to punish Klan assaults on individual rights.[328] Professor John N. Pomeroy, in his 1868 *Introduction to Constitutional Law,* believed that the Fourteenth Amendment had corrected the result in *Barron v. Baltimore.*[329] Dean Richard Aynes has argued that several other scholars writing before the decision in *Slaughter-House* agreed.[330] Thomas Cooley, the premier legal scholar of the age, seems not to have spoken on the subject before the Supreme Court's *Slaughter-House* decision and was more sympathetic with the result reached.[331]

It is also natural to assume that, of course, Supreme Court justices who had lived through the framing of the Fourteenth Amendment would give us a correct exposition of its meaning. Why would a Court, most of whose members had been appointed by Republican presidents,

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[326] *Id.* at 89 (Black, J., dissenting).

[327] *See generally* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court,* 1978 SUP. CT. REV. 39 (1979).

[328] *See* United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 160, 171–72; ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION, THE COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS (1866–1876) 125–26, 129, 131 (1985); Letter from Justice Bradley to Justice Woods (Mar. 17, 1871) (on file with *Bradley Papers New Jersey Historical Society*).

[329] *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 3, at 172–73.

[330] Aynes, *supra* note 62, at 85 (quoting TIMOTHY FERRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 546 (3d ed. 1872)).

[331] *Cf.* GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 290 (1868); FERRAR, *supra* note 330, at 546 (positing *Barron* and its progeny had been "entirely swept away" by Fourteenth Amendment). Michael Les Benedict emphasizes the strength of conceptions of dual sovereignty among legal scholars. Benedict, *supra* note 327, at 52–53 n.39. The view is not necessarily in conflict with limits on state authority as the Ex Post Facto Clause and the Contracts Clause show. *See id.* It is, however, entirely in conflict with the broad power that the *Slaughter-House* plaintiffs claimed courts possess to judge the reasonableness of state legislation under the Privileges or Immunities Clause. *See id.*; *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1937 (Thomas Cooley, ed. 1873) (generally supporting *Slaughter-House*-type analysis).

get it so very wrong? Dean Richard Aynes suggests that most members of the *Slaughter-House* majority were hostile to the basic goals of the Fourteenth Amendment because of reservations about racial equality and concerns for federalism.[332] If so, that fact offers some explanation for the majority's extraordinary liquidation of the Privileges or Imunities Clause.

VI. Conclusion: *Slaughter-House* and Economic "Liberties"

The Civil Rights Act gave all citizens the same right to contract as enjoyed by white citizens. The Act was not designed to affect substantive contract rules in the states, but to eliminate racial and similar discrimination against citizens. Section 1 of the Fourteenth Amendment and the Equal Protection Clause obviously reached beyond racial discrimination. Section 1 prohibited denial of privileges or immunities to citizens and denial of equal protection to any person. Although admittedly there is some disagreement in the debate, the primary focus of the Fourteenth Amendment was on personal liberties for all American citizens and equal protection for groups like blacks, unionists and people of a particular national origin or political or religious faith. The better reading is that it simply does not prohibit laws such as those requiring a minimum wage or an eight-hour work day. Such laws do affect fundamental interests of the Article IV sort. But the basis of classification is not race, national origin, religion, political opinion or a similarly invidious basis. To the extent that the anti-discrimination provisions of the Amendment are read in light of the general approach of the Civil Rights Act and in light of the types of problems Republicans and the nation focused on in connection with drafting and ratifying the Fourteenth Amendment, many classifications affecting wages, hours, job safety, etc. would not be suspect. The Act, Representative Shellabarger said, "does not prohibit you from discriminating between citizens of the same race . . . as to what their rights . . . shall be."[333] The Fourteenth Amendment, on the other hand, did reach some classifications affecting people of the same race, but pretty clearly not all such classifications were suspect.

Because they typically have exemptions—exemptions that may be required to get any law on the subject through the legislature—wage, hour and job safety laws could be treated as discriminating. There is,

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[332] Aynes, *supra* note 72, at 655–70.

[333] Cong. Globe, 39th Cong., 1st Sess. 1293 (1866); *cf. id.* at 1832 (statement of Rep. Lawrence) ("It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all of these are left to the States.").

however, little indication in debates on the Fourteenth Amendment that such regulations were the concern either of Congress or the nation or that they were among the constellation of evils epitomized by the slave power.

In many ways Republicans advocated expanded opportunity—subsidized education, generous homestead laws, and land-grant colleges for those with limited resources. They financed the Civil War in part by a modestly progressive income tax. Radicals insisted on dividing up estates of former slaveholders—forty acres and a mule—but the party refused to follow their lead.[334] As Akhil Amar puts it, with his characteristic eloquence, Republicans believed "property is such a good thing . . . so constitutive, so essential for both individual and collective self-governance," that "every citizen should have some."[335]

Slavery used the market economy to buy and sell human beings. Slavery produced great concentrations of economic power which in turn produced political power. As Republicans saw it, the concentrated economic and political power spawned by slavery was a major threat to democratic institutions. As Abraham Lincoln noted in 1860:

> [A]bout one sixth of the whole population of the United States are slaves! The owners of these slaves consider them property. The effect upon the minds of the owners is that of property . . . it induces them to insist on all that will favorably affect its value as property, to demand laws and institutions and a public policy that shall increase and secure its value, and make it durable, lasting, and universal . . . . Whether the owners of this species of property do really see it as it is, it is not for me to say, but if they do, they see it as it is through 2,000,000,000 dollars, and that is a pretty thick coating.[336]

"The slave power," recalled Representative Farnsworth in 1864,

> got the control of the government, of the executive, legislative, and judicial departments. [T]hey got possession of the high places of society. They took possession of the churches. They took possession of the lands. Then it became criminal

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[334] *See* McPHERSON, *supra* note 107, at 193, 443, 450–51; William E. Forbath, *Why is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1794–95 (1994).

[335] Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimum Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990); *see* Forbath, *supra* note 334, at 1795.

[336] 2 ABRAHAM LINCOLN, SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES (1859–1865) 134 (Library of America 1989).

> for a man to open his lips in denunciation of the evil and sin of slaveholding.[337]

Slavery, as Republicans saw it, had caused the Civil War. In his message to Congress in December, 1861, Abraham Lincoln warned that "the insurrection is largely, if not exclusively, a war upon the first principle of popular government—the right of the people."[338] He cited "labored arguments" advanced by Confederates "to prove that large control of the people in government, is the source of all political evil."[339] In the next paragraph of his message he warned of "the effort to place capital on an equal footing with, if not above labor, in the structure of government."[340] "Labor," Lincoln insisted, "is the superior of capital, and deserves much higher consideration."[341] He noted with satisfaction that most men neither worked for others nor had others working for them, and he noted those hired by the capitalist could reasonably hope in time to become independent, and perhaps even hire others themselves.[342] In 1864 one Republican warned that slavery "makes the laborer the mere tool of the capitalist."[343] Senator Henry Wilson insisted that "we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men in this country . . . . The same influences that go to keep down . . . the right of the poor black man . . . bear down and oppress the poor white laboring man."[344] When President Andrew Johnson vetoed the Freedman's Bureau Bill which provided aid and security for newly freed slaves, he insisted that the newly freed slaves would be amply protected by the law of supply and demand. Senator Lot Morrill of Maine noted that southern courts were not protecting newly freed slaves. He responded:

> In a condition of destitution and suffering and want, the black man cries to the nation for recognition of his manhood, for protection; the nation answers back, there is for you, no protection, no courts, no rights civil or political; in the lan-

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[337] CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864) (statement of Rep. Farnsworth).

[338] LINCOLN, *supra* note 336, at 295.

[339] *Id.*

[340] *Id.*

[341] *Id.* at 296.

[342] *Id.* at 297.

[343] CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (statement of Rep. Shannon), *in* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 471 (1989).

[344] CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Wilson); *see* VanderVelde, *supra* note 343, at 483–84.

guage of the chief Executive, you are left to "the great law of supply and demand."[345]

Translation of Republican values to the economic consolidation and monopoly power that began to accelerate in the later nineteenth century is far from a simple matter, but there is little in the record to suggest that huge concentrations of economic power were to be protected from regulation by the Fourteenth Amendment. The free labor ideology emphasized the labor theory of value and insisted that economic independence was essential for a free society. It would be ironic indeed if an ideology that emphasized the importance of economic independence was translated into a tool to secure domination by a corporate capitalism that threatened and threatens the independence of corporate employees and the existence of the small and independent artisans, farmers, and independent business people that the free labor ideology cherished. It would be ironic to read it as denying workers the minimum standards of compensation essential to the dignity and independence so many Republicans found essential. Indeed, Lea VanderVelde even suggests that the Thirteenth Amendment leads in the opposite direction. "Since the framers considered token wages to be merely a perpetuation of slavery under another guise, all laborers should have a legitimate claim to a certain minimal wage level."[346] The Gilded Age Republican party that became closely identified with big business was a far different party than the one that captured the presidency in 1860.

In the years after the Civil War, as business became consolidated in trusts and monopolies and economic power became more centralized, many Americans saw a new political and economic power, similar to the "slave power" threatening the independence of the small business person, the farmer and the worker. As economic change transformed people from farmers, small business people and independent artisans to regimented workers in vast industrial empires, Populists believed both liberty and democracy were at risk. "The unholy and lawless determination to acquire wealth and personal comfort at the expense of a weaker and less fortunate race, was the underlying spirit of slavery," wrote Populist James B. Weaver.[347] But "in the very midst of the struggle for the overthrow of the slave oligarchy, our institutions

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[345] CONG. GLOBE, 39th Cong., 1st Sess. app. at 156 (1866) (statement of Sen. Morrill); *see* VanderVelde, *supra* note 343, at 485.

[346] VanderVelde, *supra* note 343, at 499.

[347] JAMES WEAVER, CALL TO ACTION, *quoted in* NORMAN POLLACK, THE JUST POLITY 63 (1987).

were assailed by another foe mightier than the former, equally cruel, wider in its field of operation, infinitely greater in wealth, and immeasurably more difficult to control."[348] Weaver said, "[i]t will be readily understood that we allude to the sudden growth of corporate power . . . ."[349] "Slavery was restricted within narrow geographical limits and the visible manifestations of the evil were repulsive . . . . Not so with the present foe of justice and social order. It assails the rights of man under the most seductive guise."[350]

> You meet it in every walk of life. It speaks through the press, gives zeal and eloquence to the bar, engrosses the constant attention of the bench, organizes the influences which surround our legislative bodies and courts of justice, designates who shall be the Regents and Chancellors in our leading Universities, determines who shall be our Senators, how our legislatures shall be organized, who shall preside over them and who constitute the important committees. It is imperial in political caucuses . . . has unlimited resources of ready cash, is expert in political intrigue and pervades every community from the center to the circumference of the Republic.[351]

Some nineteenth century large corporations paid workers only in script redeemable only at the company store. Corporations used their market power to tie one transaction—employment—to another, the duty to shop at the company store. The employment contract guaranteed the large corporation a monopoly on purchases by their workers. Some nineteenth century state courts struck down, as a violation of freedom to contract, legislation requiring workers to be paid in legal tender.[352] The free market, as defined and understood by these courts, allowed corporations to use their market power greatly to restrict worker freedom in the market place and to disadvantage competitors of the company store. For many workers and employees the question was not between freedom and regulation. The question was between rules imposed by corporate power as to which they had no say, and rules imposed by government. As to government imposed rules, the

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[348] *Id.*

[349] *Id.*

[350] *Id.* at 93–94, *quoted in* POLLACK, *supra* note 347, at 77.

[351] *Id.*

[352] *See, e.g.*, Godcharles v. Wigeman, 6 A. 354 (Pa. 1886). On *Lochner* era jurisprudence, see WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 1–48 (1994).

citizen has a voice, but only the option of moving to another state or nation. As to corporate rules, employees do have the right to resign and seek employment elsewhere, but often have no voice in shaping the rules.

In the 1930s, *Lochner* was repudiated in part because of a growing belief that a rule which gave equal freedom to contract to the huge corporation and the lone individual was not in fact a neutral rule.[353] Many insisted that individuals should be able to regulate huge corporations through the collective action of the democratic process.

Of course, the problem is complex. Government power can also be used by the powerful to create rules that economically disadvantage the less powerful. But it is difficult to create vast federal judicial power over economic legislation without also enabling federal courts to use it to protect the economically powerful against regulation on behalf of the less fortunate.

Lochner and laissez-faire constitutional jurisprudence suggest that much of the program advocated by labor, populists, and Theodore Roosevelt and, later, by the New Deal, is unconstitutional. Of course, such a ruling was not unprecedented. *Dred Scott* held that the centerpiece of the platform of the Republican party, which called for banning slavery in the territories, was unconstitutional. Whatever one thinks of the Populists, the Progressives and the New Deal, to declare many ideas embraced by generations of major political leaders and which have become part of the fabric of American law unconstitutional is an extreme reduction of the scope of the democratic process.

To allow judges to put popular dissatisfaction with how the "market" is operating outside the ordinary democratic process is unwise, even though the market has many virtues. The Fourteenth Amendment, properly interpreted, does not prohibit most government regulations of the economy. Most regulations aimed at protecting individuals from exploitation by concentrated economic power offend neither its letter or spirit. State courts under state constitutions may be freer to protect economic liberty. Mistakes made by such courts are easier to correct.

Most Republicans in Congress were committed to preserving a substantial role for the states and were not willing to follow a path that could lead to total federal preemption of state legislation. Because of the Enforcement Clause of Section 5 of the Fourteenth Amendment, many Republicans feared that an excessively broad definition of the

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[353] *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND FALL OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 147–92 (1993).

interests protected by Section 1 would grant Congress equally broad powers to preempt state legislation.

If the Supreme Court revives the Privileges or Immunities Clause, and if the Court adheres to precedents suggesting the Clause protects individuals and not corporations,[354] the Clause might transform constitutional analysis. Exactly how it might do so is hard to say. Regulatory and other takings of corporate property might be relegated to state constitutional law, though the more likely result is that citizen shareholders would have standing to complain. Those who oppose letting corporations spend millions on ballot measures might have a slightly stronger case for state regulation. If so, corporate executives might be forced to spend their own resources rather than those of the corporation.[355] Because the Court interprets the First Amendment as guaranteeing a right to receive corporate messages as well as a right of the corporation to send them,[356] without other changes in the law, a revival of the Privileges or Immunities Clause here would probably make little difference.

Right to reply statutes might get a somewhat warmer hearing. Now statutes that require newspapers to provide a right to reply to those they attack are held a violation of the First Amendment. The news corporation is said to be a person, and people cannot be forced to express ideas with which they disagree.[357] Similarly, public utilities have been allowed to disseminate their pro-nuclear power views to customers in billing envelopes while closing the space to public interest groups with opposing views, even in the face of a state order opening the forum to opposing views.[358] If the privilege of free speech and press applied to real people—including those speaking through corporations—and not to corporations as such, then the corporate claims of

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[354] *Cf.* Slaughter-House Cases, 83 U.S. 36, 98–99 (1872) (Field, J., dissenting); Paul v. Virginia, 75 U.S. 168 (1868).

[355] I intend here merely to raise the question, not to answer it. For an extended discussion, see generally Charles R. O'Kelley Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 GEO. L.J. 1347 (1979); William Patton & Randall Bartlett, *Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (1981).

[356] *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

[357] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); *cf.* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); *see also* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, at 83–89 (1938) (Black, J., dissenting) (maintaining that word "person" in Fourteenth Amendment does not include corporations).

[358] *See, e.g., Pacific Gas*, 475 U.S. 1.

a right to silence might be impaired.[359] The change, if it occurred at all, would come about because of expanded power to the government to regulate economic corporations, not because the rights of citizens to a right to reply, for example, had grown.

Under the Privileges or Immunities Clause, aliens would not have a right to bear arms, but, as the Supreme Court reads the Second Amendment, no one else has a personal right to bear arms either. To the extent that the Privileges or Immunities Clause protects citizens, its somewhat narrower scope might allow greater regulation of the ability of artificial persons created for economic objectives to translate economic into political power. Citizens could still retain the ability to use corporations organized for free speech and association purposes for communication.

Reviving the Privileges or Immunities Clause would no doubt have other implications as well. Exactly what it would mean, of course, no one can say. What the revival of the Privileges or Immunities Clause should not do is protect the "market" from the democratic process.

For all its virtues, the market has its limits. First, as with pollution or destruction of wetlands, the unregulated market pervasively dumps costs on parties who are not parties to the bargain. Second, consumer decisions are often made with grossly inadequate information. Indeed, one characteristic effort of concentrated economic power is to keep information prejudicial to its interests from the public. Often the market is far from perfectly competitive. The market short-changes some collective and spiritual interests.[360] It does so by focusing on short term individual advantage and failing to consider long term effects on others. Large concentrations of economic power can be used to stifle competition. For example, without strong regulation of the market, an

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[359] Consider the following analogy. Assume that the right to bear arms is a personal right of citizens protected by the Fourteenth Amendment. A citizen hires aliens as security guards and arms them. A state statute prohibits aliens from bearing arms. Although the citizen would have a personal right to bear arms, he would not, it seems, have the right to use aliens to bear arms on his behalf. Similarly, a natural person would have a right against compelled expression, but the artificial corporation would not. On the other hand, one might argue that the right of reply would in effect be an unconstitutional condition, conditioning the use of the corporate form on relinquishing a constitutional right.

[360] The problem is complex because the market has many great virtues. A pressing problem is how to preserve the virtues while remedying its vices. *Compare* E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1973), *with* ANDREW BARD SCHMOOKLER, THE ILLUSION OF CHOICE: HOW THE MARKET ECONOMY SHAPES OUR DESTINY (1993), ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1997), *and* CHARLES DICKENS, HARD TIMES (Everyman 1994). *See also* Donella H. Meadows, *The Industrial System Is the Problem*, NEWS & RECORD (Greensboro, N.C.), Aug. 13, 1995, at F4.

oil company might buy and shelve patents for solar energy. The result would be to dump greater and potentially catastrophic costs from global warming on future generations to protect current profits from oil.[361] Finally, there is the problem of unequal bargaining power.

There is a paradox in proscribing regulation of the economy and leaving decisions to the "free" market. The market produces concentrations of economic power, and as James Harrington[362] and Alexis De Tocqueville[363] have noted, economic power tends to shape the political system. The political system then shapes the market. Witness, for example, the rash of legislation seeking to stifle news media reports on problems with pesticides in the food supply.[364] Consider the suggestion by the House Speaker Newt Gingrich that corporations use their advertising dollar leverage to keep ideas they dislike out of the public press;[365] and consider the legislative limits on citizens' rights to sue for defective products and negligence recently achieved by economically powerful groups. The market provides economic power which in turn is converted into political power, which in turn seeks to redefine the market to suit its desires.

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[361] *See* Ross Gelbspan, *The Heat Is On: The Warming of the World's Climate Sparks a Blaze of Denial*, HARPER'S, Dec. 1995, at 32 (reporting that in September 1995 the 2500 scientists on Intergovernmental Panel on Climate Change issued unambiguous announcement "that the earth had entered a period of climatic instability likely to cause 'widespread economic, social and environmental dislocation over the next century.' The continuing emission of greenhouse gases would create protracted, crop-destroying droughts in continental interiors, a host of new and recurring diseases, hurricanes of extraordinary malevolence, and rising sea levels that could inundate island nations and low-lying rims on the continents."). Meanwhile, Gelbspan further reports that one of the leading oil industry public relation outlets has spent more than a million dollars to downplay the threat of climate change. "The people who run the world's oil and coal companies," Gelbspan says, "know that the march of science, and of political action, may be slowed by disinformation." *Id.* at 33.

[362] JAMES HARRINGTON, THE ART OF LAWGIVING IN THREE BOOKS (1659), *reprinted in part in* DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND 397 (David Wooten ed., 1986).

[363] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 48–56 (Knopf 1973), *reprinted in* STEPHEN B. PRESSER AND JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 258 (3d ed. 1995).

[364] *See, e.g.*, ALA. CODE § 6–5–621 (1994) (punishing false reports that foods are unsafe). "The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data." *Id.* The Alar report was based on a substantial body of scientific opinion, but of course, others contested the danger. *See* Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY L. REV. 507, 535–38 (1995); Elliot Neggin, *Myths: The Alar Scare Was for Real; and So Is That Veggie Hate Crime Movement*, 725 No. 3 COLUM. JOURNALISM REV. 13 (1996).

[365] *See* Howard Kurtz & Ann Devroy, *Speaker Rails Against Media 'Socialists'; Gingrich Offers Advice On Buying Advertising*, WASH. POST, Mar. 8, 1995, at A4.

Because of the very serious danger that government regulation may be captured by the regulated, one might seek to turn the matter over to the courts. But that solution assumes that courts, appointed by politicians, are somehow immune from selection to advance particularly powerful interests while the politicians who appoint them are not. Significantly, the political institution we have that is staffed by ordinary Americans from all walks of life, that has very short term limits, and that cannot accept campaign contributions or gifts from those who seek to influence its decision, is under massive attack from concentrated economic power. That institution, of course, is the jury.

On re-reading the *Slaughter-House Cases,* I have come to three conclusions. First, Justice Miller was right in seeking an interpretation of the Privileges or Immunities Clause that did not risk total destruction of state power. Second, he was also right in not removing subjects from the democratic process because they fall loosely under the rubric of economic liberty. Finally, his decision to liquidate the Privileges or Immunities Clause in service of these goals was both unnecessary and one of the signal disasters of American judicial history.

Reflecting on the *Dred Scott*[366] case, the *Slaughter-House Cases,*[367] *United States v. Cruikshank,*[368] the *Civil Rights Cases,*[369] *Maxwell v. Dow,*[370] and *Patterson v. Colorado,*[371] one can better understand the bitter reflections of a North Carolina carpetbagger named Albion Tourgee. Tourgee grew up in Ohio, fought in the Civil War and emigrated to North Carolina, where he became Republican, an advocate of equality for Americans of African descent, a leading member of the State Constitutional Convention of 1868, and a Republican Superior Court Judge. After living through Reconstruction in North Carolina, Tourgee returned to the North and wrote powerful novels about his experience.[372] Tourgee represented Plessy without a fee in the 1896 case of *Plessy v. Ferguson,*[373] which unsuccessfully challenged state mandated segregation of railroad cars. The Supreme Court, Tourgee said, "has always been the consistent enemy of personal liberty and equal rights."[374]

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[366] 60 U.S. 393 (1856).

[367] 83 U.S. 36 (1872).

[368] 92 U.S. 542 (1875). The cases that follow on race get much worse than anything the Waite Court said.

[369] 109 U.S. 3 (1883).

[370] 176 U.S. 581 (1900).

[371] 205 U.S. 454 (1907).

[372] *See, e.g.,* ALBION W. TOURGEE, A FOOL'S ERRAND BY ONE OF THE FOOLS (1879).

[373] 163 U.S. 537 (1896).

[374] BOSTON GLOBE, May 31, 1896, *cited in* OTTO OLSEN, CARPETBAGGER; CRUSADE, THE LIFE OF ALBION WINEGAR TOURGEE 334 (1965). For a short biographical essay, see Michael Kent Curtis,

Tourgee considered an era that stretched from *Dred Scott*, through the *Slaughter-House Cases*, to cases rejecting application of the Bill of Rights to the states, to the *Civil Rights Cases* that struck down the first national public accommodation law, and to the decision in *Plessy* upholding state-imposed racial segregation. From our present vantage point, we can see that the Supreme Court has not always been an enemy of personal liberty or a supporter of the more against the less powerful, even if, as a matter of history, this has too often been the case.

Albion Tourgee, Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson, 13 CONST. COMMENTARY 187 (1996).