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THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS

*by Michael Kent Curtis**

The fourteenth amendment marked the beginning of a constitutional revolution. More deliberately than has sometimes been recognized, its drafters established the basis for much contemporary constitutional law. Shortly after the amendment's adoption, the nation entered a period of reaction and, to a great extent, lost interest in federal protection of the civil rights of its citizens.¹ In the 1960s, renewed interest in the constitutional rights of blacks and other American citizens produced profound constitutional change, based to a considerable degree on the groundwork laid by the fourteenth amendment and the post-Civil War reconstruction acts.²

*University of the South, A.B. 1964; University of North Carolina, J.D. 1969. Member of the North Carolina Bar; partner in the firm of Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, North Carolina. The author wishes to thank Ms. Norita Speaks and other members of the Greensboro Public Library for assistance in obtaining research materials used in this article.

1. See K. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* (1965); V. WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890* (1965).

2. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Monroe*

Revolutions spark counterrevolutions. The constitutional revolution of the 1960s has produced both intense political criticism³ and a host of articles and books in which scholars and others suggest paths to be followed by constitutional counterrevolutionaries.⁴ This article explores one path suggested by the critics—the argument that application of provisions of the Bill of Rights to the states through the fourteenth amendment was an historical “mistake.”

The Supreme Court has held that selected provisions of the Bill of Rights apply to the states under the due process clause. While several Justices seem to believe that due process does not require full or literal application of the Bill of Rights to the states, most hold the contrary view, at least with regard to those provisions they consider incorporated by the due process clause.⁵

On occasion, the question whether the states are bound by the literal provisions of the Bill of Rights or by subjective notions of due process has had profound significance. The clearest examples are the cases in which Justice Powell, agreeing with four of his colleagues, found that the sixth amendment *did* require unanimous juries, but nonetheless, in which he found that the fourteenth amendment did *not* require full or literal application of the sixth amendment to the states.⁶ The upshot was that states could convict persons in criminal cases by nonunanimous juries. Usually, however, the Burger Court has restricted these guarantees rather than failing to apply them to the states.⁷

v. Pape, 365 U.S. 167 (1961).

3. G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 387 (Goldwater), 408-09 (Nixon) (1977); J. SCHELL, THE TIME OF ILLUSION 45-46 (1976); A. SINGER, CAMPAIGN SPEECHES OF AMERICAN PRESIDENTIAL CANDIDATES, 1928-1972, at 361 (1976)(Nixon).

4. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 413 (1977). Berger's book was greeted with widespread interest and attention. See also Kaus, *Abolish the Fifth Amendment*, *WASH. MONTHLY*, Dec., 1980, at 12.

5. For the majority view, see *Benton v. Maryland*, 395 U.S. 784 (1969); for the minority view, see the concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J., rejecting full incorporation of the sixth amendment in *Ballew v. Georgia*, 435 U.S. 223, 245 (1978). See also *Buckley v. Valeo*, 424 U.S. 1, 291 (1976)(Rehnquist, J., concurring in part and dissenting in part)(holding that not all the strictures of the first amendment apply to the states by the fourteenth amendment).

6. *Apodaca v. Oregon*, 406 U.S. 404, 414 (1972)(Powell, J., concurring). See *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972)(Powell, J., concurring).

7. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969)(applying the fifth amendment to the states). The recent trend has been to narrow the scope of the protections of the Bill of Rights. See, e.g., *United States v. Salvucci*, 448 U.S. 83 (1980), *overruling* *Jones v. United States*, 362 U.S. 257 (1960); *Fisher v. United States*, 425 U.S. 391 (1976)(essentially *overruling* *Boyd v. United States*, 116 U.S. 616 (1886)); *Hudgens v. NLRB*, 424 U.S. 507 (1976)(essentially *overruling*

Since the fourteenth amendment was ratified in 1868, whether the amendment was designed to apply the Bill of Rights to the states has been disputed.⁸ Much has been written on the question from an historical perspective.⁹ Why, the concerned yet weary reader may ask, why more?

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); *Colgrove v. Battin*, 413 U.S. 149 (1973); *Kastigar v. United States*, 406 U.S. 441 (1972) (essentially overruling *Counselman v. Hitchcock*, 142 U.S. 547 (1892)). See also *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (allowing the issue of search warrants, instead of subpoenas, to search newspaper offices for evidence of a crime). Cf. *Paul v. Davis*, 424 U.S. 693 (1976) (a citizen mistakenly labeled an active shoplifter by a state government official without notice or opportunity to be heard has no federal right to protection against such conduct although remedy may be available at state law); G. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 408-09 (1977).

8. For early cases, see *Maxwell v. Dow*, 176 U.S. 581 (1900); *O'Neil v. Vermont*, 144 U.S. 323 (1892); *Spies v. Illinois*, 123 U.S. 131 (1887); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). For an early case holding that the guarantees of the Bill of Rights were privileges and immunities under the fourteenth amendment, see *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). The first amendment was assumed to be applicable to the states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech and press protected by due process).

One of the oddest discussions—in light of the plain language of the fourteenth amendment, prohibiting abridgment of the “privileges or immunities of citizens of the United States”—is contained in *Palko v. Connecticut*, 302 U.S. 319 (1937). By the time Justice Cardozo wrote the opinion, the judiciary had made the privileges and immunities clause essentially meaningless. Although the controversy in *Palko* centered on the due process clause, one wonders whether Justice Cardozo was aware of the irony of his discussion, in which he concluded that states need not under due process respect certain of the “privileges and immunities” of citizens of the United States set out in the Bill of Rights. *Id.* at 326.

Justice Black produced the first (and last) major judicial examination of the legislative history of the fourteenth amendment as it bore on the question of applicability of the Bill of Rights to the states. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

9. For recent commentary on the question of whether the fourteenth amendment applies the Bill of Rights to the states, see BERGER, *supra* note 4 (arguing it does not); Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (arguing it does, criticizing C. Fairman); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) (arguing it does, criticizing R. Berger); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (arguing it does not). See also J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); J. TEN BROEK, *EQUAL UNDER LAW* (1965); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (dealing primarily with the question of segregation); Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33. For studies supporting, in a general way, the main conclusion of this article, see H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); Akins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968); Crosskey, *supra*; Kazorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1973). See also H. GRAHAM, *EVERYMAN'S CONSTITUTION* (1968).

There are two answers. First, some significant evidence and interpretation has not yet been brought to bear on the subject. Second, the history of the amendment provides an opportunity to weigh current arguments for restricting its guarantees of liberty against historical experience. The fourteenth amendment was the culmination of one of the greatest battles for liberty in American history. For that reason its history is worthy of detailed study by each generation. At an irreducible minimum, a guarantee of liberty should mean no less than its framers intended.

This article continues a study of the purposes of the framers of the fourteenth amendment that I began in a recent article in the *Wake Forest Law Review*.¹⁰ That article criticized Raoul Berger's analysis of this subject in his 1977 book *Government by Judiciary*. Subsequently, Mr. Berger published an article criticizing my analysis.¹¹ So the controversy on the meaning of the fourteenth amendment continues.

The intent of the framers of the fourteenth amendment can best be understood by detailed analysis of the political and legal theories held by Republicans in 1866. While there are a number of sources for further exploration, I have looked primarily at two. First, I have examined debates in the 39th Congress on the subject of reconstruction, as well as the debates on the fourteenth amendment. These debates provide previously untapped information on the legal ideas held by Republicans. Second, I have looked again at the election campaign of 1866 and at certain materials concerning ratification of the amendment. Here, as well, there is significant information clarifying Republican legal ideas and political ideology.

As a result of further study, my ideas have changed in some respects. For example, I now recognize that at least some Republicans read substantive liberties into the due process clause in 1866. And I have abandoned the common view that the rights catalogued in the Civil Rights Bill were clearly distinct from the catalogue of rights in the Bill of Rights. Finally, I have been impressed by a wide consensus among Republicans in the 39th Congress that the rights in the Bill of Rights limited, or should limit, the states as well as the federal government. In short, new materials on the fourteenth amendment provide a deeper understanding of the debates on the amendment in the 39th Congress, debates that themselves have been looked at before and, no

10. Curtis, *supra* note 9.

11. Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 *Ohio St. L.J.* 435 (1981).

doubt, will be looked at again.

I. THE HISTORY OF THE FOURTEENTH AMENDMENT

The purposes of the framers of the fourteenth amendment should be assessed in light of several factors: the pressing practical and political problems facing the Republicans of the 39th Congress, their view of the history of the previous thirty years, their political philosophy, and their legal ideas.

A. *Practical and Political Problems*

When the 39th Congress assembled in December 1865, it faced severe political problems. The South had seceded and had been defeated after a bitter war. Southern states were seeking readmission to Congress and the Union. Slavery had been abolished. Once the Southern states were fully restored to Congress and the Union they would, except for the limitations of the new thirteenth amendment, enjoy all the powers and rights they possessed before the Civil War.¹²

Republicans had long been troubled by the South's interference with rights guaranteed by the Bill of Rights. After the war, furthermore, the South apparently believed its power to regulate its local black population, short of actual re-enslavement, was undiminished. Southern legislatures passed Black Codes denying blacks many important liberties secured to whites. The codes restricted such basic rights as freedom to move, to contract, to own property, to assemble, and to bear arms.¹³ Last, but not least, the thirteenth amendment's abrogation of the clause by which each slave was counted as three-fifths of a man for the purposes of representation meant that the rebellious Southern states could expect a substantial increase in their representation in the House.¹⁴

When the 39th Congress assembled in late 1865, Southern Representatives were excluded while Congress considered what additional guarantees should be required before their readmission.¹⁵ The fourteenth amendment was the principal additional guarantee selected by the Congress.

12. See generally JAMES, *supra* note 9; E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

13. J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 573-74 (1961); K. STAMPP, *THE ERA OF RECONSTRUCTION* 80 (1965).

14. JAMES, *supra* note 9, at 21-22.

15. CONG. GLOBE, 39th Cong., 1st Sess. 6-7 (1865).

B. *The Republican View of History—The Slave Power Conspiracy Against Individual Liberty*

Most Republican Congressmen agreed on the meaning of the history that preceded the framing of the fourteenth amendment. Republicans saw events from 1830 to 1866 as a battle between slavery and freedom, a battle to determine whether the nation would become all slave or all free. On the outcome of that battle hung the liberty of all citizens of the United States. Slavery was seen as fundamentally incompatible with a free society. Its survival required eliminating the basic liberties of citizens, white as well as black.¹⁶

A speech by Congressman Plants of Ohio typifies the Republican view. First, Plants noted that slaveholders were convinced of their right to hold slaves and to employ "all the means requisite to their full enjoyment of that guarantee." But,

[t]he system would not be secure if men in the slave States were permitted to discuss the matter in any form; and hence freedom of speech and the press must be suppressed as the highest of crimes; and no man could utter the simplest truths but at the risk of his life. For more than a quarter of a century the world knew no despotism so absolute and reckless as that which ruled the South.¹⁷

Plants then noted that slaveholders demanded the right to take slaves into any territory of the United States, a right finally assured in the "immortal infamy of the Dred Scott decision."¹⁸ But, as slavery moved into the territories, so did the closed society required to protect it. Thus, from the dictum in *Dred Scott*

naturally unfolded the laws of Kansas, which if in force today, would hie you, Mr. Speaker, to the dungeon or the gibbet, if found with a copy of the Chronicle or the Globe in your trunk, though used only as wrapping paper. And all that was right if slavery was right. But, by logical necessity, that same

16. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 114 (Arnold), 261 (resolution introduced by Smith), 1202 (Wilson), 2102 (Boutwell) (1864).

17. CONG. GLOBE, 39th Cong., 1st Sess. 1013 (1866).

18. *Id.* The Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), held that blacks were not citizens of the United States, were not entitled to any of the rights, privileges and immunities of citizens of the United States, and were not entitled to sue in federal court. In addition, the Court suggested that laws of Congress banning slavery from the territories were unconstitutional. *Id.* at 448-52.

[*Dred Scott*] decision carried slavery with all its consequences into all the States But if they had a right to take and hold their slaves in the free States, they had a right to do it in safety, and as they could not hold them safely where dissent was permitted, all dissent must be suppressed by the strong hand of power. Will any one dare to say this would not have been the next step [O]nly one of two things remained possible—either the utter destruction of slavery or the total extinguishment of freedom.¹⁹

Speeches by Republicans in the 38th Congress, which passed the thirteenth amendment, reflect the Republican view that slavery destroyed constitutional rights. Implicit, and often explicit, in these declarations was the view that the Bill of Rights secured the rights of citizens and protected these rights against interference from any quarter. Congressman Arnold, for example, complained that: "Liberty of speech, freedom of the press, and trial by jury had disappeared in the slave States."²⁰ Congressman Wilson, Chairman of the House Judiciary Committee, insisted that slavery had defied the supremacy clause and nullified the constitutional rights, privileges, and immunities of citizens.

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. With these rights no State may interfere without breach of the bond which holds the Union together.²¹

Still, in the South, "[t]he press has been padlocked, and men's lips have been sealed. Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in this country."²² While Wilson said he "might enumerate many other constitutional rights of the citizen which slavery" had "practically destroyed," he believed he had done enough to prove that slavery "denies to the citizens of each State the privileges and immunities of citizens in the several States."²³ Other Senators and

19. CONG. GLOBE, 39th Cong., 1st Sess. 1013 (1866).

20. CONG. GLOBE, 38th Cong., 1st Sess. 114 (1864).

21. *Id.* at 1202.

22. *Id.*

23. *Id.*

Representatives expressed similar concerns and a similar view of history.²⁴

In their analysis of the effect of slavery on liberty, these Republican Congressmen were essentially correct. Beginning in the 1830s, Southern states passed laws abridging freedoms of speech and the press as they applied to slavery. Advocating abolition and denying a master's right to property in slaves were made crimes.²⁵ Anti-slavery publications were eliminated from mails in the South, and Southern states sought to extradite Northerners responsible for anti-slavery publications.²⁶ What could not be accomplished by law was enforced by mobs.²⁷ The elimination of free speech in the South affected Republicans as well as abolitionists. By the time of the Lincoln-Douglas debates, both Lincoln and Douglas recognized that Republicans could not proclaim their doctrines in the South.²⁸

Guarantees of liberty were also sacrificed to facilitate recapture of fugitive slaves. In several Northern states blacks were presumed free, and free blacks were citizens. In the South, blacks were presumed slaves.²⁹ Under the Fugitive Slave Act of 1850,³⁰ blacks living in the North who were claimed as runaway slaves were deprived of the right to testify in their own behalf, to cross-examine witnesses, to benefit from the writ of habeas corpus, and to have a jury trial before they were handed over to the private person claiming them as slaves.³¹ Northern personal liberty laws carefully passed to secure these rights to blacks were invalidated.³² To make matters worse, the commissioner who decided whether the person brought before him was a fugitive slave received a larger fee if he found the black to be a fugitive slave.³³

24. See, e.g., *id.* at 1313 (Trumbull), 1439 (Harlan), 2615 (Morris). See also CONG. GLOBE, 38th Cong., 2d Sess. 138 (Ashley), 193 (Kasson), 237 (Smith) (1865).

25. C. EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH 118, 128-29 (1964). See, e.g., *State v. Worth*, 52 N.C. (7 Jones) 488 (1860).

26. EATON, *supra* note 25, at 199, 209, 211-12. See WIECEK, *supra* note 9, at 178; CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864)(Farnsworth).

27. R. NYE, FETTERED FREEDOM 174-218 (1972). See EATON, *supra* note 25, at 185.

28. CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 290-91 (P. Angle ed. 1958).

29. T. MORRIS, FREE MEN ALL 5-6, 24, 96, 101-02, 104 (1974).

30. Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850).

31. MORRIS, *supra* note 29, at 146. See S. CAMPBELL, THE SLAVE CATCHERS, 26-48 (1970).

32. MORRIS, *supra* note 29, at 146. Northern personal liberty laws had been seriously crippled by the decision in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

33. MORRIS, *supra* note 29, at 146. The explanation was that more paper work was required.

C. *Republican Political Philosophy*

The Republican reaction to the problems of Reconstruction also was moulded by their political philosophy. Republican Congressmen accepted an eighteenth-century view of the relation of man to government. Government existed, as the Declaration of Independence asserted, to protect natural rights of man—inalienable rights to life, liberty, and the pursuit of happiness. Because of the nature of the social compact, all citizens shared their fundamental rights equally.³⁴ Arguments by Democrats that the protection of fundamental rights would interfere with the legitimate rights of states struck Republicans as absurd. No state retained the legitimate authority to deprive citizens of their fundamental rights because government, at all levels, was designed to protect such rights.³⁵

Although Republicans rejected the notion that states could invade the fundamental rights of citizens, they still wanted to preserve the states. They did not want the federal government to supplant them altogether or usurp their basic functions.³⁶ Several Congressmen used an analogy to the solar system. States must be kept within their proper orbit,³⁷ an orbit that would keep them from colliding with the rights of the individual. But while Republicans wanted to preserve the states, they did not sympathize with the doctrine of states' rights advanced by slaveholders and their Democratic allies in Congress in the years before the Civil War—a doctrine that permitted some citizens to deny the rights of others. "States' rights" in this sense was seen by Republicans as the cause of the Civil War.³⁸

D. *Republican Legal Thought*

By 1866, Republicans were strongly nationalistic concerning the protection of the rights of the citizen from the hostile acts of states. In fact, a recurring theme in the debates of the 39th Congress was the need to protect the rights of citizens and to require states to respect them.³⁹

34. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 728 (Henderson), 1757-58 (Trumbull), 1832-33 (Lawrence), 2904 (Bromwell) (1866).

35. *Id.* at 1089 (Bingham), 2904 (Bromwell).

36. *Id.* at 1292 (Bingham), 1832-33 (Lawrence), app. 99 (Yates).

37. *Id.* at 1088 (Woodbridge), app. 99 (Yates), app. 257 (Baker).

38. *Id.* at 1825 (Baldwin), 1839 (Clarke), app. 144 (Loan). See also CONG. GLOBE, 35th Cong., 1st Sess. 1964 (1859)(Fessenden). "Why," Senator Nye asked, "do you not talk about State wrongs?" CONG. GLOBE, 39th Cong., 1st Sess. 2526 (1866).

39. CONG. GLOBE, 39th Cong., 1st Sess. 123, 158 (Bingham), 1781 (Trumbull), 2405 (Inger-

In their efforts to protect the basic rights of blacks and the basic civil liberties of all citizens, Republicans faced hostile Supreme Court decisions. In *Barron v. Baltimore*,⁴⁰ decided in 1833, the Court held that the guarantees of the Bill of Rights did not apply to the states. In *Dred Scott v. Sandford*,⁴¹ the Court held that blacks, even free blacks, belonged to a degraded class at the time the Constitution was written and, short of a constitutional amendment making them citizens, could never be citizens of the United States. As a result, blacks were not entitled to any of the privileges, immunities, or rights secured by the Constitution to citizens, including those in the Bill of Rights.⁴² Republicans reacted to these decisions by rejecting them.

1. Antecedents

Republican constitutional theory was influenced by the work of radical abolitionist lawyers who wrote before the Civil War. Joel Tiffany's *Treatise on the Unconstitutionality of American Slavery*,⁴³ published in 1849, typifies much of the thinking of these men. As the title of his book suggests, Tiffany concluded that slavery was unconstitutional, even in the states. Slaves were citizens and entitled to all the constitutional protections accorded citizens.⁴⁴ This doctrine was not accepted by most Republican Congressmen prior to the passage of the thirteenth amendment.⁴⁵ For one thing, it was difficult to reconcile with American history and several provisions of the Constitution. But with a few significant modifications, such as admitting that slaves were not protected as citizens, Tiffany's theories provided the basis for a plausible civil libertarian reading of the Constitution. Since Tiffany's views are remarkably similar to those expressed by Republicans in the 39th Congress, they are worth examining.

Tiffany believed in a paramount national citizenship requiring allegiance by the citizen and protection of the citizen's rights by the na-

soll), app. 67 (Garfield), app. 99 (Yates) (1866).

40. 32 U.S. (7 Pet.) 243 (1833).

41. 60 U.S. (19 How.) 393 (1857).

42. *Id.* at 404-10. See also Crosskey, *supra* note 9, at 5-10. For a brilliant analysis of *Dred Scott*, see D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978).

43. J. TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* (1849).

44. *Id.* at 84-95.

45. CONG. GLOBE, 38th Cong., 2d Sess. 243 (Woodbridge), 265 (Stevens) (1865); 38th Cong., 1st Sess. 1461 (1864)(Henderson). For the minority view that the due process clause prohibited slavery in the states, see CONG. GLOBE, 38th Cong., 2d Sess. 138 (Ashley), 486 (Morris) (1865); 38th Cong., 1st Sess. 1479 (Sumner), 2978 (Farnsworth) (1864).

tional government. All persons born or naturalized in the United States were citizens.⁴⁶ The object of the national government was to protect the natural and inalienable rights of each citizen, protection that extended against “the encroachments of foreign nations, and domestic states.”⁴⁷ After all, “a state might assume the authority to rob a portion of her citizens of their dearest rights.”⁴⁸

Tiffany found support for his libertarian reading in the preamble to the Constitution, which announced its objects as establishing justice and securing the blessings of liberty. A “careful examination” of the Constitution showed that “ample provision” had been made to protect the rights of citizens “from the despotism of states at home.”⁴⁹ The rights protected were “all the rights, privileges, and immunities, granted by the constitution of the United States.”⁵⁰ “[W]henever a state shall by its legislation, attempt to deprive a citizen of the United States of those rights and privileges which are guaranteed to him by the Federal Constitution . . . such legislation of the state is void” and the federal judiciary was required to correct the violation.⁵¹

The “privileges and immunities” of citizens of the United States included “all the guarantys of the Federal Constitution for personal security, personal liberty and private property.”⁵² Tiffany then asked: “But what further guarantys, for personal security and liberty could a government provide than the constitution of the United States has already provided?” He listed the guarantees in the Bill of Rights and “*the great writ of Liberty, the Habeas Corpus.*”⁵³

46. TIFFANY, *supra* note 43, at 55-57, 84-97.

47. *Id.* at 55.

48. *Id.*

49. *Id.* at 56.

50. *Id.* at 56.

51. *Id.* at 57-58.

52. *Id.* at 97.

53. Tiffany noted:

[The Constitution] has secured the right of petition, the right to keep and bear arms, the right to be secure from all unwarrantable seizures and searches, the right to demand, and have a presentment, or indictment found by a grand jury before he shall be held to answer to any criminal charge, the right to be informed beforehand of the nature and cause of accusation against him, the right to a public and speedy trial by an impartial jury of his peers, the right to confront those who testify against him, the right to have compulsory process to bring in his witnesses, the right to demand and have counsel for his defence, the right to be exempt from excessive bail, or fines, etc., from cruel and unusual punishments, or from being twice jeopardized for the same offence; and the right to the privileges of the great writ of Liberty, the Habeas Corpus.

Id. at 99.

Tiffany insisted that the federal government had the power to enforce the guarantees of personal liberty contained in the Constitution. The Bill of Rights was a source of legislative power by which the federal government could directly protect the rights of citizens within the states.⁵⁴ To be a citizen of the United States, according to Tiffany,

is to be invested with a title to life, liberty, and the pursuit of happiness, and to be protected in the enjoyment thereof, by the guaranty of twenty millions of people. It is, or should be, a panoply of defense equal, at least, to the ancient cry, "I am a Roman Citizen." And when understood, and respected in the true spirit of the immortal founders of our government it will prove a perfect bulwark against all oppression.⁵⁵

Tiffany read "privileges and immunities" to include those rights set out in the Bill of Rights.⁵⁶ The *Dred Scott* decision itself had held that since blacks were not citizens of the United States, they were not entitled to any of the "rights, and privileges, and immunities, guarantied by [the Constitution] to the citizen."⁵⁷ Later in the same opinion, Chief Justice Taney referred to guarantees of the Bill of Rights as the "rights and privileges of the citizen," and again as the "rights of person or rights of property."⁵⁸

2. Republican Legal Theories—1866

By 1866, most Republicans accepted several unorthodox constitutional doctrines. While the *Dred Scott* decision had held that free blacks were not citizens, and therefore not entitled to any constitutional rights or privileges, Republicans insisted that free blacks were indeed citizens.⁵⁹

Republicans also relied on an unorthodox reading of the due process clause of the fifth amendment.⁶⁰ After the ratification of the thirteenth amendment, the question of slavery in the territories and District of Columbia was of no practical significance. Still, the debate on this question that raged before and during the Civil War highlights the

54. *Id.* at 139-40.

55. *Id.* at 56 (emphasis omitted).

56. *Id.* at 97-99.

57. 60 U.S. (19 How.) at 403.

58. *Id.* at 449.

59. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 574 (Trumbull), 1115 (Wilson), 1832 (Lawrence) (1866).

60. See generally NATIONAL PARTY PLATFORMS 27 (D. Johnson ed. 1956).

State shall be entitled to all the privileges and immunities of citizens in the several States." We must make American citizenship the shield that protects every citizen, on every foot of our soil.⁹⁰

Senator Pomeroy believed that the thirteenth amendment "secured the freedom of all men wherever the old flag floats," and provided for the protection of freedom by appropriate legislation.⁹¹ Such legislation, he said, "can be nothing less than throwing about all men the essential safeguards of the Constitution."⁹² One of the safeguards that he mentioned was the right to bear arms, secured by the second amendment.⁹³

Some Republicans frankly recognized that their constitutional views were unorthodox. Still, they insisted that the government had the power to protect individuals from state abuses. Congressman Broomall noted that the government had been considered powerless to guard a citizen of Pennsylvania from illegal arrest in Virginia, or to protect the liberty of an agent of the state of Massachusetts in the city of Charleston.⁹⁴ Broomall considered illegal arrests and denials of due process, together with denials of the rights of speech, petition, habeas corpus, and transit, to be denials of the privileges and immunities of citizens secured by article IV, section 2.⁹⁵

Congressman Hart insisted that the rebellious Southern states should not be restored to full relations with the Union "until the bondsmen we have set free shall stand erect in all the rights of citizenship, protected in person, property, and liberty and burdened by no restriction imposed because of race or color."⁹⁶ Hart insisted that the rebellious states provide "a government whose 'citizens shall be entitled to all privileges and immunities of other citizens,' " where the guarantees of the first, second, fourth, and fifth amendments should be respected.⁹⁷

Republican speakers approached the subject of Reconstruction with remarkable awareness of the historical significance of their actions. The results would be, as Congressman Clarke of Kansas noted, "momentous to the interest of civil liberty."⁹⁸ Clarke sought "a more

90. *Id.* at app. 67.

91. *Id.* at 1183.

92. *Id.*

93. *Id.* For Henry Wilson's views, see *id.* at 1255.

94. *Id.* at 1263.

95. *Id.*

96. *Id.* at 1628.

97. *Id.* at 1629. For Lawrence's views, see *id.* at 1833.

98. *Id.* at 1837.

perfect freedom and a grander nationality" and "an enlarged liberty to the citizen."⁹⁹ He asserted that the Constitution provided that "the right of the people to keep and bear arms shall not be infringed." Alabama and other rebellious states had denied blacks the right to bear arms, a right Clarke insisted should be respected.¹⁰⁰

Senator Nye of Nevada made one of the most comprehensive analyses of the Constitution's protection of the rights of citizens. Nye had been a close political ally of Abraham Lincoln. Lincoln appointed him Governor of the Nevada territory, and when Nevada became a state, he was one of its first Senators.¹⁰¹ His view that the Bill of Rights limited the states was consistent with the views of other Republicans. According to Nye,

the enumeration of personal rights in the Constitution to be protected, prescribes the kind and quality of the governments that are to be established and maintained in the States.

. . . .
In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—"life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person". . . and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated."

. . . .
Will it be contended, sir, at this day, that any State has the power to subvert or impair the natural and personal rights of the citizen? Will it be contended that the doctrine of "State sovereignty" has so far survived the wreck of its progenitor, slavery, that we are yet kept aloof from the true construction of the Constitution?

While slavery existed as a political power, it was not possible to adopt a true construction of the fundamental law.¹⁰²

99. *Id.* at 1837-38.

100. *Id.* at 1838.

101. VII DICTIONARY OF AMERICAN BIOGRAPHY 600 (1959).

102. CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866). Several Republicans, of course, believed a constitutional amendment was required to correct *Barron v. Baltimore*. See notes 167-70, 211-13 & 241 *infra*.

Republican interpretation of the due process clause. In *Dred Scott*, Chief Justice Taney insisted that slaveholders' rights to due process would be violated if they were denied the right to take their slaves into federal territories.⁶¹ Republicans, on the other hand, believed that slavery in the territories—where the fifth amendment applied to all persons—would deprive slaves of due process of law. As Republicans read the clause, “citizens” in the states and “persons” within the exclusive jurisdiction of the federal government were only to be deprived of their liberty by appropriate legal process.⁶² Since slaves had not been deprived of their liberty by the accepted process of trial in the courts, to hold them in slavery in the territories violated the fifth amendment. Where the clause applied in full force, it protected the rights to life, liberty, and property from illegal invasion from any quarter, even by private persons.⁶³

In addition to believing that free blacks were citizens and that the due process clause had banned slavery in federal territories, many Republicans in the 39th Congress relied on an unorthodox reading of the privileges and immunities clause of article IV, section 2.⁶⁴ That clause provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Most Republicans read the clause to protect the fundamental rights of American citizens against hostile state action.⁶⁵ But, in *Dred Scott*, the Court had said that the clause applied only to temporary visitors from other states. A state could still restrict the rights of its own citizens and of citizens from other states who took up permanent residence.⁶⁶ Republicans, however, believed in a body of national rights that states were required to respect.⁶⁷ Finally, most Republicans who expressed their views on the subject rejected the ruling in *Barron v. Baltimore*⁶⁸ that the guarantees of the Bill of Rights did not limit the states. To most Republicans, section one of the fourteenth amendment merely declared existing constitutional law, properly understood.

61. 60 U.S. (19 How.) at 450.

62. See note 60 *supra*.

63. CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862)(Bingham—on abolition in District of Columbia).

64. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 430 (Bingham), 1263 (Broomall), 1833, 1835-36 (Lawrence) (1866); 38th Cong., 1st Sess. 1202 (1864)(Wilson).

65. See CONG. GLOBE, 39th Cong., 1st Sess. 574, 1115, 1832 (1866); note 64 *supra*. See also notes 188-207 *infra* and accompanying text.

66. 60 U.S. (19 How.) at 422-23.

67. See notes 78-103 *infra* and accompanying text.

68. 32 U.S. (7 Pet.) 243 (1833). See notes 78-103 *infra* and accompanying text.

To a number of Republicans, the Civil War and the thirteenth amendment transformed American constitutional law. Slavery had subverted the guarantees of the Constitution and the libertarian character of American government. With the end of slavery, however, the situation changed. "Hitherto," Senator Howe noted, "we have taken the Constitution in a solution of the spirit of State rights. Let us now take as it is sublimed and crystalized in the flames of the most gigantic war in history."⁶⁹ As Congressman Anderson said: "We are to-day interpreting the Constitution from a freedom and not from a slavery standpoint."⁷⁰

To these Republicans, the thirteenth amendment had a broad libertarian effect. It provided:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.⁷¹

Republicans believed that the thirteenth amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens. As Senator Yates put it, "by the amendment to the Constitution . . . the freedman becomes a free man, entitled to the same rights and privileges as any other citizen of the United States."⁷² According to Congressman Eliot: "The slave becomes freedman, and the freedman man, and the man citizen, and the citizen must be endowed with all the rights which other men possess."⁷³ "They are free by the constitutional amendment lately enacted," said Senator Lane, "and entitled to all the privileges and immunities of other free citizens of the United States."⁷⁴ According to Senator Trumbull, blacks were made citizens by the thirteenth amendment and so were entitled to the great fundamental rights of citizens.⁷⁵ Trumbull believed that the thirteenth amendment author-

69. CONG. GLOBE, 39th Cong., 1st Sess. 163 (1866).

70. *Id.* at 1478.

71. U.S. CONST. amend. XIII.

72. CONG. GLOBE, 39th Cong., 1st Sess. 1780 (1866).

73. *Id.* at 513.

74. *Id.* at 602.

75. *Id.* at 475. Trumbull said civil rights included the right to make and enforce contracts, to sue, to give evidence, to acquire property, and to enjoy full and equal benefit of all laws and proceedings for security of person or property.

ized Congress to pass laws to secure freedom. Although it was "difficult to draw the precise line, to say where freedom ceases and slavery begins," a "law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void."⁷⁶

A resolution of the New York legislature expressed a similar idea. The thirteenth amendment, it said,

conferred upon Congress all the constitutional powers needful to establish and enforce universal freedom in practice and in fact; so the nation is pledged . . . that in all lawful ways the liberty and civil rights of every human being, subject to the Government of the United States, shall be protected and enforced, regardless of race, color, or condition, against every wrongful, opposing law, ordinance, regulation, custom or prejudice.⁷⁷

3. The Rights of Citizens: The Republican View

With the end of slavery, Republicans considered blacks citizens and entitled to all the rights, privileges, and immunities of citizens of the United States.⁷⁸ What, then, did Republicans see as the rights, privileges and immunities of citizens? And what was the scope of these protected rights?

First, Republicans believed that the rights of citizens established by the Constitution placed limitations on both state and federal governments. Second, they believed that these rights, privileges, and immunities included the rights in the Bill of Rights. Several Republicans recognized that Supreme Court decisions were contrary to their view and needed correction.⁷⁹

In the 38th Congress, Congressman Wilson said that he might enumerate "many . . . constitutional rights of the citizen which slavery has disregarded and practically destroyed."⁸⁰ He discussed specifically "[f]reedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition." These rights belonged

76. *Id.*

77. *Reprinted in id.* at 1843.

78. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866)(Raymond).

79. *See* text at notes 167-70, 211-13 & 241 *infra*.

80. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

"to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere"⁸¹ Other Congressmen complained of denials of the "constitutional rights of our citizens in the South," including freedom of speech and of the press,⁸² and of violations of protection against unreasonable searches and seizures.⁸³

Congressman Arnold complained that the Constitution had disappeared in slave states. He cited state denial of liberty of speech, freedom of the press, and trial by jury,⁸⁴ all secured by the Bill of Rights. Congressman Scofield also referred to rights secured by the Bill of Rights. Slavery, he said,

suspends the great writ of liberty in time of peace, tramples down the trial by jury when found in its way, contracts freedom of speech to the right to advocate its unchristian cause, revives constructive treason, and . . . indicts of that high crime respectable citizens who spoke too rudely of its traffic in men.⁸⁵

In discussing the proposed thirteenth amendment and the claim that it would interfere with the reserved rights of the states, Congressman Higby expressed his views on the Bill of Rights:

Rights reserved! Why, just look at these amendments which have already been made, and you will find that they were all for the purpose of securing liberties to the people, and not for the purpose of giving them power of oppression and despotism. Rights were reserved, fearing that the General Government might be too strong or too weak; if too strong, that it might trample under foot the liberties of the people, might establish despotism; rights were reserved, if it proved too weak, for the purpose of keeping vitality in the General Government, that it should be administered for the purpose of securing liberties to the people.⁸⁶

81. *Id.*

82. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

83. CONG. GLOBE, 38th Cong., 1st Sess. 20 (1864).

84. *Id.* at 114-15, 1197.

85. *Id.* at 1971-72.

86. CONG. GLOBE, 38th Cong., 2d Sess. 479 (1865). For other Republican complaints about violations of the Bill of Rights in the Southern states, see CONG. GLOBE, 38th Cong., 1st Sess. 951 (Baldwin—slavery "organized despotism and defiance of constitutional rights in every community subject to its sway"), 1313 (Trumbull—freedom of speech), 1439 (Harlan—freedom of speech),

Republicans in the 39th Congress also interpreted the guarantees of the Bill of Rights to limit the states as well as the federal government. Early in the session Senator Wilson, like many of his colleagues, complained that the South enacted laws that discriminated against blacks.⁸⁷ Senator Cowan, a Republican legislator who later abandoned the party to support Andrew Johnson, interrupted:

[T]he Constitution of the United States makes provision by which the rights of no free man, no man not a slave, can be infringed insofar as regards any of the great principles of English and American liberty; and if these things are done by the authority of any of the southern States, there is ample remedy now. Under the fifth amendment of the Constitution, no man can be deprived of his rights without the ordinary process of law; and if he is, he has his remedy.⁸⁸

Wilson might have cited *Barron v. Baltimore* to show that Cowan was wrong, and that the Bill of Rights did not limit the states. Instead, he agreed that the Constitution protected blacks "so far as the Constitution can do it; and the [thirteenth] amendment to the Constitution empowers us to pass the necessary legislation to make them free indeed."⁸⁹

Congressman Garfield also believed that the Bill of Rights limited the states.

In reference to *persons*, we must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty, and property shall be guaranteed to the citizen in reality as they are now in the words of the Constitution, and no longer left to the caprice of mobs or the contingencies of local legislation. If our Constitution does not now afford all the powers necessary to that end, we must ask the people to add them. We must give full force and effect to the provision that "no citizen shall be deprived of life, liberty, or property without due process of law." We must make it as true in fact as it is in law, that "the citizens of each

2615 (Morris—free speech) (1864). See CONG. GLOBE, 38th Cong., 2d Sess. 237 (1865)(Smith). See also CONG. GLOBE, 39th Cong., 1st Sess. 167 (Howe), 783 (Ward), 1617 (Moulton), app. 142 (Wilson) (1866).

87. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866).

88. *Id.*

89. *Id.*

Later in the same speech, Nye summarized his understanding of the Constitution as it affected the rights of citizens. Congress could "give effect by the enactment and enforcement of laws to all the protective provisions of the Constitution." In addition, both Congress and the legislatures of the states were prohibited from subverting or impairing "the natural or personal rights enumerated or implied in the Constitution." Finally, Congress could enforce the guarantee of Republican government "making the enumeration of personal and natural rights and the protective features of the Constitution the definition and test of what is republican government."¹⁰³

4. Republican Goals for Reconstruction

So far, I have examined the fourteenth amendment in light of the Republican view of history, Republican political philosophy, and Republican legal thought. Another way to understand the amendment is to look at the goals Republicans sought to achieve. Almost invariably, these goals were stated in extremely broad and libertarian terms. To Republicans, the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of citizens of the United States. As Speaker Colfax saw it, the goal was to protect men in their inalienable rights.¹⁰⁴ Senator Wilson sought "security of the liberties of all men, and the security of equal, universal, and impartial liberty."¹⁰⁵ Congressman Farnsworth insisted on "security for the protection of the rights of men."¹⁰⁶ Congressman Thomas, like a number of his colleagues, sought to insure for blacks the rights to acquire and dispose of personal and real property, to testify, and to have their life, liberty, and property protected by the same laws that protected whites.¹⁰⁷

Several Senators wanted to "carry out and give effect to every single guarantee of the Constitution."¹⁰⁸ Other Congressmen insisted on protection for the rights and privileges of citizens,¹⁰⁹ for the personal and natural rights of citizens,¹¹⁰ for the fundamental rights of citizens,¹¹¹ for the civil rights of citizens,¹¹² and for the natural and per-

103. CONG. GLOBE, 39th Cong., 1st Sess. 1075 (1866).

104. *Id.* at 5.

105. *Id.* at 111.

106. *Id.* at 207.

107. *Id.* at 263. *See also id.* at 667, 911 (protection of blacks in natural and civil rights).

108. *Id.* at 566 (Brown), 741 (Lane).

109. *Id.* at 868 (Newell).

110. *Id.* at 1032 (McClurg).

111. *Id.* at 1295 (Wilson).

sonal rights enumerated in the Constitution.¹¹³

Like Garfield, many Republicans wanted personal liberty and personal rights placed in the keeping of the nation and protected from local legislation.¹¹⁴ According to Congressman Morrill, the government should insure that states did not deny equal rights to their citizens. In this respect it "should protect its citizens against state authority and state interpretations of their rights, privileges, and immunities as citizens of the United States."¹¹⁵ Many Republicans believed authority to protect those rights already existed and needed, at most, clarification. Senator Yates of Illinois was surprised at suggestions that the federal government lacked the power to protect its citizens:

I had in the simplicity of my heart, supposed that "State rights" being the issue of the war, had been decided. I had supposed that we had established the proposition that there is a living Federal Government and a Congress of the United States. I do not mean a consolidated Government, but a central Federal Government which, while it allows the States the exercise of all their appropriate functions as local State governments, can hold the States well poised in their appropriate spheres, can secure the enforcement of the constitutional guarantees of republican government, the rights and immunities of citizens in the several States, and carry out all the objects provided for in the preamble of the Constitution . . . "establish justice," and "secure the blessings of liberty to ourselves and our posterity."¹¹⁶

While Republican Congressmen emphasized the need to protect the basic rights of blacks, they also expressed concern for the protection of rights of white unionists and for rights in the Bill of Rights.¹¹⁷

112. *Id.* at 1182 (Pomeroy).

113. *Id.* at 1074. Narrower goals were less frequently mentioned. *See id.* at 111 (Stewart), 508 (Kasson).

114. *See, e.g., id.* at 123 (Bingham), app. 67 (Garfield). Republican concern for rights in the Bill of Rights was a longstanding concern that had been expressed in party platforms. *See NATIONAL PARTY PLATFORMS 27-28* (D. Johnson ed. 1956); R. SEWELL, *BALLOTS FOR FREEDOM* 284 (1976).

115. *CONG. GLOBE*, 39th Cong., 1st Sess. app. 155 (1866).

116. *Id.* at app. 99.

117. *See, e.g., id.* at 783 (Ward), 1072 (Nye), 1183 (Pomeroy), 1262 (Broomall), 1291 (Bingham), 1617 (Moulton—specifically mentioning outrages against Union men and lack of protection for freedom of speech, press, and life, liberty or property), 1629 (Hart), 1837 (Clarke), app. 67 (Garfield), app. 142 (Wilson). *See also id.* at 237 (Kasson), 462 (Baker).

Senator Brown suggested an amendment "so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in that instrument," including the clause guaranteeing a republican form of government and that securing privileges and immunities of citizens in every state.¹¹⁸

Congressmen Donnelly also advocated an amendment that provided for congressional power to enforce all the guarantees of the Constitution. He listed specifically its "sacred pledges of life, liberty, and property."¹¹⁹ Congress itself, in passing a resolution proposed by Congressman McClurg, indicated its belief that it was enforcing the guarantees of the Bill of Rights in the Southern states. The resolution asserted that Congress was forced by the "continued contumacy in the seceding states" to legislate "to give the loyal citizens of those states protection in their natural and personal rights enumerated in the Constitution."¹²⁰

Petitions presented to Congress by Republican lawmakers on behalf of private citizens also demanded protection for rights in the Bill of Rights, as well as equality before the law. Senator Sumner presented a petition "from the colored citizens of the State of South Carolina." It asked for "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press."¹²¹ Senator Trumbull submitted a petition from citizens of Quincy, Illinois that demanded absolute equality of political as well as civil rights and "free speech, free press, free assembly, and free instruction."¹²² A similar petition from Detroit Germans presented by Senator Howard sought "[p]rohibition of all restrictions on free speech, free press, free assemblage and free instruction."¹²³

II. THE FRAMING OF THE FOURTEENTH AMENDMENT

A. *Bingham's Prototype*

When Congress assembled on December 4, 1865, Southern Congressmen were excluded.¹²⁴ Congress appointed a Joint Committee to

118. *Id.* at 566.

119. *Id.* at 586.

120. *Id.* at 1032, 2724.

121. *Id.* at 337.

122. *Id.* at 436.

123. *Id.* at 494.

124. *Id.* at 6-7.

consider conditions for the readmission of Southern states to Congress. The fourteenth amendment was the result of the Committee's deliberations.¹²⁵

President Johnson's message to Congress in December 1865 emphasized limitation of government, both state and national, in the interest of protecting the rights of man. These included the "equal right of every man to life, liberty, and the pursuit of happiness [and] to freedom of conscience." "As a consequence," Johnson noted, "the State government is limited, as to the General Government in the interests of union [and] as to the individual citizen in the interest of freedom."¹²⁶ Johnson specifically mentioned separation of church and state and free speech. "Here," he noted, "toleration is extended to every opinion, in the quiet certainty that truth needs only a fair field to secure the victory."¹²⁷

Congressman Bingham, a member of the Joint Committee and the future author of section one of the fourteenth amendment, was a veteran anti-slavery Congressman from Ohio. Like many opponents of slavery, he had a deep and emotional respect for the Bill of Rights.¹²⁸ On December 6, 1865, Bingham introduced a resolution proposing a constitutional amendment authorizing Congress to pass all laws necessary to secure all persons in every state of the Union equal protection in their rights to life, liberty, and property.¹²⁹

When Bingham spoke on January 9, 1866, he hailed the President's message. Equal and exact justice had been denied to white and black alike, Bingham explained, so it had been unsafe for advocates of equality to be found in Richmond or Charleston:

[I]t was not because the Constitution of the United States sanctioned any infringement of his rights in that behalf, but because in defiance of the Constitution its very guarantees were disregarded. . . . In view of the fact that many of the States—I might say, in some sense, all the States of the Union—have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens, it is time that we take security for the future, so that like occurrences may not again arise to distract our people and finally dismem-

125. *Id.* at 77, 2286, 2765.

126. *Id.* at app. 1.

127. *Id.* at app. 1, 5.

128. See CONG. GLOBE, 34th Cong., 1st Sess. app. 122-27 (1856).

129. JAMES, *supra* note 9, at 81.

ber the Republic.

When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis "of the United States") in the several States."¹³⁰

In proposing his amendment, Bingham wanted to ensure that the provisions of article IV, section 2, were respected in each state. Therefore, his understanding of article IV, section 2, is of crucial importance.

Bingham had spoken in Congress in 1859 against the admission of Oregon to the Union. The proposed Oregon Constitution, opposed by Bingham and a number of other Republicans, provided that no free negro or mulatto could come into the state, hold real estate, make contracts, or sue in the courts of the state.¹³¹ Bingham's Oregon speech shows that he read the original privileges and immunities clause to protect all rights of citizens of the United States, including those in the Bill of Rights, from state interference: "To the right understanding of the limitations of the Constitution of the United States upon the several States, it ought not to be overlooked that, whenever the Constitution guarantees to its citizens a right, either natural or conventional, such guarantee is in itself a limitation on the States"¹³² Since free blacks were citizens, they were entitled to all privileges and immunities of citizens of the United States. "Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States."¹³³ Among these were "the rights of life and liberty and property, and their due protection in the enjoyment thereof by law."¹³⁴

Bingham believed that the rights in the Bill of Rights were protected from state infringement by the privileges and immunities clause of article IV, section 2. Still, he was aware of decisions like *Barron v.*

130. CONG. GLOBE, 39th Cong., 1st Sess. 157-58 (1866). As this quote indicates, Bingham believed there was an ellipsis implied in the language of article IV, § 2.

131. CONG. GLOBE, 35th Cong., 2d Sess. 974 (1859).

132. *Id.* at 982.

133. *Id.* at 984.

134. *Id.*

Baltimore that held to the contrary.¹³⁵ Moreover, unlike Tiffany, Bingham denied that the rights could be enforced by congressional legislation. Indeed, in Bingham's view, the only enforcement method was the oath state officials took to obey the Constitution.¹³⁶

When Bingham spoke again on January 25, 1866, he warned his colleagues that a constitutional amendment was required before Congress would have the power to enforce all the guarantees of the Constitution. "In what I have said upon the limitations of power," Bingham said, "I do not express my own opinion, but the opinions of others and the uniform construction."¹³⁷ Bingham thought that the question "whether the Constitution shall be so amended as to give Congress the power by statute to enforce all its guarantees" was the most important issue that would come before the Congress.¹³⁸ With such powers, Congress could legislate "that hereafter no state shall make it a crime for a man, whether he be black or white, a citizen of the Republic, to learn the alphabet of his native tongue and his rights and duties."¹³⁹ Southern states, of course, had made it a crime to teach slaves to read.¹⁴⁰

On February 1, 1866, Congressman Donnelly spoke in favor of Bingham's proposed amendment. It provided "in effect that Congress shall have the power to enforce by appropriate legislation all the guarantees of the Constitution." Donnelly asked:

Why should this not pass? Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty, and property to fall to the ground through lack of power to enforce them? . . . Or shall that great Constitution be what its founders meant it to be, a shield and a protection over the head of the lowliest and poorest citizen in the remotest region of the nation?¹⁴¹

Since January, the Joint Committee had been considering proposed amendments to the Constitution. On February 3, 1866, the Committee agreed to report favorably on one drafted by Bingham.¹⁴² It provided:

135. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1089-90, 1292 (1866).

136. *Id.* at 429, 1034.

137. *Id.* at 429.

138. *Id.* at 432.

139. *Id.*

140. *Id.* at 1013 (Plants).

141. *Id.* at 586.

142. JAMES, *supra* note 9, at 82.

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).¹⁴³

On February 13, 1866, Bingham reported the amendment to the House. Shortly thereafter, Bingham and Congressman Brooks, a Democrat, argued over when the amendment would be considered. Brooks said he wanted the country to know "how these things are managed." Bingham shot back: "And I want it understood who are opposed to enforcing the written guarantees of the Constitution."¹⁴⁴

On February 26, 1866, Bingham presented his proposal to the House. It gave Congress power to secure privileges and immunities to citizens and equal protection in the rights of life, liberty, and property to persons.¹⁴⁵ The proposal contained several defects. First, it was not self-executing, but depended upon congressional legislation. The rights Bingham wanted to secure were left to a majority of Congress, vulnerable to the shifting winds of the political process. Second, it was written on the assumption that Bingham's views and those of a number of his colleagues, not the decisions of the Supreme Court, accurately stated the law.¹⁴⁶ The proposal assumed, without providing explicitly, that contrary to *Dred Scott*, free blacks were citizens of the United States. And it assumed that the Republican reading of article IV, section 2,¹⁴⁷ not the dictum in *Dred Scott*, was correct. Bingham was not alone in holding these views.¹⁴⁸

When Bingham introduced his resolution, he spoke briefly in its support. He said that the due process clause required equal protection, and that the provisions of the proposed amendment were already in the

143. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (1914).

144. CONG. GLOBE, 39th Cong., 1st Sess. 813 (1866).

145. *Id.* at 1033-34.

146. Crosskey, *supra* note 9, at 20.

147. *See, e.g.*, notes 183-99 *infra* and accompanying text. For Congressman Lawrence, the clause seems both to have protected fundamental rights of all citizens, such as those contained in the due process clause, and to have ensured equality in certain rights with citizens of a state. CONG. GLOBE, 39th Cong., 1st Sess. 1833-35 (1866). For other comments on the clause, see *id.* at 474 (Trumbull), 867 (Newell), 899 (Cook—emphasizing equality of rights of a citizen of one state with citizens of a state to which he goes).

148. For Fessenden's repudiation of *Dred Scott*, see CONG. GLOBE, 35th Cong., 1st Sess. 1964 (1858).

Constitution, except for the enforcement power.¹⁴⁹ All state officers took an oath to support the Constitution as the supreme law of the land. And, Bingham observed, "it is equally clear by every construction of the Constitution . . . legislative, executive, and judicial, that these great provisions of the Constitution, this immortal Bill of Rights embodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the States."¹⁵⁰

Bingham, like many Republicans, read article IV, section 2, as protecting the privileges and immunities of citizens of the United States, including those in the Bill of Rights, from state infringement.¹⁵¹ As Bingham said on January 25, 1866: "I believe that the free citizens of each State were guaranteed, and intended to be guaranteed by the terms of the Constitution, all—not some, 'all'—the privileges of citizens of the United States in every State."¹⁵²

Discussion of Bingham's prototype of section one lasted several days. The proposal evoked both support and opposition. The opposition from Republicans was not based upon the requirement that the states

149. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

150. *Id. Compare with Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860)(duty of state governor to deliver up fugitive slaves legally unenforceable).

See also TIFFANY, *supra* note 43, at 71. Tiffany did not accept the positivist view that the law was whatever the Supreme Court said it was. He believed that court decisions were not law, but only evidence of what the law had been held to be on a particular occasion. Tiffany's approach explained why the law could be corrected when found to be mistaken.

For attempts to show that Bingham's reference to "[t]he Bill of Rights" did not mean the Bill of Rights, see BERGER, *supra* note 4, at 141; Fairman, *supra* note 9, at 26. Fairman goes to extraordinary lengths to prove that Bingham's references to the Bill of Rights did not refer to *the* Bill of Rights but were simply examples of "careless imprecision." Fairman, *supra* note 9, at 31. He quotes Bingham as saying "this word property has been in your bill of rights since 1789," and then to prove Bingham's imprecision, Fairman tells us that the Bill of Rights Bingham invoked "had been part of the Constitution from the year 1789." *Id.* at 30-31. The reader is apparently expected to infer that Bingham was not talking about *the* Bill of Rights, which was not ratified until 1791. In fact, of course, the phrase had been in the Bill of Rights since 1789, when the Bill of Rights was proposed by Congress. 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1164-66 (1971).

151. See notes 64-65 *supra*.

152. CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866). The Supreme Court, on several occasions, has referred to the rights in the Bill of Rights as privileges or immunities of citizens. *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937); *Boyd v. United States*, 116 U.S. 616, 618 (1886). The fourth and fifth amendment question raised in *Boyd* was described as "a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen." *Id.* See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969)(use of streets for assembly and free speech "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens"). Oddly enough, use of the same phrase by Bingham and his colleagues to refer to the rights in the Bill of Rights has never been considered adequate.

obey the Bill of Rights, but on concern over new congressional power to legislate directly on matters traditionally covered by state law.

Congressman Kelly supported the amendment, not because it was absolutely necessary, but because there were some legislators, even some Republicans, who doubted that the "powers to be imparted by it [were] already to be found in the Constitution."¹⁵³ Kelly apparently believed Congress already had power to protect citizens from all invasions of their rights secured by the Bill of Rights. "For myself," Kelly said, "I find in [the Constitution] now, powers by which the General Government may defend the rights, liberties, privileges, and immunities of the humblest citizen wherever he may be upon our country's soil."¹⁵⁴ Congressman Higby of California supported the amendment for similar reasons. The proposal would "only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument." Had the privileges and immunities clause been enforced, "a citizen of New York would have been treated as a citizen in the State of South Carolina The man who was a citizen in one State would have been considered and respected as a citizen in every other State of the Union."¹⁵⁵

Congressman Woodbridge of Vermont said that the proposal would permit Congress to "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.*" In Woodbridge's view, the proposal tended "to keep the States within their orbits."¹⁵⁶

The principal attack on Bingham's proposal came from Congressman Hale of New York, a moderate Republican.¹⁵⁷ Hale directed his argument to the equal protection section.¹⁵⁸ His concern was that the amendment would authorize Congress to pass uniform legislation in areas traditionally left to the states, such as marriage, property, and defi-

153. CONG. GLOBE, 39th Cong., 1st Sess. 1057 (1866).

154. *Id.* at 1062-63.

155. *Id.* at 1054.

156. *Id.* at 1088 (emphasis added).

157. *Id.* at 1063-65.

158. *Id.* at 1064.

dition of crimes.¹⁵⁹ The idea that states should be required to obey the Bill of Rights did not disturb Hale. He believed they already were required to do so. The notion that the Bill of Rights allowed Congress to pass uniform laws on *all* subjects related to life, liberty, or property did concern him, however. Hale insisted that the amendments were restrictions on, not grants of, power.¹⁶⁰ "They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation."¹⁶¹

Bingham interrupted Hale to ask him to produce a single case holding that the Constitution guaranteed a citizen the right to sue in state courts. Had not the "nation . . . been dumb in the presence" of a state constitution denying "eight hundred thousand natural-born citizens . . . the right to prosecute a suit" in its courts? Hale admitted that he did not know of a case holding that the "Constitution is sufficient for the protection of the liberties of the citizen." But he had "somehow or other, gone along with the impression that there is that sort of protection thrown over us." When Bingham offered to produce a case holding the Constitution insufficient for the protection of the liberties of the citizen, Hale rejected the offer as a side issue.¹⁶²

Bingham insisted that the amendment would apply to loyal whites as well as blacks, and to non-Southern states that included "in their constitutions and laws . . . provisions in direct violation of every principle of our Constitution."¹⁶³ He cited Oregon as an example of such a state. Hale accepted Bingham's correction and said that the amendment would apply to every state which, in Bingham's opinion, did not provide equal protection to life, liberty, and property. But if Oregon in fact had constitutional provisions or laws violating the Bill of Rights, Hale insisted that the courts could correct the situation.¹⁶⁴

Bingham spoke again in support of his amendment on February 28, 1866: "The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."¹⁶⁵ Although, Bingham said, "[g]entlemen [admitted] the force of the provisions in the bill of rights,

159. *Id.* at 1063-64.

160. *Id.* at 1064-65.

161. *Id.* at 1064.

162. *Id.*

163. *Id.* at 1065.

164. *Id.*

165. *Id.* at 1088.

that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law;" still they insisted that "enforcement of the bill of rights, as proposed" would "interfere with the reserved rights of the States." Who had ever before heard, Bingham asked, "that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States?"¹⁶⁶

In the same speech, Bingham cited *Barron v. Baltimore*¹⁶⁷ and *Livingston v. Moore*¹⁶⁸ to show "that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied."¹⁶⁹ Those who opposed the amendment, Bingham insisted, opposed federal authority to enforce the Bill of Rights.¹⁷⁰

Despite Bingham's appeal, many were not convinced. Congressman Hotchkiss of New York wanted "to secure every privilege and every right to every citizen in the United States" that Bingham wanted to secure.¹⁷¹ He objected, however, to the equal protection provision because he believed it would allow Congress to legislate directly on all subjects that might be included within the phrase "life, liberty, or property"—in short, on all imaginable subjects.¹⁷² Hotchkiss also objected to the failure of the amendment to protect rights from state interference.¹⁷³ Hotchkiss said that he understood Bingham's object was to prevent discrimination in rights among citizens. He believed the privileges and immunities section was identical to the guarantee already in the Constitution. Hotchkiss concluded: "Now I desire that the very privileges for which the gentleman is contending shall be secured to the

166. *Id.* at 1089.

167. 32 U.S. (7 Pet.) 243, 247-48 (1833).

168. 32 U.S. (7 Pet.) 469 (1833).

169. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866).

170. *Id.* at 1090.

171. *Id.* at 1095.

172. *Id.* For similar objections, see *id.* at 1064 (Hale), 1082 (Stewart). Stewart suggested that the amendment gave Congress power to "make all the law in all the States affecting the protection of either life, liberty, or property, precisely similar." *Id.* He found the privileges and immunities section "not very material" because it was already in the Constitution and courts would declare denial of privileges and immunities void. He cited laws prohibiting migration of free blacks as a violation of privileges and immunities. *Id.*

173. *Id.* at 1095.

citizens; but I want them secured by a constitutional amendment that legislation cannot override."¹⁷⁴

Bingham's amendment was tabled.

B. *Debate on the Civil Rights Bill*

Both before and after its discussion of Bingham's prototype of the fourteenth amendment, Congress debated the Civil Rights Bill. As enacted, the Civil Rights Bill provided that "[a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed" were "citizens of the United States." "Such citizens," the act continued,

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 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 citizens¹⁷⁵

Scholars who argue that the fourteenth amendment was not intended to make the Bill of Rights a limit on the states have relied on statements made by some Congressmen that the amendment incorporated the substantial protections of the Civil Rights Bill—such as rights to contract and to testify at trials, and to full and equal benefit of all laws for security of person and property. They assume these rights exclude those in the Bill of Rights.¹⁷⁶ The problem with this analysis is that provisions of the Bill of Rights are, by ordinary use of language, "laws for security of person and property." For example, Joel Tiffany described the rights in the Bill of Rights as "guarantys" for "personal security and liberty."¹⁷⁷

In *Dred Scott v. Sandford*, Justice Taney noted that Congress could make no law respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech and the press, or

174. *Id.*

175. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added), reprinted in R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* 211 (app. 1) (1964).

176. See BERGER, *supra* note 4, at 36, 150-52; Fairman, *supra* note 9, at 60-67.

177. TIFFANY, *supra* note 43, at 99. Cf. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 684 (1979).

the right to bear arms. These provisions limited the power of the federal government over the "person or property" of the citizen.¹⁷⁸

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 are guarded with equal care. Thus the rights of property have been 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, and property, without due process of law.¹⁷⁹

In 1886, in *Boyd v. United States*,¹⁸⁰ the Court also referred to the rights in the Bill of Rights in the same way. In a case that turned on fourth and fifth amendment rights, the Court noted that "constitutional provisions for the security of person and property" should be liberally construed.¹⁸¹

The most telling evidence that the "full and equal benefit of all laws and proceedings for the security of person and property" could be read to include constitutional rights in the Bill of Rights comes from Republicans in the 39th Congress themselves. When they passed the Freedman's Bureau Bill, they provided that blacks should have, among other things, "full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms.*"¹⁸²

Virtually all Republicans who spoke on the subject believed that the rights in the Bill of Rights were rights of citizens that limited or should limit the powers of the states as well as the federal government.¹⁸³ Once blacks became citizens, they were entitled, like other citizens, to all the rights, privileges, and immunities of citizens of the United States.¹⁸⁴ Consequently, the Republicans reasonably may have

178. 60 U.S. (19 How.) at 449-50.

179. *Id.* at 450. See note 152 *supra*.

180. 116 U.S. 616 (1886).

181. *Id.* at 635.

182. CONG. GLOBE, 39th Cong., 1st Sess. 654, 743, 1292 (1866)(Bingham's speech sets out the pertinent portion of the text of the Freedman's Bureau Bill)(emphasis added).

183. See, e.g., notes 80-103 *supra* and accompanying text.

184. See notes 72-78 *supra* and accompanying text. See also CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866)(Raymond). Congressman Raymond proposed to make blacks citizens "and thus secure to them whatever rights, immunities, privileges, and powers belong as of right to all citizens of the United States." *Id.* If blacks were made citizens, Raymond said, they would have the right of free passage from one state to another, the right to testify in federal courts, and the right to

read the Civil Rights Bill as protecting the rights in the Bill of Rights from state infringement. At the very least, statements that the fourteenth amendment embodied the provisions of the Civil Rights Bill do not prove that the speaker believed the amendment did not apply the Bill of Rights to the states. Bingham himself had referred to the Civil Rights Bill as a bill providing for enforcement of the Bill of Rights.¹⁸⁵

Senator Trumbull managed the Civil Rights Bill in the Senate. Trumbull considered the provision of the Civil Rights Bill making people born in the United States citizens "declaratory of what in my judgment, the law now is."¹⁸⁶ The Civil Rights Bill was "a bill providing that all people shall enjoy equal rights."¹⁸⁷ Here again, language used by a prominent Republican lawmaker is ambiguous. *Dred Scott* held that blacks were not citizens and not entitled to any of the rights, immunities, or privileges secured by the Constitution to citizens. So a bill that secured, among other things, the rights in the Bill of Rights to all citizens, would secure equal rights.

Trumbull said the bill "declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness."¹⁸⁸ At times Trumbull suggested that the bill would have no operation in a state that did not discriminate in civil rights among its citizens.¹⁸⁹ But at other times, Trumbull was more precise: "Each State, so that it does not abridge the great fundamental rights belonging under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial."¹⁹⁰ Citizenship, Trumbull insisted, carried with it some rights, "those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union."¹⁹¹ He quoted Chancellor Kent to establish that the inalienable rights of citizens included equality of rights and the "absolute rights of individuals" to personal security, personal liberty,

bear arms. *Id.*

185. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866). See also *id.* at 1294 (Wilson).

186. *Id.* at 574.

187. *Id.* at 599.

188. *Id.* (emphasis added).

189. *Id.* at 600.

190. *Id.* at 1760 (emphasis added).

191. *Id.* at 1757.

and the acquisition and enjoyment of property.¹⁹²

Trumbull accepted the Republican view that there were certain fundamental rights of citizens of the United States that no state could abridge. He identified these rights with the privileges and immunities secured by article IV, section 2.¹⁹³ To support this theory, he and other prominent Republicans relied on Justice Washington's dictum in *Corfield v. Coryell*.¹⁹⁴ In *Corfield*, Justice Washington noted that the privileges and immunities protected by article IV, section 2, were those "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."¹⁹⁵ These included broad categories of rights such as protection by government, the enjoyment of life and liberty, and the right to acquire and possess property.¹⁹⁶

Congressman Wilson managed the Civil Rights Bill in the House, and he also relied on the broad references to liberty in Blackstone, Kent, and *Corfield*:

I have already said, "If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure each and every citizen these things which belong to him as a constituent member of the great national family."¹⁹⁷

"What are these rights?" Wilson asked. "Certainly they must be as comprehensive as those which belong to Englishmen." He then quoted Blackstone and Kent to show that both English and American authorities agreed that these fundamental rights were rights to personal security and personal liberty, and the right to acquire and enjoy property.¹⁹⁸

Thus, sir, we have English and American doctrine harmonizing. The great fundamental rights are the inalienable possession of both Englishmen and Americans; and I will not admit

192. *Id.*

193. *Id.* at 475.

194. 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3230).

195. *Id.* at 551.

196. *Id.* at 551-52. Particular privileges mentioned by Washington (a list he said was not exclusive) included the right to pass through and reside in a state, to institute court actions, to hold and dispose of property, and to the benefit of the writ of habeas corpus. These and many others which might be mentioned, Washington said, were privileges and immunities. *Id.* at 552.

197. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

198. *Id.*

that the British constitution excels the American Constitution in the amplitude of its provisions for the protection of these rights. *Our Constitution is not a mockery; it is the never-failing fountain of power from whence we may draw our justification for the passage of this bill; for there is no right enumerated in it by general terms or by specific designation which is not definitely embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right.*¹⁹⁹

A major Democratic criticism of the Civil Rights Bill was that Congress lacked the power to pass it. Republican supporters of the bill found the necessary power in the thirteenth amendment, in the privileges and immunities clause of article IV, section 2, and in the Bill of Rights. Bingham, however, argued that Congress was without power to pass the bill.

Wilson rejected Bingham's argument. Citizens of the United States, Wilson insisted, were 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."²⁰⁰ Wilson also rejected Bingham's argument that the oath taken by state officers was the sole enforcement mechanism.²⁰¹ Government that could "draw the citizen by the strong bond of allegiance to the battlefield" had to have the power to give protection to the citizen's rights. If Bingham's assertion were correct, it meant "that at the mercy of the States lie all the rights of the citizen of the United States . . . *that revolted South Carolina may put under lock and key the great fundamental rights belonging to the citizen.*"²⁰²

According to Wilson, the Bill of Rights gave Congress the authority to pass the Civil Rights Bill. He relied specifically on the due process clause.

[Bingham] says that we cannot interpose in this way for the protection of rights. Can we not? . . . I find in the bill of rights which the gentleman 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."

199. *Id.* at 1118-19 (emphasis added).

200. *Id.* at 1294.

201. *Id.* at 1292 (Bingham), 1294 (Wilson).

202. *Id.* at 1294.

I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates²⁰³

Wilson then cited *Prigg v. Pennsylvania*²⁰⁴ to support the idea that the existence of the rights in the Bill of Rights necessarily implied congressional power to enforce them. *Prigg* had held that the existence of a right to have fugitive slaves "delivered up" necessarily implied congressional power to enforce that right.²⁰⁵ Wilson's argument is nearly identical to that made by Tiffany in his *Treatise on the Unconstitutionality of American Slavery*.²⁰⁶ Wilson concluded:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. . . . The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection²⁰⁷

Democrats were not convinced. In addition to frequent and blatant appeals to racism,²⁰⁸ they insisted that Congress had no power to pass the Civil Rights Bill.²⁰⁹ This claim was supported by Congressman Bingham. Bingham said that he did not oppose the Bill's purpose; he only doubted that it was authorized by the Constitution.²¹⁰ He did not "oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic."²¹¹ Bingham agreed with Wilson "in

203. *Id.*

204. 41 U.S. (16 Pet.) 539 (1842).

205. *Id.*

206. TIFFANY, *supra* note 43, at 99-100.

207. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). Other Congressmen apparently followed Wilson's analogy. *See id.* at 1153, 1270 (Lawrence), 1833 (Thayer). For a contrary reading, see BERGER, *supra* note 4, at 453-56.

208. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2081 (1866). Nicholson suggested that states should be free to impose harsher penalties on blacks because of their "brutal, sensual nature" and warned that "[t]he negro's idea of freedom is to do nothing but bask in the sunshine."

209. *Id.* at 1260. For Democratic views, *see id.* at 1122-23, 1156 (13th amendment), 1270 (Kerr—Bill of Rights), 3212 (Niblack—privileges and immunities). *But see id.* at 530, 766 (Johnson), 1157 (Thornton).

210. *Id.* at 1291.

211. *Id.*

an earnest desire to have the bill of rights in your Constitution enforced everywhere." But the enforcement of the Bill of Rights was, in view of past interpretation and the text of the Constitution, left to state officials and tribunals, subject to the requirements of an oath they took to support, protect, and defend the Constitution as supreme law.²¹² Bingham said:

I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.²¹³

As originally proposed, the Civil Rights Bill provided that "[t]here shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery."²¹⁴ Bingham objected that the phrase embraced every right, state or federal, belonging to any citizen, and urged that it be deleted.²¹⁵ Even with its deletion, he insisted that a constitutional amendment would be required to empower Congress to pass the Civil Rights Bill.²¹⁶

Wilson denied that the phrase encompassed rights belonging to citizens of the United States and all rights conferred on any citizen of a state:

He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction.²¹⁷

Wilson then said that the rights of citizens of the United States that Congress could require the states to respect included rights in the Bill of Rights.²¹⁸

212. *Id.*

213. *Id.* at 1292.

214. *Id.* at 1291.

215. *Id.*

216. *Id.* at 1367 (Bingham voting against passage).

217. *Id.* at 1294.

218. *Id.*

In the final version of the Civil Rights Bill, the phrase prohibiting discrimination in "civil rights or immunities" was omitted.²¹⁹ In the final version of the fourteenth amendment, states were prohibited from abridging "privileges or immunities of citizens of the United States," a phrase that Bingham read as applying only to those rights provided for in the Constitution. Although many Republicans believed that "fundamental" rights not explicitly listed in the Constitution were protected, there was no consensus on what these rights were.²²⁰

Republicans believed that rights in the Bill of Rights did, or should, limit the states, and they explicitly criticized contrary Supreme Court decisions. Republicans thought that slavery had perverted constitutional law and produced Court decisions that restricted liberties of the citizen. In discussing the Civil Rights Bill, Congressman Wilson noted that in the later days of the Republic, the government and courts had drifted from the "old moorings of equality and human rights."²²¹ Senator Nye insisted that the rights in the Bill of Rights limited the states (and provided a basis for legislative power to secure the rights of citizens), and he noted that slavery had made true interpretation of the Constitution impossible.²²² Slavery, as Congressman Newell said, had a "contaminating influence" on the principles on which the Constitution was founded. It "gave the lie direct to its declaration of rights."²²³ Other Republican Congressmen believed slavery had "polluted" or "defiled"²²⁴ the judiciary. While Republicans believed that the Bill of Rights limited the states, and therefore rejected decisions like *Barron v. Baltimore*, Democrats generally embraced these decisions and used them as a text from which to lecture the Republicans.²²⁵

C. *Final Debates on the Fourteenth Amendment*

On April 30, 1866, the Joint Committee reported a revised resolution for a constitutional amendment.²²⁶ Section one of the proposed amendment provided:

No State shall make or enforce any law which shall abridge

219. *Id.* at 1366.

220. *See, e.g., id.* at app. 99.

221. *Id.* at 1115.

222. *Id.* at 1072.

223. *Id.* at 866.

224. *Id.* at 1468 (Hill); 38th Cong., 2d Sess. 142 (1865)(Orth); 38th Cong., 1st Sess. 2615 (1864)(Morris).

225. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 1120, 1270 (1866).

226. *Id.* at 2265, 2286.

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.²²⁷

A fifth section gave Congress enforcement powers.

The amendment still did not declare that all persons born in the United States and subject to its jurisdiction were citizens. In other respects, however, it was substantially improved from Bingham's original proposal. The rights secured by the amendment no longer depended upon the will of Congress. And the Republican view, that the fundamental privileges and immunities secured by the Constitution to citizens of the United States could not be abridged by any state, was incorporated explicitly in the amendment. Persons, whether citizens or not, were protected from state denial of due process or equal protection.

Congressman Stevens was the first to speak in favor of the amendment. He considered section two, which reduced the representation in Congress of states that excluded adult males from the franchise, as the most important part. After summarizing section one, he said:

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and 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.²²⁸

Stevens said that it was "partly true" that the Civil Rights Bill secured the same things but, he noted, "a law is repealable by a majority."²²⁹

Congressman Thayer claimed that the amendment added to the Constitution "what is found in the Bill of Rights of every State of the Union." The amendment

incorporat[ed] in the Constitution of the United States the

227. *Id.* at 2286.

228. *Id.* at 2459. Representative Garfield was "glad to see this first section here which proposes to hold over every American citizen without regard to color, the protecting shield of law." Garfield thought that the amendment put the Civil Rights Bill beyond partisan strife, which it undoubtedly did. He believed the bill was constitutional even without the amendment. *Id.* at 2462.

229. *Id.* at 2459.

principle of the civil rights bill which has lately become a law . . . in order . . . that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States.²³⁰

Thayer believed that Congress had the constitutional power to pass the Civil Rights Bill because it could legislate to enforce the rights in the Bill of Rights. Indeed, when Thayer advocated the Civil Rights Bill in March 1866, he said it simply declared that "all men born upon the soil of the United States shall enjoy the fundamental rights of citizenship" that were "stated in the bill."²³¹ Power to pass it could be found in the fifth amendment, which guaranteed "to all the citizens of the United States their right to life, liberty, and property."²³²

Several Congressmen observed that the amendment would eliminate any question about the power of Congress to pass the Civil Rights Bill.²³³ Others considered the amendment a reiteration of the Civil Rights Bill.²³⁴ Several others suggested that the Constitution already effectively contained the provisions of the amendment.²³⁵ Implicit in such remarks, of course, was the view that the due process clause of the fifth amendment applied to the states even prior to the passage of the fourteenth amendment—that the guarantees of the Bill of Rights already limited the states and that the amendment was declaratory of existing law.

Bingham was one of the last speakers to support the amendment the first time it passed the House:

There was a want hitherto, and there remains a want now, in

230. *Id.* at 2465.

231. *Id.* at 1151-53. *See also id.* at 1833 (Lawrence).

232. *Id.* at 1152.

233. *Id.* at 2498 (Broomall), 2511 (Eliot). Congressman Broomall said the fourteenth amendment gave "power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction." *Id.* at 2498.

234. *See, e.g., id.* at 2883 (Latham), 3069 (Van Aernam). Latham treated section one as meaning that no state could discriminate on account of race or color with respect to the civil rights of its citizens. And he said that as long as civil rights did not include political rights, the section "probably includes nothing more than the Constitution originally intended." *Id.* at 2883. Either Latham was reading the due process clause out of the amendment, or he thought the Constitution was originally intended to apply the clause to the states contrary to the conclusion reached in *Barron v. Baltimore*.

235. *Id.* at 2468 (Kelley), 2539 (Farnsworth).

the Constitution of our country, which the proposed amendment will supply. . . . It is the 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 in-born rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.²³⁶

Although states had no right to deny privileges or immunities or equal protection, they had exercised the power to do so and no remedy was available.²³⁷

Bingham insisted that the section was necessary even though it did not confer suffrage. "[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States" for which the national government could furnish no remedy. As an example, Bingham explained that "[c]ontrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens."²³⁸

Senate consideration of the amendment was delayed by the illness of Senator Fessenden, Chairman of the Joint Committee. Finally, on May 23, 1866, with Fessenden present but still ill,²³⁹ Senator Howard presented the amendment on behalf of the committee. After quoting section one, Howard noted:

It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. . . .

The first clause of this section relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States. It is not, perhaps, very easy to define with accuracy

236. *Id.* at 2542.

237. *Id.*

238. *Id.* Cruel and unusual punishment, of course, violates the eighth amendment, one of the guarantees in the Bill of Rights.

239. *See id.* at 2768-70.

what is meant by the expression, "citizen of the United States
... "240

Howard discussed citizenship and cited *Corfield v. Coryell* to identify some of the privileges and immunities secured by article IV, section 2. He continued:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They 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

240. *Id.* at 2765.

public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying 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.*²⁴¹

After Howard spoke, Senator Wade suggested an amendment to identify those whose privileges and immunities were protected, and it subsequently became the definition of citizenship contained in the first sentence of section one.²⁴²

There was no extended discussion of section one in the Senate after Howard spoke. Senator Henderson's remarks on section one were brief, but consistent with Howard's speech. He discussed the first section "only so far as citizenship is involved in it. . . . It makes plain only what has been rendered doubtful by the past action of the Government." The remaining provisions of section one, Henderson said, "merely secure the rights that attach to citizenship in all free governments."²⁴³

Today, scholars have difficulty with the idea that all the rights in the Bill of Rights are essential to liberty.²⁴⁴ Framers of the Bill of Rights, however, described them as "essential and unalienable rights of

241. *Id.* at 2765-66 (emphasis added). For news accounts of Howard's speech, see e.g., N.Y. Times, May 24, 1866, at 1, col. 5-6; Philadelphia Inquirer, May 24, 1866, at 8, col. 2.

242. CONG. GLOBE, 39th Cong., 1st Sess. 2768, 2890 (1866).

243. *Id.* at 3031.

244. Fairman, *supra* note 9, at 63. "Unless the first eight amendments enumerate 'rights that attach to citizenship in all free governments,' Henderson's understanding is to be counted as opposed to that of Howard." *Id.*

the people,"²⁴⁵ and as "essential to secure the liberty of the people."²⁴⁶

Several Congressmen and Senators construed section one to mean that the rights of citizens of the United States should not be abridged by any state, a reading consistent with Howard's interpretation. For example, Senator Yates noted:

But above all there is in the first section a clause that I particularly favor. It is this: All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. And then it goes on to provide that their rights shall not be abridged by any State.²⁴⁷

Congressman Windom supported the amendment by citing the South's reluctance to accept the full consequences of its defeat. Initially, "[t]hey understood well the principles of liberty and equal rights for which the nation had contended, and they anticipated such terms and conditions as would forever guaranty them." Yet because of President Johnson's encouragement, they were recalcitrant.²⁴⁸ "Has the Government," Windom asked,

a right to demand of traitors, as a condition precedent to their full restoration to political power, such guarantees as will insure its own safety, guard its honor, and *protect its humblest defender in all the rights of citizenship*? Congress asserts that right. The rebels deny it.²⁴⁹

Congressman Orth read the amendment in the same way. Section one, he said, secures "to all persons born or naturalized in the United States the rights of American citizenship."²⁵⁰ For Congressman Bundy, section one protected "the security and defense of the personal and prop-

245. 2 B. SCHWARTZ, *THE BILL OF RIGHTS* 840 (1971). The quotation is from the preface to the resolution for a bill of rights introduced in the Virginia convention called to ratify the federal constitution. Virginia considered civil and criminal juries as among the essential and unalienable rights of the people. *Id.* at 841.

246. *Id.* at 1029. The quotation is from James Madison speaking in Congress on behalf of a Bill of Rights. He was referring specifically to trial by jury.

247. CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866). In fact, under *Dred Scott* the rights in the Bill of Rights were rights of citizens of the United States only, and did not extend to blacks who could be citizens of a state but not of the United States. II W. CROSSKEY, *POLITICS AND THE CONSTITUTION 1089-95* (1953).

248. CONG. GLOBE, 39th Cong., 1st Sess. 3167 (1866). See generally E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

249. CONG. GLOBE, 39th Cong., 1st Sess. 3167 (1866)(emphasis added).

250. *Id.* at 3201.

erty rights of the citizen in all the States."²⁵¹

Congressman Baker of Illinois discussed the amendment on July 9, 1866. He recalled that slavery had gone "about overthrowing the great landmarks of liberty." The proposed amendment, Baker said, was most valuable "for the security and future growth of liberty."²⁵² Baker apparently regarded section one as a declaration of existing constitutional law, properly understood. After quoting section one, he said: "This section I regard as more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power which it contains."²⁵³ Since the amendment expressed existing law, Baker must have believed that the states *already* were prohibited from denying due process, that is, that the guarantees of the Bill of Rights already applied to them. After quoting the privileges and immunities clause, Baker asked:

What business is it of any State to do the things here forbidden? *To rob the American citizen of rights thrown around him by the supreme law of the land?* When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.²⁵⁴

III. THE AMENDMENT BEFORE THE STATES

A. *The Campaign of 1866*

The election campaign that began in the summer of 1866, when Congress adjourned, was a referendum on the issue between President Johnson, who insisted that the rebellious states should be admitted at once with no further conditions, and Congress, which insisted on the conditions set out in the fourteenth amendment. Politically, the issue was whether the Southern states, which had lost the war, would win the peace. Would the Southern states be allowed to continue to deny blacks the right to vote, but benefit from the substantial increase in representation in the House produced by the thirteenth amendment's repeal of the three-fifths clause? Most of the discussion of the fourteenth amendment centered on the political consequences of its rejection and on the merits of the contest between President Johnson and

251. *Id.* at app. 210. *See also id.* at app. 227 (Defrees).

252. *Id.* at app. 255.

253. *Id.* at 256.

254. *Id.* (emphasis added).

Many Republicans saw section one as a declaration of what the law was in any case.²⁶⁰ A letter from a Southern unionist published in the *New York Tribune*, and reprinted in other Northern papers, typifies this view.

For years before this war, almost everywhere in the South, northern born men were mobbed; some even put to death for uttering abolition sentiments The rights of American citizens, not only to enjoy their rights, but to protection in the full enjoyment of them, is now the dogma of the hour. At last it is to be asserted that it is the paramount duty of the government to protect its citizens in the full enjoyment of all constitutional rights, among which are the right to free speech, and to be secure to their personal property, as well as in redress of their grievances.

This is what the Flag means. . . . [B]e assured that this great mass of free people, whose rights, whose hopes and destinies, are all wrapped up in and secured by this great chart of liberty, have studied it well, and most especially those clauses which relate to their right to migrate from one state to another, and to be secure in every place in all the high behests of an American citizen.²⁶¹

"The right of the citizen to protection, by law, in and to all his constitutional rights," the writer concluded, "is one which cannot be left out as a sequence to this war." The right was not a new one acquired by war, but one over which "the slave power had scattered so much dust that it took a war to upheave the incrustation."²⁶²

The idea that first amendment rights, protected against state as well as federal invasion, were among the rights of all American citizens in every state was a recurring theme in the campaign.²⁶³ While the idea was expressed by a number of Republican speakers, none emphasized it more than the Southern unionists, who undertook a major campaign role. The statements of the Southern unionists received wide attention from the Republican press.

The unionists convened in Philadelphia in September 1866. Their

260. See, e.g., notes 75-77 & 80-103 *supra* and accompanying text.

261. Reprinted in *Dubuque Daily Times*, Dec. 3, 1866, at 2, col. 2.

262. *Id.* Compare Kelley's remarks on Bingham's prototype of the fourteenth amendment. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

263. See, e.g., *Daily Territorial Enterprise*, Sept. 20, 1866, at 1, col. 2 (Butler); *id.* Sept. 16, 1866, at 1, col. 3 (Senator Stewart); *Dubuque Daily Times*, Sept. 8, 1866, at 1, col. 3.

proceedings repeatedly emphasized the need to protect rights in the Bill of Rights. The call for the convention, issued in July and read again when the convention assembled in September, put the question squarely:

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

Rebels and Rebel sympathizers assert that "the right of the citizens must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe."²⁶⁴

The convention produced *The Appeal of the Loyal Men of the South to their Fellow Citizens*,²⁶⁵ which was reprinted in most of the Republican press. The *Appeal* assumed that universally applicable first amendment rights were among the rights of citizens of the United States. "[S]eeds of oligarchy," the *Appeal* insisted, had been "planted in the constitution by its slavery feature" and had grown to be a monstrous power. The recognition of slavery

wrung from the reluctant framers of that great instrument enabled these [slave] States to entrench themselves behind the perverted doctrine of States Rights. . . . The hand of the government was stayed for eighty years. The principles of constitutional liberty languished for want of government support. Oligarchy matured its power with subtle design. Its history for eighty years is replete with unparalleled injuries and usurpations. . . . It held four millions of human beings as chattels, yet made them the basis of unjust power for themselves in federal and State Governments. . . . Statute books groaned under despotic laws against unlawful and insurrectionary assemblies aimed at the constitutional guarantees of the right to peaceably assemble and petition for redress of grievances; it proscribed democratic literature as incendiary; it nullified constitutional guarantees of freedom and free speech and a free press; it deprived citizens of other States of their privileges

264. N.Y. Daily Tribune, Sept. 4, 1866, at 1, col. 4.

265. See, e.g., Fairfield (Iowa) Ledger, Sept. 20, 1866, at 1, col. 3; Philadelphia Press, Sept. 7, 1866, at 1, col. 2.

and immunities in the States—an injury and usurpation, alike unjust to Northern citizens, and destructive of the best interests of the States themselves.²⁶⁶

Judge Lorenzo Sherwood proposed an alternate address to the convention, differing from the one adopted in that Sherwood called for negro suffrage. His proposal was rejected.²⁶⁷ On the question of the Bill of Rights, however, Sherwood's address differed little from the call for the convention. It emphasized protection of "the Constitutional rights of the citizens . . . specified and enumerated in the [Constitution]" including "Security to Life, Person, and Property," free speech, press, free exercise of religion, trial by jury, and the right to travel. "These rights being established by the supreme law of the land, there is no power, legislative, executive, or judicial, state or national, that has authority to transgress or invade them; and protection to these rights must be made coextensive with American Citizenship."²⁶⁸

The report of the Committee on Non-Reconstructed States to the convention²⁶⁹ also concluded that black suffrage was necessary to protect the rights of unionists in the South.²⁷⁰ In its recital of the sufferings of loyal men in the South, the report cited violations of the Bill of Rights, violations that still occurred in the South after its defeat:

The laws passed in the days of slavery for its protection are enforced with the same exactness today as ten years ago. Citizens have been arrested on the charge of having told negroes that they were rightfully entitled to vote, thrown into prison, retained for months, tried by a judge without a jury, refused time to send for witnesses or counsel, convicted and sentenced to punishment in the penitentiary.²⁷¹

The report also emphasized the denial of first amendment rights in New Orleans. The New Orleans massacre had received detailed attention in the Republican press. As the report explained it, a loyal convention had been summoned to assemble in New Orleans in July.

The Mayor of the city, by means of his police, put in circulation the report of his determination to suppress that body if it

266. Newark Daily Advertiser, Sept. 7, 1866, at 1, col. 7.

267. N.Y. Daily Tribune, Sept. 7, 1866, at 1, col. 4.

268. *Id.*

269. Washington (D.C.) Evening Chron., Sept. 9, 1866, at 1, col. 4.

270. *Id.* at col. 7.

271. *Id.* at col. 5.

should attempt to meet in the city of New Orleans. The judge of the criminal court made a charge to the grand jury, in which he discussed and endorsed the policy of Andrew Johnson, and instructed them to find bills of indictment against those gentlemen who should respond to the call of the president of the convention and the Governor of the State.²⁷²

In a letter to the Mayor, according to the report, the union general informed the Mayor that the meeting had not sought and did not need permission to meet: "If these persons assemble, as you say is intended, it will be, I presume, in virtue of the universally-conceded right of all loyal citizens of the United States to meet peaceably, and discuss freely questions concerning their civil governments . . ." ²⁷³ According to the report, when the convention met its members were massacred with the knowledge and connivance of local authorities.²⁷⁴

After the convention, Southern unionists campaigned for Republicans throughout the North.²⁷⁵ In Trenton, New Jersey, Governor Hamilton of Texas spoke on what he saw as the central issue of the campaign:

The claims of Andrew Johnson to their confidence were predicated on the declaration that he wants the Union restored. They all wanted that, he said; but as for his part, althoug [sic] much was said about the Union as it was and the Constitution as it is. He wanted the Union as it wasn't and the Constitution as it isn't. He wanted a Union of loyal men in which all, even the humblest, can exercise the rights of American freemen every where—not the least of which are the rights to speak, to write and to impress their thoughts on the minds of others. . . . Any other [Union] than one which guaranteed these fundamental rights was worthless to him.²⁷⁶

Southern loyalists were not the only Republican activists to read the rights of citizens to include the rights in the Bill of Rights. A speech by Governor Hawley of Connecticut to a "Loyal Meeting" at National Hall in Philadelphia also shows a broad reading of the rights of American citizens. As reported by the *Philadelphia Inquirer*:

272. *Id.*

273. *Id.*

274. *Id.* at cols. 5-6.

275. N.Y. Daily Tribune, Sept. 11, 1866, at 5, col. 1.

276. *Id.* at col. 2.

He claimed liberty, not only for men of Connecticut or Pennsylvania, not simply for men of the Anglo-Saxon race, but for men of every race and color . . . It was said that the whole country was now free, and yet men now assembled in the Loyal Convention in Philadelphia were denied the right of meeting to petition for a redress of grievances.

There were men who had been honorably discharged from our armies who had been ruthlessly stripped of the very weapons given them by the Government for their fidelity to it. He claimed that the war was not over until every man should have free and uninterrupted possession of every right guaranteed him by the Constitution.²⁷⁷

Senator Yates suggested that the former rebellious states should be barred from the Union until "every American citizen can travel to every village and hamlet in these States, and speak his sentiments freely, and be protected in his property, and enjoy his Constitutional rights."²⁷⁸ "Do you suppose," Yates asked in his speech, "any of you can go down South and express your sentiments freely in safety? No; and yet the Constitution of the United States guarantees to the citizens of each State all privileges and immunities in the several States."²⁷⁹

The idea that the thirteenth amendment clothed blacks with all the rights of citizens was expressed by Republicans out of Congress, just as it had been expressed by those in Congress. Judge Noah Davis spoke to the Republican Union State Convention, held in Syracuse on September 5, 1866, and noted that Congress had been given the power to enforce the thirteenth amendment by appropriate legislation. That amendment, Davis insisted, was intended to do more than merely "change the name of a great evil."

By force of the amendment the former slaves were at once made freemen, possessed of the rights that belong under the federal Constitution to persons who are free. The right freely to buy and sell; to do lawful labor and have its fruits; peaceably to assemble and petition against grievances; to keep and bear arms; to be free from unreasonable searches and seizures; to have liberty of conscience; to migrate from one State to another, carrying with them these constitutional rights; to

277. Philadelphia Inquirer, Sept. 5, 1866, at 8, col. 3.

278. (Springfield) Daily Ill. St. J., Sept. 21, 1866, at 2, col. 6.

279. *Id.*

"due process of law," in the protection of life, liberty and property; to the care and custody of their own children and families—all these with their necessary incidents became theirs as absolutely as they ever were the rights of the proudest of their masters . . . It is a badge of slavery when a freeman, without conviction of a crime, is made subject, without his consent, to laws depriving him of these rights, or unjustly restricting their exercise, and especially to such laws as do not equally affect all other citizens of the state.²⁸⁰

"Who will say," Davis asked, "that Congress has not power to protect all citizens everywhere, when necessary, in the enjoyment of rights expressly secured to them by the Constitution itself?"²⁸¹

Judge Davis's discussion of section one was brief. It was, in his judgment, "simply declaratory of existing law."²⁸² But, he conceded, many disagreed. The amendment was needed to clarify the law, to secure the rights of all inhabitants of the rebel states. "The first and most important of these is the right of citizenship both of the United States and of the State, and to prevent the deprivation by States of the rights to life, liberty and property, and the denial of the equal protection of the laws."²⁸³

The New York Soldiers and Sailors State Convention also supported the proposed amendment and the Republicans who advocated it.²⁸⁴ The address adopted by the Convention demonstrates, once again, that for many the fourteenth amendment was declaratory of existing rights of citizens already enforceable in the states. The address was read by General Martindale. It insisted that if freedom "has not been secured, if it is not entrenched and fortified in the Constitution and the laws by the most complete and undeniable guarantees, we demand that it shall be entrenched and guaranteed beyond all doubt and

280. Proceedings of the Republican Union State Convention 35 (Sept. 5, 1866).

281. *Id.*

282. *Id.* at 41.

283. *Id.* See also the speech of Lyman Tremain: "The first [section of the fourteenth amendment] defines citizenship of the United States, and prohibits any State from denying to any person its privileges without legal process . . . The first section is necessary to secure to the millions of newly created freedmen the rights of citizenship." *Id.* at 20. Tremain noted that the Civil Rights Bill might be held unconstitutional or repealed. "It seems, therefore, to be demanded by every consideration of justice and wise statesmanship that these persons should be secured in the rights and privileges of citizenship, the right to sue, to make contracts, to hold and transmit property and to be witnesses, by an amendment of the constitution." *Id.* at 20-21.

284. Albany Evening J., Sept. 21, 1866, at 1, col. 3.

misconstruction."²⁸⁵

The address complained of denial of rights basic to freedom. As an example, it cited a South Carolina law that restricted the right of blacks to sell, keep arms, travel, and work in such trades as mechanic or shopkeeper without a license. The address found "[t]his infamous code" violative of "freedom and of the United States Constitution," which "provided that 'the right of the people to keep and bear arms shall not be infringed,' also that 'the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States,' [and] that no person 'shall be deprived of life, liberty or property without due process of law.'"²⁸⁶ The address concluded that if the thirteenth amendment was not adequate to secure freedom to blacks, loyalists were duty bound to support "still further amendments and appropriate legislation."²⁸⁷

Several Congressmen who spoke about the amendment after Congress adjourned equated section one of the fourteenth amendment with the Civil Rights Bill.²⁸⁸ The equation is understandable. Both defined citizenship and, in the view of Republicans, thereby secured to all persons made citizens the rights, privileges, and immunities of American citizenship.²⁸⁹ Senator Trumbull spoke in Illinois about the amendment:

285. *Id.* at col. 3.

286. *Id.* at col. 4.

287. *Id.* at col. 5.

288. See speech of Senator Luke Poland to the Vermont legislature, *reprinted in* Daily (Burlington, Vt.) Free Press, Nov. 23, 1866, at 2, col. 1, & Nov. 24, 1866, at 2, col. 1 (suggesting that the Civil Rights Bill embodied the same principles as section one); speech of Senator George Edmonds, *reprinted in* Daily (Burlington, Vt.) Free Press, Nov. 13, 1866, at 2, col. 2 & Nov. 14, 1866, at 2, col. 2 (summarizing section one as extending the rights and privileges of citizens to blacks). Compare speech of Senator Stewart in the Daily Territorial Enterprise, Sept. 16, 1866, at 1, col. 2-3. Benjamin Butler's speech, recorded in the Daily Territorial Enterprise, Sept. 20, 1866, at 1, col. 3, noted:

Therefore, it becomes the duty of every man to sustain the Congress, in sustaining first the Civil Rights Bill, which gives to everybody their rights in every State; and sustain Congress in giving protection to the negro, in holding these States where they are, and insisting that free speech, a free press, civil and religious liberty, shall be guaranteed until a change can be made, sustain the loyal men of the South.

See also speech of Senator Stewart *reprinted in* Daily Territorial Enterprise, Oct. 14, 1866, at 1, col. 1. For a few other campaign statements saying that the amendment covered the same ground as the Civil Rights Bill and an argument that these vague statements show that the rights in the Bill of Rights were not incorporated, see Fairman, *supra* note 9, at 68-78. Of the statements Fairman collected, one seems inconsistent with incorporation of the Bill of Rights, a speech by Senator John Sherman saying that the sum and substance of the first clause was the right to come and go, to sue, and to make contracts. Fairman, *supra* note 9, at 77.

289. See notes 75, 77 & 80-103 *supra* and accompanying text.

The next step taken by Congress in the work of reconstruction was the submission to the States, for their ratification, of an amendment to the Constitution. The first clause of this amendment secures civil liberty to all citizens of the United States, whether native born or naturalized, and declares that no State shall 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. An unnecessary provision, perhaps since the abolition of slavery and the passage of the Civil Rights Bill; still the declaration of the great principles of individual freedom and civil liberty cannot be too often repeated, and may well find a place in the fundamental law of the land.²⁹⁰

It is possible, of course, that Trumbull believed that the great principles of individual freedom and civil liberty did not include the rights to free speech, freedom of religion, to be free from unreasonable searches and seizures, to bear arms, or to be free from cruel and unusual punishment. He may have believed that the great principles of civil liberty that he described were limited to the right to make and enforce contracts, to sue, to give evidence, and to inherit, lease, purchase, and sell real and personal property. But this is unlikely. From his remarks in Congress, we know that Trumbull believed the thirteenth amendment gave Congress power to secure practical freedom. Trumbull thought that state laws depriving blacks of the right to teach, preach, or own property violated the rights of a freeman.²⁹¹ Some of Trumbull's colleagues in Congress suggested that the freedom guaranteed by the thirteenth amendment included liberties in the Bill of Rights.²⁹² By making black citizens, the Civil Rights Bill secured to them all rights, privileges, and immunities of citizens of the United States.²⁹³

Today the term "civil rights" is often used to describe the rights in the Bill of Rights. Republican use of the term often was equally broad. Senator Wiley, speaking in Congress, said that blacks must be guaranteed "every civil right of man." They must "be fully protected in the

290. Cincinnati Commercial, Sept. 3, 1866, at 2, col. 3.

291. See note 76 *supra* and accompanying text.

292. See, e.g., notes 92-93 *supra*.

293. See notes 72-74 *supra* and accompanying text. See also CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866)(Thayer).

enjoyment of 'life, liberty, and the pursuit of happiness.'"²⁹⁴ All agreed, Wiley said, to "yield to the negro equality of civil rights" that included "[a]ll that enters into the security and enjoyment of 'life, liberty and the pursuit of happiness.'"²⁹⁵

A speech by Senator Nye in Nevada after Congress adjourned shows that Republicans believed the Civil Rights Bill had a broad and libertarian effect. "The gist of the whole bill," Nye said, "was that it clothed these heretofore downtrodden slaves with the vesture of American citizenship. . . . If the cry 'I am a Roman citizen!' protected the Roman in his mongrel republic, with what redoubled force does the cry that I am an American citizen protect me."²⁹⁶ From Nye's remarks in Congress, we know that he believed the guarantees of the Bill of Rights were rights of citizens that limited the state as well as the federal government.²⁹⁷ Nye concluded his speech by hailing the spirit of determination "that the fruits of this great victory shall not be lost; that it shall result in securing in its perfection and fullness the sweets of political and personal freedom to every citizen on this continent."²⁹⁸

Congressman Woodbridge spoke to the Vermont legislature about the amendment. He "read the proposed Constitutional amendment, and dwelt at length upon each section."²⁹⁹ Unfortunately, the newspaper account of his speech did not, giving only the following "synopsis":

The question to be considered by the people was, are these amendments republican in form? are they general in their application? are they just to the whole country? and will they answer the desired ends? They wish to cement the Union, that any of us can go into any State in the Union with the declaration "I am an American citizen," with the same consciousness of protection as of old it was sufficient for any citizen of the Roman empire to say "I am a Roman citizen."³⁰⁰

Congressman Wilson of Iowa defended the amendment as necessary to secure first amendment rights:

We must still guarantee to those boys the liberty of going into

294. CONG. GLOBE, 39th Cong., 1st Sess. 3436 (1866).

295. *Id.* at 3437.

296. Daily Territorial Enterprise, Sept. 13, 1866, at 1, col. 2.

297. See notes 102-03 *supra* and accompanying text.

298. Daily Territorial Enterprise, Sept. 13, 1866, at 1, col. 2.

299. Brattleboro Vt. Record and Farmer, Nov. 3, 1866, at 1.

300. *Id.*

any part of the United States and causing their type to speak as freely as when our army was there to back them. They must have the same liberty of speech in any part of the South as they always have had in the North. He would have no more cross road committees to wait upon liberty loving men. . . . The validity of the national debt shall never be questioned. The rebels never should be remunerated for the loss of their slaves.³⁰¹

Congressman Allison of Iowa explained why a change in the Constitution was needed: "If any man asks me if I want the Constitution as it was and the Union as it was, I tell him. No. I want a Constitution and Union where free speech is possible, and where a man is a man and not three fifths of a man."³⁰²

Congressman Bingham also discussed the amendment during the campaign. The proposal, he said, imposed a limitation on the states to correct their abuses of power. It secured equal protection of the laws. It was essential to the peace and safety of the Republic.

Hereafter the American people cannot have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.³⁰³

A reading of Republican speeches during the campaign reveals that discussion of section one was often cursory. Some speakers did not mention rights in the Bill of Rights.³⁰⁴ Many, however, insisted on the need for protection of rights in the Bill of Rights, and many demanded protection of the constitutional rights of loyalists in the South.³⁰⁵

B. *Debate on Ratification of the Amendment*

Most of the state legislatures that considered the fourteenth amendment either kept no record of their debates, or their discussion was so perfunctory that it shed little light on their understanding of its meaning. Messages by Governors are available, but most are not help-

301. Burlington (Iowa) Hawk Eye, Sept. 13, 1866, at 1, col. 2.

302. Dubuque Daily Times, Sept. 8, 1866, at 1, col. 3.

303. Cincinnati Commercial, Aug. 27, 1866, at 1, col. 3.

304. See Fairman, *supra* note 9, at 68-78.

305. See, e.g., notes 264-86 & 301-03 *supra* and accompanying text.

ful.³⁰⁶ The message of Governor Cox of Ohio, the debates of the Pennsylvania legislature, and a report by a committee of the Massachusetts legislature are exceptions.

Governor Cox described the amendment as necessary to protect "immunities" such as freedom of speech:

The [provisions] consist, *first*, of the grant of power to the National government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals, or deprive them of equal protection of the laws. . . .

A simple statement of these propositions is their complete justification. The first was proven necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are the very essence of free government.³⁰⁷

Debates on the amendment in Pennsylvania were both lengthy and recorded. Much of the debate involved partisan wrangling between Republicans and Democrats. The dispute covered such topics as John Brown and responsibility for the Civil War. Judging by the number and frequency of their appeals to racism, Democrats considered it one of their most potent political weapons.³⁰⁸ Still, there was some, often quite general, discussion of section one. Some speakers noted a correspondence between section one and the Civil Rights Bill.³⁰⁹

Representative Browne of Lawrence saw the issue as a battle between Republicans on one side "engaged in defending a constitutional amendment to secure civil rights to every individual born in the land, and upon the other side a party opposed to giving this security to civil liberty and to civil right."³¹⁰ The amendment, Browne noted, defined

306. For a survey of some of this material and a contrary opinion, see Fairman, *supra* note 9, at 81-126.

307. *Id.* at 96.

308. *See, e.g.*, Pa. Leg. Rec. app. LIII (1867).

309. *Id.* at XVI. State Senator Bigham noted that section one of the amendment guaranteed "State rights" to every human being, but not political rights. *Id.* at XVI. He also suggested it put the Civil Rights Bill in the Constitution. *Id.* at XVII. *See also id.* at XLV.

310. *Id.* at XXXI.

citizenship for the first time.³¹¹ Without it, a man born on "the soil of Massachusetts, and a [presidential] elector might be incarcerated in South Carolina, and sold for jail fees into interminable slavery."³¹² Brown wanted the government to have the power to protect its citizens. He noted that "it is for the rights of States these gentlemen are concerned. Are, then, States of more importance than men? For what are States created but to conserve the rights of men?"³¹³

Representative Mann, another Republican supporter of the amendment, answered those who claimed the amendment was useless by recounting the suppression of free speech in the South before the war. Those who ruled the South

denounced the *Tribune* as an abolition paper, and they only had to say that any paper was an abolition paper to justify the rifling and burning of mails. And from 1838 down to the surrender of Lee, there was an entire suppression of the freedom of speech in those States. Not a syllable was uttered publicly or privately against slavery, unless surrounded by walls so thick that no one outside could hear for fear [o]f vigilance committees and star chamber courts.³¹⁴

According to Mann, there had been rifling of the mails and "a denial of the constitutional right of free speech." Whoever "went down South was obliged to put a padlock on his mouth."³¹⁵ Mann hailed the amendment because it would secure equality before the law.³¹⁶ The provision would also

enable the Government to accomplish the object for which its founders declared that Governments were established. . . . What is the worth of a Government that wilfully neglects to protect all its citizens in their rights of life, liberty and property? And what reasons did the signers of the Declaration of Independence give to the nations of the earth as a sufficient excuse for throwing off their allegiance to the mother government . . . ? Their reason was that the old Government had failed to maintain those rights of citizenship, of liberty and

311. *Id.* at XXXII.

312. *Id.* at XXXIII.

313. *Id.*

314. *Id.* at XLV.

315. *Id.*

316. *Id.* at XLVIII.

property, that it had failed to secure to the inhabitants of these territories those rights to secure which was the chief object of government.³¹⁷

Representative M'Camant of Blair County insisted that the amendment was

necessary to secure to us the blessings of peace and the freedom of every man, woman and child in the country—that freedom of speech and action which before the war was denied and even now is denied to every man who has not been a rebel or rebel sympathizer, a secessionist, or a traitor.³¹⁸

He concluded by asking Democrats to be

as true to the Constitution as has been the Republican organization. Stand by us in demanding from the South that our citizens and loyal men everywhere be protected by their laws *in the enjoyment of all their constitutional rights*. . . . We demand the freedom of speech and of the press; we demand, sir, a Union reconstructed upon the principles of universal justice to all men, whether they be white or black.³¹⁹

Representative Allen of Warren County compared the first section of the amendment to the Pennsylvania Constitution and found no contradiction.³²⁰ Allen equated the citizenship clause, and indeed the entire first section, with the first section of the Pennsylvania "Declaration of Rights" that provided: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."³²¹ Section one would not require black suffrage, but would secure to blacks all the rights provided for in the Constitution.

I want to do to those colored men what I want to do to any honest, deserving men. I want to give them the right of the protection of the law, the right to hold property, and *all the*

317. *Id.*

318. *Id.* at LV.

319. *Id.* at LVI (emphasis added). See also remarks by Ewing: the first section of the fourteenth amendment would secure to the oppressed "all the privileges and rights of man," *id.* at LIX, and Landon: the amendment would "make liberty a reality," *id.* at LXXIX.

320. *Id.* at XCIX.

321. *Id.*

*rights which the Constitution provides for men—all the rights which this amendment indicates—in full.*³²²

Allen apparently read the amendment's privileges or immunities clause to mean literally what it said—all rights guaranteed by the Constitution would be protected.

Democrats claimed that the amendment provided for "consolidation" and revolutionized the federal system.³²³ Their reading of the privileges or immunities clause was exceptionally broad. A privilege, Representative Wallace insisted, meant "everything it is desirable to have."³²⁴ Representative Kurtz believed the privileges or immunities clause permitted Congress to confer suffrage on blacks.³²⁵

The report of the Committee on Federal Relations of the Massachusetts House of Representatives also provides a detailed statement of how Republicans read section one. In Massachusetts, the amendment faced strong opposition from radical Republicans because it did not directly provide suffrage to blacks. The majority report of the Committee of the State House recommended rejection because of this shortcoming and because the amendment provided no new securities to liberty.³²⁶ The report repeated old Republican refrains: it implicitly rejected the *Dred Scott* decision by insisting that free blacks were citizens of the United States and it implicitly rejected *Barron v. Baltimore* by insisting that the Bill of Rights limited the states.

In response to the question whether the amendment gave any additional guarantees to human rights, the majority compared section one to the original Constitution, which it read much as Joel Tiffany had. Two questions emerged at the outset:

First. Does it give any additional guarantees to human rights?

Second. Does the proposed amendment impair or endanger any rights now recognized by the Constitution?³²⁷

The Committee responded:

It is difficult to see how these provisions differ from those now existing in the Constitution. The preamble to the Constitution

322. *Id.* (emphasis added).

323. *See, e.g., id.* at XIII.

324. *Id.*

325. *Id.* at LII.

326. H.R. Doc. No. 149, Mass. Gen. Ct., at 1-4 (1867).

327. *Id.* at 2.

grandly and solemnly declares: "WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Many of our ablest jurists agree with the opinion of the late Attorney-General Bates, that all native-born inhabitants and naturalized aliens, without distinction of color or sex, are citizens of the United States. The Constitution (Article IV, section 2) declares,—“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

“Sect. 4. The United States shall guarantee to every state in this Union a republican form of government.”

The Committee then cited the first, second, sixth, and seventh amendments, and the due process clause. It asserted:

Nearly every one of the amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights.

It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language; and, upon any fair rule of interpretation, these provisions cover the whole ground of section first of the proposed amendment.

. . . .
We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.³²⁸

The minority report did not dispute the merits of the amendment. Nor did it dispute the interpretation given it by the majority report. It simply found the amendment “a declaration of the true intent and

328. *Id.* at 2-4.

meaning of American citizenship."³²⁹

IV. OTHER ARGUMENTS AGAINST INCORPORATION

Professor Fairman and other scholars opposing full incorporation have insisted that the country would not have tolerated having the "federal provisions on grand jury, criminal jury, and civil jury . . . fastened upon them in 1868."³³⁰ Fairman described the seventh amendment's requirement of a civil jury as such a waste of time as to be an "atrociousness."³³¹ This argument ignores the realities of the political process. The campaign of 1866 dealt with gut issues: rights of blacks, the political power of the rebellious Southern states, racism, and protection for loyalists in the South. These were issues that could and did defeat politicians. No politician, then or since, is likely to be defeated for advocating grand juries, criminal juries of twelve, or the right to jury trial in civil cases where the damages exceed twenty dollars. Fairman's argument assumes that Republicans in state legislatures would allow the South a dramatic increase of political power by counting disenfranchised blacks for purposes of representation rather than provide for jury trials in civil cases where the damages exceed twenty dollars. Outside the pages of law review articles, politicians do not behave in this fashion.

In any case, it is unlikely that Republicans would have shared the view that the seventh amendment jury trial requirement was an "atrociousness." Republicans were familiar with real atrocities. Slavery was an anathema to them. Even worse, however, were provisions of fugitive slave laws that had extended the grasp of slavery into the North. Northern opponents of slavery watched with horror the spectacle of people being captured in their states and hauled into slavery. To Republicans, Northern blacks—free as well as escaped slaves—faced capture and enslavement.³³²

Opponents of slavery responded by arguing that all people in their states were free and by insisting on procedural guarantees secured to

329. *Id.* at 25. In 1871, Bingham said that the privileges and immunities of citizens of the United States under the fourteenth amendment included those rights in the first eight amendments. CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871). *But cf.*, H.R. REP. NO. 22, 41st Cong., 3d Sess. 1 (1871), reprinted in A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 466 (1967). On subsequent legislative construction of the privileges and immunities clause, see Crosskey, *supra* note 9, at 90-110.

330. Fairman, *supra* note 9, at 137.

331. Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 155 (1954).

332. See generally MORRIS, *supra* note 29, at Chs. 10-12.

free persons.³³³ Among the most important of these guarantees were trial by jury, the writ of habeas corpus, and the writ *de homine replegiando*, an ancient writ designed to test the question of freedom, which secured trial by jury.³³⁴

Trial by jury was an issue on which both abolitionists and more moderate politicians agreed. Benjamin Lundy, a veteran abolitionist, had warned in 1837 that free blacks were being seized and sold into slavery. Lundy's solution was "trial by jury in all cases of claims to service, that the acknowledged rights, privileges, and immunities of our own citizens may be duly guarded and protected."³³⁵ Several states, through personal liberty laws, provided for trial by jury in the case of alleged fugitive slaves and secured other procedural rights to alleged slaves.³³⁶

These protections were crippled by the Supreme Court's decision in *Prigg v. Pennsylvania*³³⁷ and by the Fugitive Slave Act of 1850.³³⁸ *Prigg* held the federal power over fugitive slaves exclusive, permitting the seizure of blacks in the free states without any of the guarantees prescribed by personal liberty laws.³³⁹ The Fugitive Slave Act of 1850 explicitly provided that blacks could be denied the right to testify, to cross-examine, and to receive a jury trial before they were delivered to those claiming them as slaves.³⁴⁰

These restrictions on liberty produced protests from Northerners, who insisted that fugitive slave laws violated the fourth, fifth, and seventh amendments.³⁴¹ Supporters of the laws replied that such guarantees applied only to citizens, not to slaves. But that, as opponents of slavery noted, was the very matter to be resolved.³⁴²

The Fugitive Slave Act of 1850 was vigorously attacked by anti-slavery legislators. Congressman Mann of Massachusetts argued that a claim for a fugitive was a suit at common law that, under the seventh amendment, required a jury trial.³⁴³ He believed that the Fugitive

333. *Id.* at 77-78. See also *id.* at 90-92, 137-38.

334. *Id.* at 8-9, 77.

335. *Id.* at 74.

336. *Id.* at 71-93.

337. 41 U.S. (16 Pet.) 539 (1842).

338. For discussions of the Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850), see MORRIS, *supra* note 29, at 130-47. See also S. CAMPBELL, *THE SLAVE CATCHERS*, at 3-48 (1968).

339. 41 U.S. (16 Pet.) at 622.

340. CAMPBELL, *supra* note 338, at 32-46.

341. MORRIS, *supra* note 29, at 78.

342. *Id.*

343. *Id.* at 137.

Slave Act also violated the due process clause, which required a jury trial, and the fourth amendment. "What 'seizure' can be more 'unreasonable,' than one whose object is, not an ultimate trial, but bondage forever, without trial?"³⁴⁴ When the Fugitive Slave Act was finally abolished in 1864 by a Republican Congress, its repeal was justified as securing trial by jury "in accordance with the Constitution of the United States and the laws of the State where such person is found."³⁴⁵

Trial by jury in civil cases where the amount in controversy exceeds twenty dollars may be an "atrocious" to some. But to a number of Republicans, it was one of the precious guarantees of the Bill of Rights designed to prevent atrocities.

Another argument asserting that section one did not apply the Bill of Rights to the states is that the due process clause would appear in the amendment twice, once as a privilege or immunity of citizens, and again in the due process clause as a protection for all persons. Professor Fairman has suggested that one might attribute to the Committee "a design to give the citizen the protection of the entire Bill of Rights, and then" extend due process to aliens as well. But, Fairman tells us, no particular interest in aliens was expressed, so such an interpretation must be rejected.³⁴⁶

Fairman overlooks the effect of the struggle against slavery on the amendment. Republicans had believed and announced in their party platforms that the due process clause prohibited slavery in national ter-

344. *Id.* at 138.

345. CONG. GLOBE, 38th Cong., 1st Sess. 2919 (1864)(Morris). At least some Southern states had denied slaves the right to trial by jury. See *State v. Dick*, 4 La. Ann. 182 (1849); Avins, *supra* note 9. On subsequent legislative construction of the privileges and immunities clause, see Crosskey, *supra* note 9, at 90-100; Fairman, *supra* note 9, at 15-16 & 24-25. After 1866, a number of Republican Congressmen indicated their belief that the privileges and immunities clause of the fourteenth amendment included rights set out in the Bill of Rights. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 334 (Hoar); 382 (Hawley); 414 (Roberts); 476 (Dawes) (1871). For another example, see CONG. GLOBE, 41st Cong., 2d Sess. 515 (1870)(Fowler). Several Congressmen explicitly said that trial by jury was protected by the fourteenth amendment. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872)(Sherman). Sherman believed that the privileges and immunities secured by the fourteenth amendment included those defined in the Constitution including rights secured by the amendments. But he denied that these encompassed all privileges and immunities of citizens of the United States. *Id.* at 843. Representative Lawrence also believed that the seventh amendment trial by jury was one of the rights protected from state interference by the fourteenth amendment. CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871). For Southern Democrats who accepted the idea that the first eight amendments to the Constitution were privileges and immunities under the fourteenth amendment and protected from state interference, see 2 CONG. REC. 241-42 (Senator Norwood); 384 (Representative Mills) (1874). See Avins, *supra* note 9.

346. Fairman, *supra* note 9, at 59.

ritories. As to the states, however, most Republicans believed that due process guarantees were limited to citizens.³⁴⁷ The amendment contained conscious duplication to prevent any person from ever again suffering atrocities like slavery. Indeed, Bingham explained that a grant of power such as that sought in his prototype of section one had not been included in the Constitution because such power "would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons."³⁴⁸

Shaped, no doubt, by the law's treatment of slaves, concern for the rights of aliens *was* also expressed in the debate on the Civil Rights Bill. Congressman Wilson believed that Congress could not protect inhabitants who were not citizens under the Civil Rights Bill.³⁴⁹ Since Wilson justified the bill by citing Congress's power to enforce the Bill of Rights in the states, he apparently believed such power was limited to citizens.³⁵⁰

Congressman Bingham was convinced that Congress lacked the power to pass the Civil Rights Bill. Beyond that, he objected to the Civil Rights Bill because it did not follow the scope of the fifth amendment and protect "strangers" as well. The bill, Bingham complained, would permit the states to deny aliens their due process rights.³⁵¹ The fourteenth amendment's duplication in the case of persons was consciously designed to protect those who were not citizens and to prevent denials of due process such as those that had characterized slavery.

CONCLUSION

The weight of the evidence supports the conclusion that the fourteenth amendment *was* designed to require the states to respect all the guarantees of the Bill of Rights. The plain language of the amendment, which provides that no state could abridge the privileges or immunities of citizens of the United States, says as much. The natural place to look for the privileges and immunities of citizens of the United States is in the enumeration of rights in the Constitution. These certainly include the rights in the Bill of Rights, together with other rights secured

347. NATIONAL PARTY PLATFORMS 27, 32-33. (D. Johnson ed. 1956). See CONG. GLOBE, 37th Cong., 2d Sess. 1638-39 (1862); note 45 *supra*.

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

349. *Id.* at 1115.

350. *Id.* at 1294.

351. *Id.* at 1291-92.

to the citizen, such as the right to the writ of habeas corpus.

One of the most common contemporary descriptions of section one was that it protected the rights of citizens of the United States or all the rights the Constitution secured. Both Bingham and Howard described section one or its prototype as securing the rights in the Bill of Rights from state interference. Both said that a constitutional amendment was needed to correct the doctrine set out in *Barron v. Baltimore* that the Bill of Rights did not limit the states.³⁵² In addition, several other Congressmen who spoke in the 39th Congress said that they wanted a constitutional amendment to secure and enforce "all the guarantees" of the Constitution,³⁵³ a phrase that embraces the rights in the Bill of Rights.

Most Republicans believed the states were already required to obey the Bill of Rights. They did not accept the "positivist" notion that the Constitution was merely what the Supreme Court of the moment said it was. For many Republicans, the amendment merely declared constitutional law properly understood. Not a single Republican in the 39th Congress said in debate that states were not and should not be required to obey the Bill of Rights. *Barron v. Baltimore* was mentioned only when Republicans urged its repudiation.³⁵⁴

Some scholars have relied on statements that the amendment was already in the Constitution, or already there except for equal protection, to bolster their contention that the amendment was not intended to apply the Bill of Rights to the states.³⁵⁵ By comparable logic, one might argue that the amendment did not make blacks citizens or did not require the states to accord due process because some Republicans thought the Constitution provided for these things before its amendment.

The major argument scholars have made to prove that the amendment was not designed to apply the Bill of Rights to the states is that most of its supporters did not say the amendment would apply the Bill of Rights to the states, and that some did say that the Civil Rights Bill contained the same principles as those set out in the amendment.³⁵⁶

This insistence that supporters of the amendment should use the

352. See notes 136, 138, 144, 162, 165 & 167-70 *supra* and accompanying text (Bingham); note 241 *supra* (Howard).

353. See notes 108-10 & 141 *supra* and accompanying text.

354. See notes 167-68 & 241 *supra* and accompanying text.

355. Fairman, *supra* note 9, at 51.

356. See generally *id.* at 43-134.

phrase "Bill of Rights" is curious. When Congressman Bingham used the phrase, these scholars insist that he did not really mean the amendments to the Constitution, but was using the phrase in a technical sense, never heard of before or since. In any case, advocates of section one did use phrases that included Bill of Rights liberties. In fact, they used phrases that were more accurate, since the rights of American citizens include, but are not limited to, those in the Bill of Rights. Supporters said that the amendment would secure all rights of citizens of the United States;³⁵⁷ the rights thrown around the citizen by the supreme law of the land;³⁵⁸ all his rights to every citizen;³⁵⁹ the privileges conferred on every citizen by the federal Constitution;³⁶⁰ the full enjoyment of all constitutional rights;³⁶¹ every right guaranteed by the Constitution;³⁶² constitutional rights;³⁶³ individual freedom and civil liberty;³⁶⁴ immunities such as freedom of speech;³⁶⁵ civil liberty and civil rights;³⁶⁶ protection of life, liberty, and property;³⁶⁷ all the rights that the Constitution provides,³⁶⁸ and the rights of citizens enumerated in the Constitution.³⁶⁹ In evaluating the meaning of these broad statements, it is important to remember that they referred to constitutional limitations specifically placed on the states in the interest of liberty. Statements such as these have been rejected as too broad. However, when Republicans mentioned particular rights in the Bill of Rights, such as freedom of speech, their statements are rejected as too narrow.³⁷⁰

Another argument purporting to prove that the amendment did not apply the Bill of Rights to the states is that some speakers supporting the amendment said the Civil Rights Bill covered exactly the ground of the amendment or contained the same principles.³⁷¹ Since

357. See notes 248-50 & 255 *supra* and accompanying text.

358. See note 254 *supra* and accompanying text.

359. See note 256 *supra* and accompanying text.

360. See note 259 *supra* and accompanying text.

361. See notes 261 & 319 *supra* and accompanying text.

362. See note 277 *supra* and accompanying text.

363. See note 278 *supra* and accompanying text.

364. See note 290 *supra* and accompanying text.

365. See note 307 *supra* and accompanying text.

366. See note 310 *supra* and accompanying text.

367. See note 317 *supra* and accompanying text.

368. See note 322 *supra* and accompanying text.

369. See note 264 *supra* and accompanying text.

370. Fairman, *supra* note 9, at 76-77.

371. *Id.* at 68-81. Fairman uses this evidence to reject total incorporation but ultimately supports selective incorporation. *Id.* at 138-39. Raoul Berger rejects any incorporation. BERGER,

none of the rights in the Bill of Rights are spelled out in the Civil Rights Bill, the argument goes, section one could not have been designed to apply the guarantees of the Bill of Rights to the states.³⁷² The problem with this argument is that it proves too much.

The Civil Rights Bill, it will be recalled, made people born in the United States American citizens. It secured to such citizens

the same right, in every State and Territory in the United States, to make and 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 security of person and property, as is enjoyed by white citizens.³⁷³

If the amendment and the Civil Rights Bill cover exactly the same ground, the Civil Rights Bill contains at least one guarantee from the Bill of Rights—a federal standard of due process. The implication is that the federal constitutional guarantee of due process already applied to the states prior to the passage of the fourteenth amendment, an implication contrary to *Barron v. Baltimore*.

A second problem with this argument is that the phrase “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens” was sufficiently broad to encompass the rights in the Bill of Rights—particularly because virtually all Republicans expressing themselves on the subject thought that the Constitution, properly interpreted, made those rights a limit on the states. Rights in the Bill of Rights had been described as provisions for security of person and property both before and after the adoption of the fourteenth amendment. Finally, Republicans believed that making blacks citizens would secure to them all rights, privileges, and immunities of American citizens, rights most Republicans considered universally applicable.

The privileges and immunities clause was the primary vehicle through which Bingham, Howard, and their colleagues intended to force the states to obey the commands of the Bill of Rights. The rights in the Bill of Rights and all other privileges and immunities of citizens of the United States were to be respected by the states. Read simply

supra note 4, at 134-56, 413.

372. BERGER, *supra* note 4, at 152.

373. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, reprinted in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 211 (app. 1) (1964).

and literally, the clause commands such a result.

Power to compel obedience was given to both Congress *and* the courts. Republicans repeatedly said that the passage of the amendment put enforcement of its principles beyond the power of congressional majorities. These statements clearly presuppose judicial enforcement.³⁷⁴

Some Republicans also read the due process clause to apply the Bill of Rights to the states. The *process* required was the traditional one of trial in the courts. So a number of Republicans read the clause to mean that a person could be deprived of his rights, including those guaranteed by the Bill of Rights, only after conviction of a crime with all the procedural protections inherent in such a trial, or after a trial with all the safeguards that would protect a party in an action involving property.³⁷⁵ As Senator Sumner saw it, the due process clause “[b]rief as it is, it is in itself alone a whole Bill of Rights.”³⁷⁶ Finally, as Professor Crosskey has noted, many of the guarantees in the Bill of Rights are “process” guarantees. Prior to the framing of the fourteenth amendment, the Court had suggested that procedural guarantees set out in the Constitution were part of the process required by the due process clause.³⁷⁷

Since the fourteenth amendment was designed to apply the Bill of Rights to the states, should the guarantees limit the states in the same sense they limit the federal government? Justices who have argued for a different standard have typically assumed that the amendment was not designed to apply the Bill of Rights to the states, but only to apply those rights “implicit in the concept of ordered liberty.”³⁷⁸ Many rights that the framers of the Bill of Rights or of the fourteenth amendment considered implicit seem, to more modern judges, not so essential.³⁷⁹

Since the rights in the Bill of Rights were to limit state power

374. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (Garfield—referring to the principles of the Civil Rights Bill), 2896 (Howard—rights of citizens under the Civil Rights Bill put beyond mere legislative power) (1866).

375. See CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1866)(Sumner). To deprive free persons of rights in the Bill of Rights without conviction of a crime was, Judge Davis believed, a badge of slavery. Proceedings of the Republican Union State Convention 35 (Sept. 5, 1866).

376. CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1866)(Sumner).

377. Crosskey, *supra* note 9, at 6-7 (citing Murray's Lessee v. Hoboken Land & Improvements Co., 59 U.S. (18 How.) 272 (1856)).

378. See, e.g., Pointer v. Texas, 380 U.S. 400, 408-09 (1965)(Harlan, J., concurring); Adamson v. California, 332 U.S. 46, 61-63 (1947)(Frankfurter, J., concurring); Palko v. Connecticut, 302 U.S. 319 (1937).

379. See, e.g., Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

under the fourteenth amendment, it is much more difficult, as a matter of language and logic, to argue that the states should be bound by a different standard. It is not impossible, however. Considerations of federalism and deference to the police powers of the states could permit such an analysis. On this question, the debates surrounding the fourteenth amendment provide no direct guidance. Still, the restrictions on freedom of speech and other basic liberties in the South before the Civil War were justified under the police powers of the states. The framers of the amendment believed that the courts had done an inadequate job of protecting citizens from such abuses of state police power. For this reason, it seems unlikely that the framers of the fourteenth amendment would choose to vest the courts with an undefined power to approve state restrictions on liberty. This is particularly so since Republicans had little patience with the argument that protection of individual rights would interfere with any legitimate rights of the states.

Today, the idea that the states should be required to obey the Bill of Rights is under attack, an attack advanced in the name of history and the duty of fidelity to the intention of its framers. States, we are told, must be free to experiment.³⁸⁰

The framers of the fourteenth amendment had lived through thirty years of state and federal experiments with the rights in the Bill of Rights. The history of those years shows, as clearly as history shows anything, the need for strict adherence to the rights in the Bill of Rights.

As Justice Black noted in dissent in *Adamson v. California*:

I cannot consider the Bill of Rights to be an outworn 18th Century "straight jacket" . . . 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 whenever 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.³⁸¹

380. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972)(Powell, J., concurring).

381. *Adamson v. California*, 332 U.S. 46, 89 (1947)(Black, J., dissenting).