

Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights

MICHAEL KENT CURTIS*

I. INTRODUCTION

The theory that the Bill of Rights was incorporated as a limit on the states by the fourteenth amendment, Raoul Berger tells us, has been “[d]iscredited by Professor Charles Fairman in a study with which even activists” agree.¹ A virtually solid wall of contemporary scholarly opinion, Berger implies, has been confronted by my “attempt” to revive the doctrine of incorporation.² In fact, however, a number of scholars either have found the amendment was designed to make the states obey the Bill of Rights or have failed to recognize that such a point of view has been discredited.³

From an historical point of view, the problem is to find what Republicans in the Thirty-ninth Congress understood the fourteenth amendment to mean. In the search for this understanding, we should accept Republicans on their own terms. To treat them as first year law students who have failed to master constitutional law does not advance our understanding of *their* purpose or of the intended meaning of the fourteenth amendment. In the same way, an attempt to squeeze the framers of the fourteenth amendment into judicially accepted orthodox constructions of the Constitution does nothing to advance our understanding of their purposes unless, of course, they themselves accepted these orthodox constructions.

The fourteenth amendment should be assessed in light of the history that produced it. Part of that history was Republican concern for the rights of blacks. An equally important part was Republican concern for the protection of the constitutional rights of all citizens, rights that the Republicans considered to be limits on the states. In service of their concern for protection of

* A.B., University of the South; J.D., University of North Carolina. Partner, Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, N.C. Member, North Carolina Bar Association, Association of Trial Lawyers of America, and the North Carolina Academy of Trial Lawyers.

1. Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435 (1981) [hereinafter cited as Berger].

2. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter cited as Curtis].

3. In addition to Crosskey, Charles Fairman, “Legislative History,” and the Constitutional Limits on State Authority, 22 U. CHI. L. REV. 1 (1954) [hereinafter cited as Crosskey], see, e.g., H. ABRAHAM, FREEDOM AND THE COURT 45-46 (1977); I. BRANT, THE BILL OF RIGHTS 302-59 (1967); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 85, 130 (1965). For a balanced appraisal of Crosskey’s work, see C. PRITCHETT, THE AMERICAN CONSTITUTION 376-82 (1959). See also C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 329-34 (1954). For an article (which I initially overlooked) rejecting Fairman’s analysis, see Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. LEGIS. 1 (1968). For another article rejecting Fairman’s analysis, see Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972). Citation of these articles does not, of course, indicate agreement with every assertion made in them.

individual liberty virtually all Republicans who spoke on the subject in Congress from 1864 to 1866 embraced the idea that the rights in the Bill of Rights were absolute rights of citizens—absolute in the sense that the states could not infringe them. In addition, leading Republicans read the article IV privileges and immunities clause to protect absolute rights to liberty that the states, as well as the federal government, could not deny.

The statements of two of the three leading Republican proponents of the fourteenth amendment—that is, Republican members of the Joint Committee that had charge of the amendment—clearly indicate an intent to require the states to obey the commands of the Bill of Rights. The most common Republican description of the fourteenth amendment was that it would protect “all rights of citizens.”⁴

To overcome these obstacles in the way of his rejection of incorporation of the Bill of Rights, Mr. Berger has produced an extraordinary analysis. Whether he is successful is something the reader must judge.

Mr. Berger at once alerts his readers that I am an “activist” who has “reasoned back from the ‘right result,’ a method reminiscent of ‘the end justifies the means.’”⁵ First, how do such labels advance analysis? Second, Mr. Berger’s conclusion is based on a misunderstanding. In my study I made clear that I based my analysis on history, not policy.⁶ When I suggested that the Supreme Court had been approaching the “right” result on the issue of incorporation for the “wrong” reason, I referred to the result I considered correct based on the language of the amendment and the weight of the evidence as to the historical intentions of its framers. Since in this case, at least, history and public policy point to the same result, we are twice blessed.

I was genuinely puzzled that Mr. Berger ignored Professor Crosskey’s 143-page article on the fourteenth amendment and the Bill of Rights,⁷ an article that criticized Professor Fairman’s 169-page *Stanford Law Review* article⁸ on which Mr. Berger relied so heavily. The puzzle is now solved. Mr. Berger tells us, “There is nothing ‘curious’ about my disregard. Professor Julius Goebel wrote that ‘Crosskey’s performance, measured by even the least exacting scholarly standards, is . . . without merit. . . .’”⁹ What Mr. Berger fails to make clear is that Professor Goebel and the other commentators he cites wrote not about Crosskey’s article responding to Fairman but about his book, *Politics and the Constitution*.¹⁰ The article was largely devoted to material not included in the book.¹¹

4. For specific support for these contentions, see text accompanying notes 27–28, 33–43 and 123 *infra*.

5. Berger, *supra* note 1, at 435.

6. See Curtis, *supra* note 2, at 47, 49, and indeed the entire article.

7. Crosskey, *supra* note 3.

8. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) [hereinafter cited as Fairman].

9. Berger, *supra* note 1, at 437.

10. W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953).

11. Compare Crosskey, *supra* note 3 with II W. CROSSKEY, *POLITICS AND THE CONSTITUTION* chs. XXXI and XXXII (1953).

At any rate, scholars should not be consigned to outer darkness in this fashion. Scholars, being human beings, all make mistakes. Professor Crosskey, like Professor Fairman and Mr. Berger and myself, no doubt made his share. Nevertheless, the idea that a major article criticizing another can be totally ignored because of reviews of a previous book by the author is unacceptable.

If we are to progress in our knowledge of a subject, we need to recognize and eliminate mistakes, our own and those of others. Those who ignore the work of a critic of an author on whom they rely are doomed to repeat and multiply the author's mistakes. This, lamentably, is just what happened to Mr. Berger, and this is true whether Crosskey is "right" or "wrong."

Had he not contemptuously dismissed Professor Crosskey's article as unworthy of attention, Mr. Berger could have avoided a number of mistakes, including his assertion that there was "no inkling" that the North had become dissatisfied with protections the Bill of Rights received from the states from 1789 to 1866;¹² his assumption that anti-slavery legal thought had no significant impact on Republican ideology;¹³ his citation of Judge Hale to prove that incorporation of the Bill of Rights as a limit on the states would have been regarded as an intolerable interference with state sovereignty, when in fact Judge Hale thought the states were already required to obey the Bill of Rights;¹⁴ his citation of James Wilson as believing it unacceptable that the states should obey the Bill of Rights, when in fact Wilson thought that they were already required to obey it and that this was highly desirable;¹⁵ his claim that the failure of any major newspaper to report Senator Howard's speech on incorporation somehow robbed it of its authority, when in fact the speech was reported in detail on page one of the *New York Times*;¹⁶ and his misconstruction and miscitation of remarks by Giles Hotchkiss.¹⁷

II. PLAIN LANGUAGE AND ARRANT NONSENSE

The fourteenth amendment provides in part that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

12. See R. BERGER, *GOVERNMENT BY JUDICIARY* 182 (1977) [hereinafter cited as *GOVERNMENT BY JUDICIARY*].

13. See Berger, *supra* note 1, at 445-49. See generally *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 134-56, 230-45; Crosskey, *supra* note 3, at 10-21.

14. See *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 153-54, 178 n.47; Crosskey, *supra* note 3, at 30-32; Curtis, *supra* note 2, at 69-71.

15. See *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 143; Crosskey, *supra* note 3, at 49; Curtis, *supra* note 2, at 91.

16. See *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 148 n.66. Berger also suggests that if incorporation were the intent of the framers, "honesty required disclosure." *Id.* at 153. Why disclosure in the *Congressional Globe* (not to mention page one of the *New York Times*) is not sufficient, he does not explain. See Crosskey, *supra* note 3, at 101-03; Curtis, *supra* note 2, at 92-96.

17. See *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 228; Crosskey, *supra* note 3, at 44; Curtis, *supra* note 2, at 99-100.

States. . . ." To me it seems that a natural reading of "privileges or immunities" is that the phrase is equivalent to "rights." The amendment read that way says that no state shall abridge the rights of citizens of the United States. These rights, literally understood, would include all rights of citizens provided for in the Constitution, including rights set out in the Bill of Rights.

To treat the words "privileges or immunities" in this way, Berger announces, is "arrant nonsense" because we deal with legal provisions, not "street terms."¹⁸ Berger seems to say that the idea that article IV meant such a thing is silly.¹⁹ The point I was discussing was the natural meaning of the words in the fourteenth amendment, not the somewhat different language of article IV.

To determine, simply as a matter of language, whether the words "privileges or immunities" could reasonably be read to include the rights in the Bill of Rights, I thought it was significant that Justices of the Supreme Court had used the words as encompassing the rights in the Bill of Rights. So Justice Cardozo in *Palko v. Connecticut*²⁰ used the phrase "privileges and immunities" to describe the rights in the Bill of Rights.²¹ Cardozo did not hold that all the privileges or immunities (or rights) in the Bill of Rights were applicable to the states under the privileges or immunities clause of the fourteenth amendment. The Court had held otherwise.²² What he did do, however, was repeatedly use the words "privileges and immunities" to describe the rights in the Bill of Rights. Nor was he alone. Justice Bradley, speaking for the Court, had used the words "privileges and immunities" to describe fourth and fifth amendment rights.²³ And in *Near v. Minnesota*,²⁴ during oral argument, Chief Justice Hughes told counsel for the State of Minnesota: "[Y]ou need not argue further whether or not freedom of the press was a privilege or immunity under the Fourteenth Amendment," since he felt prior decisions of the court had so held.²⁵ That Justices of the Supreme Court have used the words "privileges and immunities" to encompass the rights in the Bill of Rights shows that such a use of the phrase is a natural one. Why the use of the phrase

18. Berger, *supra* note 1, at 436, 437.

19. *Id.* at 436.

20. 302 U.S. 319 (1937).

21. *Id.* at 325-26.

The exclusion of these immunities and privileges [indictment by grand jury, jury trial, protection against self incrimination, and double jeopardy] from the privileges and immunities protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

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

22. *E.g.*, Maxwell v. Dow, 176 U.S. 581 (1900).

23. *Boyd v. United States*, 116 U.S. 616 (1886). The Court in *Boyd* described the fourth and fifth amendment issues in the case as "a very grave question of constitutional law, involving the personal security and privileges and immunities of the citizen." *Id.* at 618.

24. 283 U.S. 697 (1931).

25. F. FRIENDLY, MINNESOTA RAG 129 (1981).

should be an adequate way for a Justice to describe rights in the Bill of Rights, but not adequate for a congressman, is something I do not understand.

A number of Republicans in the Thirty-ninth Congress read the fourteenth amendment to mean that the rights of citizens of the United States would not be abridged by any state or that all the constitutional rights of American citizens would be protected.²⁶ Taken literally, the rights of American citizens would, of course, include rights embodied in the Bill of Rights. The fact that Republicans had been very unhappy with the protection rights in the Bill of Rights received from the states,²⁷ together with the fact that almost all Republicans who spoke on the subject in the Thirty-eighth and Thirty-ninth Congresses seem to have believed that the states were already or should be required to respect the rights in the Bill of Rights, further confirms such an interpretation.²⁸ It gives us some guidance as to what Republicans meant when they referred to the rights of citizens.

III. PRIVILEGES OR IMMUNITIES

A. Article IV and the Fourteenth Amendment

Article IV provides that the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states. The fourteenth amendment provides that no state shall abridge the privileges or immunities of citizens of the United States. There are differences in the language of the provisions. The most important is that the fourteenth amendment tells us what privileges or immunities (or, as I argue, "rights") it is talking about. They are all those belonging to citizens of the United States. Consequently, it recognizes a body of national privileges that cannot be infringed by any state. In the case of the rights of citizens of a state under state law, the rights are, of course, not absolute. Subject to the limits of state constitutions, the state could eliminate them altogether by ordinary legislation.

As Justice Bradley noted in discussing the difference between the fourteenth amendment and the conventional judicial interpretation of article IV, "[T]he fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."²⁹ Bradley concluded that the amendment protects

26. CONG. GLOBE, 39th Cong., 1st Sess. 3038 (Yates), 3167 (Windom), App. 236 (Baker) (1866). The Republican national committee referred to it as protecting "all the rights of citizens." SPRINGFIELD ILLINOIS STATE JOURNAL, Sept. 24, 1866, at 1, col. 4. Others referred to full enjoyment of all constitutional rights. PA. LEGIS. REC. at LVI (1867).

27. See Curtis, *supra* note 2, at 50-64.

28. See, e.g., *id.*; see note 121 *infra*.

29. Live-Stock Dealers & Butchers' Ass'n v. Crescent City Live-Stock Landing Co., 15 F. Cas. 649, 652 (1870).

“privileges and immunities of an absolute and not merely relative character.”³⁰

Mr. Berger cites Justice Harlan to support the idea that we should not assume that Congress used words in their dictionary meaning when they have previously been construed as words of art.³¹ Such a position is essential to Mr. Berger’s case because, construed in its ordinary meaning, the phrase privileges or immunities of citizens of the United States does encompass, but is not limited to, rights in the Bill of Rights.

In spite of the difference in the way the two provisions are phrased, one possible gloss on the words “privileges or immunities” in the fourteenth amendment is the *orthodox* judicial interpretation of the words “privileges and immunities” in article IV. Indeed, as I read Mr. Berger’s article, that is one gloss he suggests,³² at least to the extent that it is serviceable in opposing incorporation of the Bill of Rights.

The gloss applied to article IV by leading Republicans was that the privileges and immunities of article IV embraced the absolute rights of “personal security, the right of personal liberty, and the right to acquire and enjoy property.”³³ These were the inherent rights of free individuals. Justice Washington in *Corfield v. Coryell*³⁴ found that article IV embraced, among other things, the enjoyment of life and liberty.³⁵ By themselves these broad formulations could (at the very least) be read to include rights in the Bill of Rights.

On this subject I thought it was useful to explore Republican ideas. Mr. Berger criticizes me for arguing that remarkable and unorthodox ideas influenced Republicans in the framing of the amendment, and suggests that I have ignored the “vastly preponderant Republican view to the contrary.”³⁶ In my *Wake Forest* article I discussed three particular areas of Republican thought: due process, citizenship, and privileges and immunities.³⁷

Chief Justice Taney’s view was that the due process clause protected the right to take slaves into the territories.³⁸ The *unorthodox* Republican view, as evidenced by Republican platforms in 1856 and 1860, was that the due process clause prohibited slavery in the territories.³⁹ On this subject there is simply no evidence of a preponderant orthodox Republican view to the contrary. The opposite is the case. The same is true on the issue of black citizenship.⁴⁰

30. *Id.* at 653. Bradley noted that “the more we have reflected on the subject, the more we are satisfied that the fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character.” *Id.*

31. Berger, *supra* note 1, at 439 n.38.

32. *See id.* at 441, 442.

33. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (Trumbull). *See id.* at 1118–19 (Wilson).

34. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

35. *Id.* at 551–52.

36. Berger, *supra* note 1, at 436.

37. Curtis, *supra* note 2, at 54–55.

38. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422–23 (1857).

39. *See NATIONAL PARTY PLATFORMS 1840–1956*, at 27 (K. Porter & D. Johnson eds. 1956), quoted in Curtis, *supra* note 2, at 56–57. *See also Avins, Incorporation of the Bill of Rights*, 6 HARV. J. LEGIS. 1, 7 (1968).

40. *See Curtis, supra* note 2, at 53 n.59.

The Republican view of privileges and immunities under article IV was also unorthodox. Under the orthodox interpretation of the original privileges and immunities clause, the clause applied only to migrants, not residents, and only prohibited certain types of *discrimination* between a state's citizens and migrants. Under the Republican view the clause protected residents as well as migrants and protected certain absolute rights—"the right of personal security," "personal liberty," and "the right to acquire and enjoy property."⁴¹ According to Trumbull, "These are declared to be inalienable rights, belonging to every citizen of the United States . . . no matter where he may be."⁴² Judge Washington referred to "fundamental rights," which "belong, of right, to the citizens of all free governments."⁴³

Mr. Berger's analysis depends on a clear distinction between these general descriptions of absolute fundamental rights and the particular rights in the Bill of Rights. No such clear distinction exists in the debates in the Thirty-ninth Congress. Congressman Wilson, Chairman of the Judiciary Committee and manager of the Civil Rights Bill in the House, said that the fundamental rights of personal security, personal liberty, and the right to acquire and enjoy property were the inalienable possession of Americans.⁴⁴

The great fundamental rights are the inalienable possession of both Englishmen and Americans; and I will not admit that the British constitution excels the American Constitution in the amplitude of its provision for the protection of these rights. *Our Constitution is not a mockery; it is the never-failing fountain from which we may draw 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.*⁴⁵

As Mr. Berger reads their remarks, the framers of the fourteenth amendment thought the rights to liberty, security, and property were so inclusive that they included the right to testify, inherit, and contract, but were so narrow that they excluded the rights in the Bill of Rights. Senator Howard, however, described the rights in the Bill of Rights as "great fundamental rights."⁴⁶

The attempt to define the fourteenth amendment privileges or immunities clause by a rule of construction that gives it the orthodox content of the privileges and immunities clause of article IV is not legitimate, especially not for Mr. Berger. This is because Mr. Berger himself attributes to Republicans an unorthodox reading of the clause in the original Constitution (an adaptation, as he puts it) by which it protected residents as well as migrants.⁴⁷ "[I]t cannot too often be emphasized," Mr. Berger has wisely noted, that "the

41. CONG. GLOBE, 39th Cong., 1st Sess. 158, 1117, 1757, 1833 (1866). For the orthodox judicial view, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422-23 (1857).

42. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

43. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

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

45. *Id.* at 1118-19 (emphasis added). The reader should note that the antecedent of the third "it" in Wilson's quote could be read as "bill," changing the meaning somewhat.

46. *Id.* at 2765-66.

47. See GOVERNMENT BY JUDICIARY, *supra* note 12, at 41-42, 44.

cardinal purpose of interpretation . . . is to ascertain and effectuate, not defeat, the intention of the framers. Once that purpose is ascertained, it may not be thwarted by a rule of construction."⁴⁸

Republicans suggested that the rights to make and enforce contracts, to sue, to be parties, to give evidence, to inherit, and the like, were incidents of the absolute rights of individuals to "personal liberty," "personal security," and "private property" embraced by article IV.⁴⁹ When it comes time to define the "privileges or immunities of citizens of the United States," however, Mr. Berger chooses to look at these *incidents*, not the overarching principles from which they were derived.⁵⁰

Since the Republican reading of the privileges and immunities clause of the original constitution was unorthodox, I believed it was useful to look at how leading Republicans read the clause. For that purpose I looked at prior speeches by Bingham and Wilson. Wilson's remarks in 1864 show that he read the original privileges and immunities clause to encompass rights in the Bill of Rights.⁵¹ Wilson's views are confirmed by his remarks in the Thirty-ninth Congress.⁵² Bingham's 1859 speech on the admission of Oregon is in the same category.⁵³ In addition to Wilson and Bingham, Congressman Broomall also read the privileges and immunities clause to include, but not to be limited to, rights in the Bill of Rights.⁵⁴ Remarks by other congressmen, though less clear, seem to support a similar interpretation.⁵⁵ Furthermore, there was an anti-slavery legal tradition that read the clause in the same way.⁵⁶

Nor is such a reading as outlandish as Mr. Berger would have us believe. As Justice Bradley noted, dissenting in the *Slaughter House Cases*,⁵⁷ article IV, section 2 speaks of the "privileges and immunities of a citizen *in* a state, not of citizens *of* a state."⁵⁸ As Bradley noted, the clause is "fairly susceptible to a broader interpretation than that which makes it a guarantee of mere equality."⁵⁹

Berger criticizes my citation of Bingham's 1859 speech on Oregon, pointing out that Oregon was admitted over Bingham's objections.⁶⁰ That, of course, is true. I cited Bingham's speech to show his views, not to suggest

48. *Id.* at 45. If Mr. Berger still believes that an unorthodox reading of the clause was relied on by Republicans, then citations suggesting that the privileges or immunities clause of the amendment was absolutely identical to article IV, § 2, are clearly beside the point.

49. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

50. *See* Berger, *supra* note 1, at 442, 455.

51. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864); Curtis, *supra* note 2, at 58-60.

52. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

53. *See* CONG. GLOBE, 35th Cong., 2d Sess. 982-84 (1859); CONG. GLOBE, 39th Cong., 1st Sess. 158, 813 (1866).

54. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866).

55. *See, e.g., id.* at 1629.

56. J. TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 99 (1849). *See also id.* at 55-57, 84-97.

57. 83 U.S. (16 Wall.) 36 (1873).

58. *Id.* at 117 (dissenting opinion) (emphasis in original).

59. *Id.* at 118.

60. Berger, *supra* note 1, at 444.

that they were accepted by all Republicans in 1859. Times change. In 1866 Congress prohibited laws like Oregon's about which Bingham had complained.⁶¹ By 1866 the overwhelming number of Republicans considered blacks citizens of the United States.⁶² In 1859 some had not yet arrived at this point of view.

Berger cites (or miscites as in the case of Fessenden⁶³) statements of some Republicans to show that they thought article IV was duplicated by the privileges or immunities clause of the fourteenth amendment.⁶⁴ But if these men interpreted article IV as protecting absolute rights to liberty, such statements do not prove rejection of incorporation of the Bill of Rights.

In my article I produced a number of Republican statements from the Thirty-eighth and Thirty-ninth Congresses to show that many Republicans thought the states were already required to obey the Bill of Rights.⁶⁵ Mr. Berger has produced *no contemporaneous* Republican evidence to the contrary. At the very least, is it not reasonable to believe that such men may have considered the rights in the Bill of Rights to be protected and encompassed in the absolute right of the citizen to liberty? The Bill of Rights, after all, was originally justified on the ground that it was "essential to liberty."⁶⁶

Mr. Berger notes that the 1787 "article IV privileges and immunities obviously could not comprehend the as yet unborn Bill of Rights."⁶⁷ The statement seems designed to show that the way Bingham and Wilson read the clause was outlandish. Bingham, of course, read the article IV provision to mean that "the citizens of each state (being *ipso facto* citizens of the United States) shall be entitled to all privileges and immunities of citizens (supplying the ellipsis 'of the United States in the several states')."⁶⁸ As Bingham put it, a citizen is entitled to "all—not some, 'all'—the privileges of citizens of the United States in every State."⁶⁹ Other framers read the provision to protect the absolute right to liberty of citizens of the United States.⁷⁰ In short the

61. Act of Apr. 9, 1866, ch. 31, §§ 1 and 2, 14 Stat. 27 (1866) (the Civil Rights Bill).

62. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1115 (Wilson), 1756 (Trumbull) (1866).

63. See text accompanying notes 100-07 *infra*.

64. *E.g.*, Berger, *supra* note 1, at 457.

65. See Curtis, *supra* note 2, at 57-64.

66. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 840, 1029 (1971).

67. Berger, *supra* note 1, at 436, 457.

68. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866). Bingham read article IV to protect a body of national privileges and immunities and relied on an "ellipsis" in the language of article IV to support his theory. As he explained in his speech on the admission of Oregon:

The citizens of each State, all the citizens of each State being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." 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. There is an ellipsis in the language employed in the Constitution but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guarantees.

CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

69. CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866).

70. *Id.* at 1757 (Trumbull), 1833 (Lawrence).

provision was understood to mean that all the rights of citizens of the United States must be respected.

Since we are concerned with the intention of the framers, we must look at the matter from their perspective. Mr. Berger's argument that the 1787 clause could not include later guarantees repeats one made by Professor Fairman.⁷¹ Since Mr. Berger repeats Mr. Fairman's argument, it seems reasonable to note Professor Crosskey's response. As Professor Crosskey noted in his article criticizing Fairman:

This argument is certainly a very remarkable one to find in a paper intended to be read by lawyers. For, while [it] was true enough before December 15, 1791, when the first eight amendments became effective, it was not true at all thereafter. For a general provision relating to "all Privileges and Immunities of Citizens [of the United States]" . . . would of course become immediately implemented with all after-created privileges, or immunities, of this kind, as soon as any such privileges or immunities were created. This is elementary law. . . .⁷²

B. Mr. Berger's Analysis of the Evidence

Mr. Berger considers the remarks of particular congressmen in his effort to refute the idea that for Republicans the rights of American citizens protected by the privileges or immunities clause of the fourteenth amendment included the fundamental rights in the Bill of Rights.⁷³ It is useful to look at one case in detail.

In my *Wake Forest* article I examined the remarks James Wilson, Chairman of the House Judiciary Committee, had made in 1864 during the debate on the abolition of slavery. The remarks illustrate Republican dissatisfaction with the protection the Bill of Rights had received in the southern states and show that Wilson read the privileges and immunities clause to encompass rights in the Bill of Rights. As I noted:

[Wilson] first cited the supremacy clause as the most important provision for the protection of the unity of the nation. Then Wilson quoted the privileges and immunities clause and asked: "To what extent has it been regarded as the supreme law of the land in States where slavery controlled legislation, presided in the courts, directed the Executives, and commanded the mob?" To answer this question Wilson turned to first amendment rights which he clearly considered among the privileges and immunities of citizens.⁷⁴

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.⁷⁵

71. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 62 (1949).

72. Crosskey, *supra* note 3, at 83.

73. See Berger, *supra* note 1, at 453-56, 445.

74. Curtis, *supra* note 2, at 61-62.

75. *Id.* at 61 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864)).

Denial of rights of free speech and press, Wilson said, proved slavery's disregard for the privileges and immunities of citizens in the several states.⁷⁶

How did Mr. Berger deal with this evidence?

Curtis also summons an 1859 [sic] James Wilson utterance condemning Southern denials of free speech and press. But these were conspicuously absent from his summation in 1866 of *the goals of the Civil Rights Bill*: "I understand civil rights to be simply the absolute rights of individuals—such as the right of personal security, *the right of personal liberty*, and the right to acquire and enjoy property!"⁷⁷

Wilson had based power to pass the Civil Rights Bill in part on the article IV, section 2 privileges and immunities clause, which he said meant the citizen had the "right of protection by the Government, *the enjoyment of life and liberty*. . . ."⁷⁸ Unless one makes further assumptions not supported by the evidence, Wilson's remarks in 1864 and 1866 are consistent.

To understand the problem with Mr. Berger's handling of Wilson's 1866 remarks about enforcing the Bill of Rights, one must remember the context. The Thirty-ninth Congress wanted to protect rights of blacks and unionists primarily in the South. There was a question about constitutional power. Early in the session Bingham recognized that some of his colleagues took the position that Congress could by legislation enforce all the guarantees of the Constitution, but Bingham denied that this was so.⁷⁹ Several congressmen specifically argued that Congress could enforce rights in the Bill of Rights.⁸⁰

There was an anti-slavery legal tradition justifying this approach. The anti-slavery argument had been that allegiance to and protection by the government are reciprocal, and that the federal government could protect the citizen against the states in all his rights in the Bill of Rights.⁸¹ The case of *Prigg v. Pennsylvania*,⁸² which provided for federal enforcement of the fugitive slave law, was cited as a precedent for this proposition—that the possession of rights in the Bill of Rights implies a remedy.⁸³ So in 1866 several congressmen found legislative power to pass the Civil Rights Bill in the due process clause of the fifth amendment. Among these was James Wilson.

Wilson insisted that "citizens of the United States as such" were entitled to certain rights which could be protected by the federal government.⁸⁴ He denied that states could—as they had in the past—deprive American citizens of life, liberty, or property without due process of law. Wilson then responded to Bingham's claim that Congress lacked power to pass the bill:

76. *Id.* at 62.

77. Berger, *supra* note 1, at 444-45 (emphasis added).

78. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

79. *Id.* at 429.

80. *See, e.g., id.* at 1294 (Wilson), 1270, 1833 (Thayer), 1075 (Nye).

81. J. TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 55-58, 97, 99, 117 (1849).

82. 41 U.S. (16 Pet.) 539 (1842).

83. J. TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 99-100 (1849).

84. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

He says that we cannot interpose in this way for the protection of rights. Can we not? What are the great civil rights to which the first section of the bill refers? 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." 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 relates, having nothing to do with subjects submitted to the control of the several States.

And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights.⁸⁵

Wilson then discussed *Prigg v. Pennsylvania* to show that the existence of a right in the Constitution implies a remedy deposited in the Government of the United States. He then 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. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.

The citizen is entitled to the right of life, liberty, and property. Now, if a State intervenes and deprives him, without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions? When such a case is presented can we not provide a remedy? Who will doubt it? Must we wait for the perpetration of the wrong before acting? Who will affirm this? The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not at all. They must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government.⁸⁶

Berger's reading of Wilson's remarks is that the "fundamental rights embraced in the bill of rights" refer only to the "right to life, liberty, and property" and that these broad rights are limited to the rights in the Civil Rights Bill read narrowly.⁸⁷ Why Wilson would have considered the right to due process as

85. *Id.*

86. *Id.*

87. Berger, *supra* note 1, at 453-54. Mr. Berger relies on statements by Congressman Thayer to prove that he did not understand the amendment to incorporate the principles of the Bill of Rights. *Id.* at 455-56. The context of Thayer's remarks is important. Opponents of the Civil Rights bill read the bill as conferring suffrage and all rights a person would have as a citizen of a state. *See, e.g.*, text accompanying note 163 *infra*. Supporters denied that this construction was correct. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Wilson). Thayer said that the bill declared that "all men born on the soil of the United States shall enjoy the fundamental rights of citizenship," which were "stated in the bill." *Id.* at 1151. These included "full and equal benefit of all laws as proceedings for the security of person and property" as enjoyed by white citizens. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866). Compare this position with Berger, *supra* note 1, at 455-56.

In considering the fourteenth amendment, Thayer said that it simply brought into the Constitution "what is found in the Bill of Rights of every state of the Union." It was

but incorporating in the Constitution the principle of the civil rights bill which has lately become 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.

CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866). Mr. Berger concludes from these two passages that Thayer

enforceable by the federal government, but not other rights found in the Bill of Rights such as freedom of speech or protection from cruel and unusual punishment, Mr. Berger does not explain.

At times Mr. Berger explains remarks of congressmen so that they fit his thesis. Representative Woodbridge, a Vermont "radical," is quoted as saying of Bingham's prototype, "It is intended to enable Congress by its enactments when necessary to give a citizen of the United States . . . those privileges and immunities which are guaranteed to him under the Constitution [article IV]. . . ."⁸⁸ The bracket, of course, is Mr. Berger's interpretation of the speaker's meaning. To disprove incorporation, however, one also has to assume a conventional reading of article IV.

A natural reading of Woodbridge's statement, particularly in light of unorthodox Republican ideas, would be this: "It is intended to enable Congress by its enactments when necessary to give a citizen of the United States in whatever State he may be those privileges and immunities [rights] which are guaranteed to him under the Constitution [*e.g.*, the privilege of the writ of habeas corpus, the rights specified in the Bill of Rights, and other privileges of the citizen set out in the Constitution]. . . ." This, of course, is how Bingham and Wilson read article IV, section 2.

Mr. Berger seeks to use an 1871 speech by Trumbull to prove that the fourteenth amendment privileges or immunities clause was equivalent to that of article IV (conventionally understood) and that the fourteenth amendment consequently did not include rights in the Bill of Rights:

[I]n 1871 Trumbull explained that the "privileges or immunities" clause is "a repetition of a provision [article IV] as it before existed The protection which the Government affords to American citizens under the Constitution as it was originally formed is *precisely* the protection it affords to American citizens under the Constitution as it now exists. The fourteenth amendment *has not extended the rights and privileges of citizens one iota.*" . . . As the draftsman of the antecedent "civil rights and immunities" in the Civil Rights Bill and chairman of the Senate Judiciary Committee who explained its meaning in unequivocal terms, Trumbull's views carry great weight. . . .⁸⁹

believed that the fourteenth amendment merely incorporated the Civil Rights Bill (read narrowly). Berger, *supra* note 1, at 455-56. It is important to recall of course that the *Dred Scott* decision had stripped blacks of the protection of the rights in the Bill of Rights.

To me it seems that Thayer's remarks on the Civil Rights Bill cannot be read as limiting all rights of citizens to the rights to contract, to inherit, to testify, and to equal protection by *state* civil and criminal law. In the same speech on the Civil Rights Bill referred to by Mr. Berger, Thayer says that sufficient power to pass the Civil Rights Bill can be found in "that clause in the Constitution which guarantees to all citizens of the United States their right to life, liberty, and property." CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866). So for Thayer, either the due process clause was somehow embodied in the Civil Rights Bill or he believed that there were some fundamental rights of citizens of the United States that limited the states but were not included in the bill. In the same speech Thayer also said:

If, then, the freedmen are now citizens, or if we have power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens. They are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property. . . .

Id. In addition to these facts, we must remember that Congress itself had already read "full and equal benefit of all laws and proceedings for the security of person and (estate)" to be sufficiently broad to include the "constitutional right" to bear arms. See text accompanying note 124 *infra*.

88. Berger, *supra* note 1, at 454.

89. *Id.* at 455-56 (emphasis in original).

In the same speech Trumbull explained that the states were the depositories of the rights of the individual against encroachment.⁹⁰

In *Government by Judiciary*, Mr. Berger considers Trumbull's 1871 remarks, notes that the Supreme Court attaches little weight to post-enactment remarks, and concludes that remarks such as Trumbull's should be treated with "special reserve," particularly "[w]hen they contradict representations made by the speaker during the enactment process. . . ."⁹¹ Mr. Berger concludes that Trumbull's remarks were a "half truth," because Trumbull had adapted article IV to protect residents in the same way a migrant would be protected. Trumbull's remarks, Berger tells us, were "a repudiation of his own explanation to the framers, his enumeration of specific rights in the Bill that were to belong to 'citizens of the United States.'"⁹² Since Trumbull's 1871 speech relied on so heavily by Mr. Berger was, by Mr. Berger's own prior analysis (though an analysis for different purposes), entitled to little weight, was a repudiation of Trumbull's prior statements, and was a half truth, it seems to me it offers little or no support to Mr. Berger on the Bill of Rights question.⁹³

Mr. Berger also relies on a speech by Trumbull in the Thirty-ninth Congress in which he said that the "great fundamental rights, *which are set forth in the Civil Rights Bill*," are "the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."⁹⁴ Mr. Berger uses this quotation to prove there was no room left in the *privileges and immunities clause of the fourteenth amendment* for Bill of Rights liberties.⁹⁵

At other times during the Thirty-ninth Congress Trumbull gave other descriptions of rights in the Civil Rights Bill, and included in them the right to "enjoy liberty and happiness. . . ."⁹⁶ Being a citizen, 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"⁹⁷ Another time, speaking of congressional power under the thirteenth amendment, he described laws that prohibit men from speaking or preaching as being laws inconsistent with the status of a free person.⁹⁸ Describing the effect of the Civil Rights Bill, Trumbull said that "[e]ach State, so that it does not abridge the great fundamental rights belonging under the Constitution, to all citizens, may grant or withhold such rights as it pleases. . . ."⁹⁹ Clearly, in 1866 Trumbull had in mind some absolute rights seen as belonging to citizens under the Constitution.

90. CONG. GLOBE, 42 Cong., 1st Sess. 577 (1871).

91. GOVERNMENT BY JUDICIARY, *supra* note 12, at 49-50.

92. *Id.* at 51.

93. *Id.* at 49-51.

94. Berger, *supra* note 1, at 440, 442.

95. *Id.* at 442.

96. CONG. GLOBE, 39 Cong., 1st Sess. 599 (1866).

97. *Id.* at 1757.

98. *Id.* at 475.

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

In further support of his thesis that the fourteenth amendment privileges or immunities clause was equivalent to particular rights listed in the Civil Rights Bill (read narrowly) and to a conventional (or more conventional) reading of article IV, Mr. Berger announces:

Senator Fessenden, who was the Chairman of the Joint Committee, declared that "[t]he real and *only object*" of section 1 "is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to *its provisions*." And he added, the "privileges or immunities" clause "is unnecessary, because that matter is provided for in article four. . . . This provision comprehends the *same principle*. . . ." ¹⁰⁰

Coming, so Berger tells us, from the Chairman of Joint Committee, this is strong stuff. There are, however, several things to be noted.

Since we don't know how the speaker read article IV, we cannot be sure how he interpreted the privileges or immunities clause of the fourteenth amendment. Some very influential Republican congressmen, we know, read article IV to make all constitutional rights of citizens, including rights in the Bill of Rights, binding on the states.¹⁰¹ Berger fails to notice the remaining portion of the quotation in which the speaker says that the object of the provision is to press blacks forward to full equality of civil and political rights.¹⁰² Berger also fails to note that the speaker whom he quotes as describing the "'real and only' object of section 1" was *not discussing section 1* but was discussing the citizenship clause. What the speaker really said was this:

The real and only object of the first provision of this section, *which the Senate has added to it*, is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle.¹⁰³

The citizenship clause was, of course, added by the Senate, as the first sentence of section 1.¹⁰⁴ In the next paragraph the speaker discusses "the next provision of this section," which he expressly identifies as the privileges or immunities clause.¹⁰⁵

All this aside, there is a compelling reason why this quotation does not answer Mr. Berger's purposes. It was not uttered by Senator Fessenden, Chairman of the Joint Committee, but by Senator Garrett Davis, Democrat of Kentucky.¹⁰⁶ Senator Davis' speech, from first to last, was an attack on the Republican majority and the fourteenth amendment. As Mr. Berger has reminded us, we must look to the "'explanations of those who advocated, not those who opposed'" a constitutional provision.¹⁰⁷

100. Berger, *supra* note 1, at 457 (footnote omitted) (emphasis in original).

101. See text accompanying notes 51-55 *supra*.

102. See CONG. GLOBE, 39th Cong., 1st Sess. S. App. 240 (1866).

103. *Id.*

104. *Id.* at 3040, 3042.

105. *Id.* at S. App. 240. The speaker argued that the provision "is unnecessary, because that matter is provided for in article four, section two, of the Constitution. . . ." *Id.*

106. *Id.*

107. CONG. GLOBE, 39th Cong., 1st Sess. S. App. 240 (1866).

On the question of the connection between the fourteenth amendment and the Civil Rights Bill, I found only one statement by Senator Fessenden. This is the context: Senator Doolittle, an opponent of the amendment, had suggested that Bingham had supported the amendment as necessary to cure a lack of congressional power to pass the Civil Rights Bill.¹⁰⁸ (Many supporters said that the bill removed any question on that score, as it clearly did. Such remarks obviously do not disprove incorporation of the Bill of Rights.) Fessenden had this to say:

I will say to the Senator one thing: whatever may have been Mr. Bingham's motives in bringing it forward, he brought it forward some time before the civil rights bill was considered at all and had it referred to the committee, and it was discussed in the committee long before the civil rights bill was passed. Then I will say to him further, that during all the discussion in committee that I heard nothing was ever said about the civil rights bill in connection with that. It was placed on entirely different grounds.¹⁰⁹

Berger suggests that the Civil Rights Bill and the fourteenth amendment were identical.¹¹⁰ Thaddeus Stevens, manager of the fourteenth amendment in the House, denied that the amendment and the Civil Rights Bill were identical. That was, as he said, only "partly true."¹¹¹

Among the statements cited by Mr. Berger to support his identification of the Civil Rights Bill with the fourteenth amendment are statements by Representative Latham,¹¹² who voted for the fourteenth amendment,¹¹³ and Senator Doolittle,¹¹⁴ who voted against it.¹¹⁵ Most of the statements relied on by Mr. Berger do not indicate that the measures were completely identical. Many indicated that the amendment clearly gave Congress power to pass the bill and that the principles of the Bill were protected by the amendment.¹¹⁶ And, of course, both statements are clearly true. It is clear that the amendment incorporated the principles of the bill. What is not clear is that the Bill, if read as narrowly as Mr. Berger reads it, encompassed the entire amendment.

Some supporters of the Civil Rights Bill had argued that its enactment could be justified because Congress had power to enforce the Bill of Rights, specifically the fifth amendment.¹¹⁷ Bingham had insisted that an amendment allowing enforcement would be required.¹¹⁸ Bingham got his amendment, and

108. CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

109. *Id.*

110. *See Berger, supra* note 1, at 458.

111. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

112. *Berger, supra* note 1, at 440.

113. CONG. GLOBE, 39th Cong., 1st Sess. 2545.

114. GOVERNMENT BY JUDICIARY, *supra* note 12, at 149.

115. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

116. *Berger, supra* note 1, at 457-58. For example, Mr. Berger quotes Garfield as saying that "the amendment proposed to put the Civil Rights Bill 'beyond the reach of the plots and machinations of any party.'" *Id.* at 457.

117. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Wilson), 1163, 1270 (Thayer), 1833 (Lawrence) (1866). *Cf. id.* at 1075 (Nye) (discussing Congress' power to enforce the Bill of Rights).

118. *Id.* at 429.

there is no doubt that Congress got the power to pass the Civil Rights Bill, if, as Bingham believed (probably correctly) it did not already have it.

Some speakers did treat the amendment as a reiteration of the Civil Rights Bill.¹¹⁹ Like Mr. Berger, I initially considered such statements inconsistent with incorporation of the Bill of Rights. I no longer believe there is any *necessary* inconsistency.

Both the amendment and the Bill made all persons born and naturalized in the United States citizens of the United States. Earlier in the session several congressmen noted that making blacks citizens would solve the entire problem since they would have all rights of citizens of the United States.¹²⁰ For most Republicans who spoke on the subject, rights in the Bill of Rights (protected from invasion by the states as well as by the federal government) were rights of citizens in the United States.¹²¹ For example, Representative Thayer argued that the due process clause provided the constitutional power necessary to pass the Civil Rights Bill:

If, then, the freedmen are now citizens, or if we have the power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens.

They are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property. . . .¹²²

Among the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right to freedom of speech, the right to due process of law, and the right to bear arms.¹²³

In addition, the Civil Rights Bill gave all United States citizens "full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens. . . ." Rights in the Bill of Rights could be, and have been, read as provisions for security of person and property. The Freedman's Bureau Bill, passed by Republicans in the Thirty-ninth Congress, provided that blacks should be protected in, among other things, "the full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms."¹²⁴

It is obvious that there is, at the very least, considerable overlap between the provisions of the fourteenth amendment and those of the Civil Rights Bill. Both made all persons born and naturalized in the United States and subject

119. *See, e.g., id.* at 2883 (Latham).

120. *See, e.g., id.* at 1266 (Raymond), 1153 (Thayer).

121. *See, e.g., id.* at 340 (Cowan), 1183 (Garfield), 1263 (Broomall), 1629 (Hart), 1838 (Clarke), 1072 (Nye). *See also* Curtis, *supra* note 2, at 58-64.

122. CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866).

123. *See* authorities cited in note 121 *supra*.

124. CONG. GLOBE, 39th Cong., 1st Sess. 654, 743, 1292 (1866). Joel Tiffany described the rights in the Bill of Rights as "guarantys" for "personal security, personal liberty, and private property." J. TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY 99 (1849). Chief Justice Taney described first, second, and fifth amendment rights as guarding the rights of person and property of the citizen. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856). In *Boyd v. United States*, 116 U.S. 616, 635 (1886), Justice Bradley described the fourth and fifth amendments of the Bill of Rights as "constitutional provisions for security of person and property."

to its jurisdiction citizens, and both required equal protection, although the dimensions of the equal protection required by each are probably different. Finally, the fourteenth amendment clearly gave Congress the power to pass bills such as the Civil Rights Bill.

Suppose, as Berger argues, the amendment and the bill were *identical*.¹²⁵ If they were, it follows that the Civil Rights Bill contained a federal standard of due process. If a federal standard of due process was contained in the language of the Civil Rights Bill, it might be contained in several ways. First, since the bill made all persons born in the United States citizens, they would have all the rights of citizens, rights that most Republicans who spoke on the subject believed included the protection of Bill of Rights liberties against infringement by the states.¹²⁶ One such right would have been the fifth amendment's guarantee of due process. The Court in *Dred Scott v. Sandford*,¹²⁷ of course, had held that blacks were not citizens of the United States and consequently had deprived them of the protection of the rights in the Bill of Rights as well as other basic rights.¹²⁸

Second, the due process clause—and other provisions of the Bill of Rights—could also be comprehended in the phrase “full and equal benefit of all laws and provisions for security of person and property, as is enjoyed by white citizens.”¹²⁹

The inescapable implication of the assertion that the Civil Rights Bill and section one of the fourteenth amendment were *identical* is that at least some rights in the Bill of Rights applied to the states prior to the passage of the fourteenth amendment. In short, that some Republicans considered the amendment *identical* to the Civil Rights Bill provides no proof that incorporation of the Bill of Rights was not intended by the framers.

IV. REPUBLICAN IDEAS

The Republican party was a coalition whose members shared opposition to slavery. Some of its members were radicals, some moderates. By 1866 there was a Republican consensus that blacks were citizens,¹³⁰ should receive the same basic protection of civil and criminal laws that whites received, and should have all the rights of citizens of the United States.¹³¹ There was no consensus on questions like integrated education or suffrage.

In my article I attempted to show that there were areas of agreement between Republican radicals and moderates on some unorthodox legal ideas.

125. Berger, *supra* note 1, at 458.

126. See note 121 *supra*.

127. 60 U.S. (19 How.) 393 (1857).

128. *Id.* at 404-09.

129. See note 124 *supra*.

130. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1115 (Wilson), 1832 (Lawrence), 1756 (Trumbull) (1866).

131. *Id.* at 1153 (Thayer), 602 (Lane). Among these constitutional rights the Congress included the right to bear arms. See text accompanying note 124 *supra*.

This fact is really beyond dispute. Republican acceptance of ideas such as the anti-slavery effect of the due process clause in federal territories, black citizenship, and applicability of the Bill of Rights to the states does not prove that the men who adopted them were radical or favored school integration or black suffrage. So Berger's citation of Senator Sherman's remark that every radical idea in the fourteenth amendment was defeated,¹³² proves nothing about incorporation of the Bill of Rights unless incorporation was, at the time, a radical idea for Republicans. If the idea that the Bill of Rights did or should limit the states was a radical idea, we should expect it to be held by radicals and rejected by moderates.

James F. Wilson of Iowa, Chairman of the Judiciary Committee in the House, was, as Berger admits, no radical. But Wilson accepted the idea that the Bill of Rights limited the states and that Congress could legislate directly to protect rights in the Bill of Rights.¹³³ Bingham himself, contrary to Berger's assumption, was not a radical within the context of the issues of 1866. Indeed, Eric McKittrick has described him as one of the most conservative Republicans in the House.¹³⁴ But Bingham accepted and built on anti-slavery legal thought and believed the Bill of Rights should limit the states.

The fact of the matter is that Mr. Berger has not produced a statement by a single Republican congressman from the Thirty-ninth Congress to show that application of the Bill of Rights to the states was regarded as a radical idea or that there was even dissension on the issue. Most Republicans seem to have thought the states were already required to obey the Bill of Rights under a proper construction of the law.¹³⁵ The laments of Republican congressmen in the Thirty-ninth Congress on the subject of suffrage, failure to end all distinctions, and similar statements relied on by Mr. Berger¹³⁶ prove nothing on the Bill of Rights issue. In striking contrast to complaints that blacks had not been given the vote, which the Republicans made to the end of the debates, no one complained that the states would be allowed to continue to violate the Bill of Rights.

The area of disagreement in debate on Bingham's prototype was not on whether the states should obey the Bill of Rights. It was on the subject of whether Congress should be able to legislate directly to provide equal protection on all subjects included in the broad terms "life, liberty and property." Many congressmen feared that such legislative power would allow Congress to legislate on subjects like marriage, property, and definition of crimes—subjects which have traditionally been left to the states.¹³⁷ In short, disagree-

132. Berger, *supra* note 1, at 443 n.69. Of course, the idea that states should obey the Bill of Rights is an essentially conservative idea that is in accordance with the theory of the Declaration of Independence that governments are instituted to protect the rights of citizens.

133. See text accompanying notes 74-76 and 79-86 *supra*.

134. E. MCKITTRICK, ANDREW JOHNSON AND RECONSTRUCTION 257 (1960). For Berger's mistaken portrayal of Bingham as a radical, see, e.g., Berger, *supra* note 1, at 454.

135. See note 121 *supra*.

136. Berger, *supra* note 1, at 448.

137. See Curtis, *supra* note 2, at 69-75.

ment on Bingham's prototype revolved around congressional power to protect "life, liberty and property" from individual as well as state action.

V. JOHN A. BINGHAM AND JACOB HOWARD

Mr. Berger takes offense at my suggestion that he considered Bingham a legal moron.¹³⁸ Still, he describes Bingham as "muddled,"¹³⁹ "inept,"¹⁴⁰ as "veer(ing) as crazily as a rudderless ship,"¹⁴¹ and as unable "to understand what he read."¹⁴²

To discredit his evidence of Bingham's contradictions, according to Mr. Berger, I cited evidence from contemporaries that Bingham's reputation as a lawyer was excellent.¹⁴³ "A lawyer who is forced to invoke evidence of good reputation," Mr. Berger tells us, "confesses that his defense on the merits is inadequate."¹⁴⁴ Mr. Berger misunderstood my purpose. I cited the high esteem in which Bingham was held by his contemporaries not to answer Mr. Berger's claims as to Bingham's "contradictions," but to respond to his attack on Bingham's reputation. Surely a response to such tactics is legitimate. By his attack on Bingham's reputation in *Government by Judiciary*, has Mr. Berger "confessed that his [case] on the merits is inadequate"? Probably so. It is significant that Mr. Berger launches *ad hominem* attacks against both Bingham and Howard.

I attempted to deal with Bingham's alleged "contradictions," not by citing evidence of reputation, but by examining Mr. Berger's editing.¹⁴⁵ Such an examination is once again required. To say this is not, however, to challenge Mr. Berger's sincerity. That I do not doubt. What I challenge is his analysis.

Mr. Berger tells us that Bingham translated the provisions of "article IV that 'the citizens of *each state* shall be entitled to all privileges and immunities of citizens in the several States' as 'the provisions *in the bill of rights* that citizens of *the United States* shall be entitled to all privileges and immunities of citizens of the United States. . . .'"¹⁴⁶ Mr. Berger then comments, "The Bill of Rights contains no privileges and immunities provision."¹⁴⁷ Bingham never said it did. The passage indicates, it seems to me, Mr. Berger's strained and bizzare reading of what Bingham said. The quotation cited by Mr. Berger is an edited version of the following statement by Bingham:

138. See Berger, *supra* note 1, at 449.

139. GOVERNMENT BY JUDICIARY, *supra* note 12, at 145.

140. *Id.* at 219.

141. Berger, *supra* note 1, at 450.

142. *Id.*

143. *Id.* at 452.

144. *Id.*

145. See Curtis, *supra* note 2, at 88-90.

146. Berger, *supra* note 1, at 450.

147. *Id.*

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several states,¹⁴⁸ and that no person shall be deprived of life, liberty or property without due process of law.¹⁴⁹

Here Bingham is supporting his contention that the amendment is in accordance with the Constitution. He seems to be listing three items in a series. He wants to enforce the Bill of Rights and equal protection. Why not, he says. We have the provisions of the Bill of Rights, the provisions of article IV, and the due process clause.

The second item in the series seems clearly to be Bingham's summary, not of the Bill of Rights, but of the privileges and immunities clause. Bingham interpreted section two of article IV as meaning that "[t]he 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."¹⁵⁰

Mr. Berger seems to object to Bingham's understanding of article IV. He suggests that Bingham's phrase "citizens of the United States shall be entitled to all privileges and immunities of citizens of the United States" shows that Bingham confused "the rights of citizens of a state with those of the United States." Bingham, Mr. Berger seems to suggest, read article IV to protect rights of citizens of the United States, not rights of a citizen of a state.¹⁵¹

The privileges or immunities clause of the fourteenth amendment, which Mr. Berger equates with article IV, of course did exactly that: "No state shall . . . abridge the privileges or immunities of citizens of the United States." As written, the fourteenth amendment was essentially equivalent to Bingham's reading of article IV, a reading that protected the *rights* of citizens of the United States, as Mr. Berger notes.¹⁵² The *privileges and immunities clause of the fourteenth amendment* was changed from Bingham's prototype, which gave Congress power to "secure to the citizens of each state all privileges and immunities of citizens in the several states," to provide, in the final draft of the fourteenth amendment, that "[n]o state shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States.*"

To understand Bingham's views it is important to remember that in 1866 he did not agree that *Barron v. Baltimore*¹⁵³ had been correctly decided, that he personally believed the states were required to obey the Bill of Rights by the oath state officers took to support the Constitution, and that he thought

148. As Bingham understood article IV, § 2, it meant that "[t]he citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all privileges and immunities (supplying the ellipsis "of the United States") in the several States." CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866). See note 68 *supra*.

149. *Id.* at 1089.

150. *Id.* at 158. See note 68 *supra*.

151. Berger, *supra* note 1, at 450.

152. *Id.*

153. 32 U.S. (7 Pet.) 243 (1833).

there was, in any case, no way to enforce the obligation of this oath.¹⁵⁴ Mr. Berger finds Bingham's position on this subject contradictory. There is no doubt that by taking a few of Bingham's remarks out of their context and by ignoring Bingham's distinctions between his own view of the law and that of the Supreme Court,¹⁵⁵ one can interpret Bingham's views on this subject as being contradictory.

The dangers of selective quotation (which haunt us all) are clear in Berger's quotations of Bingham's views. He quotes Bingham as saying, for example, that "'the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the power of the States. . . .'"¹⁵⁶ The quotation is telling because it appears to be an endorsement of the Court's views by the "rudderless ship." Actually Bingham was complaining about the failure to include aliens in the Civil Rights Bill. Here is what Bingham actually said: "If the Bill of Rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of the States and prohibit such gross injustice by States, it does limit the power of Congress and prohibit any such legislation by Congress."¹⁵⁷ In the accurate quotation Bingham's skepticism about the correctness of *Barron v. Baltimore* is clear. In the edited version employed by Berger it is eliminated. In another quotation, a slightly corrected version of one I complained about in my *Wake Forest* article, Mr. Berger quotes Bingham as saying:

The care of the property, the liberty, and the life of the citizen . . . is in the States and not in the federal government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with power to . . . punish all violation by state officers of the bill of rights.¹⁵⁸

"If the care of these rights," Berger asks, "'is in the states,' how do state officers violate the Bill of Rights. . . ."¹⁵⁹ We must remember that Bingham believed that state officers were required to obey the Bill of Rights by their oath to support the Constitution, the decision of the Supreme Court in *Barron v. Baltimore* notwithstanding. At any rate, this is what Bingham actually said:

[T]he care of the property, the liberty, and the life of the citizen, *under the solemn sanction of an oath imposed by your Federal Constitution*, is in the States and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. 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*.¹⁶⁰

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

155. *Id.* at 429.

156. Berger, *supra* note 1, at 451 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (Bingham)).

157. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

158. Berger, *supra* note 1, at 451.

159. *Id.* For my prior criticism, see Curtis, *supra* note 2, at 89-90.

160. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (emphasis added).

To me Mr. Berger's omissions seem to produce a decidedly misleading effect. They leave out Bingham's qualification, which was, essentially, that the care of the property, life and liberty of the citizen, *subject to constitutional limitations*, is in the states. Mr. Berger believes these omissions are utterly insignificant.¹⁶¹ On this question the reader can compare the two passages and come to his or her own conclusion.

Mr. Berger seems to tax Bingham with inconsistency because he objected to the provision in the Civil Rights Bill that "there shall be no discrimination in civil rights or immunities" but inserted in the fourteenth amendment protection for "privileges or immunities of citizens of the United States."¹⁶² As Bingham read the privileges and immunities clause, it was limited to those rights of American citizens provided for by the Constitution. Such constitutional rights, he thought, needed to be protected by constitutional amendment. Civil rights and immunities, for Bingham, included all rights under state law as well and might affect schools, suffrage, as well as other subjects.¹⁶³

Throughout, Mr. Berger assumes a necessary correlation of a congressman's views on the Bill of Rights as a limit on the states and his views on such issues as suffrage for blacks and integration. The debates show that there was no necessary correlation. He also assumes that a man who had accepted any abolitionist ideas—for example, protection of the rights in the Bill of Rights and black citizenship—must accept all.¹⁶⁴ The fallacy of such a position is obvious. For example, abolitionists favored jury trials for alleged fugitive slaves, and many Northern states provided them.¹⁶⁵ This does not prove, however, that the Northern legislators were abolitionists. Berger's elaborate citations to prove the Thirty-ninth Congress did not abolish all forms of racial discrimination are simply beside the point.¹⁶⁶

Bingham's 1871 statement that the privileges or immunities in the fourteenth amendment are chiefly those in the first eight amendments of the Constitution is treated by Berger as "Curtis' Bombshell."¹⁶⁷ The speech is significant simply because it corroborates what Bingham said in 1866. It is no more of a bombshell, however, than statements made by Bingham in Congress in 1866 or in an 1866 campaign speech in which he suggested that the fourteenth amendment was essential to prevent states from denying freedom of speech,¹⁶⁸ a view shared by other Republicans during the campaign of

161. See Berger, *supra* note 1, at 463. I do not charge that Berger "'edited' and omitted in order to make a case." *Id.* However, I believe that his omissions occurred based on a mistaken assumption that the omitted portion was insignificant, a mistake that assisted his case.

162. *Id.* at 451.

163. Compare CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (Bingham) with *id.* at 1294 (Wilson).

164. See, e.g., Berger, *supra* note 1, at 445-49.

165. See T. MORRIS, FREE MEN ALL 71-93 (1974).

166. See Berger, *supra* note 1, at 445-49.

167. *Id.* at 461.

168. The Cincinnati Commercial, Aug. 27, 1866, at 1, cols. 2-3. See Curtis, *supra* note 2, at 83-84 and notes 302-06.

1866.¹⁶⁹ Such statements are, of course, flatly inconsistent with Mr. Berger's thesis that none of the rights in the Bill of Rights was incorporated by the fourteenth amendment except for the due process clause, a clause that Berger denies had any substantive content.¹⁷⁰

I do think my treatment of the evidence of the intent of the framers contained a "bombshell": the speech of Jacob Howard, manager of the fourteenth amendment in the Senate. However, Howard's speech was a "bombshell" only because of the way Mr. Berger had presented it in his book. After alerting the reader that Howard was a reckless radical¹⁷¹ (a characterization taken from an historian of the extreme pro-Southern school), Mr. Berger had this to say: "After reading the privileges and immunities listed in *Corfield v. Coryell*, [Howard] said, 'to these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments.' . . . No one . . . rose to challenge Howard's remark, casually tucked away in a long speech."¹⁷² Howard's discussion of the privileges or immunities clause and the Bill of Rights covered one full page in small print in my article.¹⁷³ In his speech Howard listed the rights of the Bill of Rights, pointed out that the courts had held that they did not operate as a restraint or prohibition on state legislation, summarized the holding in *Barron v. Baltimore*, and said that "the great object of the first section of this amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees."¹⁷⁴ Howard's statement on the Bill of Rights comprises about half of his entire discussion of the privileges or immunities clause of the fourteenth amendment and about one-ninth of his "long" speech. In short, Mr. Berger's treatment of it as a "remark casually tucked away in a long speech" was seriously mistaken.

To further denigrate Howard's speech, Mr. Berger cited Senator Poland as saying that the privileges or immunities provision of the fourteenth amendment secured nothing beyond what was intended by article IV.¹⁷⁵ Poland also said that article IV had become a dead letter because of the doctrine of states' rights, "induced mainly, as I believe, for the protection of the peculiar system of the South," a portion of his speech not discussed by Mr. Berger.¹⁷⁶ Since Mr. Berger believes that the privileges or immunities

169. See, e.g., Crosskey, *supra* note 3, at 104-11.

170. Berger, *supra* note 1, at 438. In my *Wake Forest* article I assumed that use of substantive due process as a tool to protect the Bill of Rights liberties was a mistake. Curtis, *supra* note 2, at 49. On further study and thought I think I may have been mistaken. Berger says that "due process applied only to judicial proceedings, never to action by a legislature. . . ." Berger, *supra* note 1, at 438. However, both the opinion of the Chief Justice in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857), and the Republican party platforms of 1856 and 1860 read the clause as a limit on the legislature. NATIONAL PARTY PLATFORMS 1840-1956, at 27 (K. Porter & D. Johnson eds. 1956), quoted in Curtis, *supra* note 2, at 56-57.

171. GOVERNMENT BY JUDICIARY, *supra* note 12, at 147.

172. *Id.* at 148 (emphasis added).

173. See Curtis, *supra* note 2, at 94-95.

174. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

175. GOVERNMENT BY JUDICIARY, *supra* note 12, at 148-49.

176. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866); Curtis, *supra* note 2, at 88.

clause of the fourteenth amendment went beyond the conventional judicial interpretation of article IV, either Poland gave the clause an unorthodox reading or, if Mr. Berger's book is correct, his remarks did not reflect the intent of the framers. Once it is conceded that an unorthodox interpretation of article IV was held by Republicans, the question that remains is what *exactly* Poland thought the clause meant. On this subject Mr. Berger provides us no guidance.

To discredit Howard's speech Mr. Berger also cited Senator Doolittle:

Senator Doolittle stated that the Civil Rights Bill "was the forerunner of this constitutional amendment, and to give vitality to which this constitutional amendment is brought forward." Such reminders of known and limited objectives were designed to reassure those whose consent had thus far been won; and they rob Howard's remark of uncontroverted standing.¹⁷⁷

Senator Doolittle, however, was an opponent of the measure.¹⁷⁸ His remarks were obviously not designed to "reassure" supporters. As an opponent his remarks are entitled to little consideration.¹⁷⁹

177. GOVERNMENT BY JUDICIARY, *supra* note 12, at 149.

178. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

179. GOVERNMENT BY JUDICIAL, *supra* note 12, at 157. Berger tells us that "the Joint Committee's rejection of Bingham's proposal to add the fifth amendment phrase 'nor shall private property be taken for public use without just compensation' *alone* is incompatible with incorporation of the Bill of Rights." Berger, *supra* note 1, at 454. Basically the argument seems to be that rejection of the proposal is incompatible with subsequent acceptance.

To understand this argument we need to recall the chronology. On February 3, 1866, the Joint Committee had approved Bingham's prototype of the fourteenth amendment—the one that had given Congress the power to secure privileges and immunities and equal protection in the rights of life, liberty and property. The amendment was postponed by the House on February 28, 1866. See Curtis, *supra* note 2, at 65-66.

On April 21, 1866, the Joint Committee considered a totally new amendment. Section 1 of this amendment prohibited discrimination in civil rights by any state or by the United States on account of race, color, or previous condition of slavery. Its general language failed to take account of and overrule the doctrine of *Barron v. Baltimore* that the Bill of Rights did not limit the states. It also contained no equal protection clause.

Bingham proposed to amend this new proposal by adding "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." Bingham's proposed addition was rejected by a vote of 7 to 5. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83, 85 (1914).

Subsequently Bingham proposed to add a new § 5 to the new amendment. This proposal prohibited states from abridging privileges or immunities of citizens of the United States, due process, or equal protection. This proposal was accepted. *Id.* at 87. After further developments, Bingham's proposal became § 1 of the fourteenth amendment and was reported to Congress.

Suppose the committee had included only one of the narrow guarantees of the Bill of Rights and had provided in § 1 of the proposed amendment only that no state could deny equal protection or take private property for public use without just compensation. And suppose (as was the case in the April 21st proposal) that the amendment had contained no general language which could be read as broad enough to cover other Bill of Rights liberties. Then, no doubt, Mr. Berger would have argued that the proposal was designed to incorporate only one provision from the Bill of Rights and no others. And if, as in the April 21st proposal, the amendment had failed to include any general words that could be read as incorporating Bill of Rights liberties, he would be correct. Basically, Berger's argument, logically developed, tells us that if Bingham's April 21st amendment passed, it would have disproved incorporation; and also tells us that the defeat of the proposal disproves incorporation—an absurd result.

On April 21, 1866, the committee rejected a proposal providing for equal protection and just compensation. It subsequently passed one providing for equal protection, due process, and privileges or immunities. In short, the April 21st rejection proves nothing except that at the time it was submitted the committee found the form of Bingham's proposal deficient. For a later case holding that the due process clause of the fourteenth amendment prohibited taking private property for public use without compensation, see *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897). Several congressmen read the final version of the fourteenth amendment to

Mr. Berger tells us that Bingham's 1871 explanation of the privileges or immunities clause as including the rights in the Bill of Rights "was plainly not shared by his fellows."¹⁸⁰ The 1871 debate was addressed mainly to the question of state action. Controversy about the Bill of Rights was, as several congressmen pointed out, a side issue.¹⁸¹ At any rate, Mr. Berger's conclusion that Bingham's analysis was rejected by his colleagues in the House is unsupported by the record. A number of Bingham's colleagues supported his reading of the privileges or immunities clause of the fourteenth amendment to include rights in the Bill of Rights.¹⁸² Most, like Garfield, who have been read as disagreeing with Bingham, never said that they believed the amendment *did not* make the Bill of Rights a limitation on the states.¹⁸³ Although they did make remarks that can be read as inconsistent with Bingham's position, these remarks are, on balance, not conclusive.

Mr. Berger cites an 1871 Judiciary Committee Report rejecting women's suffrage. The Report suggests that the fourteenth amendment was equivalent to article IV, which the Report explains by reference both to *Corfield's* fundamental rights and by a conventional reading of article IV. It points out that the Bill of Rights had been held inapplicable to the states and says that the fourteenth amendment was designed to prevent the same treatment of article IV.¹⁸⁴ If the report gives article IV a conventional reading, it is inconsistent both with Bingham's prior and subsequent statements and with the contemporaneous view of the framers of the fourteenth amendment.

Mr. Berger describes remarks by congressmen made in 1876 on the Blaine Amendment as the "clincher" in his effort to prove that the framers of the fourteenth amendment did not understand it to incorporate the Bill of Rights.¹⁸⁵ The Blaine Amendment had been proposed as a result of concern with the use of public funds for sectarian schools. Among other things, it prohibited states from establishing religion or interfering with free exercise of religion.¹⁸⁶ Quoting from another scholar, Mr. Berger tells us:

"Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. . . . Remarks of Randolph, Christiancy, Kernan, Whyte,

prohibit taking private property for public use without compensation. See CONG. GLOBE, 41st Cong., 3rd Sess. 1245 (1871) (Lawrence); see also text accompanying note 205 *infra*. When he presented the fourteenth amendment to the Senate, Howard noted that it would correct court decisions that had held "that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction on State legislation. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

180. Berger, *supra* note 1, at 463.

181. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. App. 314 (1871).

182. Crosskey, *supra* note 3, at 89-100.

183. CONG. GLOBE, 42 Cong., 1st Sess. App. 151 (1871) (Garfield).

184. H.R. REP. NO. 22, 41st Cong., 3rd Sess. 1 (1871), reprinted in A. AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 466 (1967). Some statements in the Report are not consistent with the views Bingham expressed in March 1871. See CONG. GLOBE, 42d Cong., 1st Sess. App. 314 (1871).

185. Berger, *supra* note 1, at 464. See also Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 346 (1979).

186. 4 CONG. REC. 175 (1875).

Bogy, Eaton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First."¹⁸⁷

Randolph, Christiancy, Kernan, Whyte, Bogy, and Eaton were Democrats who spoke *ten years* after the fourteenth amendment debates.¹⁸⁸ Four of them opposed the Blaine Amendment,¹⁸⁹ and several of them suggested that it would violate states' rights to require the states to obey the religious guarantees of the first amendment.¹⁹⁰

The claim that the fourteenth amendment was not intended to require the states to obey the guarantees of religious liberty contained in the first amendment is inconsistent with the general views which Congressman Bingham and Senator Howard expressed *at the time* the fourteenth amendment was presented to Congress.¹⁹¹ But, Mr. Berger insists, to "cling" to Bingham's and Howard's remarks is "obstinately to ignore the facts showing that they were not generally shared and were untenable."¹⁹²

The question Mr. Berger addresses is what senators and representatives understood the fourteenth amendment to mean in 1866. Remarks by senators and representatives on the Blaine Amendment debates are significant only if they shed light on this subject—if they prove, as Mr. Berger asserts, that Bingham's and Howard's views were not shared by their colleagues.¹⁹³ In fact, the Bingham-Howard interpretation of the amendment was explicitly accepted by a number of Republicans.¹⁹⁴

In 1871 Bingham had said that the privileges and immunities of citizens of the United States were chiefly set out in the first eight amendments to the Constitution.¹⁹⁵ Representative Hoar also speaking in 1871, believed that the "privileges and immunities"¹⁹⁶ in the fourteenth amendment referred to "all the privileges and immunities declared to belong to the citizen by the Constitution itself" together with "those privileges and immunities which all republican writers of authority agree in declaring fundamental and essential to citizenship."¹⁹⁷

187. Berger, *supra* note 1, at 464 (quoting F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116 (1958)).

188. *E.g.*, 4 CONG. REC. 5581, 5583, 5592 (1876).

189. See 4 CONG. REC. 5595 (1876); Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 943 (1951).

190. See 4 CONG. REC. 5581 (Kernan), 5583 (Whyte), 5592 (Eaton) (1876). See also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 943 (1951).

191. See CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (Howard), 2542 (Bingham), 1034, 1089 (Bingham speaking of the prototype of his amendment) (1866). See also CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871) (Bingham).

192. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 347 (1979).

193. *Id.*

194. See generally Crosskey, *supra* note 3, at 84-100; Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. LEGIS. 1, 8-13, 24-25 (1968).

195. CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871).

196. *Id.* at 334.

197. *Id.*

Representative Dawes described the rights in the Bill of Rights as "privileges and immunities"¹⁹⁸ and, in a reference to the fourteenth amendment, said that "every person born on the soil was made a citizen and clothed with them all."¹⁹⁹

Representative Monroe, another Republican who spoke in 1871, accepted Hoar's analysis of the "meaning of the words 'privileges and immunities'" in the fourteenth amendment.²⁰⁰ And Representative Benjamin Butler seems also to have embraced both Bingham's and Hoar's views.²⁰¹ Several Republicans said that the rights of American citizens protected by the fourteenth amendment included absolute rights to freedom of speech.²⁰² In addition to these men, Mr. Berger himself has described Senator Joseph Fowler and Representative Horace Maynard, both of Tennessee, as adhering to Bingham's views.²⁰³

In 1871 Representative Lawrence of Ohio insisted that the seventh amendment right to trial by jury was one of the rights protected against state interference by the fourteenth amendment. Lawrence relied on the privileges and immunities clause and also on the due process clause. While he knew that "doubts have been entertained on this subject prior to the adoption of the fourteenth amendment," he believed that "since the adoption of the fourteenth article, it may well be maintained that a common-law trial by jury is secured."²⁰⁴

Senator Frelinghuysen believed that "the right that private property shall not be taken without compensation is among those privileges" protected by the privileges or immunities clause of the fourteenth amendment.²⁰⁵ And in 1872 Senator Sherman said that the "right to be tried by an impartial jury is one of the privileges included in the fourteenth amendment; and no State can deprive any one by a State law of this impartial trial by jury."²⁰⁶

Like a number of other Republicans, Sherman thought that the privileges or immunities clause of the fourteenth amendment included rights not explicitly listed in the Constitution. But he clearly recognized that it included rights in the Bill of Rights. "What are those privileges and immunities?" he asked. "Are they *only those defined in the Constitution, the rights secured by the amendments?* Not at all."²⁰⁷ To define the "privileges or immunities" secured by the fourteenth amendment, Senator Sherman suggested that the courts should look

198. *Id.* at 475-76.

199. *Id.* at 476.

200. *Id.* at 370.

201. *Id.* at 448.

202. *See, e.g., id.* at 382 (Hawley), 414 (Roberts).

203. *See* CONG. GLOBE, 41st Cong., 2d Sess. 515 (1870) (Fowler), App. 310 (Maynard) (1871). *See also* Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 346 n.217 (1979).

204. CONG. GLOBE, 41st Cong., 3rd Sess. 1245 (1871).

205. *Id.* at 42d Cong., 1st Sess. 499 (1871).

206. *Id.* at 42d Cong., 2d Sess. 844 (1872).

207. *Id.* at 843.

first at the Constitution of the United States as the primary fountain of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . and so on back to the earliest recorded decisions of the common law.²⁰⁸

Sherman said that he did not distinguish between the words "privileges, immunities, and rights," and cited the ninth amendment in support of his broad construction of fourteenth amendment "privileges or immunities."²⁰⁹

The idea that the privileges or immunities secured by the fourteenth amendment included rights in the Bill of Rights and other rights explicitly provided for by the Constitution was even accepted and advocated by a number of Democrats in the early years after the adoption of the amendment. In 1871 several Democrats accepted the argument that the privileges or immunities clause included the privileges and immunities in the Bill of Rights²¹⁰ or assumed, for the sake of argument, that Bingham's position was correct.²¹¹ All denied that the privileges or immunities clause provided the constitutional power necessary to pass the Ku Klux Act,²¹² which was under consideration.

Although Democrats consistently rejected broad readings of the privileges or immunities clause such as that suggested by Senator Sherman, a number believed that the privileges or immunities referred to in the fourteenth amendment included Bill of Rights liberties. In 1874 Representative Mills noted that the demand for a Bill of Rights followed the federal convention that drafted the Constitution. And he said, "These first amendments and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in Article 4, § 2, of the Constitution and in the fourteenth amendment."²¹³

Mills asked what the rights, privileges, and immunities of citizens of the United States were:

[I]t is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself as the supreme law over all; that they are fundamental, such as lie beneath the very foundation of the Government; that they are fixed and absolute. . . . These privileges are, among others, the right to enjoyment of life, liberty, property, and the pursuit of happiness; the right of peaceable assemblage for all purposes not criminal, freedom of speech, of the press, and of religion; immunity of one's person, house, and papers against unlawful seizure and search; trial by jury when held to answer for crime. . . . [etc.]²¹⁴

208. *Id.* at 844.

209. *Id.*

210. See Crosskey, *supra* note 3, at 98-100; CONG. GLOBE, 42d Cong., 1st Sess. 454 (Cox), 396 (Rice) (1871).

211. CONG. GLOBE, 42d Cong., 1st Sess. App. 314 (1871).

212. Ch. 99, 16 Stat. 433. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 396, App. 314 (1871).

213. 2 CONG. REC. 384 (1874).

214. *Id.* at 384-85.

These privileges were the same in every state and states were "impotent" to abridge them.²¹⁵

Senator Norwood, Democrat of Georgia, also believed that the privileges or immunities of citizens of the United States protected by the fourteenth amendment included all rights in the Bill of Rights, together with other rights provided for by the Constitution. These included the privilege of the writ of habeas corpus; immunity from bill of attainder, ex post facto laws, and from slavery or involuntary servitude except for punishment of crime; and the right not to be deprived of the right to vote on account of race, color, or previous condition of servitude.²¹⁶

Norwood said that the argument that the amendment conferred no new rights was true in one sense, but not in another. "No new rights are enumerated; the amendment simply refers to existing rights, and in this sense no new privileges were conferred. . . ." ²¹⁷ But "while not technically conferring new rights," the fourteenth amendment had "given additional protection to existing rights."²¹⁸ This was so because before the adoption of the fourteenth amendment a state "could have deprived its citizens of any of the privileges and immunities contained in the first eight [amendments]. . . ." ²¹⁹ Before its adoption "any State might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms . . . inflicted unusual and cruel punishment, and so on."²²⁰ But "the instant the fourteenth amendment became a part of the Constitution, every State was from that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution."²²¹ Other Democrats seem also to have accepted the idea that the privileges or immunities secured by the fourteenth amendment included the rights in the Bill of Rights.²²²

By 1876, when most of the debate on the Blaine Amendment took place, the earlier broad support for the Bingham-Howard reading of the fourteenth amendment had evaporated. Democrats insisted that the rights in the first amendment did not limit the states and further insisted that application of the Bill of Rights to the states would violate states' rights.²²³ Some Republicans also said that the religious guarantees of the first amendment did not limit the states.²²⁴ At least during the Blaine Amendment debates themselves, no one

215. *Id.*

216. *Id.* at App. 241.

217. *Id.* at App. 242.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. 2 CONG. REC. 420 (Herndon) (1872). Compare CONG. GLOBE, 42d Cong., 2d Sess. App. 25 (1872) with 2 CONG. REC. 4086 (1874) (Thurman).

223. See text accompanying note 190 *supra*.

224. 4 CONG. REC. 5561 (1876) (Frelinghuysen).

said that the privileges or immunities clause of the fourteenth amendment protected the rights set out in the Bill of Rights.

How can this remarkable transformation be explained? The answer, I believe, lies in two Supreme Court decisions handed down very shortly before most of the debate on the Blaine Amendment took place. In March of 1876 in *United States v. Cruikshank*²²⁵ the Court held that the right of peaceable assembly and the right to bear arms were not privileges secured by the fourteenth amendment. These and other rights in the Bill of Rights were merely limitations on the powers of the national government.²²⁶ All the Justices except one concurred in the Court's opinion.²²⁷ In April of that year in *Walker v. Sauviner*²²⁸ the Court held that the seventh amendment right to trial by jury was not a privilege or immunity of national citizenship protected by the fourteenth amendment and that the right was also not protected by the due process clause. Justices Clifford and Field dissented.²²⁹

Congressmen had been reluctant to accept the idea that the fourteenth amendment privileges or immunities clause had no significant meaning. Even after the constricted reading given to the privileges or immunities clause in the *Slaughter House Cases*, many believed and continued to assert that the clause protected fundamental liberties of American citizens set out in the Bill of Rights.²³⁰ But the decisions in *Cruikshank* and *Walker* were unequivocal.

On the issue of rights of American citizens, the Supreme Court was more royalist than the king, more devoted to a restricted states' rights interpretation of the Constitution than even some Southern Democrats. In the context of the Court's then recent decisions in *Cruikshank* and *Walker*, it is not surprising that the earlier broad belief that the privileges or immunities clause of the fourteenth amendment protected *at least* Bill of Rights liberties was not repeated. Nor is it surprising that some congressmen said that the religious guarantees of the first amendment did not limit the states. That was clearly the law. The true and intended meaning of the fourteenth amendment was, by this time, of only academic interest.

Senator Morton, speaking on the Blaine Amendment, noted the sad fate that had befallen the fourteenth amendment at the hands of the Court:

The fourteenth and fifteenth amendments which we supposed broad, ample, and specific, have, I fear, been very much impaired by construction, and one of them in some respects, almost destroyed by construction. Therefore I would leave as little as possible to construction. I would make [the proposed provisions of the Blaine Amendment] so specific and so strong that they cannot be construed away and destroyed by the Courts.²³¹

225. 92 U.S. 542 (1876).

226. *Id.* at 553-54.

227. *Id.* at 559. Justice Clifford dissented.

228. 92 U.S. 90 (1876).

229. *Id.* at 93.

230. See text accompanying notes 206-25 *supra*.

231. 4 CONG. REC. 5585 (1876).

Finally, Berger points out that Bingham did not use the words "first eight amendments" in 1866.²³² Of course, Bingham did refer repeatedly to "the Bill of Rights." To paraphrase Professor Crosskey, while the phrase "the Bill of Rights" is good enough to let readers of Mr. Berger's law review article know that the author is talking about the first eight amendments to the Constitution, Mr. Berger and other opponents of incorporation have never considered the phrase adequate when Bingham uses it.²³³

In 1871 Bingham did not say that the privileges or immunities clause was equivalent to amendments one through eight. Instead he said privileges and immunities were "chiefly" those contained in amendments one through eight.²³⁴ They would, of course, include other rights of the citizen under the Constitution, including the writ of habeas corpus and other rights of citizens added later. This is because the clause was intended to protect all the rights of citizens of the United States.

While Bingham seems not to have used the words "amendments one through eight" in 1866, he did use other phrases that are sufficiently broad in meaning to include the Bill of Rights. Early in the session Bingham said that the major question for Congress was whether the Constitution should be amended to allow Congress to enforce "*all its guarantees*."²³⁵ On another occasion he referred to opponents of his prototype as "opposed to enforcing the written guarantees of the Constitution."²³⁶ On January 25, 1866, in the same speech in which he had said he considered enforcement of all the guarantees of the Constitution the most important issue before Congress, Bingham explained, "I believe that the free citizens of each State were guaranteed, and were . . . intended to be guaranteed by the Constitution, all—not some, 'all'—the privileges of citizens of the United States in every State."²³⁷

Mr. Berger asks why "the Bill of Rights" was not explicitly written into the fourteenth amendment, as due process and citizenship were.²³⁸ The reason, of course, is that the rights in the Bill of Rights make up some, and the most important, but not all of the rights of citizens of the United States.

VI. JUDICIAL INTERPRETATION

Oddly enough, Mr. Berger seeks assistance from the *Slaughter-House Cases* majority opinion in his attempt to treat the privileges or immunities clause of the fourteenth amendment as a reiteration of a conventional (or perhaps more conventional) reading of article IV. He tells us:

Although the majority of the Court took an even narrower view of the clause [than had Justice Field], concluding that it referred only to the privileges and immunities

232. Berger, *supra* note 1, at 463.

233. See Crosskey, *supra* note 3, at 27.

234. CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871).

235. *Id.* at 39th Cong., 1st Sess. 432 (1866).

236. *Id.* at 813.

237. *Id.* at 430.

238. Berger, *supra* note 1, at 453.

of a citizen of the United States as distinguished from those of a state citizen, it yet stated in comparing article IV and the fourteenth amendment that "[t]here can be but little question that the privileges are the same in each [case]."²³⁹

The majority opinion deprived the clause of any significant meaning, holding that it was limited to only an extraordinarily narrow class of rights—for example, protection on the high seas and the right to travel to and from the seat of government.²⁴⁰ Both Mr. Berger and I agree that it was incorrectly decided.²⁴¹

On the point for which he cites it, however, the opinion provides Mr. Berger no support. That is because the majority was *not* comparing article IV and the fourteenth amendment in the passage Mr. Berger cites. It was comparing the provisions of article IV with a similar provision of the Articles of Confederation.²⁴² The holding of the *Slaughter-House Cases* was the opposite from that Mr. Berger ascribed to it. In fact, the Court held that the provisions of articles IV and XIV were not identical.

Justice Field's dissenting opinion is also cited by Mr. Berger to prove the rights in the Bill of Rights were excluded. He quotes Field's opinion as saying, in reference to "privileges or immunities," "[I]n the first section of the Civil Rights Act Congress has given its interpretation to these terms . . . [including] the right 'to make and enforce contracts [etc.]'"²⁴³ Although the *Slaughter-House Cases* did not squarely present the question of whether the Bill of Rights applied to the states, one might infer from Field's statement, as presented by Mr. Berger, that only the rights in the Civil Rights Bill (read narrowly) were included as privileges or immunities by the fourteenth amendment. In fact, Justice Field was more cautious in his appraisal: "In the 1st section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which in its judgment, these terms include. . . ."²⁴⁴

Of the dissenters, two of the Justices, Bradley and Swayne, read the privileges or immunities clause of the fourteenth amendment to protect absolute rights including those in the Bill of Rights.²⁴⁵ On further reflection Justice

239. *Id.* at 441.

240. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

241. Curtis, *supra* note 2, at 48; GOVERNMENT BY JUDICIAL, *supra* note 12, at 44-49.

242. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-76 (1872).

243. Berger, *supra* note 1, at 441.

244. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872) (dissenting opinion). Berger also quotes Justice Bradley as saying, "[T]he first section of the [Civil Rights] bill covers the same ground as the fourteenth amendment." Berger, *supra* note 1, at 441. Such statements are inconsistent with incorporation only if one reads the Civil Rights Bill as not embracing the rights in the Bill of Rights either as rights of citizens or rights for the security of person and property. In March 1871 Bradley expressed the view that the clause embraced rights in the Bill of Rights. Letter from Justice Bradley to Judge Woods (Mar. 12, 1871), Bradley Papers, New Jersey Historical Society. At any rate, what Bradley said was "the first section of the bill covers the same ground as the fourteenth amendment, at least so far as the matters involved in this case are concerned." *Live-Stock Dealers & Butchers' Ass'n v. Crescent City Live-Stock Landing Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408).

245. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118-19 (1872).

Field also concluded that the privileges or immunities clause made the Bill of Rights binding on the states.²⁴⁶ Judge, later Justice Woods, had read the amendment the same way:

By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof. The amendment proceeds: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. *Corfield v. Coryell* [Case No. 3,230]. Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble . . . We think, therefore, that the right of freedom of speech, and other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States.²⁴⁷

VII. ENFORCEMENT BY THE COURTS

Mr. Berger suggests that the amendment was unenforceable by the courts except by virtue of congressional action. In his article he corrects a miscitation in his book and asks: "Why did Hotchkiss protest that [the prototype of section 5] 'proposes to leave it to the caprice of Congress' whether or not to enforce antidiscrimination, if it was assumed that the Courts could act in the face of congressional inaction."²⁴⁸ My argument that Hotchkiss' protest about Bingham's prototype, which simply gave enforcement power to Congress, plus the change in the form of the amendment to include limitations on the states in section one plus enforcement power in section five showed a plan for judicial enforcement is dismissed as "2 plus 2 equal 5."²⁴⁹

Hotchkiss had noted that Bingham's plan for congressional enforcement was weaker than some existing provisions of the Constitution. He spoke to Bingham's prototype of the fourteenth amendment which gave Congress power to pass all laws necessary and proper to secure privileges and immunities and equal protection. Here is what Hotchkiss had to say:

Suppose that we should have an influx of rebels. . . ? What would become of this legislation? And what benefit would the black man or the white man derive from

246. *O'Neil v. Vermont*, 144 U.S. 323, 361-63 (1892) (Field, J., dissenting).

247. *United States v. Hall*, 26 F. Cas. 79, 81-82 (C.C.S.D. Ala. 1871) (No. 15,282).

248. GOVERNMENT BY JUDICIARY, *supra* note 12, at 228. See also Berger, *supra* note 1, at 459.

249. Berger, *supra* note 1, at 460.

it? Place these guarantees in the Constitution in such a way that they *cannot be stripped from us by any accident* and I will go with the gentleman.

.....
 Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another congressional amendment. *We may pass laws here today and the next Congress may wipe them out. Where is your guarantee then?*

.....
*I desire that the very privileges for which the gentleman is contending be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override.*²⁵⁰

Bingham's amendment was subsequently changed by providing that no state could deprive any person of due process, equal protection, or privileges and immunities and also by giving Congress power to enforce its provisions, just as Hotchkiss had proposed. Mr. Berger suggests that his attribution of Hotchkiss' remark to section five of the fourteenth amendment instead of to the prototype is insignificant because both the prototype and section five provided for congressional enforcement. The significant change, of course, is the addition of section one, which said that no state could deny equal protection, privileges or immunities, or due process. This provision was absent from the prototype.

Hotchkiss had suggested that with such a change blacks and whites could still benefit from the amendment even with Democratic control of Congress and repeal of all civil rights laws. How would they benefit? By enforcement of the amendment in the courts just as other limitations on the states had been enforced in the courts.²⁵¹ Mr. Berger quotes congressmen as saying that the amendment put the principles of the Civil Rights Bill beyond partisan strife, which it unquestionably did. If, however, repeal of the Civil Rights Bill by a Democratic Congress would have left the rights it provided unenforceable, it is clear the amendment did not put the Civil Rights Bill beyond partisan strife.

VIII. CONCLUSION

The way to find the intention of the framers of the fourteenth amendment is by a detailed investigation of the legal ideas held by Republicans and a detailed examination of the goals they sought to achieve. The matter cannot be solved by pronouncement. Without detailed empirical investigation, further substantial progress on this subject is not likely to be made.

Mr. Berger's book has the merit of providing a framework for analyzing legislative intent. He suggests that we should give great weight to statements by members of the committee that had charge of the legislation.²⁵² He reminds

250. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (emphasis added).

251. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

252. GOVERNMENT BY JUDICIARY, *supra* note 12, at 136-37.

us that statements of opponents and after-the-fact interpretations are entitled to little weight.²⁵³ And he reminds us that rules of construction cannot be used when they would clearly defeat the intent of the framers.²⁵⁴ In looking for the intent of the framers, of course, one should also look at the conditions leading up to the adoption of the amendment and the evils that produced it.²⁵⁵

The leading proponents of the fourteenth amendment, it seems to me, would be John Bingham, author of the amendment and member of the Joint Committee; Jacob Howard, member of the Joint Committee who managed the amendment in the Senate; and Thaddeus Stevens, the member of the committee who managed it in the House. To a lesser extent remarks by Chairman Fessenden of the Joint Committee, James Wilson, Chairman of the House Judiciary Committee, and Senator Trumbull, Chairman of the Judiciary Committee in the Senate are significant, though neither Wilson nor Trumbull was a member of the Joint Committee that had charge of the amendment.

When we examine the ideas of the three leading members of the Joint Committee, *at least* two—Bingham and Howard—clearly read the amendment to make the Bill of Rights a limit on the states.²⁵⁶ The remarks of Stevens are inconclusive on this issue, although they contradict Professor Berger's thesis that all leading Republicans considered the amendment and the Civil Rights Bill identical.²⁵⁷

In the campaign of 1866 we find Bingham and Wilson saying that the amendment is necessary to secure freedom of speech,²⁵⁸ a position flatly contrary to Mr. Berger's thesis. Trumbull, in a campaign speech, described the privileges or immunities clause as securing "civil liberty to all citizens of the United States" and as a "declaration of the great principles of individual freedom and civil liberty. . . ."²⁵⁹

Many scholars have accepted Mr. Berger's historical pronouncements without conducting a detailed investigation of the historical sources for themselves. At least on the question of the application of the Bill of Rights to the states, such an investigation shows that Mr. Berger's analysis is defective and does not justify the massive rollback of civil liberty which he proposes.²⁶⁰

253. *Id.* at 157 and 49.

254. *Id.* at 49.

255. For a summary of relevant history, see Curtis, *supra* note 2, at 52-64.

256. *Id.* at 64-74, 81-84, 93-96.

257. *Id.* at 82. See also the remarks of Chairman Fessenden at text accompanying note 109 *supra*.

258. See Curtis, *supra* note 2, at 84 & nn.304-06.

259. The Cincinnati Commercial, Sept. 3, 1866, at 2, col. 3. Trumbull also indicated that the amendment might be unnecessary in light of the thirteenth amendment and Civil Rights Bill. Trumbull, of course, had read the thirteenth amendment to allow Congress to protect the rights of free persons, including rights to speak and preach. See text accompanying note 98 *supra*.

260. See GOVERNMENT BY JUDICIARY, *supra* note 12, at 413. Taken to its logical conclusion, Berger's view would require that none of the rights in the Bill of Rights would be a limit on the states.