No State Shall Abridge

The Fourteenth Amendment and the Bill of Rights

Michael Kent Curtis

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To

Deborah F. Maury

and

Matthew Fontaine Curtis-Maury

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Foreword

The best introduction to this important book by Michael Curtis was effectively provided by the Attorney General of the United States, Mr. Edwin Meese, on July 9, 1985. It appeared in the form of his major address to the American Bar Association, in Washington, D.C. The subject of the Attorney General's nationally reported speech was the extent to which the Bill of Rights does or does not apply to the states. It is the same subject to which Mr. Curtis devotes himself in *No State Shall Abridge*. This foreword is in turn but a bridge, an invitation as it were, to cross over from the Attorney General's address to Mr. Curtis's response.

In his remarks to the ABA, Mr. Meese shared with the assembled lawyers his satisfaction with certain recent Supreme Court decisions he described as tending to undo "the damage" previously done by what he referred to as the "piecemeal incorporation" of the Fourth Amendment to the Constitution through the Fourteenth Amendment. The "damage" to which the Attorney General referred was damage he associated with a set of significant Supreme Court cases decided principally during the tenure of the Warren Court—cases in which search-and-seizure practices by state law enforcement officials had been examined by the Supreme Court under Fourth Amendment standards. To the extent that recent Supreme Court decisions reviewing state search-and-seizure procedures reflected a somewhat more relaxed view on the Court, namely, that the states may *not* be bound to observe the same standards constitutionally required of federal law enforcement agents, Mr. Meese regarded the new cases as both welcome and encouraging. They tended, as he said, to undo "the damage" previously resulting from the Warren Court's use of the "incorporation" doctrine.

These recent developments, the Attorney General felt encouraged to suggest, might not represent an isolated trend. Rather, they might

be taken to reflect a new willingness on the part of the Supreme Court to reconsider the entire incorporation doctrine, which it was the object of his address to have his audience reflect upon. "[N]owhere else," the Attorney General said, "has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation." And "nothing can be done," he counseled his audience, "to shore up the intellectually shaky foundation upon which the [incorporation] doctrine rests."

The doctrine to which the Attorney General referred is a familiar doctrine in American constitutional law. It is the doctrine that the enactment of the Fourteenth Amendment put an end to the dispute respecting the exemption of the states from the Bill of Rights. It is that exemption the Attorney General suggests may in fact never have been given up and, indeed, may even now be reclaimed.

Turning to the church-state clauses of the First Amendment, the Attorney General implied that these provisions, too, may not apply to the states or at least not apply in anywhere near the same manner as they apply to the national government. (Indeed, it was in the context of addressing these clauses, rather than the Fourth Amendment, that he spoke of the "constitutionally suspect . . . theory of incorporation.") And if that is so, then may not the states each be free to support religion in a variety of ways foreclosed to Congress? Mr. Meese left no doubt of his own view that they may.

The relationship of the Bill of Rights to the states was thus the very subject of the Attorney General's address, prompted by what he regarded as encouraging developments in the Supreme Court itself. Indeed, in November, spiritedly responding to published criticism of his ABA address (Anthony Lewis of the *New York Times* accused the Attorney General of seeking to "repeal legal history"), Mr. Meese took up the challenge altogether cheerfully. "Now, as we approach the bicentennial of the framing of the Constitution," he declared to members of the Federalist Society in Washington, "we are witnessing another debate concerning our fundamental law. It is not simply a ceremonial debate, but one that promises to have a profound impact on the future of our Republic."

There may be, of course, a bit of hyperbole in the Attorney General's view. It may bespeak undue confidence in anticipating certain appointments to the Supreme Court, or it may exaggerate the impact that such expected "debate" might have. Even so, assuming the foundations of the incorporation doctrine are truly as shaky as the Attorney General believes, his expectation is scarcely unreasonable. If the grounds for associating the Bill of Rights with the Fourteenth Amendment are not there, it is difficult to say why that observation should not now count—why it no longer matters. And, indeed, so far as the

importance of the subject itself is concerned, it is difficult to imagine a more consequential subject than this one, short of pulling back the Bill of Rights even from the federal government itself.

Whether, for instance, the free speech and press clause of the First Amendment applies only partly to the states, equally to the states, or not at all to the states is obviously an issue of great consequence. Whether the Seventh Amendment right to trial by jury (even in a civil case involving but twenty-one dollars) is binding on the states matters as well, although doubtless not nearly so much. But whether as a general proposition the whole regime of the Bill of Rights is carried across the boundary of federalism (literally "tittle for tittle and jot for jot"), whether only parts of it are thus transposed, or whether indeed virtually none of it applies is—as the Attorney General says—no mere "ceremonial" question. It is, rather, a question so consequential as to make it appear astonishing that the answer could possibly be thought doubtful at this late date, virtually two centuries after the ratification of the Bill of Rights itself and more than a century after the ratification of the Fourteenth Amendment.

And yet, for many very serious people, the question is still doubtful, even as the Attorney General suggested. The question raised publicly by the Attorney General in his ABA address has been raised repeatedly by others, many of whom preceded him by decades and indeed by generations. The fact is that Mr. Meese's point of view does not stand alone; it is no late Reaganite novelty, and it has troubled some of the most serious scholars (and judges) of our constitutional history.

Moreover, contrary to what most people might have supposed, the Supreme Court itself has never quite settled on a single rationale in associating the Bill of Rights with the Fourteenth Amendment. Within the existing case law, for instance, one will find no less than four "doctrines" differently relating the Bill of Rights to the states via the Fourteenth Amendment. There are, in brief, at least two positions a number of justices have taken additional to the mutually exclusive primary positions—of full association or of no association.

The strongest of these positions is of course that of full association (or "incorporation" as it is called). And in sharp contrast to the Attorney General's thinking, Mr. Curtis does not think that that foundation is shaky at all. To the contrary, he believes it is sound—indeed that it is overwhelming. In this book he undertakes to show why.

Necessarily, Mr. Curtis's book is not a quick or an easy read; nothing that undertakes a conscientious review of sources appropriate to a subject such as this one can be reduced in that way. Much better than any quick or easy read, however, *No State Shall Abridge* provides the most powerful response to doubts respecting the incorporation doc-

trine yet published. One will not know the full strength of the incorporation case without reading this book. But I need to say no more, since this invitation is now complete. The Attorney General wrote the real foreword, last July.

William W. Van Alstyne
March 1986

Acknowledgments

Many people have given me encouragement and help in connection with my work on the Fourteenth Amendment and the Bill of Rights. Although they have provided help and encouragement, they cannot be held responsible for ideas contained or mistakes made. One of the gifts of the best teachers is to encourage students to pursue their own ideas. The teacher deserves much of the credit, but he or she deserves none of the blame. Similarly, those reviewing a long and complex project may help the writer avoid some mistakes. To help a writer avoid all would require an undertaking equivalent to that which produced the manuscript.

For encouragement in pursuing my work on the Fourteenth Amendment I want to thank particularly Professors Leonard Levy (whose encouragement has been constant and crucial), William Van Alstyne, Louis Lusky, and Henry J. Abraham. The Frances Lewis Law Center at Washington and Lee University has a lawyer-in-residence program where I spent a month working on the book. For the help and support of people at Washington and Lee I am particularly grateful.

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This book is far better than it would otherwise have been because of all the help and encouragement I have had. Had I the insight and judgment to understand and follow all the critical suggestions of those who read the manuscript, the end product might have been significantly better. The views expressed are my own, and not the responsibility of those whose help or encouragement I have acknowledged.

Introduction

Current Controversy

The idea that the federal Bill of Rights protects liberty of speech and press, freedom of religion, and other basic rights from violations by the states has become commonplace, even for lawyers. Indeed, many Americans probably accepted this commonplace when careful lawyers knew it was not so. From 1833 to 1868 the Supreme Court held that none of the rights in the Bill of Rights limited the states.[1] From 1868 to 1925 it found very few of these liberties protected from state action.[2] Those the states were free to flout (so far as federal limitations were concerned) seemed to include free speech, press, religion,[3] the right to jury trial,[4] freedom from self-incrimination,[5] from infliction of cruel and unusual punishments,[6] and more. State constitutions, with their own bills of rights, were available to protect the individual, but too often they proved to be paper barriers.[7]

Most, but not all, scholars believe that the Supreme Court was right, at least as a matter of history, up to 1868. They believe, that is, that the founding fathers *did not intend* for the Bill of Rights to limit the states.[8]

In 1868 the Fourteenth Amendment was ratified. Section 1 provided:

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

A reasonable reader might conclude that the Fourteenth Amendment was intended to change things so that states could no longer violate rights in the federal Bill of Rights. The reader might think this was what was intended by the language, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." I believe that the reader would be right.

The thesis is intensely controversial. It has never, for instance, been accepted by the United States Supreme Court, although the Court has haltingly reached much the same result by gradual incorporation of most of the rights in the Bill of Rights as limits on the states under the due process clause, a development that reached fruition in the 1960s.[9] Historical justification for this selective incorporation of rights under the clause of the Fourteenth Amendment that says "No state shall deprive any person of life, liberty, or property without due process of law" has also been controversial.[10] Here again, at least as to all procedural guaranties—the right to jury trial, the right against self-incrimination, the right to counsel, and the like—the reading is also historically correct.

The idea that the framers of the Fourteenth Amendment intended guaranties of the Bill of Rights to limit state action has been rejected by many legal scholars. These scholars have treated their rejection as "amply documented and widely accepted."[11] The historical argument for applying the Bill of Rights to the states has been treated as "conclusively disproved,"[12] and the evidence for it marshaled by Justice Hugo L. Black[13] has been denounced as "flimsy."[14] One scholar tells us that "it is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights."[15] Another assures us that the idea that the Fourteenth Amendment was designed to apply the Bill of Rights to the states has been "discredited . . . in a study with which even activists concur."[16] A noted professor of law says that the application of the religious guaranties of the Bill of Rights to the states occurred "solely at the whim of the Court."[17] Still another tells us that it is now "generally accepted" that the framers of the Fourteenth Amendment intended no restrictions on government regulation of speech.[18]

It may well be that most professors of constitutional law who have ventured an opinion on the question—and it sometimes seems most have—have reached the conclusion that application of the Bill of Rights to the states under the Fourteenth Amendment was, as a matter of history, a mistake. Still, such opinions have usually been expressed in passing, as a minor feature of the author's work, and not after exhaustive investigation of the historical sources. Among scholars who have studied the historical sources in detail, opinion is more divided. Most of this group seem to agree that the Fourteenth Amendment *was* intended to apply the Bill of Rights—or at least most of them—to the states.[19]

Skepticism in the scholarly and judicial community as to the intent of the framers of the Fourteenth Amendment has begun to have extreme political and judicial manifestations, often not intended by the skeptics.[20] In a recent book, *Government by Judiciary*, published by the Harvard University Press, Mr. Raoul Berger has called for a "rollback" of decisions applying the Bill of Rights to the states.[21] There are indications that some are willing to respond to the trumpet call.

One federal judge has found the Supreme Court's decision applying the First Amendment guaranty of free exercise of religion to the states "a result oriented decision which cannot be supported by historical data."[22] Still, the judge recognized that he was bound by the decision. Another federal court has not been so timid. It ruled that none of the guaranties of the Bill of Rights applies to the states.[23] Although the decision was promptly reversed,[24] it indicates a changing judicial climate, one in which federal protection for many liberties in the Bill of Rights may be frozen out of existence.

Mr. George Will, whose columns are widely circulated, has announced that "the Court took a radically wrong turn when it 'incorporated' the First Amendment into the fourteenth amendment."[25] Senator John P. East, Republican of North Carolina, has asserted that the framers of the Fourteenth Amendment did not intend to apply the Bill of Rights to the states, and he has introduced legislation designed to free the states and localities from federal protection for liberties in the Bill of Rights. Attorney General Edwin Meese has flirted with similar ideas.[26]

The idea that protection of human liberty under the Bill of Rights against state action is the result of judicial whim or judicial usurpation eats like acid at the legitimacy of federal protection of civil liberty. The current Supreme Court seems unwilling to embrace the proposed rollback.[27] Still, pervasive skepticism about the legitimacy of application of the Bill of Rights to the states may be a factor in encouraging the recent trend in Supreme Court decisions toward restricting individual liberty and expanding government power. Indeed, one scholar who has questioned the historical legitimacy of federal protection of Bill of Rights liberties has suggested that the Court begin a rollback of civil liberty by more restrictive readings of particular guaranties.[28] For whatever reason, the Court has given an increasingly strict construction to the rights of the individual and an increasingly broad construction to the power of government.[29]

In particular cases and for particular Justices, whether the states are bound by the literal provisions of the Bill of Rights or by subjective notions of what the Justice finds essential to liberty has had profound significance. The clearest examples are the cases in which Justice Lewis

F. Powell, Jr., agreeing with four of his colleagues, found that the Sixth Amendment *did* require unanimous juries, but nonetheless in which he found that the Fourteenth Amendment did *not* require full or literal application of the Sixth Amendment to the states. The upshot was that states could convict persons in criminal cases by nonunanimous juries.[30]

Justices Powell, Warren E. Burger, and William H. Rehnquist insist that the guaranties of the Bill of Rights are not literally incorporated by the Fourteenth Amendment—so that certain procedures constitutionally required by the Fifth Amendment are not necessarily required by the Fourteenth.[31] Justice Rehnquist believes that "not all of the strictures which the First Amendment imposes upon Congress are carried over against the states by the Fourteenth Amendment."[32]

Lawrence Tribe, of Harvard Law School, suggests that additional Court appointments by President Ronald Reagan could produce reconsideration of the rule holding that guaranties of the Bill of Rights limit the states.[33] The legitimacy of applying the Bill of Rights to the states has practical consequences now and, unfortunately, may have more in the future.

How can it be that so many able writers of widely different political views have concluded that the Fourteenth Amendment was not designed to make Bill of Rights liberties a limit on the states? Part of the explanation, but only part of it, is that most who have expressed opinions on the subject failed to do the tedious job of wading through the historical sources. Another reason may be simple lack of interest. Henry Monaghan suggests that professors of constitutional law are "problem solvers by training" and "unsympathetic to being bound by chains of the past."[34] The assumption that study of relevant legal history admits the controlling power of the "chains of the past" has led many to treat history as irrelevant.

Another part of the explanation for the current conventional wisdom is that the historical sources are initially confusing to minds steeped in modern approaches to constitutional law. Because the job of looking at the congressional debates is so massive, and because the sources themselves are initially somewhat opaque to the modern reader, law professors and others have naturally looked to secondary studies. One study, that done by Charles Fairman,[35] has been particularly influential.

Prior Fourteenth Amendment Scholarship

Fairman wrote in 1949 in response to a dissenting opinion by Justice Hugo Black in the 1947 case of *Adamson v. California*.[36] At the time

Black wrote his dissenting opinion in *Adamson* the Supreme Court applied to the states only those rights the Justices considered implicit in the concept of ordered liberty. Many of the rights in the Bill of Rights were then thought not to fit into this category—including rights such as jury trial in criminal cases and protection against double jeopardy and self-incrimination.[37] The process of selective incorporation—by which so many of the guaranties have since been applied to the states—was then not far advanced.

In *Adamson* Justice Black argued that the Fourteenth Amendment was intended to overrule earlier Supreme Court decisions and to make the first eight amendments to the Constitution a limitation on the states.[38] Justice Black showed that the privileges or immunities clause was the primary device used to accomplish this end and that reference to privileges or immunities was a reasonable way to apply the Bill of Rights to the states.[39] Justice Black also relied on the due process clause of the Fourteenth Amendment.[40] By his reference to the due process clause, in addition to the privileges or immunities clause, Justice Black made his argument more congruent with prior Supreme Court decisions that had held some guaranties of the Bill of Rights binding on the states through the due process clause. His partial reliance on the due process clause, however, also made it easier for critics to ignore the main thrust of his argument. Three Justices joined in Black's dissent, so it looked as if it might soon become the law.

Justice Black's thesis was promptly attacked by Charles Fairman, then a professor at Stanford.[41] Fairman was horrified at the thought that the Fourteenth Amendment might require the states to obey all of the Bill of Rights, including even the right to civil jury trials.[42] Fairman examined the debates surrounding the adoption of the amendment, later construction of the amendment by Congress in the years immediately following its passage, contemporary newspaper accounts, and other sources. He concluded that the amendment in general and the privileges or immunities clause in particular were not intended to make the Bill of Rights applicable to the states.[43] Fairman read most of the evidence to show the framers of the Fourteenth Amendment understood it simply to incorporate the Civil Rights bill, passed in 1866. Since Fairman seemed to read the Civil Rights bill only to protect rights under state law, his analysis appeared to show that none of the rights in the Bill of Rights were to be applied under the Fourteenth Amendment except for the due process clause, which was written specifically into the amendment. That clause, Fairman believed, did not include any other Bill of Rights liberties—e.g., the right to civil and criminal juries or the right to free speech.[44]

What, then, according to Fairman did the framers expect the privi-

leges or immunities clause to mean? "Pretty clearly there never was any such clear [inclusive and exclusive] conception."[45] After "brooding over the matter," Professor Fairman "slowly" concluded, however, that "implicit in the concept of ordered liberty" was about as close as one could come to the "vague aspirations" that the framers had for the clause.[46] Such an interpretation had the advantage, at least, of explaining why guaranties of the Bill of Rights such as freedom of speech were mentioned in connection with the clause.[47]

The framers of the Fourteenth Amendment emerge from Professor Fairman's article as men with, at best, only a vague idea of what they were doing. Although scholars often accept most of Fairman's negative conclusions, many refuse to accept his argument that a selective incorporation was intended.[48] This reluctance is understandable. Fairman's conclusion on this point seems at war with the burden of his argument. As the scholarly opinions cited above show, Fairman's article has been accepted as gospel by many legal scholars.[49] It did much to sharpen the debate on the intended meaning of the Fourteenth Amendment.

Still, Fairman's article suffered from defects. First, it ignored much of the larger historical context out of which the Fourteenth Amendment grew, including the crusade against slavery and for civil liberty during the years from 1830 to 1866. Because Fairman read only the debates on the Fourteenth Amendment and the Civil Rights bill and read these from the standpoint of legal orthodoxy, he was unable to make much sense out of many things that leading Republicans said. Fairman failed to look at debates on the Thirteenth Amendment and Reconstruction, overlooked much evidence that tended to contradict his thesis,[50] denigrated the evidence of intent to apply the Bill of Rights to the states that he did find,[51] and made much over the failure to find evidence explicitly indicating an intent to apply the Bill of Rights to the states.[52] For example, he shows that there is little evidence from Republicans in state legislative debates on ratification showing an intent to apply the Bill of Rights to the states. The negative evidence loses much of its force, however, when one understands that Republicans often agreed not to say anything on the subject, content simply to wait and vote.[53]

An Antislavery Analysis of the Fourteenth Amendment

This book examines the Fourteenth Amendment in light of the antislavery crusade that produced it. The amendment declared an antislavery constitutional interpretation. It reflected Republican legal

theories, theories that were often at variance with conventional constitutional doctrine. Indeed, when read in light of Republican constitutional theory, much that seems confusing in the congressional debates leading up to the Fourteenth Amendment becomes clear. No one will ever be able to reduce the debates to perfect harmony. But the hypothesis advanced here makes sense, rather than nonsense, of what leading Republicans had to say.

Republicans accepted the following tenets of antislavery constitutional thought. First, after the passage of the Thirteenth Amendment abolishing slavery, blacks were citizens of the United States.[54] Republicans held this view even though the *Dred Scott* decision[55] was to the contrary. Second, the guaranties of the Bill of Rights applied to the states even prior to the passage of the Fourteenth Amendment. Most Republicans held this view even though the Supreme Court had ruled to the contrary in the case of *Barron v. Baltimore*,[56] decided in 1833. Third, the privileges and immunities clause of the original Constitution[57] protected the fundamental rights of American citizens against state action.[58] Fourth, the due process clause of the Fifth Amendment protected all persons from enslavement in the District of Columbia and in the federal territories.[59]

To understand Republican ideas, I have looked in detail at the debates on the Thirteenth Amendment and on Reconstruction. In those debates shortly before the 1866 passage of the Fourteenth Amendment, Republicans tend to spell out their views that rights in the Bill of Rights limit the states. By eliminating slavery, Republicans thought they were ridding the country of the institution that had diverted the course of the law and kept the courts from nationalizing civil liberties. With the removal of slavery, the Constitution was expected by many to spring back to its original purposes—those set out in the Declaration of Independence and in the preamble. It would become a document protecting liberty.[60]

I have examined debate on the Civil Rights bill for two reasons. First (as in the case of the Thirteenth Amendment debates and debates on Reconstruction), the debate on the Civil Rights bill illustrates Republican constitutional doctrine. Second, the Civil Rights bill has been treated as evidence that the Fourteenth Amendment could not have been designed to apply the Bill of Rights to the states. The act, so the argument goes, was designed to protect blacks only from discrimination in certain rights under state law—the right to contract, testify, inherit, and to protections of state civil and criminal law. Since some supporters of the amendment said it was equivalent to the Civil Rights bill, the amendment, some scholars insist, could not have protected Bill of Rights liberties.[61] In fact, the argument is based on a mistaken

reading of the act. Statements made about the equivalence of the bill and the amendment are consistent with application of the Bill of Rights to the states.[62]

The primary method used here is detailed analysis of historical texts. A prime text, of course, is the amendment itself. Others include Republican and antislavery party platforms, antislavery constitutional tracts, newspaper accounts of speeches, and, most of all, the text of debates in Congress. These provide a rich source of material on Republican ideology and constitutional analysis. On careful analysis, these texts provide support for the proposition that the Fourteenth Amendment was designed to apply the Bill of Rights to the states.

My analysis of the purposes of the Fourteenth Amendment has been enriched and guided by earlier scholars who have looked at the connection of antislavery legal thought, civil liberties, and the Fourteenth Amendment and by those who have looked at Reconstruction in general.[63] Most influential on my thought is the major scholarly attack on Fairman's article written by W. W. Crosskey, then a professor at the University of Chicago. Crosskey was one pioneer in reading the congressional debates in light of antislavery legal thought.

Crosskey insisted that the amendment should be understood in light of "old Republican" constitutional ideas. These included a reading of the privileges and immunities clause of article IV, section 2 to mean that the citizens of each state would be entitled to all rights of citizens of the United States in every state; a reading of the Fifth Amendment guaranty of due process to require the government to supply equal protection in the rights to life, liberty, and property; and, finally, a belief that the guaranties of the Bill of Rights were limits on the states even prior to the framing of the Fourteenth Amendment.[64] Although my interpretation now diverges from Crosskey's in some significant ways, I still believe that his work brilliantly illuminates the forgotten relation of the Fourteenth Amendment to the Bill of Rights.

Other works have also helped me to understand the context in which Republicans spoke. These include Jacobus tenBroek's classic *Equal under Law*,[65] which looks at the antislavery origins of the Fourteenth Amendment (including unorthodox ideas about the scope of the Bill of Rights) and draws conclusions on the Bill of Rights question somewhat different from those reached here; William Wiecek's *Sources of Antislavery Constitutionalism in America*; works that examine southern suppression of free speech in the years before the Civil War; and studies of Reconstruction.[66]

The privileges or immunities clause of the Fourteenth Amendment and even the often maligned work of Professor Crosskey on this subject are enjoying an academic renaissance. Since I first wrote on the Bill of Rights issue in 1979 a number of scholars have looked again at the history surrounding the amendment.[67] Additional scholarly support for the thesis that the Fourteenth Amendment was designed to apply the Bill of Rights to the states can now be found in the work of Harold Hyman and Wiecek and of others. If recent scholarship is any indication, there is reason to hope that the privileges or immunities clause may once again enjoy the central role in protection of civil liberties envisioned for it by its framers.

The Search for Meaning

The provisions of the Constitution, as Hans Linde has noted, "reflect a series of decisions concerning the organization of government, its powers, and limitations that were made by particular men at particular moments in history."[68] A look at what the people who framed the Fourteenth Amendment intended as far as the protection of civil liberty was concerned is a worthwhile endeavor. Analysis of problems that confronted Republicans and led them to think the amendment necessary sheds light on what their purposes were. Understanding the threats to civil liberty that shaped the amendment shows the vitality of its purposes for our own time.

Proof that the amendment was designed to nationalize the protection of civil liberties provides legitimacy for the general endeavor of protecting rights in the Bill of Rights.[69] In one way this fact seems obvious. Justices and politicians regularly appeal to the intent of the framers in an effort to legitimize their decisions. Opponents of application of the Bill of Rights to the states appeal to history to justify their opposition. As C. Vann Woodward has noted, political movements in America have always sought to gain control of history. Woodward cites the commissar in George Orwell's novel *1984*: "Who controls the past controls the future, who controls the present controls the past."[70]

It is easy, as Woodward does so well, to criticize the search for historical legitimacy. We may seek from history more than history can provide. The fact that the likely intent of the framers of a constitutional provision (narrowly read) may provide one form of legitimacy does not mean that it provides the only form. Still, appeal to historically existing common values is one characteristic of a community. Where valid, the appeal should not be discarded simply because the method may not answer all possible questions correctly from the critic's point of view.

Modern critics have been quick to reject historical sources of legitimacy as inadequate and to look for others.[71] More careful examination of the history shows that conceding the historical record to those

The meaning of the privileges or immunities clause of section 1 of the Fourteenth Amendment is really a question of the meaning of language. Some argue that extrinsic evidence should not be allowed to contradict the plain meaning of the clause.[82] It is doubtful that words stripped from their historical context ever have plain meaning. At any rate, a look at Republican ideology and Republican legal thought and at what leading proponents said the amendment meant is fruitful because it sheds light on the meaning of the words used. In *United States v. Wong Kim Ark*[83] the Court cited statements made by congressmen in the debates on the Fourteenth Amendment as to what the words in the amendment meant. These, the Court said, were "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."[84]

Sometimes the Court says that a constitutional provision should not be construed in light of what its leading sponsors said about it at the time, but rather that courts should "read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen" and construe it to further its object.[85] This rule misses the point of investigating the congressional debates, for the debates on the adoption of the Fourteenth Amendment shed light on the condition of affairs leading to its adoption and indeed provide a rich source of evidence on that point. To ignore the words of leading sponsors of a proposal is to reject one source of light on the meaning of the words used. As Professor Monaghan has noted, "Textual language embodies one or more purposes and the text may be usefully understood and applied only if its purposes are understood. No convincing reason appears why a purpose may not be ascertained from any relevant source, including legislative history."[86]

Some argue that the purposes of those who frame and ratify a constitutional provision are difficult to know. That is true in the present case because so many people were involved and so few spoke to the question. It would be useful, for example, if a poll had been taken of all supporters of the Fourteenth Amendment in Congress and in the state legislatures. They could have been asked, "Under section 1 of the fourteenth amendment will states remain free, as they were before the Civil War, to punish political speech, as they punished expression critical of slavery? Will they continue to be free to ignore the other provisions of the federal Bill of Rights?"

No such poll was taken, of course. So the search for the purposes of the amendment requires some criteria. These the reader has a right to know: (1) The language of the amendment is a guide to the purposes of those who proposed it. (2) The meaning of the amendment should be sought in the abuses that produced it and in the political and legal philosophy of those who proposed it. (3) The congressional debates are a further guide to meaning. In evaluating the debates one should look primarily to statements of those who supported the amendment and not primarily to statements of opponents. (4) The remarks of leading proponents are entitled to great weight. And the greatest weight of all should be given to the statements of members of the committee that reported the amendment to Congress.

These criteria give disproportionate weight to the views expressed by some congressmen as opposed to the views of others. The views of those who speak are given weight over the views of those who do not. The views of the supporters of the proposal are given weight over the views of those who oppose it. The views of the leaders of the Senate and House Judiciary Committee receive greater weight than those of an ordinary representative. Greater weight is given to statements in Congress by members of the committee reporting the amendment—in this case, the members of the Joint Committee on Reconstruction. The views of the author of section 1 of the amendment and of the committee members assigned to explain its purposes to the Congress should receive the greatest weight of all. These are the people to whom other representatives would most likely have looked for guidance.

In our republican government the Constitution is treated as emanating from the people. The purposes of the people in 1866 are not knowable directly, if at all. Looking at statements of leading proponents of the Fourteenth Amendment makes the task of determining purposes more nearly attainable. It is consistent with a realistic recognition of the disproportionate influence of elites in the political process. By narrowing the scope of the inquiry to the purposes of leading Republicans with reference to the Fourteenth Amendment and the Bill of Rights, the question of purpose is more easily answered. But the answer may be less compelling as a rule of constitutional law for the future. Furthermore, the attempt to use congressional purposes as a guide to constitutional law is confronted by a paradox, for at least some Republicans accepted the legitimacy of an evolving constitution and of law as a progressive science.[87] And some may have rejected the use of history as a guide to meaning.[88]

There is still another paradox in the attempt to learn the meaning of section 1 of the Fourteenth Amendment. To the framers of the Fourteenth Amendment the meaning of the privileges or immunities clause, of the due process clause, and of the equal protection clause were of secondary importance. The questions of primary importance had to do with political power, particularly the power of the rebellious southern states and of the leaders of the rebellion.

After the defeat of the southern states, the ratification of the Thir-

teenth Amendment abolishing slavery, and the assassination of President Lincoln, his successor, Andrew Johnson of Tennessee, insisted that the rebellious southern states were entitled to immediate representation in Congress. The Constitution in article I, section 2 provided that representation in the House should be based on the number of free persons in the state and three-fifths of all other persons—that is, of slaves. With the end of slavery the former slaves would be counted as free persons for the purposes of representation. The result was that the representation of southern states would be much increased.

For years before the Civil War, southerners and their allies had dominated the federal government. After four years of civil war and untold suffering, it now seemed that the leaders of the rebellion might return to political power on the backs of their disfranchised black population. To Republicans this would be an intolerable result.

All agreed that the southern states would eventually return to the Union as states. The burning issue of 1866 was, when and on what conditions? This was the question that occupied congressmen and other politicians. The crux of that question was the issue of political power.

In the Thirty-ninth Congress and in the campaign of 1866 overwhelming attention was devoted to the question of political power. Shall rebels rule? There were endless variations on the theme—efforts to show that Congress was consistent and reasonable in requiring conditions for readmission and that the president was unreasonable and inconsistent in not requiring further conditions beyond the abolition of slavery and the repudiation of the rebel debt. Most of the political rhetoric of the day was devoted to the subject of political power.

Closely connected to the question of political power was the question of the Union debt. If the Republican party became the minority party, would the war debt be repudiated? Would the Democratic coalition require taxpayers to pay the rebel debt or perhaps compensate slaveholders for the loss of their slaves?

There are five sections and 428 words in the Fourteenth Amendment. Three-fourths of the substantive sections deal with subjects other than the rights of citizens.

Section 2 of the amendment dealt directly with the question of political power. If states disfranchised a portion of their male population over the age of twenty-one (except for participation in rebellion or other crime), their representation in the House would be proportionately reduced.

Section 3 also dealt with the question of political power. It disqualified from office those who had taken an oath to support the Constitution

and then engaged in rebellion. By a two-thirds vote of each house Congress could remove the disability.

Section 4 protected the debt of the United States, including pensions for soldiers. It also prohibited the states or the federal government from paying the rebel debt or from compensating slave owners for the loss of their slaves.

Of the 428 words in the Fourteenth Amendment, 67 were relevant to the Bill of Rights question—the citizenship, privileges or immunities, and due process clauses. If one adds the enforcement clause, the total rises to 81. In discussions of the amendment in Congress and in the campaign of 1866, the ratio of words related to due process, privileges or immunities, and equal protection to words related to the other questions discussed by the amendment is even smaller.

Distressingly, the issue that seems primary to us today, the meaning of section 1 of the amendment, received relatively little discussion. Questions of political power that are far removed from current concerns received overwhelming attention. The questions we ask today about what section 1 of the amendment meant were not the questions Republicans were typically most determined to talk about.

In a sense, of course, they were right. For if the political question had been answered as President Johnson had wished, there never would have been a Fourteenth Amendment at all, much less a Fifteenth Amendment granting blacks the right to vote.

The fact that the legal meaning of section 1 was not the focus of discussion in 1866 underscores the difficulty of answering the question of what section 1 meant to Republicans. There are very direct statements from two leading congressional Republicans indicating that section 1 of the amendment will require the states to obey the Bill of Rights. No one explicitly denied that it would have that effect. Beyond that, however, much of the evidence is partially hidden in generalizations—and is to be found in history, and ideology, and legal thought long forgotten and in what legal theories meant to Republicans in 1866 instead of what they mean to us today.

Republicans often suggested that the Fourteenth Amendment would protect all rights of citizens or all constitutional rights. They often said that it would secure an equality of basic rights to citizens. Although Republicans were emphatic on these points, the content of the rights secured received less attention. So to understand the content of "all rights of citizens" in the minds of Republicans requires a detailed historical inquiry.

In following the long and winding trail in search of one purpose of section 1 of the Fourteenth Amendment, I hope to have the reader's patience and understanding. I am looking for probable Republican

Chapter 1

From the Revolution to the Bill of Rights and Beyond

From the Revolution to the Bill of Rights

When the American colonies rebelled against Great Britain, the rebels gave their reasons in the Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The rhetoric, of course, was more advanced than the reality. Blacks were held as slaves in the colonies, not even all white males would get the vote for another sixty years or so, and all women were disfranchised and deprived of important liberties. Still, rhetoric has a way of shaping reality. By the twentieth century America was closer to the ideals of the Declaration than it was in 1776. The words of the Declaration itself were a factor in bringing about the change.

According to the Declaration, people have unalienable rights to liberty. The ideology of the revolutionary generation shaped the later American Bill of Rights. This revolutionary ideology combined and wove together both the natural rights of man and the historic rights of Englishmen.[1] The colonists emphasized natural rights and historic liberties as a result of their view of government. Government was naturally hostile to human liberty and happiness.[2] Political power was essentially aggressive.[3] The Continental Congress in its Address to the Inhabitants of Quebec quoted Marquis Beccaria:

> "In every human society . . . there is an effort, continually tending to confer on one part the heighth of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally."
>
> Rulers, stimulated by this pernicious "effort," and subjects animated by the just "intent of opposing good laws against it," have occasioned that vast variety of events, that fill the histories of so many nations.[4]

The rebellious colonists dealt with the problem of aggressive political power by several devices: separation of powers, an independent judiciary, the right of people to have a share in their own government by representatives chosen by themselves, and an insistence on the natural and historical rights and liberties of citizens reflected in revolutionary bills of rights of the several states.[5]

By 1787 delegates from the states had drafted a constitution to replace the Articles of Confederation. Juxtaposed to the ideology of the Revolution was the reality of slavery. Although the framers declined to use the word, their constitution contained clauses designed to protect the institution. As Luther Martin, member of the Constitutional Convention from Maryland, put it, the framers had avoided "expressions which might be odious in the ears of Americans, although they were willing to admit into their system the things which the expressions signified."[6]

One of the most significant constitutional advantages extended to slavery was that each slave was counted as three-fifths of a person for purposes of representation in the House of Representatives. In addition, the importation of slaves could not be banned by the federal government until 1808, and this provision could not be amended. Provision was also made for the return of fugitive slaves: "No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due."[7] In addition to provisions explicitly protecting slavery was the absence of explicit power to remove it. In the Virginia ratifying convention James Madison assured his fellows that the Constitution did not allow interference with slavery in the states.[8]

These concessions to slavery produced some protests. George Mason, delegate from Virginia and a leading advocate of a federal bill of rights, complained that delegates from South Carolina and Georgia were more interested in protecting the right to import slaves than in promoting "the Liberty and Happiness of the people."[9] Luther Martin's criticisms were more fundamental and prophetic. Slavery, Martin insisted, "is inconsistent with the genius of republicanism, and has the

traitors, as a condition precedent to their full restoration to political power, such guarantees as will insure its own safety, guard its honor, and protect its humblest defender in all the rights of citizenship? Congress asserts that right. The rebels deny it."[228] Congressman Godlove S. Orth read the amendment in the same way. Section 1, he said, secures "to all persons born or naturalized in the United States the rights of American citizenship."[229] For Congressman Hezekiah S. Bundy, section 1 protected "the security and defense of the personal and property rights of the citizen in all the States."[230]

Republican discussion of section 1 of the amendment was typically brief. According to Congressman George F. Miller, its provisions that no state could deny any person "life, liberty, or property without due process" and its guaranty of equal protection were "clearly within the spirit of the Declaration of Independence."[231] Senator Stewart read the amendment as declaring that "all men are entitled to life, liberty, and property" and as imposing "upon the Government the duty of discharging these solemn obligations."[232] Congressman Henry Jarvis Raymond, who supported President Johnson, described the amendment as "giving to the freedman of the South all the rights of citizens in the courts of law and elsewhere" and as "protecting him in their enjoyment."[233]

Senator Luke P. Poland of Vermont said the amendment had been so elaborately and ably discussed that he would not discuss it at length or in detail. He thought that the privileges or immunities clause secured "nothing beyond what was *intended*" by the similar provision of article IV, section 2. Slavery had led "to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the states. State legislation was allowed to override it." It became "really a dead letter." Finally, Poland believed that legislative power to pass the Civil Rights bill was clearly provided by the due process clause of the Fourteenth Amendment.[234]

Congressman Jehu Baker of Illinois, a lawyer and a former judge, discussed the amendment on July 9, 1866. Baker recalled that slavery had gone "about overthrowing the great landmarks of liberty." The proposed amendment, Baker said, was most valuable "for the security and future growth of liberty." He apparently regarded section 1 as a declaration of existing constitutional law, properly understood. After quoting it, he said, "This section I regard as more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power which it contains."[235] Since the amendment expressed existing law, Baker must have believed that the states already were prohibited from denying due process, that is, that the guaranties of the Bill of Rights already applied to them. After quoting the privileges and immunities clause, Baker asked, "What business is it of any State to do the things here forbidden? To rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future."[236]

In summary, debates in the Thirty-seventh, Thirty-eighth, and Thirty-ninth Congresses show that Republicans were unhappy with the protection individual liberties had received from the states. Concern for individual liberty together with increased concern for the rights of blacks shaped the Fourteenth Amendment. Leading framers of the Fourteenth Amendment and most Republicans who spoke on the subject in 1866 believed that the states were already required to obey the Bill of Rights. For them, the Fourteenth Amendment was an affirmation of their own deeply held legal theories. Even those who did not accept the unorthodox Republican doctrines could agree that the rights in the Bill of Rights were privileges and immunities of citizens of the United States that should be shielded from hostile state action.

So for Republicans the amendment was simply declaratory of existing constitutional law, properly understood. They rejected *Dred Scott* and instead believed that all free persons born in the United States were citizens of the United States. Still, they explicitly wrote into the Fourteenth Amendment national citizenship for all persons born in the United States. Some believed, contrary to *Barron v. Baltimore*, that states could not deprive persons of due process. Still, they wrote this limitation into the Fourteenth Amendment. Finally, leading Republicans believed that no state could abridge the privileges and immunities of citizens of the United States—including those privileges and immunities secured by the Bill of Rights. This idea also was written into the Fourteenth Amendment.

The Fourteenth Amendment debates show that Republicans were willing to criticize what they considered its shortcomings. The failure to give blacks the right to vote produced protests and laments that lasted to the very end of the debates.

John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.* No one complained that the amendment would allow the states to continue to deprive citizens of rights secured by the Bill of Rights. Today, the idea that states should obey the Bill of Rights is controversial. It was not controversial for Republicans in the Thirty-ninth Congress.

Chapter 4

In Which Some Arguments Against Application of the Bill of Rights to the States Are Analyzed

Professor Fairman's Fourteenth Amendment

In December 1949 Charles Fairman published his article entitled "Does the Fourteenth Amendment Incorporate the Bill of Rights?"[1] It was an historical examination of the subject. Fairman's timing was excellent. Four members of the Supreme Court had very recently indicated their belief that the amendment did apply the Bill of Rights to the states. Their spokesman, Justice Black, had based his analysis on history.[2]

Fairman's article was 139 pages long and contained 381 footnotes. He believed that he had uncovered a "mountain of evidence" that the framers of the Fourteenth Amendment did not intend to apply the Bill of Rights to the states.[3] Fairman's assessment was shared by others. Years later, Justices John Marshall Harlan and Potter Stewart would rely on the "overwhelming evidence" against total application of the Bill of Rights to the states marshaled by Fairman.[4] In the historical dispute between the professor and the justice, many academic commentators came down on the side of the professor.[5]

When Professor Fairman wrote in 1949, he lacked help available to later students. Although historians had written about the crusade against slavery, legal historians had not yet started to view Republican legal thought from that perspective. The studies of Jacobus tenBroek and Howard Graham would not appear until the 1950s.[6]

Fairman began his consideration of the Fourteenth Amendment with a brief overview of article IV, section 2. He looked at Justice Washington's opinion in *Corfield v. Coryell*, and at a few other cases cited by Republicans. Fairman thought Washington's discussion was "badly confused." Washington was thinking "subconsciously at least"

of a national standard of rights that were fundamental and that belonged to citizens of all free governments. Fairman wondered whether "all free governments" was more than a "careless phrase." Washington had referred to the writ of habeas corpus, but where, Fairman asked, did that writ exist except in Anglo-American law?[7]

Fairman contrasted Justice Washington's confusion with the clarity of the analysis of article IV by Joseph Story in his *Commentaries on the Constitution*. For Story, the measure of rights under article IV was purely local; the standard was a protection against discrimination.[8]

With that preface, Professor Fairman launched into the debates in the Thirty-ninth Congress. He started with the debates on the Civil Rights bill. As Fairman's article would unfold, the Civil Rights bill would become the main reference point for the meaning of the Fourteenth Amendment. Fairman would later show that some congressmen said that the object of the amendment was to constitutionalize the bill and that a few said that the amendment and the bill were identical.[9] The bill, Fairman explained, "made these provisions: (1) no discrimination in civil rights on account of race; and (2) inhabitants of every race should have the same right to contract, sue, take and dispose of property, and to equal benefit of all laws for the security of person and property."[10] Fairman understood the Civil Rights bill to provide for equality under *state* or local law. As he put it in his later massive study of the Supreme Court during Reconstruction, the bill "declared that in every State *all* citizens would thenceforth have the same right to contract, to sue, to testify, to hold property, and to enjoy the equal benefit of the laws, as the State allowed to white citizens."[11]

Professor Fairman set out some of Senator Trumbull's comments on the Civil Rights bill. The bill was to secure practical freedom. To Fairman's dismay, Trumbull quoted both *Corfield* and Story as to privileges or immunities, as though the two were consistent.[12] After looking at some comments by Democrats, Fairman moved on to the action in the Joint Committee. The committee, as Fairman noted, produced Bingham's prototype of the Fourteenth Amendment.

Before looking at the debates, Fairman made his own "independent analysis of the problem." He wrote, "So far as civil rights were concerned, the mischief to be remedied was, first of all, discrimination against the Negro by the government of the state wherein he resided—notably in the 'black codes.' This was an evil against which Article IV, Section 2 had nothing to say." "Far less important, though frequently mentioned as a subsidiary point, was the mistreatment that at times had been meted out in Southern states to visitors from out of state."[13]

From this vantage point, Fairman began to look at the debates.

Bingham's prototype had provided: "The Congress shall have power to make all laws which shall be necessary and proper to secure the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several states equal protection in the rights of life, liberty and property (5th Amendment)."

Fairman listed Bingham's main points. It had been the want of the Republic that Congress lacked express power to enforce the provisions of Bingham's prototype. If such power had been available and used, there would have been no rebellion.[14] The amendment did not impose on any state any duty not already required by the Constitution. The Constitution was supreme law. But "these provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."[15] If a state legislator or officer made or enforced a law that would have violated the federal Bill of Rights if done in the federal system, Fairman noted, by Bingham's view "that state officer or legislator thereby violated his oath to observe the Constitution of the United States!"[16] The exclamation mark indicates Fairman's exasperation with the argument.

To Professor Fairman, Bingham's presentation made little sense. It revealed a "novel" and "befuddled" construction of the Constitution.[17] Fairman attempted to explain Bingham's reference to "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution." The antecedent to "this immortal bill of rights," Professor Fairman believed, was "evidently" the privileges and immunities clause of article IV and the due process clause of the Fifth Amendment. "The bill of rights" was on this occasion, he said, "a fine literary phrase, not referring precisely to the first eight amendments."[18]

Fairman found a welcome contrast to Bingham's confusion in the clarity of his Democratic critics. Andrew Jackson Rogers, Fairman noted, pointed out that the Supreme Court had decided that the Bill of Rights limited the federal government only, not the states.[19]

Fairman then quoted Representative Higby, a Republican. Bingham's proposal would only "have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument." The proposal, Fairman explained, was "a sort of elixir calculated to give a general toning up to the Constitution."[20] After citing another Republican who believed the powers conferred in the amendment were already in the Constitution, Fairman moved on to a detailed consideration of remarks by New York Congressman Robert S. Hale, whom he identified as a former state judge. Fairman

cited long excerpts from Hale. Hale thought the amendment allowed Congress to pass laws covering virtually every subject previously covered by state law. Part of Bingham's answer was that the amendment would apply to all states that "have in their constitutions and laws" provisions "in direct violation of every principle of our Constitution." This was so in Oregon. Fairman commented, "Of course a state law could hardly violate *every* provision of the Constitution. Bingham's answers simply did not meet the issue."[21]

Fairman next cited a speech by Congressman Woodbridge of Vermont: The amendment would enable Congress to give a citizen "those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to other citizens of the State."[22] Fairman concluded that the explanation was "rather hazy."[23]

Fairman then turned to Bingham's last speech in favor of his prototype, and he cited portions of it.

> I repel [Bingham said] the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to . . . take away from any State any right that belongs to it. . . . The proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent—no more."
>
> . . . . . .
>
> 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, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitu-

tion which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?

What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.[24]

After citing Bingham at some length, Fairman attempted again to sort out what Bingham was saying:

> Bingham certainly says that the effect of his proposal is to arm Congress with power to enforce the bill of rights: it will do this and nothing more. What bill of rights? Once more he makes it clear by the context: The bill of rights that says that the citizens of the United States shall be entitled to the privileges and immunities of citizens of the United States in the several states (which refers to, but misquotes, Art. IV, section 2) and that no person shall be deprived of life, liberty, or property without due process of law (which is one of the Fifth Amendment's limitations upon the Federal Government). And this measure would take from the state no authority it now enjoys under the Constitution.[25]

Fairman noted with some astonishment that Bingham cited *Barron v. Baltimore* in defense of the need for his proposal. The citation to *Barron* was, Fairman thought, beside the point. Fairman seemed to conclude that Bingham could not possibly have been talking about the first eight amendments for a second reason.

> This we know, the rights that Congress was to be empowered to *compel* the state and its officers to respect were only the rights that they were already obligated to respect. . . . No matter, then, what his personal views may have been as to the duty of the state and its officers to respect "the immortal bill of rights": the law had been clearly established in *Barron v. Baltimore*, to the effect that the first eight Amendments did not bind the states.[26]

Fairman noted that Bingham's proposed amendment was returned to committee and then turned his attention to the Civil Rights bill. Civil rights were explained by Wilson, chairman of the Judiciary Committee, to include the absolute rights of individuals to personal security, personal liberty, and the right to enjoy property.[27] Fairman noted that "the power to forbid discrimination in these matters" was, Wilson believed, derived from the Thirteenth Amendment[28] and also, as he fails to note, from article IV, section 2.[29]

Fairman then moved on to Congressman Thayer. Fairman quoted Thayer's assertion that the power to pass the bill could be found, among other places, in the power to enforce the Fifth Amendment's due process clause.[30] Thayer was a Republican. Once again, Fairman found clarity from the Democrats. Michael C. Kerr, Indiana Democrat, "found Thayer an easy target."[31] Kerr noted that the amendments limited only the federal government, not the states, and cited *Barron v. Baltimore*.[32]

Fairman then quoted briefly from the speech Bingham gave against the Civil Rights bill. Bingham indicated that his proposed amendment was designed to allow Congress to enforce the oath that state officers took to uphold the Constitution. But it was not designed to take over all subjects to state legislation. Without the amendment, Bingham thought, Congress lacked power to pass the Civil Rights bill.[33]

After noting developments in the Joint Committee,[34] Fairman turned his attention to the amendment finally produced. The amendment provided that no state should abridge the privileges or immunities of citizens of the United States, or deny due process or equal protection to any person.[35]

The first speech in the House on the proposal was given by Thaddeus Stevens. The provisions of section 1 were set forth in some form or another in the Declaration or in organic law, "but the Constitution limits only the action of Congress and is not a limitation of the states. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally and upon all."[36] "As Stevens saw it," Fairman concluded, "*discrimination* was a great evil, *equal* protection was the dominant purpose of Section 1."[37]

Fairman summarized several other speeches about section 1 of the amendment. Congressman Garfield said that section 1 would "hold over every American Citizen without regard to color, the protecting shield of law." It would put the Civil Rights bill "above the reach of political strife . . . and fix it in the serene sky, in the eternal firmament of the Constitution."[38]

Fairman quoted Congressman Broomall: "we propose, first, to give power to the Government to protect its own citizens within the States, within its own jurisdiction." Those who voted for the Fourteenth Amendment had voted for "this proposition in another shape in the Civil Rights Bill."[39] Fairman noted that "over and over in this debate, the correspondence between Section 1 of the Amendment and Civil

Rights Act is noted. The provisions of one are treated as though they were essentially identical with those of the other."[40] But Fairman insisted that the rights established by the act were the rights to contract, to testify, and to sell, to enjoy the full and equal benefits of laws for the security of person and property. "Never, even once, does advocate or opponent say 'first eight amendments.'" Fairman overlooked Bingham's references to "all the guaranties of the constitution."[41]

Fairman also cited a speech from Henry Raymond. Bingham's prototype of the Fourteenth Amendment had been designed to give Congress "power to secure an absolute equality of civil rights in every state of the Union." Now an amendment was proposed to make the constitutional power to do that clear. Since Raymond was in favor "of securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," he favored the amendment. The principle of the first section secured an equality of rights among all citizens of the United States.[42]

Generally, the more Professor Fairman thought that a speech tended to disprove application of the Bill of Rights to the states, the better introduction the speaker got.[43] John F. Farnsworth was "an important member of the Republican delegation from Illinois and a professional lawyer." Farnsworth said there was only one clause in the amendment that was not already in the Constitution—the equal protection section—"but a reaffirmation of a good principle will do no harm, and I shall not therefore oppose it on account of what I may regard as surplusage." From this speech, Fairman concluded that "to Farnsworth Section 1 means equal protection, expressed with harmless surplusage."[44]

Bingham's final speech to the Congress about the amendment was presented at some length. Congress will be given the power to protect the privileges and immunities of citizens of the Republic and inborn rights of man. Cruel and unusual punishments have been inflicted by the states in the past and this would be corrected. Section 1 would provide protection by national law from unconstitutional state enactments.

Fairman's conclusion about the speech was framed in the form of rhetorical question. "Can it possibly be said that in this final utterance he was putting the House on notice that, at least to him, Section 1 meant the provisions of the first eight Amendments. The answers seem obvious."[45]

Senator Howard's speech presented an even greater problem for Fairman. Fairman conceded that it was a full statement of an intent to apply the Bill of Rights to the states.

Still, Fairman thought incorporation was disproved by a redundancy.

If the privileges or immunities clause incorporated the Bill of Rights, the due process clause would be found both in the privileges or immunities clause and in the due process clause for the Fourteenth Amendment. "How can this be maintained?"[46]

Finally, Fairman cited a speech by Senator Henderson of Missouri. The provisions of section 1 "secure rights that attach to citizenship in all free governments."[47] Fairman concluded, "Unless the first eight amendments enumerated 'rights that attach to citizenship in all free governments,' Henderson's understanding is to be counted as opposed to that of Howard."[48]

Looking back at the debates, Fairman concluded that "Bingham . . . did a good bit of talking about 'this immortal bill of rights,' and once spoke of 'cruel and unusual punishments.' Senator Howard, explaining the new privileges or immunities clause, said that it included . . . 'the personal rights guaranteed and secured by the first eight amendments. . . .' That is all. The rest of the evidence bore in the opposite direction, or was indifferent."[49]

Fairman looked at the campaign of 1866. He found some speakers who said, "the first clause in that Constitutional Amendment is simply a reaffirmation of the first clause in the Civil Rights bill, declaring the citizenship of all men born in the United States, without regard to race or color."[50] This is true but is a somewhat unenlightening observation. Several congressmen noted the correspondence between the bill and the amendment.[51] A senator is quoted as saying that the amendment would allow Congress to ensure equal justice when the states refuse to enforce it.[52] Several representatives, including Bingham, talked about the protection for freedom of speech,[53] leading Fairman to wonder whether a selective incorporation was intended.[54] Still, he suggested that perhaps the freedom of speech protected was speech limited to federal matters.[55]

This account summarizes the evidence presented by Professor Fairman from the Thirty-ninth Congress and the campaign of 1866. Fairman also looked at ratification proceedings in the states and construction of the amendment in Congress after 1866. Looking at these items, he found little evidence of an intent to apply the Bill of Rights to the states under the Fourteenth Amendment.[56] These matters will be discussed in subsequent chapters, where I will show that Professor Fairman overlooked significant evidence.

Fairman's conclusion is puzzling. After much analysis that seems designed to show that basic rights in the Bill of Rights were not to be applied to the states, Fairman opted for selective incorporation. Republican thinking was "hazy," making it hard to catch the "vague aspirations" Republicans had for the privileges or immunities clause.

But the amendment "undoubtedly" proposed to establish a standard below which state action must not fall.[57]

Professor Fairman's Analysis: A Critical Appraisal

The major fault with Professor Fairman's effort to understand the Fourteenth Amendment is that it overlooked the antislavery origins of the amendment. Much of what Republicans had to say does seem confused if read without an understanding of the antislavery background, and in light of modern legal ideas.

Read in light of antislavery legal thought, Bingham's remarks are fairly clear. Bingham and other leading Republicans read article IV, section 2 to protect fundamental rights of citizens of the United States from violation by the states. Bingham recognized that the Supreme Court had held otherwise, but he thought that the states *were* obligated to obey the Bill of Rights. Still, he found the obligation legally unenforceable—just as the Court had treated other obligations of article IV, section 2 as unenforceable.

Fairman's analysis should alert the reader that something is askew. The Fourteenth Amendment was a Republican amendment. It was opposed by the mass of Democrats. But Fairman regularly found the Democrats to be the people who had a clear understanding of the Bill of Rights question.[58] Republicans, he said, were confused.[59]

In fact, of course, the Republicans and Democrats adhered to different legal philosophies. The Republican philosophy emphasized protection of the rights of the individual under the Bill of Rights from hostile acts of states. Democrats left the question to the states themselves. In a large section of the country before the Civil War the states had done an excellent job of suppressing Republican ideas. A whole section of the country had been out of bounds for Republican campaigners. It is not surprising that the two parties saw the issue differently.

Much of Fairman's mountain of evidence is simply beside the point. For example, Fairman used Hale's attack on the prototype of Bingham's amendment—the one that gave Congress power to secure privileges and immunities and equal protection in the rights of life, liberty, and property—to disprove incorporation of the Bill of Rights. What concerned Hale, however, was another issue—the power of Congress to secure equal protection in the rights of life, liberty, or property. Hale was afraid that the amendment would give Congress power to legislate generally on matters of state law —such as the status of married women. Hale thought that the states were already required

to obey the Bill of Rights and that in any case the issue was a side issue.[60]

In responding to Hale, Bingham explicitly noted the case of *Barron v. Baltimore* to show why his amendment was required.[61] Another Republican noted that Bingham had not gone far enough. Because Bingham assumed that the states were already bound to obey the Bill of Rights under a proper reading of the law, he had failed to write an explicit limitation on the states into the amendment.[62] The final draft corrects his mistake.

Bingham claimed that if the grant of power in his prototype had been in the Constitution and had been enforced by legislation, the rebellion would have been impossible. Fairman found that claim "difficult to square . . . with *any* reading of the amendment."[63] But if one takes Bingham's argument seriously and reads it in light of the antislavery heritage, it makes perfect sense.

In reply to Hale, Bingham had cited *Barron v. Baltimore* and *Livingston v. Moore*, noting, "By the decisions read the people are without remedy." "Is the Bill of Rights," Bingham asked, "to stand in our Constitution . . . a mere dead letter?"[64] He answered with his view of the proper construction of the Constitution. "As the whole Constitution was to be the supreme law in every State, it therefore results that the citizens of each State, being citizens of the United States, should be entitled to all the privileges and immunities of citizens of the United States in every State and all persons, now that slavery has forever perished, should be entitled to equal protection in the rights of life, liberty, and property."[65]

A grant of power such as that sought by Bingham was not inserted in the original Constitution, he said, because such a grant "would have been utterly incompatible with the existence of slavery in any State: for although slaves might not have been admitted to be citizens, they must have been admitted to be persons." Slaves, and here Bingham was apparently referring to slaves in the slave states, "were not protected by the Constitution."[66] But, in Bingham's view, the guaranties of the Bill of Rights applied to the states under the privileges and immunities clause, which protected *citizens* of the United States.[67] Consequently, he asserted, "there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves and refusing them protection in life or property."[68] But there never was any excuse, he continued, "for any man North or South claiming that any state Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, or property."[69] In fact, however, free blacks—considered citizens by Bingham—had been denied by racist laws equal access to the courts to protect their rights, even in the North.[70]

Bingham thought slavery was incompatible with the Bill of Rights. If the due process clause (read by Bingham to require equal protection in the right of life, liberty, and property) had applied to all persons (including slaves in the states) and if it had been enforced, slavery would have been impossible. Slavery was the cause of the war. To Bingham it was as simple as that.

Unlike Professor Fairman, Congressman Hale took Bingham's argument seriously and treated it respectfully. Hale noted:

> But the gentleman says there is, and there has been first to last, a violation of the provisions of this bill of rights by the very existence of slavery itself; that the institution of slavery itself has existed in defiance of the provisions of the bill of rights; that all the anomalies and all the enormities that have grown out of that institution have been equally in violation of it. I concede there is much force in that reasoning.[71]

Fairman attempted to explain Bingham's repeated references to "the Bill of Rights." Since Bingham referred to this immortal bill of rights, Fairman said, his reference must have had an antecedent. The antecedent, Fairman claimed, was article IV, section 2 and the due process clause. Before and after in American history, the phrase "bill of rights" had referred to the first eight or ten amendments to the Constitution. On this occasion, according to Fairman, it had a specialized meaning, never given to it before or since. When Bingham answered Hale by showing the need for his amendment, he referred to cases "showing that the power of the Federal Government to enforce in the United States courts *the Bill of Rights* under *the articles of amendment* to the Constitution had been denied."[72]

Finally, a reading of the debates shows that Bingham's colleagues understood "the bill of rights" to refer to the amendments to the Constitution. During the debate on the Civil Rights bill, Representative Wilson noted, "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.'"[73] Obviously, Wilson understood the Bill of Rights to be a document containing various guaranties, of which the due process clause was only one.

One of Fairman's major arguments centers on the Civil Rights bill. Fairman read the bill as securing equality under state law. Some congressmen indicated that the bill was incorporated in the amendment or equivalent to it. The inference the reader is apparently expected to draw is that the amendment excluded Bill of Rights liberties because the Civil Rights bill excluded them. There are a number of problems with this argument.

Before looking at the problems, however, it is important to note that Professor Fairman's reading is plausible. The Civil Rights Act listed certain specific rights, such as the right to testify and to hold property. These are rights under local law. It is natural to read the general words in the act in light of the specific ones.

Although some speakers suggested that the Civil Rights bill and the Fourteenth Amendment were identical,[74] 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.[75]

Several congressmen noted an equivalence between the amendment and the Civil Rights bill. Most of the statements by congressmen indicated that the amendment provided power for Congress to pass the bill and that the principles of the bill were protected by the amendment.[76] 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 so narrowly as to provide only equality under state law*, encompassed the entire amendment. The evidence shows that Republicans did not read the bill so narrowly.

Leading 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. Bingham had insisted that an amendment allowing enforcement would be required.[77] Bingham got his amendment, and 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.

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.[78] 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.[79] 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.[80]

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.[81]

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."[82] The phrase "including the constitutional right of bearing arms" was added by an amendment in the House. In explaining the amendment to the Senate, Senator Trumbull said that it did not change the meaning of the bill.[83]

Suppose the amendment and the Bill were "identical." If they were, it follows that the Civil Rights bill included a federal standard of due process. If a federal standard of due process was included in the language of the Civil Rights bill, it might be included 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.[84]

One such right would have been the Fifth Amendment's guaranty of due process. The Court in *Dred Scott v. Sandford*,[85] 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.[86] 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."[87]

The inescapable implication of the assertion that the Civil Rights bill and section 1 of the Fourteenth Amendment are 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.

In all of Fairman's examination of the evidence, both in Congress and in the campaign of 1866, he found no congressman or senator who said explicitly that the amendment would *not* require the states to obey the Bill of Rights. He overlooked a number of cases where senators and representatives said the amendment would protect all rights of citizens or all constitutional rights.[88] He found that the manager of the proposal in the Senate and the author of the proposal in the House did indicate that the amendment would apply the Bill of Rights to the states. But he discounted their statements as unsupported in or contradicted by the rest of the record. On careful analysis most (but not all) of Fairman's contradictory evidence tends to dissolve, and in some cases it even supports full application of the Bill of Rights to the states.

Other Arguments Against Incorporation

Scholars opposing full incorporation have insisted that the country would not have tolerated having the "federal provisions on grand jury, criminal jury, and civil jury . . . fastened upon them in 1868."[89] Fairman described the Seventh Amendment's requirement of a civil jury as such a waste of time as to be an "atrocity."[90]

This argument ignores the realities of the political process. The campaign of 1866 dealt with gut issues: the rights of blacks, the political power of the rebellious southern states, racism, and protection for loyalists in the South. These were issues that could and did defeat politicians. No politician, then or since, is likely to be defeated for advocating grand juries, criminal juries of twelve, or the right to jury trial in civil cases where the damages exceed twenty dollars. The argument assumes that Republicans in state legislatures would allow the South a dramatic increase of political power by counting disfranchised blacks for purposes of representation rather than provide for jury trials in civil cases where the damages exceed twenty dollars. Politicians do not behave in this fashion.

In any case, it is unlikely that Republicans would have shared the view that the Seventh Amendment jury trial requirement was an atrocity. Republicans were familiar with real atrocities. Slavery was anathema to them. Even worse, however, were provisions of fugitive slave laws that had extended the grasp of slavery into the North. Northern opponents of slavery watched with horror the spectacle of people being captured in their states and hauled into slavery. To Republicans, northern blacks—free as well as escaped slaves—faced capture and enslavement.[91]

Opponents of slavery responded by arguing that all people in their states were presumed free and by insisting on procedural guaranties secured to free persons.[92] Among the most important of these guaranties were trial by jury, the writ of habeas corpus, and the writ de homine replegiando, an ancient writ designed to test the question of freedom, which secured trial by jury.[93]

Trial by jury was an issue on which both abolitionists and more moderate politicians agreed. Benjamin Lundy, a veteran abolitionist, had warned in 1837 that free blacks were being seized and sold into slavery. Lundy's solution was "trial by jury in all cases of claims to service, that the acknowledged rights, privileges, and immunities of our own citizens may be duly guarded and protected."[94] Several states, through personal liberty laws, provided for trial by jury in the case of alleged fugitive slaves and secured other procedural rights to alleged slaves.[95]

These protections were crippled by the Supreme Court's decision in *Prigg v. Pennsylvania* and by the Fugitive Slave Act of 1850.[96] *Prigg* held the federal power over fugitive slaves to be exclusive, permitting the seizure of blacks in the free states without any of the guaranties prescribed by personal liberty laws.[97] The Fugitive Slave Act of 1850 explicitly provided that blacks could be denied the right to testify, to cross-examine, and to receive a jury trial before they were delivered to those claiming them as slaves.[98]

These restrictions on liberty produced protests from northerners, who insisted that fugitive slave laws violated the Fourth, Fifth, and Seventh amendments.[99] Supporters of the laws replied that such guaranties applied only to citizens, not to slaves. But that, as opponents of slavery noted, was the very matter to be resolved.[100]

The Fugitive Slave Act of 1850 was vigorously attacked by antislavery legislators. Congressman Horace Mann of Massachusetts argued that a claim for a fugitive was a suit at common law that, under the Seventh Amendment, required a jury trial.[101] He believed that the Fugitive Slave Act also violated the due process clause, which required a jury trial, and the Fourth Amendment. "What 'seizure' can be more 'unreasonable,'" he asked, "than one whose object is, not an ultimate trial, but bondage forever, without trial?"[102] When the Fugitive Slave Act was finally repealed in 1864 by a Republican Congress, its repeal was justified as securing trial by jury "in accordance with the Constitution of the United States and the laws of the State where such person is found."[103] To leading Republicans, "trial by jury in civil cases where the amount in controversy exceeds twenty dollars" was one of the precious guaranties of the Bill of Rights designed to prevent atrocities.

The second problem with Fairman's argument is that the due process clause of the Fourteenth Amendment would likely have been read to include the right to trial by jury. American statesmen from John Adams to John C. Calhoun had assumed that due process, or its ancestor the law of the land clause of the Magna Carta, protected the right to trial by jury.[104] There was substantial seventeenth- and eighteenth-century historical support for such a reading.[105]

Another argument asserting that section 1 did not apply the Bill of Rights to the states is that the due process clause would appear in the amendment twice, once as a privilege or immunity of citizens, and again in the due process clause as a protection for all persons. Fairman suggested that one might attribute to the committee "a design to give the citizen the protection of the entire Bill of Rights, and then" extend due process to aliens as well. But, Fairman tells us, no particular interest in aliens was expressed, so such an interpretation must be rejected.[106]

This argument overlooks the effect of the struggle against slavery on the amendment. Republicans had believed and announced in their party platforms that the due process clause prohibited slavery in national territories. As to the states, however, most Republicans believed that due process guaranties were limited to citizens.[107] The amendment contained conscious duplication to prevent any person from ever again suffering atrocities like slavery. Indeed, Bingham explained that a grant of power such as that sought in his prototype of section 1 had not been included in the Constitution because such power "would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons."[108]

Shaped, no doubt, by the law's treatment of slaves, concern for the rights of aliens was also expressed in the debate on the Civil Rights bill. Congressman Wilson believed that Congress could not protect inhabitants who were not citizens under the Civil Rights bill. Since Wilson justified the bill by citing Congress's power to enforce the Bill of Rights in the states, he apparently believed such power was limited to citizens.[109]

Congressman Bingham was convinced that Congress lacked the power to pass the Civil Rights bill. Beyond that, he objected to the bill because it did not follow the scope of the Fifth Amendment and protect "strangers" as well. The bill, Bingham complained, would permit the states to deny aliens their due process rights.[110] The Fourteenth Amendment's duplication in the case of persons was consciously designed to protect those who were not citizens and to prevent denials of due process such as those that had characterized slavery.

Professor Fairman's article on incorporation of the Bill of Rights by

the Fourteenth Amendment ignored antislavery legal thought. The oversight was corrected in Fairman's massive and thoughtful study of the Supreme Court during Reconstruction and reunion. But Fairman's later study tended to confuse radical abolitionist and moderate antislavery legal thought and so to assume that antislavery ideas—such as the idea that the liberties in the Bill of Rights protect American citizens in the states—were held by only a small minority of wild thinkers.[111] In fact, such ideas were held by a wide range of Republicans, from conservative to radical, including some of the most influential Republicans—among them the chairman of the House Judiciary Committee[112] and the author of section 1 of the amendment.[113]

Fairman considered and rejected the thesis that the Thirteenth Amendment was designed to protect basic constitutional rights of whites as well as blacks, such as those in the Bill of Rights.[114] He cited the statement of James Wilson, chairman of the House Judiciary Committee, to the effect that the amendment "introduces no intricate question of constitutional law for discussion." Since that statement would "have been untruthful" if the abolitionists' "peculiar mode of interpretation" was to be imposed, Fairman concluded that the amendment was to have no such effect.[115] Wilson's major speech on the Thirteenth Amendment shows that he believed that the guaranties of the Bill of Rights protected American citizens against infringement by the states and did so prior to the passage of the Thirteenth Amendment. The Bill of Rights was a reference point for the rights or liberties or privileges of American citizens.

In short, Wilson, like other Republicans, thought that the Constitution already protected the basic Bill of Rights liberties of the citizen prior to the passage of the Thirteenth Amendment. Abolition of slavery eliminated an institution that had perverted the Constitution and caused violation of constitutional rights. By the Thirteenth Amendment, blacks were freed and given the right to liberty enjoyed by other Americans.

In his book, Fairman's account of the battle over the Civil Rights bill omitted several significant portions of the debates. Both Congressmen Wilson and Thayer indicated their belief that the due process clause of the Fifth Amendment limited the states and supplied legislative power to pass the Civil Rights bill. Congressman Bingham insisted that his amendment would provide the power needed to justify passage of the Civil Rights bill—power to enforce the Bill of Rights.[116] Fairman's belief that antislavery legal ideas were limited to "the most radical" Republicans was simply a mistake.[117]

Fairman cited congressmen who said that the amendment clearly

conferred on Congress power to pass the Civil Rights bill. From these statements, Fairman concluded that nothing more specific was in their minds.[118] What this analysis leaves out is the fact that Wilson, Thayer, and Bingham all analyzed the bill as an attempt to enforce the Bill of Rights, specifically, the due process clause of the Fifth Amendment. The claim that the Fourteenth Amendment clearly supplied power to pass the bill, if anything, supports the conclusion that the amendment was designed to apply the Bill of Rights to the states.

Professor Fairman argued that there were only a few federal rights in 1866—the right to petition the *federal* government, to communicate through the post office, for example. When Congress in the Fourteenth Amendment undertook to secure the "enjoyment of federal rights against denial by a state, inherent problems were raised which members of Congress, in the main, failed accurately to perceive."[119] Although the analysis probably accurately reflects the state of constitutional law in 1866, it ignores a Republican consensus on the proper interpretation of the Constitution.

Professor Fairman's treatment of the amendment lacked balance. Robert Hale of New York, a critic of Bingham's prototype, is presented as a "discriminating lawyer." Hale, however, had never heard of *Barron v. Baltimore* and assumed the courts would require the states to obey the Bill of Rights.[120] Bingham was aware of the holding in *Barron* and insisted that a constitutional amendment was required to correct it. But Bingham was subjected by Fairman to a series of ad hominem attacks: Bingham is a man of "peculiar conceptions," not a man of "exact knowledge or clear conceptions or accurate language."[121] He "purport[ed] to explain" generally in "confused discourse" and "pluck[ed] a constitutional phrase and toss[ed] it in at some point to which it ha[d] no relevance." Many of his utterances "cannot be accepted as serious propositions."[122]

Fairman took a modest statement from Howard's speech and presented it in a way to suggest ignorance. He quoted Howard, accurately, as saying that he would present the views and motives of the committee "so far as I understand those views and motives." Fairman then implied that Howard did not understand Bingham's proposal because he had voted for provisions providing for black suffrage instead. "Howard, apparently, had not entered into the spirit of Bingham's drafting: three times in the committee he had voted against the author's work."[123] In fact, Howard's explanation closely paralleled Bingham's discussion of why his prototype was required—to overrule *Barron* and allow Congress to enforce guaranties of the Bill of Rights against the states.

The Influence of Professor Fairman

It is a tribute to the influence of Fairman's Stanford article, and perhaps also to the tendency of the human mind to seek agreement with others, that students of the antislavery origins of the Fourteenth Amendment have sought to make their conclusions more nearly congruent with Fairman's. The attempt is all the more remarkable since Fairman wrote his article with little or no understanding of antislavery constitutional theory.

Jacobus tenBroek in his pioneering work *Equal under Law*, for example, accepted Fairman's reading of some of Bingham's statements about applying the Bill of Rights to the states. Bingham, as we have seen, argued that those who opposed his prototype of the Fourteenth Amendment opposed enforcement of the "Bill of Rights as it stands in the Constitution today":

> Gentlemen admit the force of the provisions in the Bill of Rights, that the citizens shall be entitled to all the privileges and immunities of citizens of the United States in the several states, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, 'we are opposed to its enforcement by an act of Congress under amended Constitution as proposed.' Why are gentlemen opposed to the enforcement of the Bill of Rights, as proposed?

The Bill of Rights referred to by Bingham, tenBroek said, is "certainly not the first eight amendments" but instead is the original privileges and immunities clause, the due process clause, and a requirement of equal protection.[124] No one has read the phrase "Bill of Rights" in this fashion before or since.

Another problem with the argument that Bingham's reference to the Bill of Rights did not mean *the* Bill of Rights is that it contradicts Bingham's later statement that his amendment was designed to apply the first eight amendments (and other privileges of citizenship) to the states.[125] It is possible, of course, that Bingham's later statement was not candid. But because Bingham's earlier and later statements are apparently consistent, one should be slow to ascribe dishonest motives. This is particularly so where the hypothesis to be salvaged by a charge of dishonesty is as weak as the one in the present case.

TenBroek concluded that the Fourteenth Amendment was not intended to apply the Bill of Rights to the states, only to apply natural rights, some of which were mentioned in the first eight amendments. These included the substantive rights to life, liberty, and property protected by due process (certainly), and (perhaps) the procedural guaranties of the Fifth Amendment, the guaranties of the Fourth, and those of the First.[126] According to tenBroek, Bill of Rights liberties of a lesser order were not protected. The reason for doubt as to free speech and other basic rights is that they were rarely mentioned in the final stages of the debate.[127] But they were emphatically mentioned by Senator Howard speaking on behalf of the committee that reported the amendment. And other congressmen repeatedly said the "rights of citizens" of the United States would be protected by the amendment.

Careful study of the legal ideas held by Republican congressmen and expressed in the Thirty-eighth and Thirty-ninth Congresses provides content to their appeal to the rights of American citizens. Such rights were first and foremost those protected by the Constitution. These rights which they believed protected American citizens throughout the nation included rights to freedom of expression, religious liberty, the right to bear arms, the right to due process, to civil jury trials, together with those mentioned by tenBroek.[128] Since these rights were viewed as privileges and immunities of American citizens, it is difficult to understand the basis for excluding other fundamental constitutional rights listed in the Bill of Rights.

Howard Graham, like tenBroek, was another pioneer who has contributed much to our understanding of the antislavery origins of the Fourteenth Amendment.[129] He argued for a selective incorporation of rights in the Bill of Rights. Graham concluded tentatively that Howard's failure to list all guaranties in the Bill of Rights supported selective incorporation.[130] In fact, of course, Howard's speech militated strongly in the direction of full incorporation. Howard said that to the privileges listed by Justice Washington in *Corfield* "should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution; *such as*" freedom of speech and press, the right to assemble, the right to bear arms, not to have troops quartered in private homes during peacetime, to be free from unreasonable searches and seizures and from unreasonable bail, to be tried by an impartial jury, to be informed of the nature of an accusation, and to be free from cruel and unusual punishments.[131] Howard's use of the words "such as" makes clear that the rights he cited were illustrative of those in the first eight amendments, and that he was referring to the entire list. Later in his speech Howard indicated that the amendment would protect against taking private property for public use without just compensation. That protection was not on Howard's illustrative list. Nor, as Graham noted, did Howard list the due process clause.[132]

Graham also pointed out that different amendments received differ-

ent emphasis during the antislavery crusade. From this fact he concluded that full incorporation was probably not considered in 1866.[133] The problems with *Barron*, Graham noted, had been limited practically to cases involving freedom of speech and of the press, unreasonable seizures and searches, due process, just compensation, and criminal procedure. From this fact Graham seemed to conclude that these rights would be the ones as to which incorporation was intended. To Graham's list one needs to add the right to bear arms and the right to civil jury trial—both of which received strong emphasis from Republicans. Howard mentioned specifically the protection against quartering troops. When one adds all these guaranties together, little if anything is left to be selected out. Furthermore, it is difficult to see a logical basis for eliminating some guaranties but not others.

Judge Henry Friendly argued that the doctrine of selective incorporation of rights in the Bill of Rights has "no historical support."[134] This proposition, he insisted, is "undisputed."[135] Unless one is willing to disregard virtually all the evidence, however, the contest is between selective and full application of the provisions of the Bill of Rights to the states. The common description of the Fourteenth Amendment was that it would protect the rights of citizens of the United States from violation by the states. To the extent that Republicans gave content to these rights in the years from 1864 to 1866 they read them to protect Bill of Rights liberties from state violations. I have found over thirty examples of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating that they believed that at least some Bill of Rights liberties limited the states. I looked only at the debates on the abolition of slavery, Reconstruction, the Civil Rights bill, and the Fourteenth Amendment. Since a number of Republicans did not speak about these issues at all, among those who did speak, the percentage who accepted the application of the Bill of Rights to the states is high. The statements are made by Republican conservatives, moderates, and Radicals in the years from 1864 to 1866. When one adds statements by Republicans in Congress in the years immediately after the passage of the amendment, the total is even higher. Conversely, I found no statements by Republicans indicating that the states were free under a proper understanding of the law to violate rights in the Bill of Rights.[136]

Leading Republicans believed that the Fourteenth Amendment protected fundamental rights from violation by the states and that in this sense, as in others, it was declaratory of constitutional law properly understood. The often expressed idea that the amendment protected fundamental rights could provide a basis for selective incorporation. But, as Michael Conant has shown, *fundamental* was often used as a synonym for *constitutional*.[137] Certainly Republicans often used the word in that sense. After listing Bill of Rights liberties, for example, Senator Howard said that the great object of the first section of the Fourteenth Amendment was to "restrain the power of the states and compel them at all times to respect these great fundamental guaranties."[138]

Raoul Berger—No Application

The most vigorous current critic of incorporation is Mr. Raoul Berger. Mr. Berger rejects any incorporation. Because his work on the Fourteenth Amendment and the Bill of Rights has been accepted by a number of scholars and judges as historically accurate and because it has had growing influence, it requires careful examination. Moreover, because Berger's arguments often summarize those made by others, his work is representative of a broadly held scholarly view.

Raoul Berger and those who have accepted his arguments about application of the Bill of Rights to the states have treated their claims as generally accepted in the scholarly community. For example, Mr. Berger said, the theory that the Fourteenth Amendment was designed to make the states obey the commands of the Bill of Rights has been "discredited by Professor Charles Fairman in a study in which even activists" agree.[139] In fact, however, there is no solid wall of scholarly opinion on the subject. Among scholars who have actually studied the question at length, probably a majority have reached a view opposed to Berger's.[140]

Those who deny that any Bill of Rights liberties apply to the states have cited Fairman's[141] work as though it supported their thesis.[142] But Fairman himself seems to have concluded that the privileges or immunities clause of the Fourteenth Amendment was designed to apply many, but not all, of the guaranties of the Bill of Rights to the states.[143]

Professor Fairman's article and Mr. Berger's *Government by Judiciary* suffer some common faults. Both fail to recognize the extent to which suppression of civil liberty in the South in the thirty years before the Civil War molded the Fourteenth Amendment.[144] Both fail to recognize that Republicans operated from unorthodox legal premises.[145] Partly as a result of these shortcomings, Fairman and, to an even greater degree, Mr. Berger tended to misread the debates in significant ways.

Article IV, Section 2

Mr. Berger attempted to tie Republicans to an orthodox (or antidiscrimination) reading of the privileges and immunities clause of the

original Constitution and then to equate the privileges or immunities clause of the Fourteenth Amendment with an orthodox reading of article IV, section 2.[146]

In the section of *Government by Judiciary* on privileges and immunities, Mr. Berger first discussed what he believed to be the conventional understanding of the clause in the original Constitution. The clause was, he asserted, not intended to control the powers of state governments over the rights of their citizens, but simply to ensure that a migrant citizen would enjoy the basic rights a state accorded to its own citizens.[147]

By conventional understanding as evidenced by *Dred Scott,*[148] the state could deprive migrants who became residents of rights that similar classes in the state were denied. Because blacks were not usually migrants, the clause, as conventionally understood, was of no help to them.[149]

Mr. Berger dealt with this problem by suggesting that the framers relied on an adaptation of article IV, section 2 to support the Civil Rights bill.[150] The debates show, however, that Bingham and others who framed the Fourteenth Amendment relied on a reading of the privileges and immunities clause of article IV, section 2 by which it protected a body of national privileges and immunities of citizens of the United States, including those in the Bill of Rights. This reading may have been incorrect.[151] It does not matter, however, because in the redrafting of Bingham's first proposal, the amendment was rewritten to secure privileges and immunities of *a citizen of the United States* from state abridgment.

One argument against application of the Bill of Rights to the states suggests that privileges and immunities in article IV, section 2 on which the Republicans relied were exhausted by the list of specific rights set out in *Corfield v. Coryell*[152] and by the list contained in the Civil Rights bill.[153] These specified rights, but no more, were incorporated as privileges and immunities of citizens of the United States.[154]

Some quotations that have been used to support this view instead refute it. Senator Trumbull, the bill's sponsor, said: "Citizens of the United States" have "fundamental rights . . . *such as* the rights enumerated in this bill."[155] In *Corfield* Justice Washington had said that the privileges and immunities protected by the original Constitution are those "which are, in their nature, fundamental; which belong, of right, to the citizens of free governments."[156] These fall under various headings, including protection by the government and the enjoyment of life and liberty, with the right to acquire and possess property of every kind.[157] The general categories, such as the "enjoyment of . . . liberty," are quite broad.[158] Particular privileges falling under the heading of those considered fundamental include the right to pass through or reside in a state; the benefit of the writ of habeas corpus; the right to institute and maintain court actions; and the right to take, hold, and dispose of property.

The reference to specific rights includes the following sentence: "These, and many others which might be mentioned, are strictly speaking, privileges and immunities."[159] Fairman conceded that the reference to fundamental rights in *Corfield* "cloud[s]" the simple antidiscrimination reading of article IV, section 2 that he advocated.[160]

In introducing the "prototype" of section 1 of the Fourteenth Amendment, Bingham said it had been patterned on article IV, section 2.[161] Bingham, however, had read article IV, section 2 to protect privileges and immunities of *citizens of the United States,* including rights in the Bill of Rights, from state interference. The final version of section 1 was rewritten to incorporate this understanding explicitly. Comments by a number of Bingham's colleagues show that they shared his reading of the original privileges and immunities clause.[162]

Senator Howard also referred to article IV, section 2 in discussing privileges and immunities.[163] But Howard, the member of the Joint Committee who had charge of the amendment in the Senate, said explicitly that privileges and immunities of citizens of the United States protected by the Fourteenth Amendment included those rights set out in the first eight amendments to the Constitution.[164]

By the Republican view of the privileges and immunities clause of the original Constitution, 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."[165] According to Trumbull, "these are declared to be inalienable rights, belonging to every citizen of the United States . . . no matter where he may be."[166] Judge Washington referred to "fundamental rights," which "belong, of right, to the citizens of all free governments."[167]

One problem with arguing that the privileges or immunities clause is to be read as though it were a reiteration of an antidiscrimination understanding of article IV, section 2, is that then the clause of the Fourteenth Amendment would accomplish nothing beyond providing protection for temporary visitors. It would have been of no help to the mass of blacks in the South and of no help to southern unionists. All of the evidence indicates that these were the very people about whom Republicans were most concerned.

As some have read their remarks, the framers of the Fourteenth Amendment thought that 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."[168]

Any 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. Even Mr. Berger attributed to Republicans an unorthodox reading of the clause in the original Constitution (an adaptation, as he put it) by which it protects residents as well as migrants.[169] "It cannot too often be emphasized, the cardinal purpose of interpretation . . . is to ascertain and effectuate, not defeat, the intention of the framers," Mr. Berger has written. "Once that purpose is ascertained, it may not be thwarted by a rule of construction."[170]

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.[171] To define the "privileges or immunities of citizens of the United States," however, critics of incorporation choose to look at these *incidents*, not the overarching principles from which they were derived.[172]

In an article defending his thesis, Berger sought to use an 1871 speech by Trumbull to prove that the Fourteenth Amendment privileges or immunities clause is equivalent to that of article IV (conventionally understood) and that the Fourteenth Amendment consequently does not include rights in the Bill of Rights.

> In 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.[173]

In the same speech Trumbull explained that the states were the depositories of the rights of the individual against encroachment.[174]

In *Government by Judiciary* Mr. Berger considered Trumbull's 1871 remarks, noted that the Supreme Court has attached little weight to postenactment remarks, and concluded that remarks such as Trumbull's should be treated with "special reserve," particularly "when they contradict representations made by the speaker during the enactment process."[175] Berger concluded 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, he said, 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.'"[176] 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 Berger on the Bill of Rights question.[177]

Finally, there is a puzzling quality to Trumbull's remarks. If the Fourteenth Amendment had not extended the rights and privileges of citizens "one iota," then all of the rights it provides—including equal protection and due process—must have limited the states prior to its passage.

In a speech in the Thirty-ninth Congress Trumbull 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."[178] One might rely on this quotation to prove there was not room left in the privileges and immunities clause of the Fourteenth Amendment for the Bill of Rights liberties.[179]

At other times during the Thirty-ninth Congress, however, Trumbull gave other descriptions of rights in the Civil Rights bill, among them the right to "enjoy liberty and happiness."[180] 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."[181] 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.[182] Describing the effect of the Civil Rights bill, Trumbull said that "each 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."[183] Clearly, in 1866 Trumbull had in mind some absolute rights seen as belonging to citizens under the Constitution.

Equal National Rights or Equal Rights within a State

Professor Fairman's analysis of the intent of the framers of the Fourteenth Amendment has a somewhat schizophrenic quality. He con-

cluded that the amendment in general and the privileges and immunities clause in particular were not intended to make all of the Bill of Rights applicable to the states.[184] In support of this argument, Fairman read most of the evidence to show that the framers of the Fourteenth Amendment understood it simply to incorporate the Civil Rights bill, a bill Fairman seems to have read as not including Bill of Rights liberties.[185] Still, and somewhat inconsistently, Fairman concluded that the framers intended selective incorporation of rights in the Bill of Rights.[186] By focusing on this issue and by taking one branch of Fairman's argument to its logical conclusion, Raoul Berger has illuminated the fallacy implicit in the argument based on the Civil Rights bill.

Mr. Berger said that a Republican centrist-conservative coalition was in control of the Thirty-ninth Congress and that abolitionist ideas were an anathema to these men.[187] Not only were these congressmen hostile to abolitionist ideas, Mr. Berger asserted, but also they were influenced by "Negrophobia,"[188] and they cherished states' rights.[189] Still, they were willing to invade states' rights, as conventionally understood, to protect blacks whom they supposedly disliked.[190] But they were not willing to interfere with states' rights by requiring the states to obey the Bill of Rights, guaranties that protect whites and blacks alike. Abolitionists had many ideas and most Republicans did not share them all. Certainly, the central idea of the abolitionists was that slavery should be abolished. If abolitionist ideas were an anathema to most Republican congressmen, why, in the previous session of Congress, had they abolished slavery in the states—the main goal of the radical political abolitionists?

In fact, leading Republicans gave the states' rights argument short shrift. As Representative William Lawrence put it, "I answer that it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded."[191]

By one argument, the Civil Rights bill was merely designed to protect blacks by granting them equal protection in certain narrow rights secured by state law—the right to contract, own property, and the like. The Fourteenth Amendment, in turn, merely incorporated by the Civil Rights bill, read narrowly. The whole object, according to this view, was to grant certain rights to blacks—basically, the rights to contract, sell, testify, and to equal protection of certain state laws.[192] Fairman also seems to have read the Civil Rights bill only as providing for equal treatment under state law.[193]

The argument claims that the Fourteenth Amendment is absolutely the same as the Civil Rights bill.[194] Since the "act was merely to secure blacks against discrimination and not to displace nondiscriminatory state law,"[195] by this view the Fourteenth Amendment does not protect Bill of Rights liberties or any other absolute rights that states cannot abridge.

The argument is absolutely inconsistent with the language of the Fourteenth Amendment. If the amendment had been designed merely to prohibit discrimination in certain rights that states chose to accord their own citizens, then the due process and privileges and immunities clauses would have been superfluous. To say that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law" is a very odd way of saying that the state is prohibited only from discriminating in certain rights it gives its citizens.

In addition to being inconsistent with the language of the Fourteenth Amendment, the attempt to read the amendment as no more than a ban on discrimination collides with the way leading proponents of the amendment and the Civil Rights bill described the amendment and the overarching principles from which they derived the power to pass the bill—the absolute rights of "personal security," "personal liberty," and "the right to acquire and enjoy property."[196] These statements about power to pass the Civil Rights bill are significant because one purpose of the Fourteenth Amendment was to place the power to pass the bill in the Constitution if it was not there already.

As Senator Trumbull noted in arguing for the Civil Rights bill, the rights to personal liberty, personal security, and private property "are declared to be inalienable rights, belonging to every citizen of the United States . . . no matter where he may be."[197] If the states could eliminate such rights so long as they did it for all of their citizens, the rights would not be inalienable. Further, Congressman Wilson, chairman of the Judiciary Committee and manager of the Civil Rights bill in the House, noted that the rights of personal security, personal liberty, and the right to acquire property are "inalienable."[198] Wilson described "the right to personal security, the right to personal liberty, and the right to acquire and enjoy property" as absolute rights.[199] Bingham also referred to "absolute" rights.[200] Representative Lawrence noted "that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him."[201] Senator Howard, as we know, believed that the Fourteenth Amendment embodied the fundamental rights in the Bill of Rights and that states were not free to deny them.[202] The views of Congressman Bingham were the same.[203] If one treats the chairman of the Judiciary Committee and manager of the Civil Rights bill in the

Senate, the chairman of the Judiciary Committee and the manager of the Civil Rights bill in the House, the author of section 1 of the Fourteenth Amendment, and the senator who presented it on behalf of the Joint Committee to the Senate as leading proponents of these measures, then four of the five leading proponents of either the Civil Rights bill or the Fourteenth Amendment clearly adhered to the concept of absolute rights of citizens of the United States that no state could abridge. For that reason, attempts to use the Civil Rights bill to prove that no absolute rights are guarantied by the Fourteenth Amendment must fail. If absolute rights are guarantied by the Fourteenth Amendment, then a few statements that the Civil Rights bill and the Fourteenth Amendment are the same cannot be taken to disprove protection of Bill of Rights liberties.

If it is conceded that the Fourteenth Amendment was designed to secure absolute and fundamental rights of citizens of the United States, then the inquiry moves to what Republicans considered those rights to be. The overwhelming evidence from the Thirty-eighth and Thirty-ninth Congresses is that Republicans viewed rights in the Bill of Rights as rights of the citizens of the United States that states could not (or in a few cases should not) deny.[204] And there is evidence that leading Republicans read article IV, section 2 to embody such rights.[205]

Attacks on Bingham and Howard

John Bingham wrote section 1 of the Fourteenth Amendment (except for the citizenship clause) and was a member of the Joint Committee on Reconstruction, which reported the amendment. Jacob Howard, senator from Michigan, was a member of the Joint Committee and spoke for the committee in presenting the amendment to the Senate. The views of Bingham and Howard, leading proponents of the amendment, are entitled to very great weight. Indeed, some say that the intention of the legislature "may be evidenced by the statements of leading proponents."[206] The intent, once found, "is to be regarded as good as written into the enactment."[207] Since Bingham's and Howard's remarks are entitled to the greatest weight in determining the intent of the framers of the amendment and since what they said is extremely damaging to the thesis that the amendment does not apply the Bill of Rights to the states, both men have been subjected to personal attacks.

For example, Mr. Berger set out to prove that Bingham was a legal moron. Specifically, he said Bingham was "muddled,"[208] "inept,"[209] "veer[ed]" as "crazily as a rudderless ship,"[210] and was unable to "understand what he read."[211] Bingham was not viewed in this light by his contemporaries. The *New York Times*, for example, referred to

Bingham and Wilson as "among the most learned and talented" members of the House.[212] Bingham's reputation as a lawyer was excellent.[213] Professor Fairman took a similar, if milder, approach to Bingham. For Fairman, Bingham was a man of "peculiar conceptions,"[214] an "ardent rhetorician, not a man of exact knowledge or clear conceptions or accurate language."[215] Indeed, Fairman concluded that much of what Bingham had to say cannot be taken seriously.[216]

Mr. Berger said that Bingham was "utterly at sea as to the role of the Bill of Rights."[217] First, "he considered it to be binding on the States."[218] Then he noted *Barron v. Baltimore* had held the Bill of Rights was not applicable to the states.[219] Berger quoted other supposed "contradictions" in this vein.[220]

Bingham's remarks, however, show that he believed that the provisions of the Bill of Rights were in fact restrictions on the states by the privileges and immunities clause of article IV, section 2, but that the only enforcement mechanism was the oath state officials took to respect the Constitution as the supreme law of the land.[221] Bingham's remarks also show that Bingham was aware of Supreme Court decisions on the point but did not agree with them.[222] Wilson and Thayer held similar beliefs, but for them the rights in the Bill of Rights were privileges of citizenship secured against state interference, and Congress could legislate directly to secure the rights protected.[223]

In dealing with Bingham, Mr. Berger followed an analysis used by Professor Fairman in his article. In 1954 Fairman's article was subjected to a powerful critique by W. W. Crosskey. Interestingly, although Fairman's later book on the Supreme Court during Reconstruction and reunion did not cite Crosskey's article, it also did not repeat many of the arguments that Crosskey criticized in Fairman's original article.

Mr. Berger said 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* . . .'"[224] Mr. Berger then commented, "the Bill of Rights contains no privileges and immunities provision."[225] Bingham never said it did. The argument indicates, it seems to me, a strained reading of what Bingham said. The quotation cited is an edited version of the following statement by Bingham:

> 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,[226] and that no person shall be deprived of life, liberty or property without due process of the law.[227]

Here, Bingham was supporting his contention that the amendment is in accordance with the Constitution. He seems to have been listing three items in a series. He wanted to enforce the Bill of Rights and equal protection. Why not? he said. 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 2 of article IV as meaning that "the citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several states."[228]

Mr. Berger seems to have objected to Bingham's understanding of article IV, suggesting 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, the argument seems to suggest, read article IV to protect rights of citizens of the United States, not rights of a citizen of a state.[229]

Of course, the privileges or immunities clause of the Fourteenth Amendment that Berger equated with article IV does 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 protects the rights of citizens of the United States.[230] *The privileges or 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." In the final draft, the Fourteenth Amendment provided that "no state shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*."

Mr. Berger cited Bingham's March 9 speech on the Civil Rights bill to prove further "contradictions."[231] Bingham thought the states possessed the reserved power to control the property, life, and liberty of their citizens, that is, to legislate generally on these matters.[232] The power was subject to the limitations of the Bill of Rights enforced only by an oath to uphold the Constitution.[233] Here is how Berger showed Bingham to be so muddled that no one could understand him. First, Berger's edited version of what Bingham had to say:

> 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 . . . I have advocated here an amendment which would arm Congress with the power to punish all violations of the bill of rights . . . I have always believed that *protection* . . . within the States of all the rights of person and citizen, was of the power *reserved to the States*.[234][*sic*]

"If the care of these rights," Berger asked, "'is in the states', how do state officers violate the Bill of Rights?"[235] Recall 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:

> The 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*.[236]

Mr. Berger's omissions 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.[237]

The dangers of selective quotation (which haunt us all) are clear in Mr. Berger's quotations of Bingham's views. He quoted 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.'"[238] The quotation is telling because it appears to be an endorsement of the Court's views by the man Berger considered to be a "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 powers of the Congress and prohibit any such legislation by Congress."[239] In the accurate quotation, Bingham's skepticism about the correctness of *Barron v. Baltimore* is clear. In the edited version that skepticism is eliminated.

Mr. Berger's analysis itself contains contradictions. First, he said that Bingham's references to the Bill of Rights meant and were understood to mean only the due process clause of the Fifth Amendment and article IV, section 2.[240] Later, Berger claimed, on the issue of incorpora-

tion of the Bill of Rights as a limitation on the states, "the fact that Bingham's amendment was shelved argues against the adoption of his view."[241] Finally, Berger said that Bingham's views were so confused and muddled that his colleagues could not understand what he meant.[242]

Berger vacillated among three very different views: that Bingham's remarks about the Bill of Rights were clearly understood but limited so as not to include the Bill of Rights; that his remarks were understood to include the Bill of Rights but were rejected; and that Bingham's ideas were so muddled no one could understand them. At times, Berger viewed the first version of Bingham's amendment, the one postponed by the House, as a prototype of the amendment finally adopted.[243] Where the Bill of Rights is concerned, however, the prototype becomes simply a rejected proposal.[244]

The truth, of course, is that the language of the "second" proposal was more effectively designed to make the Bill of Rights limit the states than was the prototype. The second version was an explicit limitation on the states and specifically secured all privileges and immunities of citizens of the United States against abridgment by a state. As the debates show, leading Republicans believed that the Bill of Rights were already binding on the states and enforceable.[245] The revised language of section 1 is clearly aimed to write such an understanding into law.

One might also argue that Bingham did not refer explicitly to the Bill of Rights in the final debate on the revised section 1,[246] presumably showing that Bingham's intent to enforce the Bill of Rights against the states was abandoned. But Congress had heard Bingham at length on the subject of the amendment and the Bill of Rights. His first proposal to arm Congress with power to enforce the Bill of Rights had been changed by explicitly protecting privileges and immunities of citizens of the United States and by providing that no state could abridge them.

In his final remarks Bingham pointed out that Congress had lacked power to protect privileges and immunities of citizens and basic rights of persons when they were abridged by the unconstitutional acts of states.[247] There had been no protection against flagrant state violations of guarantied privileges of citizens of the United States.[248] For example, "contrary to the express letter of your Constitution 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens."[249] Cruel and unusual punishments are forbidden by the Eighth Amendment, one of the Bill of Rights.

Critics point out that Bingham did not use the words "first eight amendments" in 1866.[250] However, Bingham did refer repeatedly to

"the Bill of Rights." To paraphrase Crosskey, the phrase *Bill of Rights* is good enough to let readers of law review articles know that the author is talking about the first eight amendments to the Constitution. Still, opponents of incorporation have never considered the phrase adequate when Bingham uses it.[251]

Though 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."[252] On another occasion he referred to opponents of his prototype as "opposed to enforcing the written guarantees of the Constitution."[253] On January 25, 1866, in the same speech in which he had said he considered enforcement of all the guaranties of the Constitution the most important issue before Congress, Bingham explained, "I believe that the free citizens of each State were guarantied, and were . . . intended to be guarantied by the Constitution, all—not some, 'all'—the privileges of citizens of the United States in every State."[254]

One could ask why "the Bill of Rights" was not explicitly written into the Fourteenth Amendment, as due process and citizenship were.[255] The reason, of course, is that the rights in the Bill of Rights make up the most important, but not all, of the rights of citizens of the United States.

Another argument relies on Congressman Wilson's statement during the debate on the Civil Rights bill that "we are not making a general criminal code for the States."[256] The inference suggested is "that what was unpalatable in the Bill would be no more acceptable in the Amendment" so that "it becomes apparent that beyond due process the framers had no intention to adopt the Bill of Rights."[257] A code specifies offenses such as larceny and fornication. Although the Bill of Rights places some limits on state and federal criminal codes, it is not the same thing. Certainly the Bill of Rights was not viewed as a full criminal code in 1866, nor was the idea that states should obey its commands "unacceptable."

Like a number of his colleagues, Congressman Wilson thought the states were already required to obey the Bill of Rights.[258] All the evidence suggests that he considered this state of affairs desirable, not unacceptable. Although Wilson and the men who shared his views may have considered the amendment unnecessary, they would not have considered it undesirable. As Representative Farnsworth noted in the debate on the Fourteenth Amendment, "So far as this section [section 1] is concerned, there is but one clause in it which is not already in the constitution. . . . But a reaffirmation of a good principle

will do no harm."[259] Apparently, for Farnsworth, in spite of *Barron v. Baltimore*,[260] states could not deprive any person of due process even before the passage of the Fourteenth Amendment.[261] Farnsworth, of course, was a radical abolitionist Republican. By 1864 he seems to have believed that the Constitution, properly construed, prohibited slavery in the states.[262]

Wilson believed that the Fifth Amendment provided all the legislative power necessary to pass the Civil Rights bill.[263] From that, one might conclude that "implicit in Wilson's formulation is the assumption that no more is needed."[264] Wilson's remarks, however, merely show that he thought Congress already had the power under article IV, section 2 and the Bill of Rights to pass the Civil Rights bill.[265] Bingham disagreed. To remove such doubt was one of the reasons the Fourteenth Amendment was passed.

The comments by senators and representatives suggesting that the provisions and powers of the amendment were already in the original Constitution[266] show that these men adhered to a radically unorthodox reading of the original Constitution.[267] These comments do not, however, prove that they thought the amendment did not make the Bill of Rights effective against the states.

Criticism of Senator Howard

After dismissing Congressman Bingham, Mr. Berger moved on to Senator Howard. Howard was a member of the Joint Committee and managed the amendment in the Senate. Because his views are also entitled to great weight, Howard, too, had to be attacked. We are told that Howard was a "reckless . . . radical," a "Negrophile" who held out for "black suffrage" to the end.[268] Because there was a considerable difference of opinion on the Joint Committee and because "non-radicals" outnumbered "radicals," Mr. Berger insisted that Howard's opinion must be taken "with 'a bushel of salts.'"[269] As the violence of the attack suggests, Howard's remarks are very damaging to the anti-incorporation thesis.

The argument is a non sequitur. The fact that Radicals and moderate Republicans were divided over black suffrage does not prove any similar division existed over the Bill of Rights. No such division surfaced in the debates. Speaker after speaker lamented that blacks had not been given the vote.[270] No one complained that the states would be permitted to continue to violate the guaranties of the Bill of Rights.

Mr. Berger took other steps to minimize Howard's speech. He said that the sum and substance of Howard's contribution to the incorporation debate was simply noting, after the privileges and immunities

listed in *Corfield v. Coryell*,[271] that "to these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments."[272] According to Berger, this "remark" by Howard was "casually tucked away in a long speech."[273]

The characterization is grossly inaccurate. In his speech Howard listed rights included in 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 guaranties."[274] Howard's statement on the Bill of Rights comprises about one-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, treatment of it as a "remark casually tucked away in a long speech" is a serious misstatement.

To further denigrate Howard's speech, critics have cited Senator Poland as saying that the privileges or immunities provision of the Fourteenth Amendment secured nothing beyond what was intended by article IV.[275] 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."[276] Even Berger believed that the privileges or immunities clause of the Fourteenth Amendment went beyond the conventional judicial interpretation of article IV. Either Poland gave the clause an unorthodox reading or, if Berger's book is correct in asserting that Republicans went beyond the conventional reading of article IV, section 2, then Poland's 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, the critics provide us no guidance.

To discredit Howard's speech, Berger also cited Senator James R. 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 [excluding application of the Bill of Rights to the states] were designed to reassure those whose consent had thus far been won; and they rob Howard's remark of uncontroverted standing.[277]

Senator Doolittle, however, was an *opponent* of the measure.[278] His remarks obviously were not designed to "reassure" supporters.[279]

Furthermore, the claim that the Fourteenth Amendment was passed to give vitality to the Civil Rights bill is hardly inconsistent with the application of the Bill of Rights to the states. The amendment was passed in part to make clear the power of Congress to pass the Civil Rights bill, a power several leading Republicans had found under the power of Congress to enforce rights in the Bill of Rights.

One argument says that "no newspaper reported Howard's remarkable expansion of the privileges and immunities clause, notwithstanding that application of the Bill of Rights would cut a wide swath through State self rule."[280] In fact, Howard's speech was reported in detail on the front page of the *New York Times* of May 24, 1866, and elsewhere.[281] The *Times* report quoted verbatim the portion of the speech that stated that the privileges and immunities secured by the Fourteenth Amendment included the first eight amendments, Howard's listing of them, and his statement that the amendment would correct court rulings that the amendments did not bind the states.[282] Before that, the *Times* had reported Bingham's speech in which he said that the object of the "prototype" of section 1 was to enforce the Bill of Rights within the states.[283]

Mr. Berger argued that if the framers of the amendment intended to require the states to obey the Bill of Rights, "honesty required disclosure."[284] Why disclosure in the *Congressional Globe* and on page one of the *New York Times* was not adequate he did not explain.

The Power of the Courts

In a suggestion that would emasculate the Fourteenth Amendment, Mr. Berger argued that the amendment was to be enforced by Congress only, not the courts.[285] "Why," Berger asked, "did Hotchkiss protest that section five '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?"[286]

There is a straightforward answer to Berger's rhetorical question. Hotchkiss did not make his protest about section 5 of the Fourteenth Amendment, as Berger believed when he wrote *Government by Judiciary*. He spoke on February 28, 1866. At that time, no section 5 was before the House or even existed. Instead, the remark quoted occurred in the debate on Bingham's prototype of the Fourteenth Amendment —the one that gave Congress the power to secure privileges and immunities and equal protection, which did not by its terms limit the states.[287]

When Hotchkiss spoke on February 28, 1866, he objected that Bingham's prototype was not self-executing and would depend on a majority of Congress.

> 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 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.[288]

Just as Hotchkiss suggested, the Fourteenth Amendment was recast in the form of a limitation on the states so that it could be enforced regardless of congressional action.[289] The final version of the Fourteenth Amendment broke the subject into two parts, with explicit restrictions on the states in section 1 and with congressional power to enforce in section 5. The amendment in this form was not approved by the Joint Committee until April 28, 1866.[290] It was not reported to the House until April 30, 1866.[291] Hotchkiss's speech, together with a change in the form of the amendment to meet his objection, proves that the amendment was to be enforced by courts as well as Congress.

Conclusion

The weight of the evidence from the Thirty-ninth Congress supports the conclusion that the Fourteenth Amendment was designed to require the states to respect all the guaranties of the Bill of Rights. The language of the amendment, which provides that no state could abridge the privileges or immunities of citizens of the United States, says as much. One natural place to look for the privileges and immunities of citizens of the United States is in the enumeration of rights in the Constitution. These certainly include the rights in the Bill of Rights, together with other rights secured to the citizen, such as the right to the writ of habeas corpus.

One of the most common contemporary descriptions of section 1 was that it protected the rights of citizens of the United States or all the rights the Constitution secured. Both Bingham and Howard described section 1 or its prototype as securing the rights in the Bill of Rights from state interference. Both said that a constitutional amend-

ment was needed to correct the doctrine set out in *Barron v. Baltimore* that the Bill of Rights did not limit the states.[292] In addition, several other congressmen who spoke in the Thirty-ninth Congress said that they wanted a constitutional amendment to secure and enforce "all the guaranties" of the Constitution,[293] a phrase that embraces the rights in the Bill of Rights.

Most Republicans believed that the states were already required to obey the Bill of Rights. They did not accept the "positivist" notion that the Constitution was merely what the Supreme Court of the moment said it was. For many Republicans, the amendment merely declared constitutional law properly understood. Not a single Republican in the Thirty-ninth Congress said in debate that states were not and should not be required to obey the Bill of Rights. *Barron v. Baltimore* was mentioned only when Republicans urged its repudiation.[294]

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

Power to compel obedience was given to both Congress and the courts. Republicans repeatedly said that the passage of the amendment put enforcement of its principles beyond the power of congressional majorities. These statements clearly presuppose judicial enforcement.[295]

Some Republicans also read the due process clause to apply the Bill of Rights to the states. The process required was the traditional one of trial in the courts. So a number of Republicans read the clause to mean that a person could be deprived of rights, including those guarantied by the Bill of Rights, only after conviction of a crime with all the procedural protections inherent in such a trial, or after a trial with all the safeguards that would protect a party in an action involving property.[296] As Senator Sumner saw it, the due process clause "brief as it is, it is in itself alone a whole Bill of Rights."[297] Finally, as Crosskey noted, many of the guaranties in the Bill of Rights are "process" guaranties. Prior to the framing of the Fourteenth Amendment, the Court had suggested that procedural guaranties set out in the Constitution were part of the process required by the due process clause.[298]

In the years that followed congressional passage of the Fourteenth Amendment, it would be debated in the election campaign of 1866, ratified by the states, and would be tested first in Congress and finally in the Courts.

Chapter 5

The Amendment Before the States

The Campaign of 1866

The election campaign that began in the summer of 1866, when Congress adjourned, was a referendum on the issue between President Johnson, who insisted that the rebellious states should be admitted at once with no further conditions, and Congress, which insisted on the conditions set out in the Fourteenth Amendment. Politically, the issue was whether the southern states, which had lost the war, would win the peace. Would the southern states be allowed to continue to deny blacks the right to vote but benefit from the substantial increase in representation in the House produced by the Thirteenth Amendment's repeal of the three-fifths clause? Most of the discussion of the Fourteenth Amendment centered on the political consequences of its rejection and on the merits of the contest between President Johnson and Congress. Still, there was much, albeit often cursory, discussion of section 1.

Many who advocated section 1 believed that it would protect the rights of American citizens from state interference. As the Republican National Committee observed in supporting the proposed amendment, "All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens ever more; and no State shall have power to contravene this most righteous and necessary provision."[1]

A convention of pro-Republican soldiers and sailors chaired by Governor Jacob D. Cox of Ohio "resolved" that the constitutional amendment "clearly defines American citizenship, and guarantees all his rights to every citizen."[2] General John Alexander Logan, Republican candidate for congressman-at-large from Illinois, analyzed section 1

teenth 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 1876 in *United States v. Cruikshank*[92] 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 said to be merely limitations on the powers of the national government.[93] All the Justices except one concurred in the Court's opinion.[94] In April of that year in *Walker v. Sauvinet*[95] 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 Nathan Clifford and Stephen J. Field dissented.[96]

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.[97] 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 congressmen did not repeat the earlier broad belief that the privileges or immunities clause of the Fourteenth Amendment protected at least the Bill of Rights. Nor is it surprising that some congressmen said that the religious guaranties of the First Amendment did not limit the states. After rulings by the high Court, that was clearly the law. The true and intended meaning of the Fourteenth Amendment was, by this time, of only academic interest.

Senator Oliver 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.[98]

Chapter 7

The Amendment Before the Courts

(Part One)

After the ratification of the Fourteenth Amendment in 1868, the battle over its meaning shifted to the courts. By 1873 the Supreme Court began dismantling the amendment. In that year it nullified the privileges or immunities clause.[1] In a companion piece to Charles Fairman's article, Stanley Morrison read the record of the Court's decisions as a further vindication for the claim that the amendment was never intended to encompass all Bill of Rights liberties.[2] However, as Leonard Levy notes, Morrison proved "that the Supreme Court had never accepted the incorporation theory . . . but he did not prove that the several rejections of that theory had a scintilla of historical support."[3] According to Levy, the record of the Court's decisions cited by Morrison is "a melancholy litany of judicial errors."[4]

It is too easy to assume that the Court followed the only available road in rejecting application of the Bill of Rights to the states. In the years between 1868 and 1873, in fact, there was significant support for a libertarian reading of the amendment. In one early case, *United States v. Hall*, decided in 1871, a lower federal court held that the Fourteenth Amendment did apply the Bill of Rights to the states.[5] In *Hall* the defendants were charged with conspiring to deny other citizens their rights of freedom of speech and assembly. The defendants claimed that even if the charge were true it did not constitute a federal crime—because rights to freedom of speech and assembly were not privileges or immunities of citizens of the United States. Judge (later Justice) William B. Woods rejected the defense. He also held that the statute under which the defendants were charged could constitutionally reach the acts of private individuals within the states intended to deprive citizens of First Amendment freedoms.

Woods had been born in Ohio. He was admitted to the bar in 1847.

In 1857, as a Democrat, he was elected speaker of the Ohio House. In the Civil War he sided with the Union, enlisted, and was a brigadier general by the end of the war. He settled in Alabama and was appointed to the Fifth Circuit by President Ulysses S. Grant in 1869. Woods would later join with Bradley on that court in holding that a New Orleans monopoly on slaughtering animals violated the Fourteenth Amendment.[6] In later years Woods would uphold the separate but equal doctrine. In 1880 he was appointed to the Supreme Court.[7]

In deciding *Hall*, Judge Woods considered the privileges or immunities clause of the Fourteenth Amendment, a clause he understood exactly as Bingham and Howard had intended.

> 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 the 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.[8]

As Robert Kaczorowski has shown, in the years before 1873 a number of federal prosecutors and federal judges read the amendment as Judge Woods did. A letter in the Bradley papers shows that Justice Joseph P. Bradley agreed with the views Woods expressed in *Hall*.[9]

One early academic writer interpreted the Fourteenth Amendment to apply the limits of the Bill of Rights to the states. John N. Pomeroy

was a professor of law first at New York University, then at Hastings. He was a prolific and highly respected author. In his 1868 *Introduction to Constitutional Law* Pomeroy insisted that section 1 of the Fourteenth Amendment would bring civil rights under the protection of the nation. Both *Dred Scott* (holding blacks not entitled to federal constitutional protection) and *Barron v. Baltimore* (holding that the Bill of Rights did not limit the states) would be corrected.[10]

In the United States Supreme Court, Bill of Rights liberties did not fare so well. In its early cases considering the amendment, the Court read it narrowly, so narrowly that the privileges or immunities clause was virtually read out of the Constitution. These early decisions share several common characteristics. The history of abuses that led to the amendment received superficial and cursory attention at best.[11] The legislative history of the amendment— including Senator Howard's full statement as to the purpose of the privileges or immunities clause —received no attention at all. By the time the Court finally discussed Howard's remarks in 1900,[12] it had repeatedly held that the guaranties of the Bill of Rights did not limit the states and was clearly reluctant to overrule a long line of its cases on the subject. In its early misconstructions of the Fourteenth Amendment, the Court also ignored the implication of some of its own prior decisions, particularly *Dred Scott v. Sandford*,[13] *Barron v. Baltimore*,[14] and *Murray's Lessee v. Hoboken Land & Improvement Co.*[15]

Dred Scott v. Sandford had been decided in 1857. There, in accordance with Chief Justice Taney's view of the "original intentions" of the framers, the Court had held that blacks, even free blacks, had belonged to a degraded class at the time the Constitution was written and, short of a constitutional amendment making them citizens, could never be citizens of the United States or entitled to any of the "rights and privileges and immunities guaranteed by [the Constitution] to the citizen," including those in the Bill of Rights.[16]

One object of the Fourteenth Amendment (which made all persons born or naturalized in the United States citizens of the United States and of the state where they resided) was to overrule *Dred Scott* and make blacks citizens. As Crosskey has noted, *Dred Scott* had treated rights in the Bill of Rights and other privileges in the Constitution as belonging only to the class composed of citizens of the United States, a class that excluded all blacks, even those who might be citizens of a particular state.[17] The Court in *Barron v. Baltimore*, of course, held that rights in the Bill of Rights did not limit the states. So, when the Fourteenth Amendment provided that "all persons born or naturalized in the United States . . . and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside" and

that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it had a twofold object: first, to extend citizenship of the United States and of the states to blacks, and second, to provide that the privileges of citizens of the United States (previously defined in *Dred Scott* to include Bill of Rights liberties) should no longer be abridged by the states.[18]

Another antebellum case had similar implications for all of the procedural guaranties of the Bill of Rights. In 1856, about ten years prior to the framing of the Fourteenth Amendment, the Court had suggested that the procedural guaranties set out in the Constitution were part of the process required by the due process clause.[19] Most of the guaranties in the Bill of Rights—the right against self-incrimination, the right to counsel, the right to confront witnesses, and the like—are procedural. So it could have been a simple matter, under prior law, for the Court to have found that the Fourteenth Amendment applied these rights in the Bill of Rights to the states.

Neither the Court nor counsel made any reference to the Fourteenth Amendment in the first case in which the Bill of Rights question was raised in the Supreme Court after the amendment's ratification.[20] Pennsylvania had passed a statute changing the requirements for an indictment for murder or manslaughter. It was no longer necessary to specify in the indictment the means by which the death was caused. George S. Twitchell, who was convicted under such an indictment, claimed that it violated the guaranties of the Fifth and Sixth Amendments, particularly the Sixth Amendment guaranty to the accused "to be informed of the nature and cause of the accusation against him."

The Court disposed of the case by noting that the Fifth and Sixth Amendments had been held, in a long line of cases, not to apply to the states. If that "were an open question" it might be the Court's duty to hear argument on the case. However, the Court considered the question closed.[21] The opinion was written by Chief Justice Chase, an antislavery Republican activist, and joined by other Republican appointees. The Supreme Court said nothing about the Fourteenth Amendment. Apparently, counsel for the defendant had not thought to raise it.

The first time the Supreme Court considered the meaning of the Fourteenth Amendment privileges or immunities clause was in the *Slaughter-House Cases*.[22] A state statute had given one corporation a monopoly on slaughtering animals in New Orleans. Other butchers in the city went to court to attack the ordinance. Among other claims, they asserted that the monopoly violated the privileges or immunities clause of the Fourteenth Amendment. Counsel for the butchers in

one of their briefs to the court cited the congressional legislative history of the amendment, including statements by Bingham and Senator Howard indicating an intent to apply the Bill of Rights to the states.[23] The Bill of Rights question was not directly presented by the *Slaughter-House Cases*, but by its construction of the Fourteenth Amendment the Court effectively nullified the intent to apply the Bill of Rights to the states. The Supreme Court upheld the monopoly statute by a vote of 5 to 4. Justice Samuel F. Miller wrote for the majority.

Miller had been trained as a doctor and left medicine for law, practicing in Kentucky as a doctor and a lawyer. There he had advocated gradual emancipation. In politics Miller had been a Whig, a follower of Henry Clay. He was propelled into the Republican party by the passage of the Kansas-Nebraska Act. Moving to Iowa in 1850, he ran for and lost elections for state senator and governor. In 1860 he was a strong Lincoln supporter. He was on the Court by 1862.[24] Like most of his fellow Justices, he would take a narrow view of the rights of blacks in the years after the Civil War.[25]

Miller thought that the "most cursory glance" at the Thirteenth, Fourteenth, and Fifteenth Amendments discloses a "unity of purpose, when taken in connection with the history of the times." The purpose was to prevent discrimination against blacks and to protect them from those who had "formerly exercised unlimited domination over" them. Miller found it unlikely that the clause was intended to protect fundamental rights of a citizen of a state against the legislative power of his own state.[26]

Miller distinguished between the privileges and immunities of citizens of a state and the privileges and immunities of citizens of the United States. The privileges of a citizen of a state embraced "nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Justice Washington, those rights which are fundamental."[27] The privileges and immunities of a citizen of the United States were a narrow class of privileges, enjoyed by virtue of United States citizenship and including things such as protection on the high seas. According to Justice Miller the Fourteenth Amendment was not designed to transfer the protection of civil rights from the states to the federal government.[28] So by Justice Miller's construction of the Fourteenth Amendment the fundamental rights of American citizens were left to the protection of the states, a strange reading of the language of the Fourteenth Amendment.

Miller's reading also flew in the face of legislative history. Leading Republicans in the Thirty-ninth Congress had believed that the fundamental rights referred to by Justice Washington and embraced within article IV, section 2 were absolute privileges of citizens of the United

States that states could not abridge.[29] These absolute rights had other incidental rights connected with them, and Congress had power to enforce protection of such civil rights.[30] Justice Miller turned the plan for the Fourteenth Amendment on its head.

Miller did identify (lest it should be said that none existed) privileges and immunities of citizens of the United States that were protected by the amendment. These included such things as the right to go to and from the seat of government, free access to the seaports, protection on the high seas or when under the jurisdiction of foreign governments, and the right to use navigable waters.[31] Why an amendment, which Miller incorrectly thought was designed only to protect blacks, would focus on things such as traveling back and forth to Washington, D.C., and to the seaports and protection on high seas and in foreign countries, Justice Miller did not explain. He also mentioned the right to petition and assemble for redress of grievances as privileges of citizens of the United States, though later it became apparent that the Court intended to limit such rights to assembling to petition the federal government.[32]

In dissent, Justice Bradley, joined by Justice Noah H. Swayne, wrote that the privileges or immunities of citizens of the United States would include those guarantied by the Bill of Rights. The fact that the majority opinion did not follow this obvious explanation, but resorted to privileges such as protection on the high seas, indicates that it was unsympathetic with Bradley's interpretation.[33]

Bradley insisted that citizenship was not "an empty name, but had connected with it certain incidental rights, privileges and immunities of the greatest importance." "And to say that these rights and immunities attach only to state citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient interpretation of the constitutional history and the rights of men, not to say the rights of American people."[34] Because of the similarity of the original privileges and immunities clause and that of the Fourteenth Amendment, Bradley looked at article IV, section 2, which he gave a broad reading. The section, Bradley insisted, "seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens."[35] Bradley went on explicitly to interpret the privileges or immunities clause of the Fourteenth Amendment to protect all rights of citizens of the United States specified in the Constitution.

> The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated although they were secured, in express terms, from invasion by the federal government; such as the right of habeas corpus, the right of trial by jury, the free exercise of religious worship, the right of free speech and of free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all and including almost all the rest, the right of not being deprived of life, liberty, or property without due process of law. These, as well as still others, are specified in the original Constitution or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons whether citizens or not.[36]

Justices Chase and Field also dissented, but they did not reach the Bill of Rights question.

By the Court's opinion in the *Slaughter-House Cases* the most basic civil liberties were to be protected only by state laws and state constitutions. In this respect the situation was much as it had been before the Civil War.[37] The Court had reversed one of the main nationalizing results of the Civil War. Justice Swayne, one of the *Slaughter-House* dissenters, protested: the Court had turned "what was meant to be bread into a stone."[38] Protests came from Congress as well. Senator George Franklin Edmunds, one of the framers of the amendment, said the Court had "radically differed" from the intent of the framers.[39]

In 1890 political scientist John W. Burgess wrote a premature epitaph for the *Slaughter-House* decision. According to Burgess the Court had attempted to restore "that particularism in the domain of civil liberty, from which we suffered so severely before 1861." It threw away the "great gain in the domain of civil liberty won by the terrible exertion of the nation by appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overruled."[40]

For years to come, the decision was extremely influential. In the years that followed the *Slaughter-House* decision—a decision that suggested that the amendment was designed almost exclusively to protect blacks—it was cited to justify decisions denying them a wide range of rights.[41]

When the *Slaughter-House Cases* were decided in 1873, the influence of antislavery ideology in the Republican party had seriously declined. As antislavery stalwarts grew old, died off, or were defeated at the

polls, more and "more Republicans began to emphasize the issue of states' rights."[42] President Grant, a defender of the rights of blacks, found himself increasingly isolated.[43] Blacks could be protected only by federal "force," and each new application of force brought defections. With the Force Act of 1870, the once radical Carl Schurz, the United States senator from Missouri, declared himself for states' rights.[44]

The Klan was omnipresent in the 1870s. Assassination of black leaders and Republicans was becoming frequent. At first, Congress and the Grant administration acted forcefully to protect citizens. Grant suspended the writ of habeas corpus in nine South Carolina counties. A number of Klansmen were tried under federal anti-Klan statutes, and fifty-five were found guilty of violating civil rights. According to historian Page Smith more than five thousand Klansmen were arrested under the federal acts, and for a time the Klan was suppressed. Federal prosecutors and judges often had acted on the theory that Klan violence deprived citizens of their Bill of Rights privileges, privileges secured by the Fourteenth Amendment and the Reconstruction acts.[45]

The question of the constitutionality of congressional Reconstruction acts designed to protect blacks and Republicans in the states would soon reach the Supreme Court. The *Slaughter-House* decision was not encouraging. In March of 1876 the Supreme Court decided the case of *United States v. Cruikshank*.[46] A group of armed whites had killed over sixty blacks. The defendants were indicted for conspiring to oppress, threaten, injure, and intimidate blacks to prevent them from exercising their right to assemble and their right to bear arms.

By the time *Cruikshank* was decided the Court considered the meaning of the Fourteenth Amendment settled. The Court noted that "no rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."[47] The Court found that the right to assemble was not a right granted to the people by the Constitution. The First Amendment was merely a limitation on the national government. It only guarantied the right to assemble against congressional interference. "For their protection in its enjoyment, the people must look to the States."[48] Still, had the indictment alleged that the assembly was for the purpose of petitioning Congress, the Court said that the case would have been within the statutory conspiracy and the defendants could have been punished. The Court also found that the right to bear arms was not granted by the Constitution. The Second Amendment merely restricted the power of Congress.[49]

The *Cruikshank* case raised two related questions: What was the scope of the guaranties of the Bill of Rights? and Could the government directly protect rights of its citizens when their First Amendment right to assemble and Second Amendment right to bear arms were violated? In the latter respect the Court held that the Fourteenth Amendment added nothing to the rights of one citizen as against another.[50]

The view of the federal system espoused in the *Slaughter-House Cases* was reaffirmed and extended in *Cruikshank*.[51] It was becoming judicial orthodoxy. Historian Philip Paludan and others suggest that *Cruikshank*'s limitation of the reach of the Fourteenth Amendment to "state action" represented Republican commitment to federalism coming home to roost. As Paludan seems to recognize, the federalism of 1866 was at the least a federalism where states stayed within their orbits, orbits carefully marked by the guidelines of the federal Bill of Rights.[52] *Cruikshank* went beyond the state action question to free states from the constitutional constraints of the Bill of Rights.

For reasons not entirely clear, Republican judges were abandoning a commitment to enforcement of Bill of Rights liberties and the rights of blacks. Part of the reason may have been concern for federalism. Another may have been the conclusion that the protection of blacks was not worth the enormous effort it required and the conflict it produced. At any rate, views were changing—almost as fast as they changed during the Civil War, but in the opposite direction. In 1871 Justice Bradley had believed that the federal government could prohibit private conspiracies in states aimed at abridging Bill of Rights liberties. By 1874, after the *Slaughter-House Cases*, he held the government could do nothing about a politically motivated armed attack by whites that killed sixty blacks.[53] He had completely changed positions.

On one occasion, failure to require the states to obey the Bill of Rights actually enhanced the situation of blacks. In *Walker v. Sauvinet*,[54] decided in 1876, the Court considered the right to trial by jury in civil cases. In that case a black had been denied equal accommodations in violation of the state law. When the jury failed to agree, the judge—in accordance with state law—decided the case in favor of Sauvinet and against the defendant Walker, who had refused him refreshments. Walker claimed that he was entitled to trial by jury under the Seventh Amendment. The amendment, the Court held, related only to trials in courts of the United States. "A trial by jury in suits at common law pending in State Courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge."[55] Nor did the provision violate due process. Only Justices Clifford and Field dissented.[56]

While the Court was reading Bill of Rights liberties out of the Fourteenth Amendment it was also seriously restricting the power of Con-

gress to protect blacks under the Fourteenth and Fifteenth Amendments. For example, in 1876 in *United States v. Reese*,[57] Reese was prosecuted for refusing to receive and count the vote of black citizens. The Court read the statute under which Reese was prosecuted to prevent other types of interference with the right to vote in addition to those based on race. As a result the Court held the statute unconstitutional.[58]

Developments in the Court paralleled those in the nation at large. In 1876 the Democratic presidential candidate won a majority of the popular vote. The electoral vote was close and hung on the outcome in disputed southern states. By the compromise of 1877 the election was given to the Republicans. In return, federal troops were to be withdrawn from the South, leaving blacks and southern Republicans to their own devices.[59]

For a brief shining moment during and after the Civil War, protection of blacks had been associated with the cause of the Union. By the mid-1870s protection of blacks seemed to disrupt national unity, and the commitment to protection of their rights faded away as quickly as it had come. The state action limitation was a primary judicial rationalization for the retreat.

In 1883, in an opinion by Justice Woods, the Court held a section of the Enforcement Act of 1871 unconstitutional because it attempted to protect the constitutional right to equal protection against invasion by private individuals, as opposed to state officials.[60] Also in 1883 the Court in an opinion by Justice Bradley voided the Civil Rights Act of 1875, which guarantied blacks equal accommodations.[61] In 1903 in *James v. Bowman*[62] the Court indicated that the Fifteenth Amendment, like the Fourteenth, could not reach private action.

After *Walker v. Sauvinet* the Supreme Court delivered several major decisions bearing on the Fourteenth Amendment. In 1884 in *Hurtado v. California*[63] the Court considered the meaning of the due process clause of the Fourteenth Amendment, a clause the Court had earlier said would have to be defined by a gradual judicial process of exclusion and inclusion.[64] As *Hurtado* shows, in the judicial process of exclusion and inclusion, exclusion was winning out.

Hurtado had discovered that his wife was having an affair with another man. According to witnesses he wept frequently and raved and tore his hair when he discussed his problem. Hurtado confronted both his wife and her lover, and the man promised to leave the city. Instead, he continued to pursue Hurtado's wife. Finally, Hurtado shot and killed him.[65]

At the time federal courts and most state courts required indictment by grand jury for serious crimes. In California, however, state law permitted charge by information—essentially a procedure by which

the prosecutor prepared the charge of crime without the intervention of a grand jury.[66] Charged by information, Hurtado was tried and convicted of first degree murder and sentenced to death. After losing his appeal in state court, he took his case to the United States Supreme Court.

Hurtado argued that the due process clause protected ancient "common law rights" that Americans had inherited from England. There was some precedent to support Hurtado's contention, particularly an 1856 case[67] in which the Supreme Court had suggested that due process should be defined by the procedures set out in the Constitution. For procedures that did not violate an explicit constitutional guaranty, the Court said it would look to English usage that had been accepted here after settlement of the colonies.[68]

There was also historical support for Hurtado's position. The revolutionary generation of Americans, fighting for their liberty against England, looked to history to justify their resistance. The history uppermost in the minds of the colonists was the fight by Parliament for the liberties of Englishmen against the tyranny of the king. A leading prophet of the seventeenth-century resisters was Sir Edward Coke, prosecutor, judge, and member of Parliament. Coke had written a legal treatise on the Magna Carta. For Coke, the Magna Carta was a fundamental law protecting the citizen against oppression by government. Passages in Coke seemed to support the contention that Magna Carta required grand jury indictment.[69] William Penn, founder of Pennsylvania, cited and relied on Coke and the Magna Carta in his book *The Excellent Privilege of Liberty & Property Being the Birth-Right of Free Born Subjects of England*.[70] A part of the privilege of liberty which, according to Penn, was protected by the Magna Carta was grand and trial juries.[71]

John Adams reached similar conclusions. On Christmas Day, 1765, Adams was thinking about "taxation without consent." Adams wrote in his diary for that day a paraphrase of Coke's commentaries on the Magna Carta—to the effect that an act of Parliament that allowed proceedings based on information instead of presentment by a grand jury affronted the Magna Carta.[72] Chief Justice Lemuel Shaw had also construed the law of the land clause of the Massachusetts constitution to require grand jury indictment in serious felonies, relying on a statement by Coke that the "law of the land" required indictment or a presentment by a grand jury.[73] Since the law of the land clause of the Magna Carta is generally recognized as the origin of the due process clause, that, one might suppose, would be that.

The Supreme Court took a different approach. In a thoughtful study of the use of history by the Supreme Court, Charles Miller has

noted that, faced with "obstinate historical facts," the Court follows several strategies: "The first of these responses is to devise a different interpretation of history that would permit a different outcome for the case. The second is to dispute the clarity of the historical record and to hold, on that basis, that history is of no real aid in settling the issue. A third response is to ignore history altogether."[74] A fourth rather unusual approach is to admit that history is not on the Court's side and to decide the case on other principles.[75] A fifth hybrid method is to escape from history by insisting on constitutional "flexibility." In *Hurtado*, Justice Stanley Matthews followed a combination of methods one, two, and five.

Matthews had graduated from Kenyon College in Ohio. There he met and formed a lasting friendship with Rutherford B. Hayes. In politics Matthews became a Stephen Douglas Democrat. He was appointed United States attorney for the Southern District of Ohio by President Buchanan. In that office he prosecuted a newspaper reporter who had helped a fugitive slave escape. The reporter was sentenced to jail but received much public support. Matthews fought for the Union in the Civil War and had served as a judge. In 1872 he flirted with Liberal Republicanism (an anti-Grant, more states' rights approach). He was a close associate of Hayes in 1876 and soon was placed on the Court.[76]

In *Hurtado* Matthews first argued that indictment by grand jury was treated by Coke as one form of due process but not as essential to due process.[77] Matthews argued that in England grand jury indictment was not required in all capital cases—only those instituted by the king. It was not required, as even Coke recognized, in all criminal cases instituted by the king. Misdemeanors, for example, were an exception.

Second, Matthews insisted that the Constitution must be kept up to date. Limiting due process to traditional procedure "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp on our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."[78]

There is an unquestionable tension between the common law tradition, in which judges create law based on precedent and social policy, and the interpretation of the Constitution, in which judges expound a particular historical text, limited to some degree at least by its language, history, and traditions.[79]

Recently, applying provisions of the Bill of Rights to the states has been treated as the child of broad construction, unrooted in the intent of the framers, unsupported by historical tradition.[80] Ironically, the Court in *Hurtado* took the opposite tack, suggesting that the English heritage of American liberty was too parochial and constricting a guide to be followed in construing the Constitution.[81]

According to the Court in *Hurtado*, the due process clause would be read to protect liberty—"not particular forms of procedure, but the very substance of individual rights to life, liberty and property."[82] What was acceptable would be determined not by what Coke thought, or by what the framers thought about acceptable procedure, or by procedure specified in the Bill of Rights but by what the Justices thought: "Any legal proceeding enforced by public authority whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good which regards and preserves those principles of liberty and justice [i.e., those the Justices found fundamental], must be held to be due process of law."[83] So due process did not require indictment by grand jury in capital cases. The Court upheld Hurtado's conviction.

The Court in *Hurtado* had supported its conclusion by a second line of analysis. The due process clause in the Fourteenth Amendment was identical in language to the same clause of the Fifth Amendment. But the Fifth Amendment contained a separate clause that guaranteed indictment by grand jury in cases of infamous crimes. On this fact the Court constructed its argument. According to what the Court insisted was a "recognized canon of construction" (applicable in the absence of clear reason to the contrary), the Court must conclude that no part of the Fifth Amendment was superfluous. To hold that the due process clause included the right to indictment by grand jury would make the grand jury clause superfluous. Therefore, the due process clause did not include grand jury indictment.[84]

The Court's conclusion was only as true as its premises. Lawyers say everything at least twice. But the Court's canon of construction assumed that the framers of the Constitution, a group that included a large number of lawyers, was incapable of redundancy. Taken literally, the doctrine of nonsuperfluousness would mean that the due process clause excluded all rights in the Bill of Rights including, as Justice Harlan pointed out, such things as the right of an accused to be informed of the nature of the accusation against him, to be confronted with witnesses against him, to have the assistance of counsel, and so forth. Furthermore, as Justice Harlan noted, a contrary inference could be drawn from the double protection of certain procedural guaranties—that the framers intended to make the rights in question doubly secure.[85]

John Marshall Harlan was the lone dissenter in *Hurtado*. He was an extraordinary Justice. He had been born in Kentucky in 1833. His father was a Whig and supporter of Henry Clay. Harlan was raised to

defend both slavery and Union.[86] He had become a lawyer and later for one term a county judge.

In 1860 he opposed Lincoln. When the Civil War broke out, however, Harlan supported the Union, formed a company of volunteers, and fought with distinction. But he continued to support the right to hold slaves. He opposed the Emancipation Proclamation, opposed Lincoln's election in 1864, and came out against the Thirteenth Amendment. About this time he was elected attorney general of Kentucky.

After the war Harlan faced a choice between Democrats, far more racist than he was, and the Radicals, whose commitment to the rights of blacks had gone far beyond his own.[87] He chose the Radicals and supported Grant in 1868. Faced with violence against blacks and violent criticisms of himself, Harlan began to change his views. He accepted the post–Civil War amendments. In 1871 Harlan was defeated for governor of Kentucky. In the 1876 Republican convention he led the Kentucky delegation to Hayes. In 1877 Hayes appointed him to the Court.[88]

As a Justice, Harlan stood almost alone for constitutional protection for blacks. He dissented from the *Civil Rights Cases*,[89] which held an act of Congress granting blacks equal accommodations unconstitutional, and he would later dissent from the separate-but-equal doctrine of *Plessy v. Ferguson*.[90] On the income tax and antitrust laws and government regulation of business, Harlan tended to be populist or at least to support government regulation in these areas.

Harlan's commitment to liberty surfaced again and again—including a long line of cases on application of the Bill of Rights to the states. He spoke with eloquence and force. In his dissent in *Hurtado* Justice Harlan insisted on the heritage of English liberty. "Those who had been driven from the mother country brought with them as their inheritance, which no government could rightfully impair or destroy, certain guarantees of the rights of life, liberty and property, which had long been deemed to be fundamental in Anglo-Saxon institutions."[91]

The purpose of the due process clause, Harlan insisted, was to impose on the states in proceedings involving life, liberty, or property the same restrictions that had been imposed on the federal government. While the Court looked to general principles of justice to define due process, Harlan would look to the Bill of Rights to determine what rights were fundamental to liberty. "Does not the fact that the people of the original states required an amendment to the national Constitution, securing exemption from prosecution, for a capital offense, except upon indictment or presentment by a grand jury prove that, in their judgment such an exemption . . . was a fundamental principle of liberty and justice?"[92] As to the argument that the law must be allowed to grow and improve, Harlan did not find the change an improvement.

Finally, Harlan summed up his opposition to the method chosen by the Court to determine what rights were fundamental to liberty and so protected by the due process clause.

> The court, in this case, while conceding that the due process of law protects the fundamental principles of liberty and justice, adjudges, in effect, that an immunity or right, recognized at common law to be essential to personal security, jealously guarded by our national constitution against violation by any tribunal or body exercising authority under the General Government, and expressly or impliedly recognized when the Fourteenth Amendment was adopted, in the Bill of Rights or constitution of every state of the Union is not yet a fundamental principle.[93]

Justice Harlan's position was twofold. First, that at least in capital cases grand jury indictment was required. Second, that grand jury indictment was required in all cases covered by the provisions of the Fifth Amendment—in all cases of infamous crimes.

Against Harlan's powerful argument, Charles Fairman has marshaled significant evidence that points to a contrary inference. Several states that ratified the Fourteenth Amendment, according to Fairman, did not require grand juries in all cases of infamous crimes: Connecticut,[94] Kansas,[95] Indiana, and Michigan.[96] The argument is that these states would not have ratified an amendment inconsistent with their legal systems. Furthermore, as Fairman notes, these states did not institute grand juries after the passage of the Fourteenth Amendment.[97]

The Fourteenth Amendment, however, was a compromise that contained a number of independent provisions. No legislative compromise is entirely satisfactory to all its supporters. Voting on the amendment involved weighing pros and cons. It does not seem likely that Republican politicians in the state legislatures, if they thought about the grand jury system at all, would reject the amendment because of that feature. The alternative, at that point, was to swell the political power of the recently rebellious states by allowing them to count for purposes of representation all of their disfranchised black population.

In 1887 the Supreme Court considered the case of *Spies v. Illinois*.[98] The petitioners in that case were anarchists in Chicago sentenced to death in connection with the Haymarket affair. Counsel for the petitioners, J. Randolph Tucker, mounted a powerful attack on the Court's position on application of the Bill of Rights to the states.

Tucker was a lawyer, teacher, and congressman from Virginia. Before the Civil War he had been a states' rights politician and a Democratic

elector in 1852 and 1856. After the war he taught law at Washington and Lee, served in Congress, and practiced law. In Congress he was an "old fashioned strict constructionist, states rights logician."[99] In 1893 he became dean of the Washington and Lee Law School.

In 1887, when he appeared in *Spies*, Tucker was nearing his final term in Congress. When friends expressed surprise at his defense of the Chicago anarchists, Tucker replied, "I do not defend anarchy. I defend the Constitution."[100] After the decisions in the *Slaughter-House Cases*,[101] *Hurtado*,[102] and the rest, Tucker faced an uphill battle in *Spies*. Still, he argued that the privileges or immunities clause required the states to respect the guaranties of the Bill of Rights.

> One other provision of the Fourteenth Amendment will now be considered which is more comprehensive in its protection of personal rights than the one just considered. It is that:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The meaning of this clause turns chiefly on what shall be deemed "privileges and immunities of citizens of the United States." A privilege is a special and peculiar right. An immunity is an exemption or relief from burden or charge. These words are used once in the Original Constitution, Art. 4, § 2; and in respect to those privileges and immunities which are enjoyed by citizens of a State. What they are has been judicially defined partially in the judgment of Mr. Justice Washington in the case of *Corfield v. Coryell*, 4 Wash. C.C. 371. He says: "We have no hesitation in confining these expressions to those privileges and immunities which are *fundamental*, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose the Union from the time of their becoming free, sovereign, and independent." . . .
>
> When the Constitution was proposed by the Federal Convention September 17, 1787, to the several States for ratification, many of them in their conventions expressed an apprehension that by enlarged construction of the powers delegated to the General Government, and by enforced implication, the rights of the States and of the people would be endangered. The preamble of the Congress proposing them to the States shows this. It is stated that "the conventions of a number of the States having at the time of their adopting the Constitution declared a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added," etc. Those amendments have been held, chiefly upon the basis of this historic fact, to be confined to their operation as limitations on the Federal power over States and citizens.
>
> But when the late war closed and all slaves were made free by the Thirteenth Amendment, the non-slave-holding States apprehended (whether justly or not is not here in question) that the late slave-holding States would make, or enforce already existing laws abridging the rights of the African race; and, jealous of state power, as our fathers had been jealous of Federal power, they gave American citizenship to the former slaves, and prohibited the States from abridging the privileges and immunities of persons holding such citizenship. Congress made a ratification of this amendment a precondition to the admission of the Southern States to representation in the union.[103]

Tucker insisted that restraining the power of the states as to personal rights was consistent "even with the genius of the original Constitution." He proceeded to consider the purposes of the Fourteenth Amendment.

> Looking, then, to the purpose in view in adopting this Fourteenth Amendment, and to the historic condition of things which suggested it, and to the general consistency of its purpose with that which led to the original Constitution, I cannot think that we can go wrong in holding, as a canon for its true construction, that it shall have a liberal interpretation in favor of personal rights and liberty. If the views of the minority of the court in the *Slaughter-House Cases*, 16 Wall. 36, be adopted, the argument I shall present would only be the stronger, but I shall rest upon that of the majority, as above cited.
>
> I hold the privileges and immunities of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United states. Take then the declared object of the Preamble, "to secure the blessings of liberty to ourselves and our posterity," we ordain this Constitution—that is, we grant powers, declare rights, and create a Union of States. See the provisions as to personal liberty in the States guarded by provision as to *ex post facto* laws, etc.; as to contract rights—against States' power to impair them, and as to legal tender; the security for *habeas corpus*; the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury, etc.; the Declaration of Rights—the privilege of freedom of speech and press—of peaceable assemblages of the people—of keeping and bearing arms—of *immunity* from search and seizure—*immunity from self-accusation*, from second trial—and privilege of trial by due process of law. In these last we find the privileges and immunities secured to the citizen by the Constitution. It may have been that the States did not secure them

to all men. It is true that they did not. Being secured by the Constitution of the United States to all, when they were not, and were not required to be, secured by every State, they are, as said in the *Slaughter-House Cases*, privileges and immunities of citizens of the United States.

The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

. . . . . .

[T]he propounders of the Fourteenth Amendment were looking to the protection of the freedmen from the peril of legislation in the South against those fundamental rights of free speech; of freedom from unreasonable searches; of double jeopardy; of self-accusation; of not being confronted with witnesses and having benefit of counsel and the like: and if these are construed as the privileges and immunities of citizens of the United States, the Fourteenth Amendment secures them; otherwise not. The fundamental nature of these rights, as common law rights, which were recognized at the time of the Revolution as the inherited rights of all the States may be seen by reference to Tucker's Blackstone App., p. 305, Story, Constitution, § 1779, 1781–2–3. As to searches, self-accusation, etc., see Story, § 1895; May's Const. History of England, Vol. 3, Ch. 11; and especially *Boyd v. United States*, 116 U.S. 616.[104]

Some of Tucker's clients were aliens. In addition to insisting that their procedural rights, such as the right to an impartial jury, were secured by the due process clause, Tucker also found protection for them under the privileges or immunities clause.

One word more on this point. If the State cannot abridge the privilege of a citizen of the United States, the same limitation applies to an alien, for *no person* shall be denied the equal protection of the laws. So that all of these defendants are, whether citizens or aliens, alike protected from the abridgment of these privileges and immunities of citizens.[105]

In refusing to hear the *Spies* case, the Supreme Court recited the litany of cases refusing to hold the Bill of Rights applicable to the states.[106] *Hurtado* had only been the most recent in a long line.

Probably no "canon" of constitutional construction is more regularly and correctly ignored than the doctrine of nonsuperfluousness that had been announced in *Hurtado*. It was not long before the Supreme Court itself ignored the rule. The 1897 *Chicago Burlington and Quincy Railroad Case*[107] was the first of many departures from the doctrine of nonsuperfluousness. Chicago had extended a street across the property owned by the railroad. The railroad insisted on compensation. The city claimed that the railroad was entitled to only minimal compensation because the street across the tracks did not significantly impair the ability of the railroad to use the track.

When the railroad failed to win what it considered adequate compensation in state court, it appealed to the United States Supreme Court. The attorney for the railroad argued that just compensation was required by the due process clause and that the Fourteenth Amendment was designed to apply the Bill of Rights to the states.[108] The railroad won the battle but lost the war. The Court concluded that the due process clause required just compensation but that the railroad had received adequate compensation.

Since the Fifth Amendment contains the due process, grand jury, and just compensation clauses, the *Hurtado* rule of nonsuperfluousness seemed to preclude application of the just compensation clause to the states.[109] The Supreme Court treated the problem with an elegantly simple method courts sometimes use when precedent seems to preclude the desired result. The Court ignored the precedent. Perhaps it was unaware of the conflict. Since the *Burlington* decision was written by Justice Harlan who had dissented in *Hurtado* and vigorously criticized the nonsuperfluousness doctrine, this explanation seems unlikely. The more likely reason is that the members of the Court decided to let sleeping doctrines lie, at least for the moment.

Some Supreme Court Justices gave detailed consideration to the Bill of Rights issue in the case of *O'Neil v. Vermont*.[110] O'Neil was a New York liquor merchant. Selling liquor in New York was legal; selling liquor in Vermont was not. A number of ingenious Vermonters hit on the simple expedient of ordering their liquor by mail from O'Neil in New York. All went well until the State of Vermont charged O'Neil with violating its liquor laws. He was tried in Vermont and convicted of 307 offenses, fined $6,140, and sentenced to imprisonment for thirty days at hard labor. Furthermore, if he failed to pay his fine (a

large sum in those days), he was to be imprisoned at hard labor for 19,194 days.[111]

O'Neil claimed that his conviction violated the exclusive power of Congress over interstate commerce and also subjected him to cruel and unusual punishment. The majority of the Supreme Court held that O'Neil had not raised the cruel and unusual punishment claim properly and upheld his conviction.

Justice Field, joined by Justices Harlan and Brewer,[112] dissented. Field thought the convictions violated the exclusive power of Congress over interstate commerce but also imposed a cruel or unusual punishment. He noted:

> In *Slaughter-House Cases*, 83 U.S. 16 WALL 36, it was held that the inhibition of [the Fourteenth Amendment] was against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the States. Assuming such to be the case, the question arises: What are the privileges and immunities of citizens of the United States which are thus protected? These terms are not idle words to be treated as meaningless, and the inhibition of their abridgement as ineffectual for any purpose, as some would seem to think. They are of momentous import, and the inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible state invasion. It may be difficult to define the terms so as to cover all of the privileges and immunities of citizens of the United States but . . . the privileges and immunities of citizens of the United States are such as have their recognition in a guaranty from the Constitution of the United States. . . . This definition is supported by reference to the history of the first ten amendments to the Constitution and of the amendments which followed the late Civil War.[113]

After summarizing rights in the federal Bill of Rights and noting that the federal government had been prohibited from violating them, Field pointed out that when the Civil War ended there was legislation in slaveholding states inconsistent with rights in the Bill of Rights, "and a general apprehension arose in a portion of the country —whether justified or not is immaterial—that this legislation would still be enforced and the rights of freed men would not be respected."[114]

Field concluded that the privileges or immunities clause meant what it said: "Insofar as the first ten amendments declare or recognize the rights of persons, their rights belong to them as citizens of the United States under the Constitution; and the 14th Amendment as to all such rights, places a limit upon state power by ordaining that no

State shall make or enforce any law which shall abridge them."[115]

By 1892 six people who sat as Justices on the Supreme Court had concluded that the privileges or immunities clause of the Fourteenth Amendment applied the Bill of Rights to the states: Justice Woods,[116] before his elevation to the Court; Justices Bradley and Swayne in the *Slaughter-House Cases*;[117] and Justices Field, Brewer, and Harlan in the case of *O'Neil v. Vermont*.[118] Unfortunately, they did not sit and reach their conclusions at the same time.

Justice Harlan's career has already been noted. Field was a Democrat appointed to the Court by Abraham Lincoln. On issues of Reconstruction he tended to take a negative view of military reconstruction and to oppose it as a violation of basic civil liberties.[119] Many of his opinions were civil libertarian, though far less consistently than those of Justice Harlan. Guaranties of liberty, Field once wrote, "should be broadly and liberally interpreted so as to meet and protect against every form of oppression . . . in whatever shape presented."[120] He had objected to opening sealed letters and post office interference with freedom of the press; he took a broad view of the privilege against self-incrimination; and he had objected to discriminations against the Chinese. In *O'Neil* he wrote in favor of full incorporation of the Bill of Rights. Still, he had concurred in *Hurtado*.[121]

Field's great passion after the 1870s was "protection of the property" against government regulation. He joined opinions striking down regulation of railroad rates as unreasonable, narrowing the antitrust act, and striking down the income tax. He also joined in opinions restricting the power of the federal government to protect blacks.[122]

Brewer was Field's nephew. He had joined the Court in 1889. On economic matters he was also an extreme supporter of "liberty of contract" and an opponent of economic regulation of business.[123]

In 1898 William D. Guthrie published his *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States*. Guthrie was a prominent New York lawyer, one of the attorneys who had earlier persuaded the Court to invalidate the income tax. His book insisted that the privileges or immunities clause of the Fourteenth Amendment prohibited the states from impairing "the fundamental rights of the individual which are mentioned in the first eight amendments to the Constitution."[124] Guthrie argued that *Hurtado* would have been decided differently if the clear intention of the framers, including Senator Howard's speech, had been called to the attention of the Court.[125]

The idea that the Court could be persuaded to apply the Bill of Rights to the states by the legislative history of the Fourteenth Amendment was explicitly refuted in *Maxwell v. Dow*.[126] Charles Maxwell was

convicted of bank robbery in the state of Utah, a state that had had a long and vigorous history of experimenting with jury trial. The territorial legislature had provided for less than unanimous verdicts in civil cases, and the practice was upheld by the Utah Territorial Supreme Court.[127] Subsequently, it was held invalid by the Supreme Court of the United States.[128] After Utah became a state, it reduced the number of criminal trial jurors to eight and attempted to try a defendant whose crime had been committed prior to the new law by a new eight-person jury. The Supreme Court in the case of *Thompson v. Utah*[129] held the practice an unconstitutional ex post facto law. The jury referred to in the Sixth Amendment, the Court said, required twelve persons. To change the rules after the crime had been committed was impermissible.

Maxwell's crime was committed after Utah had become a state and after the state had provided for an eight-person criminal jury in such cases. The state had also eliminated the need for grand jury indictment. Maxwell challenged both of these innovations as violations of his basic constitutional rights. In *Maxwell v. Dow*,[130] decided in 1900, the Court held that a jury of eight (instead of twelve as required by the Court's reading of the Sixth Amendment) and a prosecution based on information instead of indictment (as required by the Fifth Amendment) did not violate either the privileges or immunities clause or the due process clause of the Fourteenth Amendment.[131]

The *Maxwell* decision was written by Justice Rufus W. Peckham. On economic matters Peckham was an arch-conservative Democratic New York lawyer and judge. He was appointed to the Court by President Grover Cleveland. For Peckham the liberty of the Fourteenth Amendment was primarily liberty of contract. The liberty protected the right of bakers to work more than ten hours a day and sixty hours a week and the right of miners to work more than eight hours a day. Government regulations designed to protect workers violated Peckham's view of the Fourteenth Amendment. So did many other attempts to regulate business.[132] If such statutes were passed, he felt, people would soon be "at the mercy of legislative majorities."[133] If "a little unhealthfulness" could justify limiting hours, Peckham warned, there would be "no end of meddlesome interference with the rights of the individual."[134]

In *Maxwell* Peckham relied on and repeated the rule laid down in the *Slaughter-House Cases*: "The protection of the citizen and his rights as a citizen of the state still remains with the state."[135] Indeed, the Court noted that the principle had been reiterated by it again and again. "The protection of rights of life and personal liberty within the respective states, rests alone with the states."[136] Any other rule, it said,

would "entirely" destroy states' sovereignty over Bill of Rights liberties. Justice Peckham recited an impressive litany of cases in which liberty after liberty in the Bill of Rights had been held not to apply to the states.[137] Here a claim was based on Fifth and Sixth Amendment rights. The Court had previously denied such a claim based on Seventh Amendment rights. Justice Peckham insisted that there was no logical basis for distinguishing between the various amendments in the Bill of Rights. "Is any one of the rights secured to the individual by the fifth or by the sixth amendment any more privilege or immunity of a citizen of the United States than those secured by the seventh?"[138]

For the first time the Court made reference to legislative history. Maxwell's lawyer cited Howard's speech to the Court. Peckham was unimpressed.[139] He treated the speech as that of a single senator, neglecting to note that Howard spoke on behalf of the Joint Committee that had charge of the Fourteenth Amendment. Statements of individual representatives and senators, the Court held, were to be given little weight: "What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds on which the members voted in adopting it."[140] The way to interpret the amendment was "to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, then to construe it, if there be therein any doubtful expressions, in a way, so far as reasonably possible, to forward the known purpose or object for which the amendment was adopted."[141] The "known condition of affairs" apparently required little historical investigation by the Court. Had the Court been familiar with the history leading up to the amendment, its method would have been fully adequate to apply the Bill of Rights to the states.[142]

Peckham and the Court also rejected Maxwell's argument based on due process. It cited *Hurtado* for the proposition that abolishing the grand jury did not violate due process and concluded that the "same course of reasoning established the right to reduce the number of trial jurors."[143]

For Peckham, historically established liberties had less appeal than "liberty of contract." In the area of civil liberties, diversity and experimentation were acceptable, even desirable. "It is emphatically a case of the people by their organic laws providing for their own affairs and we are of the opinion that they are much better judges of what they ought to have in these respects than anyone else can be," Peckham wrote. "It is a case of self protection and the people can be trusted to look out and care for themselves."[144]

Justice Harlan dissented. It did not solve the question to say that the first ten amendments had only been intended to limit the states.

> For, if, prior to the adoption of the Fourteenth Amendment, it was one of the privileges or immunities of citizens of the United States that they should not be tried for a crime in any court organized or existing under national authority except by a jury composed of 12 persons, how can it be that a citizen of the United States may now be tried by a state court for crime, particularly for an infamous crime, by eight jurors, when the amendment expressly declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?"[145]

Harlan noted that the Court's decision left the states free to violate all the liberties in the Bill of Rights.

He rejected the idea that the Court's decision did little harm because the states could be relied upon to protect Bill of Rights liberties under their local constitutions.

> If it be said that there need be no apprehension that any state will strike down the guaranties of life and liberty which are found in the national Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as a result of the mode of trial that would not have been tolerated in England at the time American Independence was achieved, nor even now, and would have caused rejection of the Constitution in every one of the original states if it had been sanctioned by any provision in that instrument when it was laid before the people for acceptance or rejection. Liberty, it has often been said, depends not so much upon the absence of actual oppression, as upon the existence of constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decision. . . . If some of the guaranties of life, liberty, and property which at the time of the adoption of the national Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States to so declare by an amendment to that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any state striking down guaranties of life and liberty that English speaking people have for centuries regarded as vital to personal security, and which men of the revolutionary period universally claimed as the birthright of free men.[146]

Finally, Harlan noted the *Burlington* case. Under the Fourteenth Amendment, he wrote, "It would seem that the protection of private property is of more consequence than the protection of the life or liberty of the citizen."[147]

In fact, Harlan was prophetic. As the amendment shrank as a protection of liberties explicitly written into the Bill of Rights, it grew as a protection of liberty of contract. In the years that followed *Maxwell* the Court often found that legislation designed to protect workers interfered with the liberty protected by the Fourteenth Amendment. For example, in *Lochner v. New York*[148] the Court struck down a New York law providing a ten-hour day and sixty-hour week for bakery workers. Only in the 1930s after Court appointments by Franklin Roosevelt did the process begin to go into reverse. The Roosevelt Court left the regulation of economic matters almost exclusively to the states or Congress but required ever stricter adherence to at least some basic liberties of citizens set out in the Bill of Rights.[149]

After *Maxwell* the Bill of Rights question was raised again in 1908 in the case of *Twining v. New Jersey*.[150] That case involved an instruction that the jury could draw an adverse influence from the failure of the defendant to take the stand. The defendant argued that the instruction violated the Fifth Amendment because the first eight amendments were among the privileges and immunities of citizens of the United States which the Fourteenth Amendment protected against state action.

The Court rejected the defendant's privileges or immunities argument because it considered the matter closed: "It is, however, not profitable to examine the weighty arguments in its favor for the question is no longer open in this court."[151] The *Twining* opinion was written by Justice William H. Moody, who had been appointed by Theodore Roosevelt. As far as the Fifth Amendment went, Moody referred the rights of the individual to the democratic process. "If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is their own hands."[152]

In *Twining* Justice Moody indicated that the Court might be inclined to read the due process clause to protect some basic rights in the Bill of Rights. "It is possible," he noted, "that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." The crucial thing was that the right was implicit in the due process clause, not that it was explicit in the Bill of Rights. The meaning of the clause would be "ascertained from time to time by judicial action." Due process would include fundamental principles of liberty and justice inherent in the very idea of a free government.[153] It would include, in other words, those principles held in high regard by the Justices.

Justice Moody's formulation had potential for growth. It was remarkably similar to that of Justice Washington in *Corfield v. Coryell*[154] and to the way that at least some framers of the Fourteenth Amendment described what it would accomplish. The major difference was that Republicans tended to view all or almost all the rights in the Bill of Rights as fundamental to a free society and as essential to liberty. The Supreme Court, on the other hand, held many of the guaranties in lower regard.

Chapter 8

The Amendment Before the Courts

(Part Two)

In the twenty-seven years prior to the twentieth century, the Supreme Court had liquidated the privileges or immunities clause. After doing so, however, it gradually began to read certain guaranties of the Bill of Rights into the due process clause of the Fourteenth Amendment. The result was that rights that were viewed solicitously by the Justices began to have federal protection against state abridgment.

As we have seen, the expansion of the due process clause had begun in 1897 when the Court read the due process clause to prohibit taking private property for public use without just compensation.[1] In 1925 in *Gitlow v. New York*[2] the Supreme Court suggested that freedoms of speech and the press were fundamental rights that were protected under the due process clause.

Benjamin Gitlow was a twenty-eight-year-old man who had advocated revolution in the United States. He was arrested under a state law that prohibited advocacy of overthrow of the government by violent means. Gitlow claimed that the statute, as applied to his conduct, violated the Fourteenth Amendment. In rejecting this claim, the Supreme Court had suggested in *dictum* that freedom of speech was protected by the due process clause. But the *dictum* in *Gitlow* was just that. The Court had assumed that the due process clause protected freedom of speech because it was convinced that what Gitlow had been doing was not protected by the First Amendment in any case.

Although *Gitlow* suggested that the First Amendment applied to the states, the Court had not yet found any state statute in violation of its terms. In 1931 the Court decided two significant free speech cases, *Near v. Minnesota*[3] and *Stromberg v. California*.[4] Both held that free speech and freedom of the press applied to the states under the Fourteenth Amendment. By 1931 the personnel of the Court was

changing. Since the *Gitlow* opinion, President Herbert Hoover had appointed Charles Evans Hughes to replace Chief Justice William H. Taft and Owen Roberts to replace Justice Edward T. Sanford, author of the *Gitlow* opinion. Both of the new Justices had a strong commitment to civil liberties.[5] The change in personnel may have produced a change in result.

In *Near* the Court considered the fate of *The Saturday Press*, an anti-Semitic scandal sheet that claimed to be exposing links of political officials to organized crime. After a series of attacks on public officials, Jews, the chief of police, major newspapers in Minneapolis, and the county attorney, the county attorney got an injunction silencing the paper. Under the Minnesota law the truth of the charges was irrelevant. In a landmark decision Chief Justice Hughes held that the injunction against further publication of the newspaper was a prior restraint that violated the freedom of press protected by the Fourteenth Amendment.[6]

In 1932 in *Powell v. Alabama*[7] the court considered the right to counsel in capital cases. *Powell* involved some young black men accused of raping white women in Alabama. Public feeling ran high against the accused, and troops were required to protect them. No counsel had been appointed to represent the defendants until the day of trial. On that day, unprepared counsel began a pro forma appearance for the defendants, who were on trial for their lives. The defendants were convicted and sentenced to death.

The Supreme Court reversed. The Court held that the Fourteenth Amendment due process clause required appointment and effective assistance of counsel in capital cases. The Justices confronted and disposed of the *Hurtado* doctrine of nonsuperfluousness. Justice George Sutherland, writing for the Court, candidly admitted that *Hurtado* "if it stood alone" would have made it difficult to find a right to counsel under the due process clause of the Fourteenth Amendment. (The original Bill of Rights contained a guaranty of right to counsel *and* of due process of law.)[8] Justice Sutherland cited the *Burlington* case,[9] the *Gitlow* case,[10] and the *Near* case[11] to show that the doctrine of nonsuperfluousness set out in *Hurtado* was "not without exceptions."[12]

In *DeJonge v. Oregon*,[13] decided in 1937, the Court considered the case of a Communist who participated in a meeting called to denounce police raids on the Communist party and to denounce the shooting of a longshoreman by police during a strike. Oregon's Criminal Syndicalism Act had made it a crime to assist in the assemblage of any group that advocated force or violence as a means of political change. At trial the state proved that the party advocated violent overthrow and that DeJonge had assisted in a meeting arranged by the party. It did not, however, prove that any advocacy of unlawful action had occurred at the meeting. In Oregon juries could convict by a vote of 10 to 2. DeJonge was convicted by just such a vote.[14]

The United States Supreme Court reversed DeJonge's conviction. Freedom of assembly was fundamental and was protected by the Fourteenth Amendment.[15] Communists enjoyed the rights of free speech and were entitled to take part in peaceable assemblies called for lawful purposes. This was so, even when the assemblies were called by the party itself. Speaking for the Court, Justice Hughes held that discussing public issues and seeking a redress of grievances—when done without inciting violence—were "of the essence" of the liberty protected by the Fourteenth Amendment.[16]

By the time the Court decided *Palko v. Connecticut*[17] in 1937, the rights protected by the due process clause had expanded, and the privileges or immunities clause was a dead letter.

Palko had been convicted of second degree murder in the state of Connecticut. The state appealed and, because of an error in his trial, was allowed a new trial. At the second trial the jury found him guilty of first degree murder, and he was sentenced to death.[18] In a federal prosecution the second conviction for a higher offense would have violated the double jeopardy clause as construed by the Supreme Court of the United States. Palko's counsel argued that the right against double jeopardy was protected under the privileges or immunities clause and also the due process clause.

Speaking through Justice Benjamin N. Cardozo, the Court rejected the argument that all the guaranties of the Bill of Rights applied to the states. Cardozo noted that states could prosecute people by information rather than by indictment, that persons could be compelled to be witnesses against themselves in state court, that people were not entitled to jury trials in state criminal or civil cases, and he noted that certain other guaranties of the Bill of Rights did not limit the states.[19] On the other hand, he pointed out that the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge freedom of speech or of the press or free exercise of religion or the right of peaceable assembly or the right of the accused to the benefit of counsel.[20]

In all of this Cardozo saw a rationalizing principle, one that justified failing to protect people against state infringement of some of the rights in the Bill of Rights.

> *The exclusions of these immunities and privileges 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 ap-

preciation 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.[21]

So in his opinion Cardozo, speaking for eight of the nine Justices, describes rights in the Bill of Rights as "privileges and immunities." Some of these privileges and immunities of citizens of the United States were so important that they were protected from state violation by the due process clause. Other of these immunities and privileges were less significant and the states would be permitted to violate them.[22] Why the states should be permitted to disregard some privileges and immunities of citizens of the United States set out in the Bill of Rights when the Fourteenth Amendment said that "no state shall abridge the privileges or immunities of citizens of the United States" Cardozo did not explain. The issue was so well settled by its previous decisions that the Court was apparently unaware of the irony implicit in its opinion.

When it needs to come up with a short collective phrase to describe rights in the Bill of Rights, the Supreme Court has often referred to them as privileges or immunities.[23] Use of the same language for the same purpose by John Bingham and his colleagues has, oddly enough, never been considered adequate.

Professor Crosskey has underlined the difference between expositions of the constitutional text and expositions of the Justices' decisions about the text. The decision in *Palko* is a clear example of that duality. As Crosskey notes,

> The justices, it ought not to be forgotten, rarely read, study or discuss the Constitution; they read, and study, and discuss instead, their pronouncements about it and those of their predecessors on the Court. One Chief Justice, with somewhat surprising candor, once declared that "the Constitution is what the Judges say it is." . . . As a consequence, the Court's product incorrectly called Constitutional law has come to have almost no connection with the rather sensible straight forward document on which it is supposed to be based. . . . [The Justices] simply drift along with the current without paying much attention to the ancient document they are sworn to uphold.[24]

One need not accept Crosskey's criticism at face value to see how well it describes the process in *Palko v. Connecticut*.

After *Palko* the Court continued to expand the protections of the Fourteenth Amendment. In *Cantwell v. Connecticut* and *Everson v. Board of Education*[25] the clauses protecting free exercise of religion and prohibiting establishment of religion were applied to the states.

A major assault on the judicial status quo represented by *Palko* occurred in the case of *Adamson v. California*.[26] Adamson was tried and convicted of first degree murder. During his trial the prosecution was permitted to comment adversely on his failure to take the stand. Adamson insisted that the prosecutor's comment violated his rights under the Fifth Amendment privilege against self-incrimination as well as his rights under the Fourteenth Amendment. Five Justices voted to uphold the death sentence. They held that the right against self-incrimination did not limit the states. Justice Hugo Black and three colleagues dissented.

Black was born in Alabama in 1886. He studied law, became a police court judge, district attorney, and later a successful personal injury lawyer. Black had grown up with and come to share most of the Populist outlook on business and government. In 1925 he ran successfully for the United States Senate. "I am not now," he announced proudly, "and never have been, a railroad, power company, or corporation lawyer."[27] In the Senate, Black's record was one of advanced liberalism. Throughout his career Black had taken stands that showed a strong personal philosophy. As a prosecutor, he had investigated police brutality. As a senator, he opposed custom controls over subversive and obscene publications, insisting on freedom of speech.[28]

In 1937 President Franklin D. Roosevelt appointed Black to the Supreme Court. For Roosevelt, one crucial issue was the question of economic substantive due process—the power the Court had assumed under the Fourteenth Amendment to strike down economic and social legislation. On this issue Black stood squarely against the power that had been exercised by the Court. As a result of Roosevelt appointments, the Court soon buried economic substantive due process.

On questions of civil liberties Black became one of the leading libertarian justices. He was a textualist, and he took his text from the Constitution, particularly the Bill of Rights. He often read the provisions with a literalism that was disarming or infuriating, depending on one's views. For Black, precedent occupied a secondary position. His approach to application of the Bill of Rights to the states is an example. The fact that case after case had rejected total application of the Bill of Rights to the states did not deter Justice Black.[29]

In *Adamson* Black argued that the Fourteenth Amendment was intended to overrule earlier Supreme Court decisions and to make the first eight amendments to the Constitution a limitation on the states. Justice Black examined the congressional history of the Fourteenth Amendment and found an intent to require the states to obey the Bill

of Rights.[30] He argued that the privileges or immunities clause was the primary device used to accomplish this end and that reference to privileges and immunities was a reasonable way to apply the Bill of Rights to the states.[31] In addition Black also relied on the due process clause.

Justices Frank Murphy and Wiley B. Rutledge agreed with Black that the Bill of Rights should be applied to the states under the first section of the Fourteenth Amendment. They were not prepared to say that section 1 was necessarily limited by the Bill of Rights.[32] Although Justice Black's argument for total incorporation was rejected by the Court, the Supreme Court began to find more and more guaranties in the Bill of Rights fundamental and so protected under the due process clause of the Fourteenth Amendment.

The "incorporation" movement made great strides in the 1960s. In the Warren Court "federalism" was less of a virtue than it had been in the past.[33] Conversely, the protection of individual rights against the states, particularly the rights of blacks, occupied a higher scale in the Court's scheme of values. In *Brown v. Board of Education*[34] the Court struck down segregated public school education. Federalism would be subordinated to protecting the rights of blacks. In case after case the Court of the 1960s applied guaranties of the Bill of Rights to the states. The Court had applied guaranties of the First Amendment securing free speech and press and freedom of religion and the Sixth Amendment right to counsel in capital cases to the states in the 1930s and 1940s.[35] In 1961 the Court treated the Fourth Amendment protection against unreasonable searches and seizures as fully incorporated by the Fourteenth. Evidence from such illegal searches would have to be excluded from the jury's consideration in state courts, the Justices declared, as it had been for some time in federal court cases.[36] In 1963 the right to counsel in all felony cases was held to be required by the due process clause of the Fourteenth Amendment. The Court required appointed counsel for indigents in such cases.[37] In 1964 the Court held the privilege against self-incrimination limited the states, overruling its prior decisions to the contrary.[38] In 1968 in *Duncan v. Louisiana*[39] the Court held that the Sixth Amendment right to trial by jury was applied to the states by the Fourteenth Amendment.

In *Duncan* Justice Black reiterated his view that the words "'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[40] In looking at congressional history, Black insisted, one should look at what was said, not at what was not.[41]

Justices Harlan and Stewart dissented in *Duncan*. They rejected the argument for total incorporation of rights in the Bill of Rights. They believed that the "overwhelming historical evidence marshalled by Professor Fairman demonstrates . . . conclusively" that the framers of the Fourteenth Amendment did not apply the Bill of Rights to the states. The test was fundamental fairness. The "principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary" had, Harlan and Stewart thought, largely disappeared.[42]

In *Benton v. Maryland*[43] the Court finally overruled *Palko* and found that "the double jeopardy provision of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." The Court discarded the fundamental fairness test. Once it was decided that a particular Bill of Rights guaranty was "fundamental to the American scheme of justice the same standards apply against the state and federal governments."[44]

By the end of the 1960s most of the guaranties had been applied to the states. Those that had not included the right to bear arms, against quartering troops in private homes (an issue that has not often arisen), the Fifth Amendment right to a grand jury, and the Seventh Amendment right to a civil jury trial. Of these, the Second Amendment right to bear arms and the Seventh Amendment right to a jury trial were regarded by framers of the Fourteenth Amendment as particularly precious rights, a view less in vogue today.

At the same time the Warren Court was reading the Bill of Rights back into the Fourteenth Amendment, it was also reading the amendment to afford substantial protection to blacks. Most members of the Court concluded that Congress could outlaw racially motivated private conspiracies to interfere with Fourteenth Amendment rights, whether or not state action was present.[45] For a whole range of issues from desegregation[46] to voting rights,[47] the Court gave the post–Civil War amendments a broad interpretation. And the First Amendment rights of those protesting segregation (as well as those opposing integration) also received protection of federal law.[48]

Warren Court decisions applying criminal procedure guaranties of the Bill of Rights to the states were often unpopular. Those accused of crimes are always the beneficiaries of such guaranties. It was an easy step to see the rights merely as protection for criminals. The guaranties are necessarily general and neutral: they protect the savory and unsavory alike.

Other Warren Court decisions also produced hostile public reactions, notably those finding that school prayers violated the prohibition against establishment of religion;[49] those protecting civil liberties of

Communists;[50] and also (in certain sections of the country at least) those protecting blacks.[51]

In addition to applying the Bill of Rights to the states, the Court interpreted a Reconstruction statute designed to give citizens a right of action against state officials who violated their constitutional rights to mean what it said.[52] As a result, public officials found themselves repeatedly called to answer damage actions alleging that they had violated constitutional rights.[53] (State legislators, judges, and ultimately others were held immune from suit.)[54] Still, litigants ranged from those claiming that they had been illegally arrested or searched to government employees claiming that they had been fired for the exercise of First Amendment rights.[55]

Throughout the Warren Court's march toward application of the Bill of Rights to the states, Justice John Marshall Harlan, grandson of the first Justice Harlan, protested that the effect of the Court's action would be to dilute the strength of the guaranties as applied to the federal government.[56] To make it easier for states to comply, Harlan argued, the Court would tend to water down the protections. At least in the area of trial by jury, there is reason to believe that he was correct.

By the 1960s Supreme Court precedent had made it fairly clear that the jury referred to in the Constitution contained twelve members and had to be unanimous. From its decision in *Barron v. Baltimore* in 1833 until the 1960s, the Supreme Court had indicated that the jury trial provisions of the Sixth and Seventh Amendments did not apply to the states. (As far as the Seventh Amendment is concerned, the rule remains undisturbed.) As a result, some states had experimented with different types of juries—less-than-unanimous juries and juries of fewer than twelve.

Once the Sixth Amendment right to jury trial was applied to the states, the Warren Court faced the prospect of overturning a number of otherwise lawful convictions or at least of voiding procedures established by several states. When the Court had held that the right to jury trial applied to the states in the case of *Duncan v. Louisiana*, it had sidestepped the question of whether or not the jury trial was to be defined, in accordance with the Court's precedents, as requiring twelve unanimous jurors.[57]

The first assault on the conventional idea of a jury was the 1970 Supreme Court decision in *Williams v. Florida*[58] holding that juries of twelve were not constitutionally required. Justice Marshall was the lone dissenter. It seemed possible that the Court might require the states to provide jury trial but strip the institution of all of its historic characteristics.

Next, by a margin of 5 to 4, the Court, now under Chief Justice

Burger, held in 1972 that state criminal juries need not be unanimous.[59] The effect of these two decisions—allowing nonunanimous jury verdicts and juries of less than twelve—was to change the nature of constitutionally required juries. Juries of less than twelve were less apt to include minority members of the community or those sympathetic to minority rights. The result was that the institution provided less protection to the politically or religiously unorthodox or to racial or other minorities. Nonunanimous jury verdicts had the same effect, to an even greater degree. If a couple of jurors insisted on protecting the rights of members of an unpopular political, religious, or racial minority, their views could simply be ignored.[60]

With a Court strongly devoted to civil liberties, the effect of these rules would be mitigated. DeJonge's Oregon conviction by a vote of 10 to 2 for addressing a rally sponsored by Communists, for instance, had been overturned by the Supreme Court.

The jury system in seventeenth-century England and eighteenth-century America was seen as a protection against a government determined to crush its political enemies. For this function, imperfectly realized as it is, size and unanimity were crucial. Courts, on the other hand, were viewed with suspicion—more likely than jurors to do the bidding of the government against claims of individual liberty. The years of the Warren Court tended to obscure the extent to which this assessment of the role of the courts has been true throughout much of American history.[61]

Whether the Fourteenth Amendment applies a single standard to the states and national government also arises in the context of guaranties of freedom of expression. The second Justice Harlan and others argued for a dual standard. As William W. Van Alstyne noted, a dual standard could actually provide greater protection for speech and press at the federal level.[62] States, necessarily, must have broader police powers than the federal government.

To these intriguing questions, the debates surrounding the Fourteenth Amendment provide no clear answers. Still, the restrictions of freedom of speech and other basic liberties in the South before the Civil War were justified under the police powers of the states. The framers of the Fourteenth Amendment believed that the courts had done an inadequate job of protecting citizens from such abuses of state power. And Republicans had little patience with the argument that protection of individual rights would interfere with the legitimate rights of states.[63]

Partly as a result of the civil rights revolution and support given to it by Democratic administrations, the once solidly Democratic South was becoming more and more Republican. In the long run, this politi-

cal shift would have significant impact on the personnel of the Court.

With the election of Richard Nixon, the personnel and philosophy of the Court gradually began to change. Nixon, like Barry Goldwater before him, had campaigned against the Supreme Court. The Court, he said in his 1968 Republican nomination acceptance speech, had gone too far in strengthening the criminal forces against the "peace forces."[64] The answer to the problem was a "strict construction" of the guaranties of individual liberty, particularly those connected with criminal justice. Ironically, the Nixon years would show that the line between the "peace forces" of the government and the criminal forces was less distinct than one might wish.[65]

Nixon appointed four justices to the Court. In contrast to the Warren Court, the Nixon Court began to follow a strict or narrow interpretation of the rights in the Bill of Rights and a broad interpretation of the power of the government. The issue of application of the Bill of Rights to the states presents two separate questions: whether the guaranty should be applied, and the scope or meaning of the guaranty. In the Supreme Court so far, most of the controversy has centered on the second question. The typical restrictive method of the Justices has been to read the guaranties narrowly. The trend has continued under President Ronald Reagan.[66]

The Burger Court has (with some notable exceptions)[67] refused to expand the protection afforded by Bill of Rights liberties and has instead contracted the protection afforded by them.[68] A brief look at a number of cases reveals the trend. The overall effect of the cases is expansion of government power and contraction of individual rights.

In a wide range of cases the Court has restricted Fourth Amendment rights. For years, to justify the search, a search warrant was required to be supported by an affidavit containing a statement of probable cause. If the cause was not set out in the affidavit, the product of the search could not be used in evidence. In *United States v. Leon*[69] the Court abrogated that rule. Fruits of searches based on an officer's "reasonable" reliance on a warrant that was not based on probable cause would not necessarily be suppressed.[70]

Three Justices dissented from the new rule. Justice John Paul Stevens relied on history.

> The notion that a police officer's reliance on a magistrate's warrant is automatically appropriate is one the Framers of the Fourth Amendment would have vehemently rejected. The precise problem that the Amendment was intended to address was the *unreasonable issuance of warrants*. As we have often observed, the Amendment was actually motivated by the practice of issuing general warrants

> —warrants which did not satisfy the particularity and probable cause requirements. The resentments which led to the Amendment were directed at the issuance of *warrants* unjustified by particularized evidence of wrongdoing. Those who sought to amend the Constitution to include a Bill of Rights repeatedly voiced the view that the evil which had to be addressed was the issuance of warrants on insufficient evidence.
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> In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.[71]

Stevens suggested that the Court was converting the Bill of Rights "into an unenforced honor code that the police may follow at their discretion." "If the Court's new rule is to be followed," he concluded, "the Bill of Rights should be renamed."[72]

In other cases the Court has suggested that private diaries may be seized and used to convict the writer of a crime,[73] overruling *Boyd v. United States*;[74] that a person mistakenly labeled and advertised by the government as an active shoplifter has no federal protection against such conduct, although some remedy may be available at state law;[75] that private shopping centers may ban free speech on their premises, overruling prior cases to the contrary;[76] that the death penalty may be imposed in spite of a jury recommendation of mercy even when the law at the time of the crime made the recommendation of mercy conclusive;[77] that states may convict persons of crimes by nonunanimous juries;[78] and that it is not a cruel or unusual punishment to sentence a repeated writer of bad checks to life in prison.[79] The Court is changing the face of American liberty and law.

Ironically, two Nixon Justices participated in expanding the reach by the Fourteenth Amendment to liberty not explicitly covered by guaranties in the Bill of Rights. The expansion had begun in *Griswold v. Connecticut*,[80] where the Court found that a Connecticut statute banning birth control devices violated the right of privacy secured by the Fourteenth Amendment. The decision produced a dissent by Justice Black,[81] who had never accepted the idea that liberties beyond those spelled out in the Bill of Rights were encompassed by the Fourteenth

Amendment. The *Griswold* doctrine soon produced a storm center of constitutional controversy, the decision in *Roe v. Wade*[82] prohibiting general state laws outlawing all abortions. The decision was written by Justice Harry A. Blackmun, a Nixon appointee, and was joined in by Chief Justice Burger.

Some constitutional guaranties such as the Fourth Amendment and the privilege against self-incrimination have their origin in English law. Others, such as the First Amendment, may have been designed to change English law.[83] Much of the progress in the history of liberty resulted from a very libertarian reading (or, more accurately, misreading) of the intent of the framers of the Magna Carta. Any attempt to freeze understanding of liberty at a certain period in history confronts the historical fact of evolution. Judicial evolution has never been a one-way street.

Although government power is greater than ever, today there are serious calls to restrict individual rights. Perhaps the historical purposes of the guaranties should at least set a floor, a minimal level below which Bill of Rights liberties should not be permitted to fall.

If history were treated as a minimum standard of liberty, constitutional law would have a very different shape. Many would not find the change an improvement. The right to bear arms, for example, would have to be taken seriously. In some respects, prosecution of those accused of crimes would be more difficult.[84]

Justice Stevens's dissenting opinion in *Zurcher v. Stanford Daily*[85] is an example of an interpretation focused on history. A student newspaper had published photographs of a clash between demonstrators and police at a hospital. Armed with a search warrant, the police had searched the newspaper office for evidence bearing on the crime. The question presented was whether the police could search the newspaper's files or had to proceed by way of a subpoena. The majority of the Supreme Court upheld the search.

Justice Stevens, in dissent, noted that the police power of search had been vastly expanded by the decision in *Warden v. Hayden*,[86] a Warren Court decision. That case had abolished the "mere evidence" rule. The result was that warrants authorizing the search for and seizure of private papers became possible. Stevens noted that the framers would have thought the private papers were protected from seizure[87] and so, in Stevens's view, had not specifically directed the Fourth Amendment to protect against such abuses.

Because of the privacy interest in an innocent party's private papers, Stevens suggested that a subpoena (which presumably would minimize intrusions into privacy) instead of a search warrant was ordinarily required by the Fourth Amendment. The reasonableness requirement of the Fourth Amendment was to be read in light of the amendment's history and in light of the protection historically provided to private papers. Stevens's opinion in the *Stanford Daily* case may not have gone far enough. But his dissent there, like his dissent in *Leon*, clearly tried to read and interpret the Fourth Amendment in light of its history.

As the Court has taken a narrower and narrower view of individual rights, state courts have been increasingly reluctant to follow its lead. The result has been to reawaken interest in state constitutions and bills of rights. In a number of cases, state courts have construed their state constitutions to provide liberties the Supreme Court has not found in the federal Bill of Rights.[88] Just as some opponents of slavery were supporters of states' rights when the "slave power" had control of the federal government and the courts, then changed position when opponents of slavery got control of the federal government, libertarians are now developing a new appreciation for states' bills of rights.[89]

Two writers have noted the changing positions of Justice William J. Brennan, Jr., and Chief Justice Burger on the federalism issue.[90] In 1964 Justice Brennan wrote that "the Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty."[91] In 1977 he emphasized that the legal revolution "which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it the full realization of our liberties cannot be guaranteed."[92] Meanwhile, Chief Justice Burger has switched from urging state experimentation with criminal procedure to scolding state courts that find more protection for liberty under state constitutions than the Chief Justice and his colleagues find in the federal Constitution. "When state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement."[93]

Under present law the federal protection of individual liberty is a minimum that states can exceed, at least so long as there is no conflict with federal law. State courts that clearly rely on state court constitutional provisions (as opposed to federal provisions) are supposed to be free from Supreme Court reversal. In fact, the federal Supreme Court has been increasingly reluctant to find state court decisions supported by an independent state constitutional ground.[94] Where the reliance on state law is crystal clear, the Court has typically not disturbed the state decision.[95]

The case of *Pruneyard Shopping Center v. Robins*[96] decided in 1980 underlines some of the potential complexity of the issue of incorporation for libertarians. In the 1930s the Court developed a rule that

public streets were a public forum for free speech. By the 1970s the crowds the speaker might wish to reach had moved from downtown streets to private shopping malls. In 1968 the Court balanced the right of the property owners and the importance of freedom of expression and found a right to free speech in common areas of shopping centers.[97] As the personnel of the Court changed, however, the rule changed.[98] The First Amendment no longer created a public forum in shopping centers.

Then the California Supreme Court interpreted its state constitution to provide a right to speak in shopping centers. The California court concluded that its state constitution "broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights."[99] The shopping center appealed, claiming denial of *its* Bill of Rights liberties under the First and Fifth Amendments.

In an opinion by Justice Rehnquist, the Supreme Court affirmed the California decision. Justice Marshall, concurring, "applauded" the California decision. It was part of "a very healthy trend of affording state constitutional provisions a more expansive interpretation than this court has given to the Federal Constitution."[100]

Justices Byron R. White and Powell concurred specially. They thought the California rule raised serious questions under the First and Fifth Amendments and indicated that in a proper case they would find that the rule creating a public forum in common areas of shopping centers violated the federal Bill of Rights.

The Burger Court has read the federal Bill of Rights increasingly narrowly. Usually, however, the Court has *not* held that the guaranties do not apply fully to the states. On occasion, though, the question is crucial. In *Apodaca v. Oregon*,[101] Justice Powell found that the Fourteenth Amendment did not require full or literal application of the Sixth Amendment to the states. The upshot was that states could convict people in criminal cases by nonunanimous juries. Later, in *Ballew v. Georgia*,[102] two Justices, Burger and Rehnquist, joined Justice Powell's position that the Fourteenth Amendment did not fully incorporate the Sixth Amendment right to jury trial as a limit on the states.[103] But in *Ballew* the difference in philosophy did not produce a difference in result. All the Justices agreed that states could not convict people by five-person juries. The majority reached this result under the Sixth Amendment, which it found incorporated by the Fourteenth. Justices Powell, Burger, and Rehnquist reached the same result under a "fundamental fairness" reading of the due process clause.[104]

So far, at least, the broad call to free the states from the commands

of the federal Bill of Rights has received very little encouragement from decisions of the Supreme Court. The call to restrict the content of the guaranties has already had considerable judicial success. That demand entered the political system earlier and has had fairly broad public support.

In the long run, decisions of the Court are affected by the philosophy of the Justices. The fact that a growing body of political opinion is clamoring to free the states from federal protection of the guaranties of individual liberty contained in the Bill of Rights is a disturbing development.

The Court can change direction—if it chooses—and allow states to violate the Bill of Rights. It cannot, however, justify this result by a fair reading of history.

Conclusion

Opponents of slavery never had much success in the courts. In the early years of the Republic a few state decisions held that slavery violated libertarian guaranties of state constitutions. As time went on, however, the judiciary paid less and less attention to the claims of liberty and more and more attention to the needs of slaveholders.[1]

Robert Cover, in his original and thoughtful study of the antislavery cause and the judicial process, argued that even antislavery judges followed a positivist approach to constitutional law. According to Cover, they rendered decisions against fugitive slaves because of their conception of the proper role of a judge. The judge followed positive law (whether it was morally right or wrong). He was bound by the intention of the framers, in the case of a constitution, or of the legislature, in the case of a statute. He operated on neutral principles —the values he pursued were those of others, not his own. Cover found that the judicial response to antislavery was formal and mechanical. He concluded that "given a particular juristic competence, there will be very specific consequences to and limits on the performance of judges caught in the moral-formal dilemma. If a man makes a good priest, we may be quite sure he will not be a great prophet."[2]

Judges who conscientiously follow the law do find their discretion limited by the legal process. Judges operate within a tradition that requires them to honor rules set by others, to follow the text of constitution and statutes, and to make decisions within an historical tradition. But the area of discretion is far wider than is typically recognized.

In some cases the text, history, and the intent of the framers provide fairly clear answers. By the prevailing jurisprudence of the nineteenth century, at least, in such cases the judge was required to follow the law, even if it produced morally unacceptable results. The question of the legality of slavery in the original southern states was one where text (if

read in light of the records of the federal convention), history, and intent pointed in the same direction. By prevailing nineteenth-century legal thought, a federal judge in Mississippi was simply without power to free one of Mississippi's slaves. The law did not give the judge the power to prevent a crime against humanity.

Even this case, however, is not perfectly clear. As the radical constitutional abolitionists showed, a strong antislavery argument could be made on behalf of the slave in Mississippi—based only on the constitutional text.[3] If one goes beyond the text to look at history, intent, or past interpretations, the argument loses much of its force.

To view the radical abolitionist argument solely in terms of legal methodology (and to give it a failing grade on that score) is to miss much of its point. The argument highlighted the contradiction of a union established to promote liberty but that protected slavery. It confronted slavery with the words of the Bill of Rights. Although the argument never persuaded most opponents of slavery, it probably had a significant role in producing a second, more moderate antislavery constitutional theory.

Under this moderate antislavery theory, the federal government lacked power to abolish slavery in the original southern states. But the Constitution, under the due process clause, made slavery illegal in all federal territories. The Constitution also protected the right of American citizens to go to southern states and speak against slavery and protected the other rights of citizens in the Bill of Rights. Furthermore, the Constitution protected the rights of free blacks and guarantied them procedural protections before they were kidnapped or seized by federal officers and shipped off to a state where they were presumed slaves because of their color.

The mainstream of antislavery legal thought operated at the margins. At first, at least, it did not go to the heart of the evil by finding slavery illegal in the southern states. But it contained the institution within its boundaries, protected the rights of its opponents to attack the evil at its point of origin, and insisted on constitutional protections for free blacks. It called upon a grand tradition of American history, the tradition of liberty.

Although radical antislavery legal thought was impossible to reconcile with the history of slavery and was difficult to reconcile with parts of the constitutional text, mainstream antislavery thought was a different matter. It was a more reasonable, if creative, application of the traditional legal method. That some of its conclusions were doubtful as a matter of history does not distinguish it from other legal ideas that have achieved, for a time at least, the force of law.

Robert Cover noted that judges who decided in favor of slavery

insisted that the law required the result they reached.[4] In fact, of course, even within a formal and mechanistic system that followed a positivist approach to the law, the judges had far more latitude than they admitted—and used that leeway to protect slavery. This fact is underlined by the decision in *Prigg v. Pennsylvania*.[5]

In the 1830s blacks in northern states faced capture and transportation south as alleged slaves. Northern states, concerned with the plight of blacks in their states, responded by passing personal liberty laws. The laws guarantied procedural rights to blacks before they were shipped south. Pennsylvania passed an antikidnapping law as well, punishing those who removed blacks from Pennsylvania without proper legal process. Prigg had been convicted of kidnapping for capturing a fugitive slave in Pennsylvania and taking him to Maryland without legal process. In the Supreme Court, Justice Story reversed Prigg's conviction. According to Story, the fugitive slave clause of the Constitution was self-executing. The slaveholders had a "positive unqualified right" to recapture a slave by private effort anywhere in the country.[6]

As Don Fehrenbacher noted, *Prigg* held that the slaveholder in effect carried the law of his slaveholding state with him into the free states: "One half of the nation must sacrifice its presumption of freedom to the other half's presumption of slavery, and the historic English principle of *in favorem libertas* was reversed where fugitive slaves were involved." Furthermore, Fehrenbacher noted, "Story coolly ignored . . . the argument of counsel for Pennsylvania that the law of 1793, in certain of its provisions, violated the personal rights guarantied by the privileges and immunities clause, by the Fourth Amendment, and by the due process clause of the Fifth Amendment." Blacks wrongfully claimed as slaves were deprived of basic constitutional rights.[7]

Whatever else one may say for the decision, it was not the inevitable result of the commands of the law, whatever the system of jurisprudence used. The decision was one based on policy. It sought to promote the stability of the Union at the expense of the constitutional rights of individual blacks. In the final analysis the policy may have been misguided. Like the later *Dred Scott* decision, *Prigg* may have contributed as much to disunion as to union.

Fehrenbacher suggested that racism was fundamental to the decision. The Court refused to pay any attention to the problem of kidnapping of free people—"a refusal that would have been inconceivable if the victims had been white."[8]

One segment of the antislavery movement essentially accepted the Court's view of the Constitution as a proslavery compact and "focused on the nature of moral obligation to such laws." The other part of the movement, according to Cover, "was forced to the anomalous position

that the Constitution could not mean what the Justices were saying it meant."[9] But unless one surrenders entirely to positivism, the Constitution is not simply what the judges say it is. The law in a particular case is what the judges say it is. The Constitution is a different matter. The document has a text, history, and tradition of its own. There is nothing anomalous about the argument that the judges were misreading it.

The argument that the Supreme Court had misread and perverted the Constitution was made by leading Republicans. Probably the most notable case was Abraham Lincoln's response to the *Dred Scott* decision. Lincoln thought the decision was wrong and refused to accept it as a rule of political action. "We propose," he said, "so resisting it as to have it reversed if we can, and a new judicial rule established in its place."[10]

Republican legal thought departed, on a number of points, from judicial orthodoxy established by the Supreme Court and perhaps also from historic purposes of the Constitution. To dismiss it for that reason ignores the high function it served. For such legal thought was not simply or even primarily directed at convincing courts that their precedents required an antislavery or libertarian result in specific cases. It served a prophetic function, the function of recalling Americans to their commitment to liberty. It mustered the Bill of Rights into the political battle against slavery.

By 1866 leading Republicans in Congress and in the country at large shared a libertarian reading of the Constitution. The Constitution meant what its preamble said. It established liberty. Liberty was understood in terms of the fundamental guaranties of liberty set out in the Constitution itself. For many Republicans that did not exhaust the meaning of the word, but that was its core. With the abolition of slavery, liberty extended to all citizens, white and black.

The idea that the Constitution protected fundamental liberties of citizens against state action was accepted by Republicans of all political persuasions. Its most ardent exponent was John Bingham, a conservative to centrist Republican. Bingham's greatest problem in getting the final draft of his proposal for a Fourteenth Amendment accepted was not that it departed from what Republicans thought appropriate. It was that many Republicans had so convinced themselves of the correctness of their constitutional views that they considered the Fourteenth Amendment superfluous. They thought blacks were already citizens; that states were already prohibited from depriving free persons of due process; that all the privileges or immunities or rights of American citizens protected them throughout the nation, even in the South. A major part of Bingham's argument in favor of his amendment was to point to the decision in *Barron* where the Court had held the guaran-

ties of the Bill of Rights did not limit the states. What, Bingham asked, have gentlemen to say to that?

At least one thing the gentlemen had to say was to point out that Bingham had not gone far enough. For Bingham also believed that the Bill of Rights limited the states and that the Supreme Court decisions on the subject were wrong. His first draft merely gave Congress power to enforce the Bill of Rights, failing to protect the rights if the old proslavery coalition returned to political power.

The power to enforce the Bill of Rights was a central concern for Republicans. The chairman of the House Judiciary Committee had justified the Civil Rights bill on that basis.[11] But the power to enforce alone was not sufficient to make the rights secure. A second complaint by Radical Republicans was that the amendment left out a basic liberty —the right of blacks to vote. A third complaint with the prototype of Bingham's amendment was that it would allow Congress to pass laws on all subjects traditionally covered by state law.

Another problem was that the first draft of the amendment used the words in article IV, section 2 in defining privileges and immunities. The use of the very language of article IV tied Bingham's proposal to words whose meaning was disputed. Did the article mean only, as Democrats insisted, that the citizens of each state should be entitled when visiting other states on a temporary basis to the same basic rights enjoyed by the citizens of the state visited under its state law? Were the privileges merely and solely created by state law? Did Republicans in Virginia enjoy exactly the same freedom of speech to attack slavery as citizens of Virginia enjoyed—that is to say none? Obviously, such a cramped reading of article IV had little appeal to Republicans.

In response, leading Republicans insisted on a reading of article IV that not only secured equality but that protected fundamental rights of American citizens. They read article IV to say "the citizens of each state shall be entitled to all privileges and immunities of citizens of the United States in every state." For them, article IV secured absolute rights of American citizens that the state could not deny. It is not possible to show that all Republicans shared this reading. But it is indisputable that leading Republicans in 1866 read the article to protect fundamental national rights that the states could not abridge. Their colleagues did not directly contradict them on this point.

At any rate, the ambiguity was corrected by the final draft of the Fourteenth Amendment. It clearly protected national rights, not simply those under state law. In 1871 Senator Frelinghuysen emphasized that the Fourteenth Amendment protected an absolute body of national privileges from state action. In this respect it was different from the privileges and immunities clause of article IV, section 2 as construed by

the courts. According to Frelinghuysen, *"Whatever may have been the intention of the framers of the Constitution,"* the courts had limited article IV, section 2 to protection against discrimination.[12]

Furthermore, it is clear that Republicans thought the Fourteenth Amendment protected freedom of speech and of the press and other basic constitutional rights.[13] Their statements on this question alone are sufficient to dispel the notion that the amendment in general and the privileges or immunities clause in particular protected only the right to equality under state law. Once this fact is recognized, one branch of the argument against application of the Bill of Rights to the states under the amendment collapses. The hypothesis that the amendment was exactly the same as the Civil Rights bill and that the bill only provided for equality in certain rights under state law is simply refuted by the evidence that Republicans thought the amendment protected absolute rights to freedom of speech, to assemble, to bear arms, and to due process that states could not abridge.

In a real sense one can never prove that the amendment was designed to apply the Bill of Rights to the states. One can simply take the hypothesis and see how well it fits the evidence. The hypothesis fits the evidence very well indeed. On the other hand, one can take the contrary hypothesis—that except for due process (without substantive content or the procedural content of the Bill of Rights) the amendment only provided for equality under state law. That hypothesis can be refuted easily and is impossible to reconcile with most of the evidence.

The great controversy is how to take the absence of evidence. One group treats the absence of statements that the Fourteenth Amendment will apply the Bill of Rights to the states as evidence that no such purpose was intended. (For this group, statements that the amendment will require states to obey all rights of citizens of the United States are not good enough.) If Republicans in the state legislatures failed to say anything about the meaning of the amendment, silence is taken as an admission that they did not intend to apply the Bill of Rights to the states. If speakers failed to discuss the meaning of section 1, the omission is treated as proof positive that no intent to apply the Bill of Rights existed. However, many speakers did not mention the due process clause of the amendment. Surely such failure cannot be taken as an acceptable basis for reading the clause out of the amendment.

One way to test the argument that silence precludes the application of the Bill of Rights to the states is to turn it on its head. The failure of Republicans to say that the amendment was not designed to apply the Bill of Rights to the states could be taken as proof that they did intend to

so apply it. At first the argument may seem absurd. When one recalls, however, that there was a consensus among Republicans in the campaign of 1866 that the amendment would protect rights of American citizens, and when one recalls that leading Republicans numbered among those rights the right not to be deprived of Bill of Rights liberties by the states, the argument makes at least as much sense as its opposite.

Most Republicans believed that the states were already required to obey the Bill of Rights. They did not accept the positivist notion that the Constitution was merely what the Supreme Court of the moment said it was. For many Republicans, the amendment merely declared constitutional law properly understood. Not a single Republican in the Thirty-ninth Congress said in debate that states were not and should not be required to obey the Bill of Rights. *Barron v. Baltimore* was mentioned only when Republicans urged its repudiation.[14]

The best way to understand the Republican reading of the Thirteenth Amendment and the Civil Rights bill is to recognize that those pieces of legislation reflected the preexisting liberties of American citizens. The Thirteenth Amendment freed the slaves. As a result, Republicans thought, they were made citizens of the United States. As citizens they were protected in the basic rights of American citizens, including protection of Bill of Rights liberties from state infringement. Slavery had deformed the law and diverted it from protections of the citizens' rights. Abolition of slavery was expected to reinvigorate the Constitution as a document protecting basic liberties.

The Civil Rights bill attempted to write this understanding into law. Republicans thought that the freed slaves were citizens. The Civil Rights bill said so. They were entitled to equal protection of state law. The Civil Rights bill said so. Citizens, by Republican understanding, were also entitled to protection of their Bill of Rights liberties from state violation. By vesting blacks with the *full* and equal benefit of *all* (not just state) laws and proceedings for the security of person and of property as enjoyed by white citizens, the Civil Rights bill (according to Republican legal thought) also secured protections of the Bill of Rights to blacks.

Some scholars have relied on Republican statements that the Fourteenth Amendment was already effectively in the Constitution, or already there except for equal protection, to bolster their contention that the amendment was not intended to apply the Bill of Rights to the states.[15] By comparable logic, one might argue that the amendment did not make blacks citizens or did not require the states to accord due process because some Republicans thought the Constitution provided for these things before its amendment.

The main argument scholars have made to prove that the Fourteenth Amendment was not designed to apply the Bill of Rights to the states is that most of its supporters did not say the amendment would apply "the Bill of Rights" to the states, and that some *did* say that the Civil Rights bill contained the same principles as those set out in the amendment.[16] This insistence that supporters of the amendment should use the phrase "Bill of Rights" is curious. When Congressman Bingham used the phrase, these very scholars insist that he did not really mean the amendments to the Constitution but was using the phrase in some technical sense, never heard of before or since. In any case, advocates of section 1 did use phrases that included Bill of Rights liberties. In fact, they used phrases that were more accurate, since the rights of American citizens include, but are not limited to, those in the Bill of Rights.

Both in the Thirty-ninth Congress and in the campaign of 1866 and during ratification, supporters said that the amendment would secure: *all rights* of citizens of the United States;[17] the rights thrown around the citizen by the supreme law of the land;[18] all his rights to every citizen;[19] the privileges conferred on every citizen by the federal Constitution;[20] the full enjoyment of all constitutional rights;[21] every right guarantied by the Constitution;[22] constitutional rights;[23] individual freedom and civil liberty;[24] immunities such as freedom of speech;[25] civil liberty and civil rights;[26] protection of life, liberty, and property;[27] all the rights that the Constitution provides;[28] and the rights of citizens enumerated in the Constitution.[29] In evaluating the meaning of these broad statements, it is important to remember that they referred to constitutional limitations specifically placed on the states in the interest of liberty. Statements such as these have been rejected by some scholars as too broad. However, when Republicans mentioned particular rights in the Bill of Rights, such as freedom of speech, these same critics reject their statements as too narrow.[30]

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

To ignore or dismiss the argument for freeing the states from the Bill of Rights base misses the point of how the judicial system works. By a widely accepted mythology, we live in a nation where the constitutional rights of the individual are so sacred that they are protected from the power of government, even from the power of the majority. In fact, of course, the rights of the individual are protected only so long as judges hold these rights in high esteem. Shifts in political power produce shifts in judicial personnel. Such

shifts regularly change the way the judges interpret the rights of the individual.

Those concerned with the maintenance of liberty have two potential devices at their command to protect individual rights. They may seek to persuade the judges and they may seek to persuade the people. In both cases the question of legitimacy is a crucial one. When the public becomes convinced that an institution, or a rule of law, is illegitimate, the institution or the rule loses much of its power. If a judge becomes convinced that a rule is not legitimate, the rule will be changed, at least if the judge is a justice of a supreme court and if he can convince a majority of his colleagues.

History provides one type of legitimacy. It can teach a decent respect for guaranties of liberty, guaranties that might otherwise be dismissed as unreasonable interferences with the necessary power of government. Many judges and many citizens will not be deflected from their philosophies or agendas by examination of the history of liberty. One can only hope that enough will consider the meaning of history to make a difference or that other criteria of legitimacy will receive sufficient acceptance to provide a basis for bolstering the law as an institution guarantying liberty and justice.

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

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

> I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket". . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected.[31]

Notes

Introduction

1 *E.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833).
2 *E.g.*, *compare* United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1876) *and* O'Neil v. Vermont, 144 U.S. 323 (1892) *with* Chicago, Burlington, and Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).
3 United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1876).
4 Maxwell v. Dow, 176 U.S. 581 (1900).
5 Twining v. New Jersey, 211 U.S. 78 (1908).
6 *In re* Kemmler, 136 U.S. 436 (1890).
7 *See, e.g.*, cases cited in notes 4, 5, and 6 *supra*.
8 *E.g.*, J. Ely, *Democracy and Distrust* 37, 196 (1980).
9 *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Benton v. Maryland, 395 U.S. 784 (1969).
10 Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif. L. Rev. 929, 934–35 (1965).
11 Perry, "Interpretivism, Freedom of Expression, and Equal Protection," 42 Ohio St. L. J. 261, 286 (1981) (hereinafter cited as Perry, "Interpretivism").
12 A. Bickel, *The Least Dangerous Branch* 102 (1962).
13 Adamson v. California, 332 U.S. 46, 68–123 (1947).
14 Grey, "Do We Have an Unwritten Constitution?" 27 Stan. L. Rev. 703, 711–12 (1975).
15 Alfange, "On Judicial Policymaking and Constitutional Change: Another Look at the 'Original Intent' Theory of Constitutional Interpretation," 5 Hastings Const. L. Q. 603, 607 (1978).
16 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, "Incorporation"). For a rebuttal, see Curtis, "Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation

of the Bill of Rights," 43 Ohio St. L. J. 84 (1982) (hereinafter cited as Curtis, "Further Adventures").

17 Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," 24 Vill. L. Rev. 3, 9–10 (1978).

18 Denvir, book review, 44 Ohio St. L. J. 139, 140 n.11 (1983) (reviewing M. Perry, *The Constitution, The Courts, and Human Rights* [1982]).

19 *E.g.*, H. Abraham, *Freedom and the Court* 40 (1982); H. Flack, *The Adoption of the Fourteenth Amendment* (1908); H. Hyman and W. Wiecek, *Equal Justice under Law* 386–438 (1982); J. James, *The Framing of the Fourteenth Amendment* (1956); Avins, "Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited," 6 Harv. J. on Legis. 1 (1968) (hereinafter cited as Avins); Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," 22 U. Chi. L. Rev. 1 (1954) (hereinafter cited as Crosskey); Curtis, "The Fourteenth Amendment and the Bill of Rights," 14 Conn. L. Rev. 237 (1982) (hereinafter cited as "The Fourteenth Amendment"); Curtis, "Further Adventures," *supra* note 16; Kaczorowski, "Searching for the Intent of the Framers of the Fourteenth Amendment," 5 Conn. L. Rev. 368 (1972) (hereinafter Kaczorowski). *Cf.* H. Graham, *Everyman's Constitution* (1968) (selective incorporation).

20 *E.g.*, Perry, *supra* note 11, at 286.

21 R. Berger, *Government by Judiciary* 413 (1977) (hereinafter cited as *Government by Judiciary*).

22 Crockett v. Sorenson, 568 F. Supp. 1422 (W. D. Va. 1983).

23 Jaffree v. Board of School Commissioners of Mobile County, 554 F. Supp. 1104 (S. D. Ala. 1983), *rev'd* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1707, 80 L.Ed.2d 181 (1984).

24 Jaffree v. Wallace, *supra* note 23.

25 G. Will, "A Labored Ruling on Pornography," *Greensboro Rec.* July 21, 1982, at A-12, col. 3–6.

26 S. 3018, 97th Cong., 2d sess. (1982) (East's bill); *see*, *N.Y. Times*, Aug. 3, 1985, p. 7, col. 3 (Meese).

27 *See* Jaffree v. Board of School Comm'rs of Mobile County, 104 S. Ct. 1707, 80 L.Ed.2d 181 (1984).

28 *Government by Judiciary*, *supra* note 21, at 413.

29 The recent trend has been to narrow the scope of the protections of the Bill of Rights. *See, e.g.*, United States v. Salvucci, 448 U.S. 83 (1980) *overruling* Jones v. United States, 362 U.S. 257 (1960); Fisher v. United States, 425 U.S. 391 (1976) (essentially overruling Boyd v. United States, 116 U.S. 616 [1886]); Hudgens v. NLRB, 424 U.S. 507 (1976) (essentially overruling Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 [1968]); Colgrove v. Battin, 413 U.S. 149 (1973); Kastigar v. United States, 406 U.S. 441 (1972) (essentially overruling Counselman v. Hitchcock, 142 U.S. 547 [1892]). *See also* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (allowing the issue of search warrants, instead of subpoenas, to search newspaper offices for evidence of a crime).

Cf. Paul v. Davis, 424 U.S. 693 (1976) (a citizen mistakenly labeled an active shoplifter by a state government official without notice or opportunity to be heard has no federal right to protection against such conduct although remedy may be available at state law); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 80 L.Ed.2d 772 (1984); United States v. Leon, 104 S. Ct. 230, 82 L.Ed.2d 677 (1984).

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

31 Crist v. Bretz, 437 U.S. 28, 40 (1978) (Powell, J., dissenting).

32 Buckley v. Valeo, 424 U.S. 1, 291 (1976).

33 Taylor, "Whoever Is Elected, Potential Is Great for Change in High Court's Course," *N.Y. Times*, Oct. 21, 1984, § 1, at 30, col. 6.

34 Monaghan, "Our Perfect Constitution," 56 N.Y.U.L. Rev. 353, 378 (1981).

35 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949) (hereinafter cited as Fairman).

36 332 U.S. 46, 68–123 (Black, J., dissenting).

37 Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).

38 Adamson v. California, 332 U.S. at 68–123 (1947).

39 *Id.*

40 *Id.*

41 Fairman, *supra* note 35.

42 *Id.* at 137; Fairman, "A Reply to Professor Crosskey," 22 U. Chi. L. Rev. 144, 155 (1954).

43 Fairman, *supra* note 35, at 134–39.

44 *Id.* at 139.

45 *Id.* at 138.

46 *Id.* at 139.

47 *See, e.g.*, chapter 5 *infra*.

48 *Government by Judiciary*, *supra* note 21.

49 *See, e.g.*, *supra* notes 11, 14.

50 *See generally* Crosskey, *supra* note 19, at 125–43 and notes 146–229 to Chap. 2 *infra*.

51 Fairman, *supra* note 35, at, *e.g.*, 5–34, 81–120, 134, 136–37.

52 *Id.* at, *e.g.*, 81–120.

53 *Id.*; Crosskey, *supra* note 19, at 104.

54 *E.g.*, Cong. Globe, 39th Cong., 1st sess., 1115, 1832 (1866).

55 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

56 32 U.S. (7 Pet.) 243 (1833).

57 U.S. Constitution, art. IV, § 2.

58 *See* Cong. Globe, 39th Cong., 1st sess., 430 (Bingham); 1263 (Broomall); 1833, 1835–36 (Lawrence) (1866); 38th Cong., 1st sess. 1202 (Wilson) (1864).

59 *National Party Platforms, 1840–1956*, at 27 (K. Porter and D. Johnson eds. 1956); Cong. Globe, 37th Cong., 2d sess., 1638, 1640 (Bingham) (1862). Both sources indicate that the due process clause banned slavery

in the federal territories because slavery itself was a deprivation of liberty without due process.

60 *See* "The Fourteenth Amendment," *supra* note 19, at 250, 255–56.

61 *E.g.*, Berger, "Incorporation," *supra* note 16, at 440–42, 458.

62 Curtis, "Further Adventures," *supra* note 16 at 104–106.

63 *E.g.*, L. Levy, "The Fourteenth Amendment and the Bill of Rights," L. Levy, ed., *Judgments* 64 (1972) for an analysis of the question, including Fairman's failure to consider the antislavery background; M. Benedict, *A Compromise of Principle* (1974); C. Eaton, *The Freedom of Thought in the Old South* (1940, 1964); D. Fehrenbacher, *The Dred Scott Case* (1978); E. Foner, *Free Soil, Free Labor, Free Men* (1970); J. James, *The Framing of the Fourteenth Amendment* (1956); J. James, *The Ratification of the Fourteenth Amendment* (1984); E. McKitrick, *Andrew Johnson and Reconstruction* (1960); T. Morris, *Free Men All* (1974); R. Nye, *Fettered Freedom* (1972); D. Potter, *The Impending Crisis* (1976); R. Sewell, *Ballots for Freedom* (1976); P. Smith, *Trial by Fire* (1982); tenBroek, *Equal under Law* (1965); H. Trefousse, *The Radical Republicans* (1968); W. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (1977); Avins, "Incorporation," *supra* note 19; Crosskey, *supra* note 19; Graham, "Our Declaratory Fourteenth Amendment," 7 Stan. L. Rev. 3 (1954); Kaczorowski, *supra* note 19; and the other articles and books cited in the text and notes. For an article that appeared about the same time as my first effort and that led me to look at the Civil Rights bill in a new light, see Soifer, "Protecting Civil Rights: A Critique of Raoul Berger's History," 54 N.Y.U.L. Rev. 651 (1979). My own thinking has been repeatedly stimulated and refreshed by the vigorous criticisms of Raoul Berger. For the dialogue, see Berger, "Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response," 44 Ohio St. L. J. 1 (1983) (hereinafter cited as Berger, "A Reply"). The reply was a response to Curtis, "Further Adventures," *supra* note 16, which in turn responded to Berger's "Incorporation," *supra* note 16, which in turn responded to 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, "The Bill of Rights"), which in turn responded to R. Berger, *Government by Judiciary* (1977). Finally, the work of Charles Fairman has been a great benefit in clarifying my thinking. That I strongly disagree with Fairman and Berger does not diminish my debt to them. Most of all perhaps my thinking has been influenced by two sources —Crosskey's article and the speeches of Republicans in the *Congressional Globe* and elsewhere. Although my ideas have been shaped or confirmed by others, the limitations in the theory espoused and the mistakes I make are my own responsibility.

On other topics of Fourteenth Amendment interest, see Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955) (hereinafter cited as Bickel); Dimond, "Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds," 80 Mich. L. Rev. 462 (1982) (hereinafter cited as Dimond); Frank and Munro, "The Original Understanding of 'Equal Protection of the Law,'" 50 Colum. L. Rev. 131 (1950) (hereinafter cited as Frank and Munro).

64 Crosskey, *supra* note 19, at 11–21.

65 TenBroek, *Equal under Law* (1965).

66 *See* note 63 *supra*.

67 H. Hyman and W. Wiecek, *Equal Justice under Law: Constitutional Development 1835–75*. *Cf.* Faber and Muench, "Ideological Origins of the Fourteenth Amendment," 1 Const. Commentaries 235 (1984). For another scholar citing Crosskey with approval, *see* J. Ely, *Democracy and Distrust* (1980).

68 Linde, "Judges, Critics, and the Realist Tradition," 82 Yale L. J. 227, 254 (1972).

69 *Cf. id.* On legitimacy generally, see L. Lusky, *By What Right* (1975).

70 C. Woodward, *American Attitudes toward History* 1–20 (Oxford 1968), reprinted in *Historian as Detective* 24–38 (1981).

71 *See, e.g.*, Perry, *supra* note 11; Brest, "The Misconceived Quest for the Original Understanding," 60 B.U.L. Rev. 204 (1980) (hereinafter cited as Brest).

72 *See, e.g.*, Gillers, book review, 92 Yale L. J. 731 (1983) (reviewing R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* [1982]).

73 *Compare Government by Judiciary, supra* note 21, *with* Perry, *supra* note 11, *and* Brest, *supra* note 71. *See* Lusky, *supra* note 69; Van Alstyne, "Interpreting *This* Constitution: The Unhelpful Contributions of Special Theories of Judicial Review," 35 U. Fla. L. Rev. 209 (1983).

74 *Government by Judiciary, supra* note 21; for very different historical approaches, *see* Bickel, *supra* note 63; Dimond, *supra* note 63; Frank and Munro, *supra* note 63.

75 *Cf.* Brest, *supra* note 71, and Perry, *supra* note 11.

76 C. Miller, *The Supreme Court and the Uses of History* 50 (1969) (hereinafter cited as Miller).

77 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857).

78 D. Fehrenbacher, *The Dred Scott Case* (1978) (hereinafter cited as Fehrenbacher).

79 Miller, *supra* note 76, at 81; B. Schwartz, *The Bill of Rights: A Documentary History* 1030 (1971).

80 *E.g.*, Mapp v. Ohio, 367 U.S. 643, 647 (1961).

81 *See* Maxwell v. Dow, 176 U.S. 581, 601 (1900).

82 *Cf.* United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898).

83 169 U.S. 649 (1898).

84 *Id.* at 699.

85 Maxwell v. Dow, *supra* note 81, at 602.

86 Monaghan, *supra* note 34, at 375.

87 *See* Cong. Globe, 39th Cong., 1st sess., 1010 (Clarke); 282 (Thayer) (1866).

88 *Id.* at 38th Cong., 1st sess., 2978–79 (Farnsworth) (1864).

89 2 *Collected Works of Abraham Lincoln* 405–406 (R. Blaser ed. 1953).

Chapter 1

1 B. Bailyn, *The Ideological Origins of the American Revolution* 27, 34–35, 77–81 (1967) (hereinafter cited as Bailyn).
2 *See id.* at 47–54.
3 *Id.* at 57.
4 B. Schwartz ed., *The Bill of Rights, A Documentary History* 222 (1971) (hereinafter cited as Schwartz).
5 *See id.* at 222–26 (Address to Inhabitants of Quebec), 201–10 (Rights of the Colonists and a List of Infringements and Violations of Rights, 1772), 256–313 (Revolutionary Constitutions and Declarations of Rights), 251–5 (Declaration of Independence); Bailyn, *supra* note 1 at 181–92, 105–108, 74.
6 W. Wiecek, *The Sources of Antislavery Constitutionalism in America 1760–1848* 76 (1976) (hereinafter cited as Wiecek).
7 U.S. Constitution, Art. IV, § 2, clause 3.
8 Wiecek, *supra* note 6, at 82.
9 *Id.* at 74.
10 *Id.* at 76.
11 Schwartz, *supra* note 4, at 444.
12 *Id.* at 606.
13 *Id.* at 607.
14 *Id.* at 616.
15 *Id.* at 620.
16 *Id.* at 621.
17 *Id.* at 2: 1027.
18 *Id.* at 1030.
19 *Id.* at 1030–31.
20 *Id.* at 1031.
21 32 U.S. (7 Pet.) 243 (1833).
22 *See* Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," 22 U. Chi. L. Rev. 1, 125–43 and authorities cited (1954) (hereinafter cited as Crosskey).
23 32 U.S. (7 Pet.) 243, at 249.
24 *See, e.g.*, J. Ely, *Democracy and Distrust* 196 (1980); L. Levy, "The Fourteenth Amendment and the Bill of Rights" in L. Levy, ed., *Judgments* 67 (1972).
25 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1816).
26 Fehrenbacher, *The Dred Scott Case* 117 (1978) (hereinafter cited as Fehrenbacher).
27 *Id.* at 120.
28 Livingston v. Moore, 32 U.S. (7 Pet.) 469 at 550–52 (1833).
29 44 U.S. (3 How.) 589 (1845).
30 *Id.* at 609.
31 1 Ga. 243 (1846). *See also* W. Rawle, *A View of the Constitution* 125–50 (1829); Cockrun v. State, 24 Tex. 394 (1859). See J. Featherstone, "The Second Amendment . . . Guaranties on Individual Right to Keep and Bear Arms" in *Report of the Subcommittee on the Constitution of the Committee of the Judiciary 97th Cong. 2d sess.* (1982).
32 Nunn v. Georgia, 1 Ga. 243, 249 (1846).
33 *Id.* at 250.
34 *Id.*
35 Rinehart v. Schuyler, 7 Ill. 473, 522 (1846).
36 Boring v. Williams, 17 Ala. 510, 516 (1850); Noles v. State, 24 Ala. 672, 677, 690 (1854); Colt v. Eves, 12 Conn. 242, 250, 252 (1837); Boyd v. Ellis, 11 Iowa 97, 99 (1860); State v. Barnett, 3 Kans. 250, 251, 253 (1865); State v. Keyes, 8 Vt. 57, 61, 62 (1836); Commonwealth v. Hitchings, 5 Gray (Mass.) 482, 483, 485 (1855); Jones v. Robbins, 8 Gray (Mass.) 329, 346 (1857); State v. Schricker, 29 Mo. 265, 266 (1860); Raleigh & G. R. Co. v. David, 19 N.C. 451, 459 (1837); State v. Newsom, 27 N.C. 250, 251 (1844); State v. Glen, 52 N.C. 321, 331 (1859); State v. Paul, 5 R.I. 185, 187, 196 (1858); State v. Shumpert, 1 S.C. 85, 86 (1868); Woodfolk v. Nashville & C. R. Co., 32 Tenn. 422, 431 (1852); Rhinehart v. Schuyler, 2 Gil. (Ill.) 473, 522 (1845); Campbell v. State, 11 Ga. 353 (1852); Cockrun v. State, 24 Tex. 394 (1859); *cf.* State v. Keith, 63 N.C. 141 (1869). Most of these cases were collected by W. W. Crosskey, *supra* note 19 at 142 n.266.
37 Fehrenbacher, *supra* note 26, at 522.
38 *See id.* at 474.

Chapter 2

1 *See generally* C. Swisher, *American Constitutional Development* 230–348 (2d ed. 1954); J. James, *The Framing of the Fourteenth Amendment* (1956) (hereinafter cited as James).
2 R. Sewell, *Ballots for Freedom* 7 (1976) (hereinafter cited as Sewell); Fehrenbacher, *The Dred Scott Case* 87 (1978) (hereinafter cited as Fehrenbacher).
3 Fehrenbacher, *supra* note 2, at 166–67.
4 *Id.* at 184.
5 *Id.* at 188, 192.
6 *Id.* at 474.
7 *Id.* at 453.
8 *Id.* at 192.
9 2 *Complete Works of Abraham Lincoln* 461 (House Divided Speech) (R. Blaser ed. 1953) (hereinafter cited as *Works of Lincoln*).
10 E. Foner, *Free Soil, Free Labor, Free Men* 122, 207–209 (1970) (hereinafter cited as Foner).
11 *Id.* at 122.
12 *Id.* at 311.
13 *Id.*
14 *Id.* at 314–15.
15 I. Litwack, *North of Slavery* 93 (1961).
16 *Id.* at 66.
17 *E.g.*, Cong. Globe, 35th Cong., 1st sess., 1964 (Fessenden), 1967 (Wilson) (1858)

Chapter 4

1 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949). For a reply to which I am indebted throughout this chapter and elsewhere, *see* Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," 22 U. Chi. L. Rev. 1 (1954) (hereinafter cited as Crosskey).
2 Adamson v. California, 332 U.S. 46, 71 (1947) (Black, J., dissenting).
3 Fairman, *supra* note 1, at 134.
4 Duncan v. Louisiana, 391 U.S. 145 at 510 (Harlan, J., dissenting).
5 *E.g.*, Grey, "Do We Have an Unwritten Constitution?" 27 Stan. L. Rev. 703, 711–12 (1975).
6 J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Graham, "Our Declaratory Fourteenth Amendment," 7 Stan. L. Rev. 3 (1954); Graham, "The Early Antislavery Backgrounds of the Fourteenth Amendment" (1950), Wisc. L. Rev. 479.
7 Fairman, *supra* note 1, at 11–12.
8 *Id.* at 12.
9 *Id.* at 42–50, 72–73.
10 *Id.* at 15–16.
11 C. Fairman, VI *History of the Supreme Court of the United States: Reconstruction and Reunion 1886–88* Part One 335 (1971).
12 Fairman, *supra* note 1, at 17.
13 *Id.* at 22.
14 *Id.* at 25–26.
15 *Id.* at 25.
16 *Id.*
17 *Id.* at 25.
18 *Id.* at 26.
19 *Id.* at 26.
20 *Id.* at 27–28.
21 *Id.* at 29 (Kelly), 29–32 (Bingham and Hale). Fairman's claim that Bingham believed that "the bill of rights" had been part of the Constitution since 1789 (used once again to suggest that Bingham was not talking about *the* Bill of Rights) is in error. Bingham actually said that the word *property* had been in the Bill of Rights since 1789, a correct statement since the Bill of Rights was proposed by Congress in that year. *Id.* at 30–31.
22 *Id.* at 32.
23 *Id.* at 33.
24 *Id.* at 33.
25 *Id.* at 33–34.
26 *Id.* at 35–36.
27 *Id.* at 38.
28 *Id.*
29 Cong. Globe, 39th Cong., 1st sess., 1294 (Wilson); *see also* 1835–36 (Lawrence) and 474 (Trumbull).

30 Fairman, *supra* note 1, at 39.
31 *Id.*
32 *Id.*
33 *Id.* at 40.
34 *Id.* at 41.
35 *Id.* at 42.
36 *Id.* at 43.
37 *Id.* at 44.
38 *Id.* at 45.
39 *Id.* at 46.
40 *Id.* at 44.
41 *Id.* at 45. See Cong. Globe, 39th Cong., 1st sess., 432, 813, 816 (prototypes); see 430 (1866).
42 Fairman, *supra* note 1, at 47.
43 *Id.* at 29 (Hale), 47 (Raymond), 50 (Farnsworth), 61 (Poland), 64 (Johnson).
44 *Id.* at 50–51.
45 *Id.* at 51–55.
46 *Id.* at 58.
47 *Id.* at 63.
48 *Id.*
49 *Id.* at 65.
50 *Id.* at 74.
51 *Id.*
52 *Id.* at 75–76.
53 *Id.*
54 *Id.* at 77.
55 *Id.* at 97.
56 *Id.* at 139.
57 *Id.*
58 *Id.* at 26–27.
59 *Id.* at 25–26, 32 (Bingham), *cf.* 17 (Trumbull), 39 (Thayer) "an easy target."
60 Cong. Globe, 39th Cong., 1st sess., 1064 (1866); *see* Crosskey, *supra* note 1, at 30–33.
61 Cong. Globe, 39th Cong., 1st sess., at 1089.
62 *Compare id.* at 1089 with 1095.
63 Fairman, *supra* note 1, at 27.
64 Cong. Globe, 39th Cong., 1st sess., 1090 (1866).
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.* at 1065.
72 *Id.* at 1089.
73 *Id.* at 1294.

74 *Id.* at 2883.
75 *Id.* at 2459.
76 *E.g.*, *id.* at 3069 (principles of Civil Rights bill protected by the amendment), 2498 (power to pass bill given by amendment); 2545 (Bingham on need for amendment to give power to pass bill).
77 *Id.* at 2883.
78 *Id.* at 1266 (Raymond), 1153 (Thayer).
79 *Id.* at *e.g.*, 340 (Cowan), 1183 (Garfield), 1263 (Broomall), 1629 (Hart), 1838 (Clarke), 1072 (Nye).
80 *Id.* at 1153.
81 *See* note 79 *supra*.
82 Cong. Globe, 39th Cong., 1st sess., 654, 743, 1292 (1866).
83 *Id.* at 743.
84 *See* note 79 *supra*.
85 60 U.S. (19 How.) 393 (1857).
86 *Id.* at 404–409.
87 Notes 82 and 83 *supra*.
88 *See* chapter 5 *infra*.
89 Fairman, *supra* note 1, at 137.
90 Fairman, "A Reply to Professor Crosskey," 22 U. Chi. L. Rev. 144, 155 (1954).
91 *See generally*, T. Morris, *Free Men All*, at chapters 10–12 (1974) (hereinafter cited as Morris).
92 *Id.* at 77–78. *See also id.* at 90–92, 137–38.
93 *Id.* at 8–9, 77.
94 *Id.* at 74.
95 *Id.* at 71–93.
96 41 U.S. (16 Pet.) 539 (1842).
97 *Id.* at 622.
98 S. Campbell, *The Slave Catchers*, at 32–46 (1968). For discussions of the Fugitive Slave Act, chapter 60, §§ 1–10, 9 Stat. 462 (1850), *see* Morris, *supra* note 91, at 130–47. *See also* Campbell, *supra*, at 3–48.
99 Morris, *supra* note 91, at 78.
100 *Id.*
101 *Id.* at 137.
102 *Id.* at 138.
103 Cong. Globe, 38th Cong., 1st sess., 2919 (1864) (Morris). At least some southern states had denied slaves the right to trial by jury. *See* State v. Dick, 4 La. Ann. 182 (1849); Avins, "Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited," 6 Harv. J. Legis. 1 (1968).
104 II *Legal Papers of John Adams* 200–201, 207 (L. Wroth and H. Zobel eds. 1965). D. Fehrenbacher, *The Dred Scott Case* 122 (1978).
105 A. Howard, *The Road from Runnymede* 341 (1968).
106 Fairman, *supra* note 1, at 59.
107 *National Party Platforms* 27, 32–33 (D. Johnson ed. 1956). *See* Cong. Globe, 37th Cong., 2d sess., 1638–39 (1862).
108 Cong. Globe, 39th Cong., 1st sess., 1090 (1866).

109 *Id.* at 1115, 1294.
110 *Id.* at 1291–92.
111 C. Fairman, *Reconstruction and Reunion* (6 *History of the Supreme Court of the United States* [1971]) (hereinafter cited as Fairman, *Reconstruction*) at 1141, 1129.
112 Cong. Globe, 38th Cong., 1st sess., 1202 (Wilson) (1864).
113 *Id.* at 39th Cong., 1st sess., 430, 1034 (Bingham).
114 Fairman, *Reconstruction*, *supra* note 111, at 1156.
115 *Id.* at 1157.
116 Cong. Globe, 39th Cong., 1st sess., 1118–19, 1294 (Wilson), 1153, 1270 (Thayer), 1291 (Bingham).
117 Fairman, *Reconstruction*, *supra* note 111, at 1159.
118 *Id.* at 1286.
119 *Id.* at 1124–25.
120 *Id.* at 1277.
121 *Id.* at 461, 462.
122 *Id.* at 1288–1289.
123 *Id.* at 1291.
124 TenBroek, *Equal under Law* 214 (1965; original ed. 1951) (hereinafter cited as tenBroek).
125 Cong. Globe, 42d Cong., 1st sess., appendix 84 (1871).
126 TenBroek, *supra* note 124, at 238.
127 *Id.* at 239.
128 *E.g.*, Cong. Globe, 39th Cong., 1st sess., 340, appendix 67, 1183, 1628–29, 1072, 654, 743, 1292, 1266, 1294.
129 Graham, "Our Declaratory Fourteenth Amendment," 7 Stan. L. Rev. 3 (1954) (hereinafter cited as Graham).
130 *Id.* at 19 n.80.
131 Cong. Globe, 39th Cong., 1st sess., 2765–66 (1866). Emphasis added.
132 Graham, *supra* note 129, at 18 n.80; note 131 *supra*.
133 Graham, *supra* note 129.
134 Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Cal. L. Rev. 929, 934–35 (1965).
135 *Id.*
136 *E.g.*, see notes 183–202, chapter 2 *supra*.
137 M. Conant, "Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined," 31 Emory L. J. 785, 817 (1982).
138 Cong. Globe, 39th Cong., 1st sess., 2765–66 (1866).
139 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, "Incorporation").
140 In addition to Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations 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); H. Flack, *The Adoption of the Fourteenth Amendment* (1908); J. James, *The Framing of*

the Fourteenth Amendment 85, 130 (1965); H. Hyman and W. Wiecek, *Equal Justice under Law, Constitutional Development 1835–1875*, chapter 11 (1982). For 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.

141 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949) (hereinafter cited as Fairman).

142 Berger, "Incorporation," *supra* note 139.

143 Fairman, *supra* note 141.

144 *See* chapter 2, *supra*.

145 *Id.*

146 Berger, "Incorporation," *supra* note 139, at 441–42. *See*, Fairman, *Reconstruction*, *supra* note 111, at 335.

147 Berger, *Government by Judiciary*, at 39 *passim* (1977) (hereinafter cited as *Government by Judiciary*).

148 *Government by Judiciary*, *supra* note 147, at 40; Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422 (1857).

149 *Government by Judiciary*, *supra* note 147, at 40.

150 *Id.* at 39–40.

151 Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

152 6 F. Cas. (No. 3230) 546 (C.C.E.D. Pa. 1823).

153 *Government by Judiciary*, *supra* note 147, at 22, 36, 41, 43.

154 *See id.* Soifer has come, independently, to some remarkably similar conclusions as to Berger's treatment of the privileges and immunities question. "Protecting Civil Rights: A Critique of Raoul Berger's History," 54 N.Y. U. L. Rev. 651 (1979). His article is not directed at the question of incorporation of the Bill of Rights as a limit on the states.

155 *Government by Judiciary*, *supra* note 147, at 42, citing Cong. Globe, 39th Cong., 1st sess., 1757 (1866) (emphasis added).

156 6 F. Cas. at 551.

157 *Id.* at 551–52.

158 *Id.* at 551.

159 *Id.* at 551–52.

160 Fairman, *Reconstruction*, *supra* note 111, at 1121.

161 *Government by Judiciary*, *supra* note 147, at 38.

162 Cong. Globe, 38th Cong., 2d sess., 193 (1865); *see also* Cong. Globe, 39th Cong., 1st sess., 1263 (1866) (Broomall)—specifically citing rights of speech, petition, due process, and the right to be free from illegal arrest. Howard may not have accepted this view. *See* notes 74–92, chapter 2 *supra*.

163 *Government by Judiciary*, *supra* note 147, at 38.

164 *Compare id.* at 38 with *id.* at 148.

165 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).

166 Cong. Globe, 39th Cong., 1st sess., 1757 (1866).

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

168 Cong. Globe, 39th Cong., 1st sess., at 2765–66.

169 *See Government by Judiciary*, *supra* note 147, at 41–42, 44.

170 *Id.* at 45. If Mr. Berger 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 art. IV, § 2, are clearly beside the point.

171 *See, e.g.*, Cong. Globe, 39th Cong., 1st sess., 1833 (1866).

172 *See* Berger, "Incorporation," *supra* note 139, at 442, 455.

173 *Id.* at 442–43 (emphasis in original).

174 Cong. Globe, 42d Cong., 1st sess., 577 (1871).

175 *Government by Judiciary*, *supra* note 147, at 49–50.

176 *Id.* at 51.

177 *Id.* at 49–51.

178 Berger, "Incorporation," *supra* note 139, at 442.

179 *Id.*

180 Cong. Globe, 39th Cong., 1st sess., 599 (1866).

181 *Id.* at 1757.

182 *Id.* at 475.

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

184 Fairman, *supra* note 1, at 134–35, 138.

185 *Id.* at *e.g.* 44, 77.

186 *Id.* at 134–39.

187 *Government by Judiciary*, *supra* note 147, at 205.

188 *Id.* at 233.

189 *Government by Judiciary*, *supra* note 147, at 182 n.65.

190 *Id.* at 233.

191 Cong. Globe, 39th Cong., 1st sess., 1837 (1866).

192 Berger, "Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response," 44 Ohio St. L. J. 1, 3 (1983) (hereinafter cited as Berger, "A Reply").

193 Cong. Globe, 39th Cong., 1st sess., 1837 (1866).

194 Berger, "A Reply," *supra* note 192, at 4.

195 *Id.* at 5.

196 Cong. Globe, 39th Cong., 1st sess., 1118, 1747, 2565–66.

197 *Id.* at 1757.

198 *Id.* at 1118.

199 *Id.* at 1117.

200 *Id.* at 157–58.

201 *Id.* at 1833.

202 *Id.* at 2765–66.

203 *E.g.*, *id.* at 2542.

204 Curtis, "The Fourteenth Amendment and The Bill of Rights," 14 Conn. L. Rev. 237, 242–46 (1982).
205 *E.g.*, Cong. Globe, 39th Cong., 1st sess., 1153, 1270 (Thayer) (1866).
206 *Government by Judiciary, supra* note 147, at 136–37.
207 *Id.* at 137.
208 *Id.* at 145.
209 *Id.* at 219.
210 Berger, "Incorporation," *supra* note 139, at 445.
211 *Id.* at 452.
212 *N.Y. Times*, March 10, 1866, at 1, col. 2. The following is a brief biography of Bingham prepared for Congress: "BINGHAM, John Armor, a representative from Ohio; born in Mercer, Mercer County, Pa., January 21, 1815; pursued academic studies; apprentice in a printing office for two years; attended Franklin College, Ohio; studied law; was admitted to the bar in 1840 and commenced practice in New Philadelphia, Tuscarawas County, Ohio; district attorney for Tuscarawas County, Ohio, 1846–1849; elected as a Republican to the Thirty-fourth and to the three succeeding Congresses (March 4, 1855–March 3, 1863); unsuccessful candidate for reelection in 1862 to the Thirty-eighth Congress; appointed by President Lincoln as judge advocate of the Union Army with the rank of major in 1864; later appointed solicitor of the court of claims; special judge advocate in the trial of the conspirators against the life of President Lincoln; elected to the Thirty-ninth and to the three succeeding Congresses (March 4, 1865–March 3, 1873); unsuccessful candidate for renomination in 1872; one of the managers appointed by the House of Representatives in 1862 to conduct the impeachment proceedings against West H. Humphreys, United States judge for the several districts of Tennessee, and in 1868 in the proceedings against Andrew Johnson, President of the United States; appointed Minister to Japan and served from May 31, 1873, until July 2, 1885; died in Cadiz, Harrison County, Ohio, March 19, 1900; interment in Cadiz Cemetery." *Biographical Directory of the American Congress 1774–1971*, 92d Cong., 1st sess. (1971).
213 J. James, *The Framing of the Fourteenth Amendment* 86 (1965) (hereinafter cited as James).
214 *Reconstruction and Reunion, supra* note 111, at 461.
215 *Id.*
216 *Id.* at 1289.
217 *Government by Judiciary, supra* note 147, at 143.
218 *Id.*
219 *Id.*
220 *Id.* at 143–44.
221 Cong. Globe, 39th Cong., 1st sess., 1034 (1866).
222 *Id.* at 1089.
223 *Compare* Cong. Globe, 38th Cong., 1st sess., 1202 (1864) with *id.* at 39th Cong., 1st sess., 1294 (Wilson); *id.* at 1153, 1270 (Thayer).
224 Berger, "Incorporation," *supra* note 139, at 450.
225 *Id.*

226 As Bingham understood art. IV, § 2, it meant that "the 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*.
227 *Id.* at 1089.
228 *Id.* at 158.
229 Berger, "Incorporation," *supra* note 139, at 450.
230 *Id.*
231 *Government by Judiciary, supra* note 9, at 143–44.
232 *See* Cong. Globe, 39th Cong., 1st sess., 1089–90 (1866).
233 *Id.* at 1034.
234 *Government by Judiciary, supra* note 147, at 143–44.
235 Berger, "Incorporation," *supra* note 139, at 451.
236 Cong. Globe, 39th Cong., 1st sess., 1292 (1866) (emphasis added).
237 *See* Berger, "Incorporation," *supra* note 139, at 463. I do not believe 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.
238 Berger, "Incorporation," *supra* note 139, at 451 (quoting Cong. Globe, 39th Cong., 1st sess., 1292 (Bingham) (1866).
239 Cong. Globe, 39th Cong., 1st sess., 1292 (1866).
240 *Government by Judiciary, supra* note 147, at 141.
241 *Id.* at 142.
242 *Id.* at 144–45.
243 *Id.* at 140–41.
244 *Compare id.* at 43 with *id.* at 142–43.
245 *See* notes 170–202 to chapter 2, *supra*.
246 *Government by Judiciary, supra* note 9, at 142–43.
247 Cong. Globe, 39th Cong., 1st sess., 2542–43 (1866).
248 *Id.*
249 *Id.* at 2542.
250 *E.g.*, Berger, "Incorporation," *supra* note 139, at 463. Fairman, *supra* note 1, at 45.
251 *See* Crosskey, *supra* note 140, at 27.
252 Cong. Globe, at 39th Cong., 1st sess., 432 (1866).
253 *Id.* at 813.
254 *Id.* at 430.
255 Berger, "Incorporation," *supra* note 139, at 453.
256 Cong. Globe, 39th Cong., 1st sess., at 1120 (1866); *Government by Judiciary, supra* note 147, at 143.
257 *Government by Judiciary, supra* note 147, at 143.
258 Cong. Globe, 38th Cong., 2d sess., 1202 (1864).
259 Cong. Globe, 39th Cong., 1st sess., 2539 (1866).
260 32 U.S. (7 Pet.) 243 (1833).
261 Farnsworth was a political supporter of the abolitionist-Republican Owen Lovejoy. 3 *Dictionary of American Biography* 284 (1959).

262 Cong. Globe, 38th Cong., 1st sess., 2978 (1864).
263 *Government by Judiciary, supra* note 147, at 142.
264 *Id.*
265 Cong. Globe, 39th Cong., 1st sess., 1294 (1866); *see id.* 38th Cong., 1st sess., 1202 (1864).
266 *E.g.*, Cong. Globe, 39th Cong., 1st sess., 2539, *see* 1054, 1057, 1294 (1866).
267 *Id.*
268 *Government by Judiciary, supra* note 147, at 147.
269 *Id.*
270 Cong. Globe, 39th Cong., 1st sess., 2539–40 (Farnsworth), 2058 (Boutwell), 2462 (Garfield) (1866). This statement applies, of course, only to Republicans; Democrats opposed black suffrage. *E.g.*, *id.* at 2538 (Rogers).
271 6 F. Cas. (No. 3230) 546 (C.C.E.D. Pa. 1823).
272 *Government by Judiciary, supra* note 147, at 148 (quoting Cong. Globe, 39th Cong., 1st sess., 2764–65 [1866]).
273 *Id.*
274 Cong. Globe, 39th Cong., 1st sess., 2765 (1866).
275 *Government by Judiciary, supra* note 147, at 148–49; Fairman, *supra* note 1, at 60–61.
276 Cong. Globe, 39th Cong., 1st sess., 2961 (1866); *see* Curtis, "The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger," 16 Wake Forest L. Rev. 45, 188 (1980).
277 *Government by Judiciary, supra* note 147, at 149.
278 Cong. Globe, 39th Cong., 1st sess., 3042 (1866).
279 *Cf. Government by Judiciary, supra* note 147, at 157, 149.
280 *Id.* at 148 n.66. On this point Berger cites Fairman. *But see* "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *supra* note 1, at 68.
281 *N.Y. Times*, May 24, 1866, at 1, col. 6. *See also* Crosskey, *supra* note 140, at 102–103.
282 *N.Y. Times*, May 24, 1866, at 1, col. 6.
283 *Id.*, March 1, 1866, at 5, col. 2. *See also id.* March 2, 1866, at 2, col. 5.
284 *Government by Judiciary, supra* note 147, at 148 n.66 and 153.
285 *Id.* at 221–29.
286 *Id.* at 228.
287 Cong. Globe, 39th Cong., 1st sess., 1095 (1866).
288 *Id.*
289 *Id.* at 1095.
290 *See* B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 61 (1914) (hereinafter cited as Kendrick).
291 James, *supra* note 213, at 120; Cong. Globe, 39th Cong., 1st sess., 7286 (1866).
292 Cong. Globe, 39th Cong., 1st sess., 429, 432, 813, 1034, 1064, 1088–90 (Bingham), 2765–66 (Howard) (1866).
293 *Id.* at 566 (Brown), 741 (Lane), 868 (Newell), 1032 (McClurg), and 586 (Donnelly) (1866).
294 *Id.* at 2765–66 (Howard), 1090 (Bingham).
295 Cong. Globe, 39th Cong., 1st sess., 2462 (Garfield—referring to the principles of the Civil Rights bill), 2896 (Howard—rights of citizens under the Civil Rights bill put beyond mere legislative power) (1866).
296 *See* Cong. Globe, 38th Cong., 1st sess., 1480 (Sumner) (1864). To deprive free persons of rights in the Bill of Rights without conviction of a crime was, Judge Davis believed, a badge of slavery. *Proceedings of the Republican Union State Convention* 35 (Sept. 5, 1866).
297 Cong. Globe, 38th Cong., 1st sess., 1480 (Sumner) (1864).
298 Crosskey, *supra* note 140, at 6–7 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

Chapter 5

1 *Galena* (Ill.) *Weekly Gazette*, Sept. 25, 1866, at 2, col. 4. The address seems to have been carried in virtually every Republican paper.
2 *Burlington* (Iowa) *Hawk Eye*, Sept. 28, 1866, at 1, col. 2; (Springfield) *Daily Ill. St. J.*, Sept. 28, 1866, at 1, col. 4.
3 *Galena* (Ill.) *Weekly Gazette*, Aug. 21, 1866, at 1, col. 6.
4 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 70–71 (1949) (hereinafter cited as Fairman).
5 *Dubuque Daily Times*, Nov. 21, 1866, at 2, col. 1.
6 *See, e.g.*, notes 118–121 and 124–148, *supra* chapter 2, and accompanying text.
7 *Reprinted* in *Dubuque Daily Times*, Dec. 3, 1866, at 2, col. 2.
8 *Id.* Compare Kelley's remarks on Bingham's prototype of the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st sess., 1063 (1866).
9 *See, e.g.*, *Daily Territorial Enterprise*, Sept. 20, 1866, at 1, col. 2 (Butler); *id.*, Sept. 16, 1866, at 1, col. 3 (Sen. Stewart); *Dubuque Daily Times*, Sept. 8, 1866, at 1, col. 3.
10 *N.Y. Daily Tribune*, Sept. 4, 1866, at 1, col. 4.
11 *Philadelphia Inquirer*, Aug. 25, 1866, at 2, cols. 1–2.
12 C. Fairman, *Reconstruction and Reunion (1864–88)* 180 (1971); 4 *National Cyclopedia of American Biography* 472 (1897) (hereinafter cited as NCAB); *N.Y. Tribune*, Sept. 4, 1866, at 1, col. 3.
13 4 *Dictionary of American Biography* 183 (1946) (hereinafter cited as DAB).
14 Note 30 *supra*.
15 *N.Y. Tribune*, Sept. 4, 1866, at 1, col. 3.
16 *Illinois State Journal*, Sept. 3, 1866, at 1, col. 6.
17 *See, e.g.*, *Fairfield* (Iowa) *Ledger*, Sept. 20, 1866, at 1, col. 3; *Philadelphia Press*, Sept. 7, 1866, at 1, col. 2.
18 *Newark Daily Advertiser*, Sept. 7, 1866, at 1, col. 7.
19 *N.Y. Daily Tribune*, Sept. 7, 1866, at 1, col. 4.
20 *Id.*
21 *Washington* (D.C.) *Evening Chron.*, Sept. 9, 1866, at 1, col. 4.
22 *Id.* at col. 7.

23 *Id.* at col. 5.
24 P. Smith, *Trial by Fire*, 707–708 (1982) (hereinafter cited as Smith).
25 *Id.*; M. Benedict, *A Compromise of Principle*, 205–206 (1974) (hereinafter cited as Benedict).
26 Smith, *supra* note 24, at 707–708; Benedict, *supra* note 25, at 205–206.
27 *Washington* (D.C.) *Evening Chron.*, Sept. 9, 1866, at 1, col. 5.
28 *Id.*
29 *Id.* at cols. 5–6.
30 *N.Y. Daily Tribune*, Sept. 11, 1866, at 5, cols. 1–2.
31 *Philadelphia Inquirer*, Sept. 5, 1866, at 8, col. 3.
32 (Springfield) *Daily Ill. St. J.*, Sept. 21, 1866, at 2, col. 6.
33 *Id.*, Oct. 12, 1866, at 4, col. 4.
34 *Id.*, Oct. 22, 1866, at 4, col. 2.
35 *Cincinnati Commercial*, Aug. 31, 1866, at 2, col. 3.
36 *Philadelphia Press*, Sept. 18, 1866, at 8.
37 11 NCAB, *supra* note 12, at 236 (1909).
38 *Proceedings of the Republican Union State Convention* 35 (Sept. 5, 1866).
39 *Id.*
40 *Id.* at 41.
41 *Id.* See also the speech of Lyman Tremain: "The first [section of the Fourteenth Amendment] defines citizenship of the United States, and prohibits any State from denying to any person its privileges without legal process. . . . The first section is necessary to secure to the millions of newly created freedmen the rights of citizenship." *Id.* at 20. Tremain noted that the Civil Rights bill might be held unconstitutional or be repealed. "It seems, therefore, to be demanded by every consideration of justice and wise statesmanship that these persons should be secured in the immunities and privileges of citizenship, the right to sue, to make contracts, to hold and transmit property and to be witnesses, by an amendment of the constitution." *Id.* at 20–21.
42 *Albany Evening J.*, Sept. 21, 1866, at 1, col. 3.
43 *Id.* at col. 3.
44 *Id.* at col. 4.
45 *Id.* at col. 5.
46 *See* speech of Sen. Luke Poland to the Vermont legislature, reprinted in *Daily* (Burlington, Vt.) *Free Press*, Nov. 23, 1866, at 2, col. 1, and Nov. 24, 1866, at 2, col. 1 (suggesting that the Civil Rights bill embodied the same principles as § 1); speech of Sen. George Edmonds, reprinted in *Daily* (Burlington, Vt.) *Free Press*, Nov. 13, 1866, at 2, col. 2, and Nov. 14, 1866, at 2, col. 2 (summarizing §1 as extending the rights and privileges of citizens to blacks). *Compare* speech of Sen. Stewart in the *Daily Territorial Enterprise*, Sept. 16, 1866, at 1, cols. 2–3. Benjamin Butler in a speech, recorded in the *Daily Territorial Enterprise*, Sept. 20, 1866, at 1, col. 3, noted: "Therefore, it becomes the duty of every man to sustain the Congress, in sustaining first the Civil Rights Bill, which gives to everybody their rights in every State; and sustain Congress in giving protection to the negro, in holding these States where they are, and insisting that free speech, a free press, civil and religious liberty, shall be guarantied until a change can be made, sustain the loyal men of the South." *See also* speech of Sen. Stewart reprinted in *Daily Territorial Enterprise*, Oct. 14, 1866, at 1, col. 1. For a few other campaign statements saying that the amendment covered the same ground as the Civil Rights bill and an argument that these vague statements show that the rights in the Bill of Rights were not incorporated, see Fairman, *supra* note 4, at 68–78. Of the statements Fairman collected, one seems inconsistent with incorporation of the Bill of Rights, a speech by Sen. John Sherman saying that the sum and substance of the first clause was the right to come and go, to sue, and to make contracts. Fairman, *supra* note 4, at 77.

47 *See* notes 165, 167, and 174–202, *supra* chapter 2, and accompanying text.
48 *Cincinnati Commercial*, Sept. 3, 1866, at 2, col. 3.
49 *See* note 168, *supra* chapter 2, and accompanying text.
50 *See, e.g.*, notes 192 and 193, *supra* chapter 2.
51 *See* notes 164–166, *supra* chapter 2, and accompanying text. *See also* Cong. Globe, 39th Cong., 1st sess., 1153 (Thayer) (1866).
52 Cong. Globe, 39th Cong., 1st sess., 3436 (1866).
53 *Id.* at 3437.
54 *Daily Territorial Enterprise*, Sept. 13, 1866, at 1, col. 2.
55 *See* notes 201–202, *supra* chapter 2, and accompanying text.
56 *Daily Territorial Enterprise*, Sept. 13, 1866, at 1, col. 2.
57 Oct. 4, 1866, at 1, col. 6.
58 *Cincinnati Commercial*, Sept. 9, 1866, at 8, col. 1.
59 *Id.* at col. 2.
60 *Id.*
61 *Brattleboro* (Vt.) *Record and Farmer*, Nov. 3, 1866, at 1.
62 *Id.*
63 *Cincinnati Daily Gazette*, Aug. 18, 1866, at 1, cols. 3–9.
64 Cong. Globe, 41st Cong., 3d sess., 1245 (1871).
65 Cong. Globe, 43d Cong., 1st sess., 413 (1874).
66 *North American* (Pa.), Aug. 30, 1866, at 2, col. 3, cited in Bond, "The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania," 18 Akron L. R. 435 (1985). Bond concludes that selective incorporation was intended. *See also* Bond, "Ratification of the Fourteenth Amendment in North Carolina," 20 Wake Forest L. Rev. 89 (1984).
67 *Burlington* (Iowa) *Hawk Eye*, Sept. 13, 1866, at 1, col. 2.
68 *Dubuque Daily Times*, Sept. 8, 1866, at 1, col. 3.
69 *Cincinnati Commercial*, Aug. 27, 1866, at 1, col. 3.
70 *See* Fairman, *supra* note 4, at 68–78.
71 *See, e.g.*, notes 10–60 *supra*, and accompanying text.
72 For a survey of some of this material and a contrary opinion, *see* Fairman, *supra* note 4, at 81–126.
73 *Maine Senate Journal* 20–21 (1867).
74 *Journal of the Extra Session of the 22nd Senate of the State of New Jersey* 7 (1866).

were products of Republican ideas of federalism, *see* Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 *Supreme Court Review* 39. For a more critical view, *see* C. P. Magrath, *Morrison, R. Waite: The Triumph of Character* 110–71 (1963).

61 The Civil Rights Cases, 109 U.S. 3 (1883).
62 190 U.S. 127 (1903).
63 110 U.S. 516 (1884).
64 Davidson v. New Orleans, 96 U.S. 97 (1878).
65 Cortner, *supra* note 23, at 13.
66 110 U.S. at 517–18.
67 Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856).
68 *Id.*
69 A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 158–59 (1968) (hereinafter cited as Howard); *cf. id.* at 352–53.
70 *Id.* at 412, 416.
71 *Id.* at 419, 422.
72 *Id.* at 158–59.
73 *Id.* at 352–53.
74 C. Miller, *The Supreme Court and the Uses of History* 43 (1969) (hereinafter cited as Miller).
75 *Id.*
76 Filler, "Stanley Matthews," in 2 *Justices, supra* note 6, at 1351–60.
[illegible] 110 U.S. 516, 521–27 (1884); Howard, *supra* note 69, at 352–53.
[illegible] 110 U.S. at 528–29.
79 [illegible]er, *supra* note 74, at 50.
80 R. Berger, *Government by Judiciary* 134–56 (1977).
81 Howard, *supra* note 69, at 354–55.
82 110 U.S. at 531–32.
83 *Id.* at 535.
84 *Id.* at 534–35.
85 *Id.* at 550.
86 Filler, "John M. Harlan," in 2 *Justices, supra* note 6, at 1281.
87 *Id.* at 1283.
88 *Id.* at 1283–84.
89 109 U.S. 3, 26 (1883).
90 163 U.S. 537, 552 (1896).
91 110 U.S. 516, 539–40 (1884).
92 *Id.* at 546.
93 *Id.* at 557–58.
94 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5, 84 (1949).
95 *Id.* at 101.
96 *Id.* at 106.
97 *Id.* at 82–83.
98 123 U.S. 131 (1887).
99 19 *Dictionary of American Biography* 34–35 (1927).

100 *Id.*
101 83 U.S. (16 Wall.) 36 (1873).
102 110 U.S. 516 (1884).
103 123 U.S. at 148–49.
104 *Id.* at 150–52.
105 *Id.* at 153.
106 *Id.* at 166.
107 166 U.S. 226 (1897).
108 Cortner, *supra* note 23, at 26.
109 *Id.* at 28.
110 144 U.S. 323 (1892).
111 *Id.* at 338–39 (Field, J., dissenting).
112 *Id.* at 366, 370.
113 *Id.* at 361.
114 *Id.* at 362–63.
115 *Id.* at 363.
116 United States v. Hall, 26 F. Cas. 79 (C.C.S.D.Ala. 1871) (No. 15,282).
117 83 U.S. (16 Wall.) 36, 116 (1873).
118 144 U.S. 323, 361.
119 McCloskey, "Stephen J. Field," in 2 *Justices, supra* note 6, at 1069, 1077.
120 *Id.* at 1084 (quoting *Ex parte* Wall, 107 U.S. 265, 302 [1883]).
121 *Id.* at 1084–85.
122 *Id.*
123 *Id.* at 1086.
124 W. Guthrie, *Lectures on the Fourteenth Article of Amendment* 60–65 (1898), *quoted in* Cortner, *supra* note 23, at 29.
125 *Id.*
126 176 U.S. 581 (1900).
127 Cortner, *supra* note 23, at 30.
128 *Id.*
129 170 U.S. 343 (1898).
130 176 U.S. 581 (1900).
131 *Id.* at 584.
132 Skolnik, "Rufus Peckham," in 3 *Justices, supra* note 6, at 1685, 1696–1702.
133 *Id.* at 1697.
134 *Id.*
135 176 U.S. at 593.
136 *Id.*
137 *Id.* at 594–600.
138 *Id.* at 595.
139 *Id.* at 601.
140 *Id.* at 601–602.
141 *Id.* at 602.
142 *See* notes 80–102, chapter 3, *supra.*
143 176 U.S. at 602–603.
144 *Id.* at 612.
145 *Id.* at 612.

146 *Id.* at 617.
147 *Id.* at 614.
148 198 U.S. 45 (1905).
149 *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) *with* Board of Education v. Barnette, 319 U.S. 624 (1943).
150 211 U.S. 78 (1908).
151 *Id.* at 98.
152 *Id.* at 114.
153 *Id.* at 96–99.
154 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (No. 3230).

Chapter 8

1 Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).
2 268 U.S. 652, 666 (1925).
3 283 U.S. 697 (1931).
4 283 U.S. 359 (1931).
5 Hendel, "Charles Evans Hughes," in 3 *The Justices of the United States Supreme Court* 1893 (1969) (hereinafter cited as *Justices*); D. Burner, "Owen J. Roberts," in *id.* at 2253.
6 283 U.S. at 722–23.
7 287 U.S. 45 (1932).
8 *Id.* at 65–66.
9 Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226 (1897).
10 Gitlow v. New York, 268 U.S. 652 (1925).
11 Near v. Minnesota, 283 U.S. 697 (1931).
12 287 U.S. at 67.
13 299 U.S. 353 (1937).
14 R. Cortner, *The Supreme Court and the Second Bill of Rights* 89–90 (1981).
15 299 U.S. at 364–66.
16 *Id.* at 366.
17 302 U.S. 319 (1937).
18 *Id.* at 321–22.
19 *Id.* at 325–26.
20 *Id.*
21 *Id.*
22 *Id.* at 319–25.
23 *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325–26 (1937); Boyd v. United States, 116 U.S. 616, 618 (1886). *See also* Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969).
24 W. Crosskey, *Politics and the Constitution in the History of the United States* 514 (1953), *quoted in* Anastaplo, "Mr. Crosskey, the American Constitution, and the Nature of Things," 15 Loy. U. Chi. L. J. 181, 186 (1984).
25 Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).
26 332 U.S. 46 (1947).

27 Frank, "Hugo L. Black," in 3 *Justices, supra* note 5, at 2321, 2326 (1969).
28 *Id.* at 2326–27.
29 *See* Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746 (1965).
30 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).
31 *Id.* at 68–123.
32 332 U.S. at 124 (Murphy, J., dissenting).
33 *But see* Younger v. Harris, 401 U.S. 37 (1971) (an early Burger court decision joined in by a number of Justices from the Warren Court).
34 347 U.S. 483 (1954).
35 *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Powell v. Alabama, 287 U.S. 45 (1932); Schneider v. Town of Irvington, 308 U.S. 147 (1939); Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 350 U.S. 296 (1940); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
36 Mapp v. Ohio, 367 U.S. 643 (1961).
37 Gideon v. Wainwright, 372 U.S. 335 (1963).
38 Malloy v. Hogan, 378 U.S. 1 (1964).
39 391 U.S. 145 (1968).
40 *Id.* at 166 (Black, J., concurring).
41 *Id.*, *see* Adamson v. California, 332 U.S. 46, 92–123 (1947) (Black, J., dissenting).
42 391 U.S. 145 at 174, 188 (Harlan and Stewart, dissenting).
43 395 U.S. 784 (1969).
44 *Id.*
45 *See* United States v. Guest, 383 U.S. 745 (1966).
46 Brown v. Board of Education, 347 U.S. 483 (1954).
47 Katzenbach v. Morgan, 314 U.S. 641 (1966).
48 Edwards v. South Carolina, 373 U.S. 229 (1963).
49 *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962).
50 *E.g.*, Yates v. United States, 354 U.S. 298 (1957).
51 *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).
52 42 U.S.C. § 1983 applied in Monroe v. Pape, 365 U.S. 167 (1961).
53 *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961).
54 Pierson v. Ray, 386 U.S. 547 (1967) (immunity of judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (immunity of prosecutors).
55 Connick v. Myers, 103 S. Ct. 1684 (1983); Perry v. Sinderman, 408 U.S. 593 (1972).
56 Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).
57 Duncan v. Louisiana, 391 U.S. 145 (1968).
58 399 U.S. 78 (1970).
59 Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).
60 *See* Ballew v. Georgia, 435 U.S. 223 (1978).
61 *See* J. Smith, *Freedom's Fetters: Alien and Sedition Laws* (1956); Prigg v. Pennsylvania, 41 U.S. (19 Pet.) 539 (1842); Dred Scott v. Sandford, 60 U.S.

(19 How.) 393 (1857); Berea College v. Kentucky, 211 U.S. 45 (1908); Whitney v. California, 274 U.S. 357 (1927).
62 W. Van Alstyne, *Interpretations of the First Amendment* (1984).
63 *See* Curtis, "The Fourteenth Amendment and the Bill of Rights," 14 Conn. L. Rev. 237, 241–58 (1982).
64 A. Singer, *Campaign Speeches of American Presidential Candidates 1928–1972* 361 (1976).
65 *See Impeachment, Selected Materials* (House Doc. 93-7) *Committee on the Judiciary*, 93d Cong., 2d sess., pursuant to H. Res. 803 (House Impeachment Inquiry) (1973).
66 *E.g.*, United States v. Leon, 104 S. Ct. 3405 (1984).
67 *E.g.*, Dunaway v. New York, 442 U.S. 200 (1979).
68 *See* Ohio v. Johnson, 104 S. Ct. 2536 (1984).
69 104 S. Ct. 3405 (1984).
70 *Id.* at 3419–20.
71 104 S. Ct. 3430, 3452–53 (1984) (Stevens, J., dissenting).
72 *Id.* at 3456–57.
73 Fisher v. United States, 425 U.S. 391 (1976).
74 116 U.S. 616 (1886).
75 Paul v. Davis, 424 U.S. 693 (1976).
76 Hudgens v. NLRB, 424 U.S. 507 (1976).
77 Dolbert v. Florida, 432 U.S. 282 (1977).
78 Williams v. Florida, 399 U.S. 78 (1970).
79 Rummel v. Estelle, 445 U.S. 263 (1980). The holding was severely limited in Solam v. Holm, 103 S. Ct. 300 (1983).
80 381 U.S. 479 (1965).
81 381 U.S. 479, 507 (1965) (Black, J., dissenting).
82 410 U.S. 113 (1973).
83 *See* L. Levy, *Legacy of Suppression* (1960) for an argument that the First Amendment did not substantially change English common law. For the contrary argument, *see* Mayton, "Seditious Libel and the Last Guarantee of a Freedom of Expression," 84 Col. L. Rev. 91 (1984).
84 *See* note 66 *supra*.
85 436 U.S. 547 (1978).
86 387 U.S. 294 (1967).
87 436 U.S. at 577–78 (Stevens, J., dissenting).
88 *E.g.*, State v. Granberry, 491 S.W. 2d 528 (Mo. 1973); State v. Collins, 297 A. 2d 620 (Me. 1972); State v. Santiago, 492 P. 2d 657 (Hawaii 1971).
89 *See* Wilkes, "The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court," 62 Ky. L. J. 421 (1974).
90 Elison and NettikSimmons, "Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds," 45 Mont. L. Rev. 177, 198–99 (1984).
91 Brennan, "Some Aspects of Federalism," 39 N.Y.U.L. Rev. 945, 955 (1964), *quoted in* Elison and NettikSimmons, *supra* note 90, at 198.
92 Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489, 491 (1977), *quoted in* Elison and NettikSimmons, *supra* note 90, at 199.
93 Florida v. Casals, 103 S. Ct. 3100, 3102 (1983) (Burger, C. J., concurring), *quoted in* Elison and NettikSimmons, *supra* note 90, at 199.
94 Elison and NettikSimmons, *supra* note 90. *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469 (1983).
95 Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).
96 *Id.*
97 Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).
98 Hudgens v. NLRB, 424 U.S. 507 (1976).
99 Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P. 2d 341, 347 (1979).
100 447 U.S. at 91 (Marshall, J., concurring).
101 406 U.S. 404 (1972).
102 435 U.S. 223 (1978).
103 435 U.S. at 246 (Powell, J., concurring).
104 *Id.* at 245–46.

Conclusion

1 *Compare* R. Cover, *Justice Accused* 42–61 (1975) (hereinafter cited as *Justice Accused*) *with* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
2 *Justice Accused*, *supra* note 1, at 259.
3 J. Tiffany, *A Treatise on the Unconstitutionality of American Slavery* (1849). For a thought-provoking essay, *see* Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation," 58 So. Cal. L. Rev. 551 (1985).
4 *Justice Accused*, *supra* note 1, at 120–32.
5 41 U.S. (16 Pet.) 539 (1842).
6 *Id.*
7 D. Fehrenbacher, *The Dred Scott Case* 44 (1978).
8 *Id.* at 45.
9 *Justice Accused*, *supra* note 1, at 168.
10 P. Angle and E. Miers eds., *The Living Lincoln* 275 (1955).
11 Cong. Globe, 39th Cong., 1st sess., 1294 (1866).
12 Cong. Globe, 42d Cong., 1st sess., 499 (1871).
13 *See* notes to chapters 2 and 5 *supra*.
14 Cong. Globe, 39th Cong., 1st sess., 1089–90 and 2765–66 (1866).
15 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5, 51 (1949) (hereinafter cited as Fairman).
16 *Id.* at 43–134.
17 Cong. Globe, 39th Cong., 1st sess., at 3167, 3201 (1866).
18 *Id.* at appendix 256.
19 *Burlington* (Iowa) *Hawk Eye*, Sept. 28, 1866, at 1, col. 2.
20 *Dubuque Daily Times*, Nov. 21, 1866, at 2, col. 1.
21 *Id.*, Dec. 3, 1866, at 2, col. 2.
22 *Philadelphia Inquirer*, Sept. 5, 1866, at 8, col. 3.

23 (Springfield) *Daily Ill. St. J.*, Sept. 21, 1866, at 2, col. 6.
24 *Cincinnati Commercial*, Sept. 3, 1866, at 2, col. 3.
25 Fairman, *supra* note 15, at 96.
26 Pa. Legis. Rec., appendix XXXI (1867).
27 *Id.* at XLVIII.
28 *Id.* at XCIX.
29 *N.Y. Tribune*, Sept. 4, 1866, at 1, col. 4.
30 Fairman, *supra* note 15, at 76–77.
31 332 U.S. 46, 89 (1947) (Black, J., dissenting).

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