

# The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal

GEORGE C. THOMAS III\*

*For over half a century, scholars have been debating whether the Fourteenth Amendment acted to “incorporate” the Bill of Rights so that its protections are enforceable against the states. One largely overlooked aspect of the debate is whether the states intended to impose incorporation on themselves when they ratified the Fourteenth Amendment.. As Professor Bryan Wildenthal recognizes in his impressive new article on incorporation, the ratification issue turns on whether the states were sufficiently on notice of congressional intent to incorporate. Wildenthal’s signal contribution in his new article is to develop a metric to help answer the notice question. This Response to Wildenthal reviews the evidence and concludes that it is insufficient to meet Wildenthal’s metric. I concede that some in Congress (though not very many) are on record as recognizing that the drafters of the amendment intended it to enforce the Bill of Rights against the states. The problem, for Thomas, is the silence that greeted the amendment during the ratification process and the congressional election of 1866. While the silence is not complete, it is nonetheless profound. The new evidence that Wildenthal and I present in these pages only deepens the mysteries of the Fourteenth Amendment.*

The second sentence of Section 1 of the Fourteenth Amendment has provoked intense controversy for over a century. Upon a first reading, one might wonder what all the fuss was about:

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.<sup>1</sup>

Deep mysteries lurk in these lofty words. What is a “privilege” of

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\* Distinguished Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University, Newark. For helpful comments, I thank Robin Charlow, Michael Curtis, Peter Henning, and Jim Pope. For both comments and research assistance, I thank Cassandra Cantwell, Anthony Castillo, and Michael Napolitano. My greatest debt is to Bryan Wildenthal and Paul Axel-Lute. Bryan provided tremendously helpful comments on a draft of the Response, prompting me to delete or rewrite weak arguments and, in a couple of cases, to change my mind. Paul Axel-Lute, my friend and library liaison, provided invaluable research assistance over and over again, even when my requests were highly esoteric.

<sup>1</sup> U.S. CONST. amend. XIV, § 1.

citizenship? An “immunity”? The issue that Bryan Wildenthal<sup>2</sup> and I discuss is whether the framing and ratification of the Fourteenth Amendment made some, or all, of the rights in the first eight amendments to the Constitution part of the “privileges or immunities of citizens of the United States,” an idea that has come to be known as “incorporation.”

Another mystery is why the incorporation debate so engages, and enrages, legal academics. Charles Fairman and William Crosskey were the first scholars to cross swords over this issue in the late 1940s and early 1950s.<sup>3</sup> An immense amount of scholarship followed, decade after decade.<sup>4</sup> It never seems to die. I published an article in 2001 that addressed some aspects of the incorporation issue<sup>5</sup> and thought I was finished with the topic. But when I read Bryan Wildenthal’s excellent article in draft form, I realized I had to make one more attempt at the riddle of the Fourteenth Amendment.

There are at least two reasons why the incorporation riddle continues to attract scholars. Few issues are as fundamental as the relationship between the states and the federal government. If John Adams and Thomas Jefferson were sitting at my elbow as I write this Response, I imagine that they would nod and smile, unsurprised that we still debate the question that divided them. Moreover, although many scholars have confidently claimed overwhelming historical evidence for, or against, incorporation, I am not in that camp. The evidence is sketchy, inconclusive, and subject to various plausible interpretations. The riddle will not go away because no one has solved it.

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<sup>2</sup> Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007).

<sup>3</sup> See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

<sup>4</sup> My favorite book-length treatments are MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956) [hereinafter JAMES, FRAMING]; JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984); and JOSEPH T. SNEED III, *FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN* (1997). For two excellent books about the broader history of the period, see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* (1990); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

<sup>5</sup> George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

## I. FACING THE FRAMEWORK PROBLEM

The incorporation question has produced fireworks in part because no agreement exists about how to frame the question. Moreover, most writers do not seem even to appreciate that they are cumulating evidence without a frame within which to evaluate it. Here's the problem: How much intent, and from whom, do we need to be able to pronounce Section 1 to contain the first eight amendments?

If the only intent that matters is that of the drafter of Section 1, John Bingham, then the incorporation question is easily solved. Despite the best efforts of Fairman, Raoul Berger,<sup>6</sup> and others to portray Bingham as confused or clownish,<sup>7</sup> he was neither. He was clear that the purpose of Section 1 was to give Congress the authority to enforce the Bill of Rights guarantees against state actors. But, to my knowledge, no scholar has maintained that Bingham's speeches are sufficient, standing alone, to produce incorporation.

Courts often defer to the intent of the drafter of a statute. Why do scholars seek additional evidence on the incorporation question? Is it just that more evidence is better? No, I think the reason is more fundamental. To authorize the federal government to enforce the Bill of Rights against the states is a seismic shift in the tectonic plates that underlie our government. *Barron v. Baltimore*<sup>8</sup> held in 1833 that the Bill of Rights limited only federal actors. It was the product of a unanimous Court, written by Chief Justice Marshall. I agree with Wildenthal's summary of the reasons why *Barron* was "almost certainly" correctly decided.<sup>9</sup>

To accomplish the seismic shift necessary to reverse *Barron* requires both clarity of expression and a public communication of the change, as Wildenthal realizes (more on his view of this point in a moment). The Court in *The Slaughter-House Cases* said that to read Section 1 broadly would "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."<sup>10</sup> The Thirteenth and Fifteenth Amendments accomplished even more fundamental seismic shifts in other tectonic plates that had undergirded our government, to be sure, but the wording of these amendments is crystal clear. Not so for Section 1 of the Fourteenth. It could have been crystal clear if

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<sup>6</sup> See Fairman, *supra* note 3; RAUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

<sup>7</sup> See Wildenthal, *supra* note 2, at 1535–36.

<sup>8</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>9</sup> Wildenthal, *supra* note 2, at 1530–32. I sought to dramatize the fear of the federal government that led to the Bill of Rights in Thomas, *supra* note 5, at 149.

<sup>10</sup> 83 U.S. (16 Wall.) 36, 78 (1873).

Bingham had added a simple clause, as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, *including those defined in the first eight amendments to the Constitution.*”

Lacking that kind of clarity, we need more evidence than just the intent of the drafter. We want to know that the country intended to put Congress and the federal courts in charge of ensuring that the states follow the Bill of Rights. That evidence can come in various forms. First, one might claim a sort of “plain meaning” of the text. What else would the rights created in the Bill of Rights be but privileges or immunities? Second, if one finds “privileges or immunities” not transparently clear, one can seek to infuse clarity into those terms by drawing from Republican theories of the day or commonly held views of the meaning of “privileges” and “immunities.”<sup>11</sup> The Republicans believed that the federal government had a critical role to play in achieving equality and liberty. Part of that role could be to insist that states obey the Bill of Rights. These arguments can, of course, be cumulated by claiming that the phrase “privileges or immunities” is relatively clear and that any vagueness is cleared up by reflecting on how the Republicans of the day would have understood the terms.

Most scholars seek more evidence. This is, I think, because if incorporation were simply obvious to all educated citizens who thought about it, it would have left substantial traces beyond the debates on the floor of Congress—in the public discourse outside of Congress and in the political campaign of 1866. Those traces would confirm what plain meaning suggests to some theorists. Scholars have also parsed the Congressional Globe seeking evidence of the intent of the Framers. Newspapers, books, and monographs of the period might tell us what the country, and thus the state ratifying conventions, thought Section 1 meant.

The question is essentially one of critical mass. The research done to date has failed to uncover evidence that renders the meaning of Section 1 of the Fourteenth Amendment as clear as the Thirteenth and Fifteenth Amendments. But if a sufficient mass of evidence can be found, then one can assert that however amorphous “privileges or immunities” may look to us, it was clear enough to the critical actors of the time—the Congress that reported the amendment to the states and the states that ratified it.

## II. WHAT HAS COME BEFORE

In 1947, Justice Black attached an appendix to his dissent in *Adamson v.*

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<sup>11</sup> Curtis has one of the best accounts of Republican theories of the day. See CURTIS, *supra* note 4, at 26–56.

*California* that set out the historical argument in favor of incorporation.<sup>12</sup> Two years later, Fairman published a lengthy critical assessment of Black's theory.<sup>13</sup> Crosskey, in his mammoth 1954 law review article—143 pages—repeatedly assailed Fairman's methodology and even his integrity. For example, Crosskey wrote: "The illegitimacy of Mr. Fairman's whole effort was not its only fault. In addition, there was his handling, or mishandling, of the evidence."<sup>14</sup> Fairman later accused Crosskey of "suppress[ing] . . . important evidence" and failing to be "candid and objective."<sup>15</sup>

The passionate debate over incorporation has sometimes produced scholarship that elevates advocacy over objectivity. I plead *nolo contendere* here. My 2001 article argued that incorporation had caused the Court to cut back on criminal procedure rights because broad rights were too "expensive" when applied in state courts to cases involving serious crimes like murder, robbery, and rape. To make my case, I had to undermine the Black/Crosskey theory. If it were unquestionable that the Framers intended the Fourteenth Amendment to incorporate all the rights in the first eight amendments, and if the state ratifying conventions were aware of that intent, then the Court never had a choice.<sup>16</sup> In that world, the push-back on federal rights was merely an unfortunate consequence of the much-needed Fourteenth Amendment. Naturally, I like to think I was fairer and more balanced than some of the critics of incorporation, but I did have an agenda.<sup>17</sup>

That is why I wanted another crack at the Fourteenth Amendment riddle. I wanted to sift through the evidence without needing it to come out a particular way. Unlike Crosskey and Fairman, Wildenthal and I worked together on the evidence, exchanging ideas and occasionally causing each other to modify a position. We hope that a collaborative process will give as accurate a picture as possible. To be sure, however, we will sometimes disagree about what is the best inference to draw from the objective facts on the ground.

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<sup>12</sup> 332 U.S. 46, 71 (1947) (Black, J., dissenting).

<sup>13</sup> Fairman, *supra* note 3.

<sup>14</sup> Crosskey, *supra* note 3, at 10. Only 118 pages were devoted to incorporation. The rest of the article presented an argument that *Barron* was wrongly decided.

<sup>15</sup> Charles Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40, 51, 78 (1953).

<sup>16</sup> Here I agree with Wildenthal's point about the power of originalism as an interpretive theory. See Wildenthal, *supra* note 2, at 1526–27. I would state the point as follows: If the history is sufficiently clear, and still relevant, the Court has no choice but to follow it.

<sup>17</sup> I do not accuse Wildenthal of having an agenda. Indeed, he is to be commended for acknowledging his point of view—that nationalizing the Bill of Rights is a "morally and intellectually beautiful idea." Wildenthal, *supra* note 2, at 1518.

### III. WHAT WILDENTHAL ADDS

Wildenthal offers a temperate review of the evidence that demonstrates the skewed readings of Fairman, Berger, and others who have sought to make incorporation look like fool's gold. He is less critical of Crosskey, who sometimes seeks to make incorporation appear so obvious that only a fool could miss it.<sup>18</sup> But I'll give Wildenthal a pass here because I agree that Crosskey presents the evidence more objectively than Fairman and Berger.

Wildenthal lodges valid criticisms of some of my arguments from my 2001 article and compliments some of my observations and coverage. He discusses two neglected pieces of evidence from the public discourse that occurred about the time of ratification.<sup>19</sup> He also provides useful details about the news coverage of the debates in Congress.

But, to my mind, Wildenthal's most important contribution is to deal thoughtfully with the question of state ratification. This question is part and parcel of the "critical mass" issue about the country's understanding of Section 1. The reason that the debate on the floor of Congress matters is not just to glean congressional intent but also to begin to gauge the extent to which the states were put on notice of that intent. Wildenthal agrees, noting that we should require "fair notice" of the intended meaning before ratification binds the states to that meaning.<sup>20</sup>

But he argues, and I agree, that one should not demand "specific, affirmative confirmation at the state level."<sup>21</sup> The difficulty with that standard of proof is that direct evidence is not available. Only scattered records exist, and they fail to make the case either way.<sup>22</sup> The middle ground seems best to me here. If we can be reasonably confident that congressional intent to incorporate was part of the public discourse, implicitly or explicitly, then it seems fair to read ratification as acquiescence in that intent.

Wildenthal provides a metric that allows the question to be answered without direct evidence of the intent of the ratifying legislatures. His test is whether Congress "clearly, publicly, and candidly conveyed to the country"

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<sup>18</sup> At one point, for example, Crosskey asserts that it was "certainly simple, obvious, and undeniable" that the Privileges and Immunities Clause in Section 1 applied to rights "under the first eight amendments." Crosskey, *supra* note 3, at 80. If it really were that "simple, obvious, and undeniable," why did it take him 118 pages to make the case?

<sup>19</sup> See *infra* notes 99–103 and accompanying text.

<sup>20</sup> Wildenthal, *supra* note 2, at 1612.

<sup>21</sup> *Id.* at 1613. For my earlier view on this, see Thomas, *supra* note 5, at 209–10.

<sup>22</sup> Masochistic readers can entertain themselves by comparing Fairman's and Crosskey's coverage of the scattered records that exist. See Fairman, *supra* note 3, at 58–93; Crosskey, *supra* note 3, at 104–111. Fairman's treatment is buried in his account of inconsistent state statutes and constitutions.

its intent to incorporate the Bill of Rights.<sup>23</sup> If that metric is satisfied, he argues, it is fair to read state legislative ratification as accepting congressional intent. So, to take a hypothetical example, if the public discourse on the Equal Rights Amendment (ERA) had included awareness that it would subject women to the military draft on the same basis as men, the ratifying states should be held to have embraced that interpretation of the ERA.

Or, to take a real life example, Michael Curtis has exhaustively examined the linguistic meanings of the terms “privileges” and “immunities” in the years prior to 1866.<sup>24</sup> He concludes that those terms naturally would have encompassed all rights in the first eight amendments, as well as other rights, and thus the text put the state ratifying conventions on notice. If I agreed with Curtis, then my Response would be a short one, but I do not. Three facts caution against accepting his conclusion. First, as I will show, numerous legal actors proceeded in the period 1866–1869 as if “privileges or immunities” had nothing to do with the Bill of Rights. Second, Senate opponents of the Fourteenth Amendment challenged the proponents to give a meaning of privileges and immunities.<sup>25</sup> If it were as clear as Curtis suggests, that would have been an embarrassingly futile strategy. Third, no proponent responded to the challenge by saying that, of course, “privileges or immunities” included the first eight amendments.

As to the latter point, I realize that the call for clarity was made at the very end of debate while proponents were trying to get a vote on the amendment that day,<sup>26</sup> and time was of the essence. But when opponents also raised a question about the meaning of the word “abridged” in Section 1, Senator Jacob Howard, who had introduced the amendment in the Senate, took the time to answer that objection.<sup>27</sup> So when Reverdy Johnson of Maryland and Thomas Hendricks of Indiana said that the meaning of “privileges or immunities” was unknown, it presented an easy target for a quick riposte if the meaning were as widely understood as Curtis claims. But no one took the bait.

If we insist on other evidence that the ratifying conventions were on notice of incorporation, as I believe we should, Wildenthal’s metric is the appropriate one. It is not met simply by asserting that *The New York Times*

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<sup>23</sup> Wildenthal, *supra* note 2, at 1612.

<sup>24</sup> Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000).

<sup>25</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3040 (1866) (Sen. Thomas Hendricks, D-Ind.); *id.* at 3041 (Sen. Reverdy Johnson, D-Md.).

<sup>26</sup> *Id.* at 3041 (Sen. Jacob Howard, R-Mich.).

<sup>27</sup> *Id.* at 3039.

covered the debates over Bingham's proposal for four days in a row<sup>28</sup> or that the *Times* made front page news of Senator Howard's list of rights from the first eight amendments that were to be protected by Section 1.<sup>29</sup> One must be satisfied that Congress "clearly, publicly, and candidly conveyed to the country"—the entire country, not just the East Coast<sup>30</sup>—its intent to impose the first eight amendments on the states.

At this point, Wildenthal flinches. He concedes that evidence of "any strong public awareness of nationalizing the *entire* Bill of Rights" is "vague and scattered."<sup>31</sup> He then proceeds on the assumption that "there was, essentially, silence out in the country on the incorporation issue, during ratification"<sup>32</sup> to see where that takes the inquiry. In my view, it puts him in an uncomfortable box, forcing him ultimately to embrace a version of the Kyvig-Aynes position that privileges the intent of the adopters over that of the ratifiers. I reject the Kyvig-Aynes position, as articulated by Aynes, that "it is the work of the framers that should trump any contrary views held by individual ratifiers."<sup>33</sup> This makes nonsense of the notion of sovereignty. Under our federal structure, the federal government can gain sovereignty only when the states surrender it.

Of course, once one assumes that congressional intent must be privileged over even evidence of contrary state intent, the game is over. This is my problem with much of the incorporation debate. Once you put your assumptions into place, your side wins. I was guilty of that in my 2001 article, assuming that only explicit state legislative acknowledgment of incorporation should count.

To be sure, Wildenthal's version of the Kyvig-Aynes position is defensible because he privileges congressional intent only when the states have been put on fair notice of that intent. But after he assumes that there was essentially silence on incorporation during the ratification process, I don't understand how he has proven fair notice. To find fair notice from silence is a bridge too far for me.

I agree, however, with Wildenthal that it is for readers to weigh the evidence and decide whether the states were put on fair notice of congressional intent to incorporate the Bill of Rights. My task is to gather the evidence and present it as objectively as I can and without any presumptions

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<sup>28</sup> Wildenthal, *supra* note 2, at 1557.

<sup>29</sup> *Id.* at 1564.

<sup>30</sup> Wildenthal notes that Howard's speech was "apparently" covered by papers in Philadelphia, Boston, and Washington, D.C. *Id.*

<sup>31</sup> Wildenthal, *supra* note 2, at 1600.

<sup>32</sup> *Id.* at 1609.

<sup>33</sup> Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 320–21 (2006).

that do much of the interpretive work. I begin with a sketch of the context in which the Fourteenth Amendment was drafted, approved by Congress, and ratified by the states.

#### IV. INCORPORATION POINTS OF AGREEMENT

Returning to a debate that has been as tendentious as any in legal academia, I first sketch some points that I think are not controversial. Obviously, the Fourteenth Amendment created obligations of state actors that were enforceable in federal court and that could be enforced as well by Congress. One of those obligations was not to deprive any person of life, liberty, or property without due process of law. Another obligation was not to deny any person the equal protection of the laws. The notion of due process had, of course, been around at least since 1791, and equal protection of the laws does not seem all that difficult to interpret.

The difficult part of Section 1 is the set of obligations created by the first clause of the second sentence, which protects the “privileges or immunities of citizens of the United States.” Though the phrase has a glorious ring to it, what exactly does it mean? Two basic approaches developed in seeking to understand the substance protected by Section 1. In the nineteenth century, the Court approached “privileges or immunities” as if they had free-standing meanings that had little to do with the first eight amendments. The *Slaughter-House* Court attempted a partial list that drew from the body of the Constitution—such as the privilege of the writ of habeas corpus and the right to use the navigable waters of the United States—as well as two rights from the Bill of Rights—the right to peaceably assemble and petition for redress of grievances.<sup>34</sup>

After struggling with the free-standing meaning for three decades, the Court began, ever so tentatively, to read the guarantees of the Bill of Rights more generally into Section 1.<sup>35</sup> In 1947, the Court in *Adamson* faced a stark

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<sup>34</sup> The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873).

<sup>35</sup> See *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (holding that the Fourteenth Amendment precludes a State from taking private property for public use without just compensation under the Fifth Amendment); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (noting that a “conception of liberty under the due process clause of the Fourteenth Amendment embraces the right to free speech”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Free Exercise Clause was incorporated in the Fourteenth Amendment). It is not important to the incorporation issue, but the twentieth-century Court chose to use the Due Process Clause as the home of the substantive protections imposed on the states. A more logical home, and the one the Framers clearly intended, was the Privileges or Immunities Clause. But as Akhil Amar noted with characteristic flair, the nineteenth century Court “strangled the privileges-or-immunities clause in its crib.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND*

choice. Four dissenters favored some version of incorporation, but the majority rejected the idea that the Fourteenth Amendment “draw[s] all the rights of the federal Bill of Rights under its protection.”<sup>36</sup> Justice Frankfurter wrote a broad concurring opinion that sought to lay incorporation to rest once and for all. The question had, after all, been settled only ten years earlier in an opinion by Justice Cardozo.<sup>37</sup> If that did not persuade the legal world, Frankfurter noted that the judges who had passed on the Amendment and did not favor incorporation “included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history,” among them Holmes, Brandeis, and Stone, as well as Cardozo.<sup>38</sup>

Frankfurter’s effort was in vain. While the Court has never held that Section 1 incorporates all of the rights in the first eight amendments, almost all had been incorporated by 1969.<sup>39</sup> This unstoppable doctrinal revolution reflected, I believe, both a greater appreciation for individual rights and liberty and also a realization on the Court’s part that some state courts were failing to provide sufficient rights to suspects and defendants. As many have noted, part of the Court’s concern was the way states were treating blacks and the poor.<sup>40</sup> When looking for a way to bring the states into line in the mid-twentieth century, the Bill of Rights appeared to offer a natural and easy solution.

It is, as Justice Harlan has noted, an easy solution without a theory.<sup>41</sup> If Black was correct, then all of the rights in the first eight amendments constitute a complete definition of due process of law.<sup>42</sup> If Frankfurter was

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RECONSTRUCTION 255 n.\* (2000).

<sup>36</sup> *Adamson v. California*, 332 U.S. 46, 53 (1947).

<sup>37</sup> *Id.* at 59 (Frankfurter, J., concurring) (referring to *Palko v. Connecticut*, 302 U.S. 319 (1937)).

<sup>38</sup> *Id.* at 62.

<sup>39</sup> It is a bit unclear which rights remain unincorporated, as the Court has sometimes treated a right as if it were incorporated without actually holding that it is. *See, e.g.*, *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (noting assumption that right to bail is incorporated). Cases holding rights not to be incorporated that have not been overruled are *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment right to a grand jury); *United States v. Cruikshank*, 92 U.S. 542 (1875) (Second Amendment right to keep and bear arms); *Edwards v. Elliot*, 88 U.S. 532 (1874) (Seventh Amendment right to civil jury).

<sup>40</sup> *See, e.g.*, Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. & CRIMINOLOGY 238, 240 (1966) (asserting that “[w]hat we have seen in the South is the perversion of the criminal process into an instrument of official oppression”).

<sup>41</sup> *See* *Duncan v. Louisiana*, 391 U.S. 145, 181 (1969) (Harlan, J., dissenting) (complaining that “the Court has compromised on the ease of the incorporationist position, without its internal logic”).

<sup>42</sup> Richard Aynes notes a delicious irony here. If Frankfurter had joined Black’s

correct, none of the rights, other than due process, are included in the Fourteenth Amendment. But any solution that would have some, but not all rights, included in the Fourteenth Amendment must identify the theory that discriminates. While scholars like Akhil Amar have attempted such a theory,<sup>43</sup> the Court has never articulated a test other than “fundamental fairness,” a concept so vague as to be almost worthless. Let us return to the Thirty-Ninth Congress and see what we can uncover about the likely meaning of Section 1.

## V. THE THIRTY-NINTH CONGRESS

I agree with Wildenthal that, in 1866, “the political plate for both Republicans and Democrats was already full to overflowing with issues that (for them) were far more pressing and contentious [than Section 1]—especially Black voting rights and whether and how to restore full political rights to rebel states and individuals.”<sup>44</sup> The United States was a divided, traumatized, and bitter country. The Union Army occupied the rebel states. The resentment felt by those in the defeated South is easy to imagine. But the North was deeply resentful, too, because of the horrible costs of the war. The President who had (barely) held together the North and won the war lay dead, the victim of a Southern assassin. Eight percent of the white male population aged eighteen to forty-three died in the Civil War, a rate six times higher than in World War II.<sup>45</sup> Thus, when debating the future of the country, many, both inside and outside of Congress, “waved the bloody shirt.”

The Thirteenth Amendment had solved the problem of slavery, at least as a formal matter, but the status of the former Confederate states was a looming crisis, the most pressing political question that the country had faced since the founding. Because we know how events unfolded, the depth of the 1866 crisis is difficult for us to imagine. The man who was now President was from the rebel state of Tennessee. Though a unionist, he favored re-admission of the rebel states under terms deemed too lenient by most Republicans in Congress.

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opinion in *Adamson*, the Court would have held that the first eight amendments, plus equal protection, were the only protections offered by Section 1. Aynes, *supra* note 33, at 301–02. In that world, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), would have been decided differently, or at least under a different rubric.

<sup>43</sup> AMAR, *supra* note 35, at 215–30.

<sup>44</sup> Wildenthal, *supra* note 2, at 1603.

<sup>45</sup> Craig Lambert, *The Deadliest War*, HARV. MAG., May–June 2001, at 15, available at <http://www.harvardmagazine.com/on-line/050155.html>.

When the Thirty-Ninth Congress convened on December 4, 1865, all of the former Confederate states had ratified the Thirteenth Amendment except Florida, Mississippi, and Texas.<sup>46</sup> But the Congress refused to seat any senators and representatives from the rebel states. The Radical Republicans argued that the defeated Confederacy had become a territory that could be governed indefinitely by Washington.<sup>47</sup> Congress created a Joint Committee on Reconstruction to report whether any of the former Confederate states were “entitled to be represented in either House of Congress.”<sup>48</sup>

The prospect of the indefinite governance of the conquered provinces by force of arms could not have been viewed with favor by moderate Republicans. Thus, many Republicans wanted to find a way to readmit the rebel states, at some point, provided they met the right conditions. Finding the right timeline and the right set of conditions were intensely controversial issues.

Despite the military occupation, lawlessness ran in torrents in the streets of Southern cities and towns. Congressmen reported that “[e]very mail brings to the records of injustice and outrage.”<sup>49</sup> The policy of the rebels “is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave . . . . Others have been murdered in cold blood as a warning to all northern men who should attempt to settle in the South.”<sup>50</sup>

A particular concern about the lawlessness in the South was the denial of free speech and freedom of assembly to those who might challenge white rule. Mississippi’s 1865 Black Code, for example, made it a crime for blacks to give seditious speeches, or even preach the Gospel, without a license from a “regularly organized church.”<sup>51</sup>

Given the lawlessness in the South, and the perils faced by former slaves and Union loyalists, the Republican majority wanted to legally hobble the rebel states as a condition to regaining full statehood. Thus was born the Fourteenth Amendment. As odd as it might sound to modern readers, Section 1 did not receive as much attention as Section 2, which contained a weak version of suffrage for the former slaves.<sup>52</sup> When Thaddeus Stevens of

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<sup>46</sup> FindLaw, United States Constitution: Amendments, Amendment XIII, n.5, available at <http://supreme.lp.findlaw.com/constitution/amendments.html#f5> (last visited Oct. 8, 2007).

<sup>47</sup> See SNEED, *supra* note 4, at 49–83.

<sup>48</sup> CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865).

<sup>49</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866) (Rep. Sidney Clarke, R-Kan.) (commenting on the need for the Civil Rights Bill).

<sup>50</sup> *Id.* at 2082 (1866) (Rep. Sidney Perham, R-Me.).

<sup>51</sup> 1865 Miss. Laws 165–67.

<sup>52</sup> Section 2 reduced representation in the House of states that refused to allow all male inhabitants to vote. The strong version of black suffrage will, of course, come in the

Pennsylvania introduced the final version of the Amendment in the House, he said, “The second section I consider the most important in the article.”<sup>53</sup>

Section 3 was also controversial. It went through several iterations, all of which sought to penalize support of the Confederacy. An early version denied the right to vote in federal elections to anyone who had given “aid and comfort” to the insurrection, but only for a period of four years.<sup>54</sup> The version that was ultimately reported to the states forbade the holding of any state or federal office by those who had taken an oath to support the Constitution of the United States and had then supported the Confederacy.<sup>55</sup> This bar was for life but could be removed by a vote of two-thirds of each House.

Section 1 sailed around the edge of this political maelstrom. And, to the extent it created controversy, most debate centered on the extent to which it would permit Congress to federalize all state and local law.<sup>56</sup> Almost no effort was made to question, or explain, the meaning of “privileges or immunities.” Crosskey concedes that “it would be idle to pretend that the debate on the amendment, standing by itself, was very informative as to what the House thought the Privileges and Immunities Clause of the amendment meant.”<sup>57</sup>

We should not be surprised that the meaning of “privileges or immunities” remained somewhat unfocused. Fresh from a hard-fought victory over the rebel states, and holding almost eighty percent of the House and Senate seats, Republicans enjoyed both the moral high ground and political control of Congress. Most Republicans believed that their theories of equality and liberty had prevailed for good. They would have been content with a rough sense of what Section 1 protected, confident that they could iron out the details in subsequent legislation.

Whatever the ultimate meaning of Section 1, Congress saw itself as the principal enforcer. John Bingham’s initial draft that was reported to the House simply said, “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and

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Fifteenth Amendment.

<sup>53</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens, R-Pa.).

<sup>54</sup> *Id.* at 2545.

<sup>55</sup> *Id.* at 3148–49.

<sup>56</sup> *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1064–65 (1866) (Rep. Robert Hale, R-N.Y.); *id.* at 1095 (Rep. Giles Hotchkiss, R-N.Y.); *id.* at 2500 (Rep. George Shanklin, D-Ky.); *id.* at 2538 (Rep. Andrew Rogers, D-N.J.); *id.* at 3147 (Rep. Aaron Harding, D-Ky.).

<sup>57</sup> Crosskey, *supra* note 3, at 70.

property.”<sup>58</sup> To be sure, Bingham would later rewrite the amendment into its current form that permits courts also to enforce Section 1, reacting to the concern that control of the Congress might someday pass to the Democrats.

Before I turn to the evidence on incorporation, consider an additional way to view Section 1—the equal-rights account that many in Congress supported. On this account, states were required to give everyone the same set of substantive privileges and immunities and to enforce those privileges and immunities in an even-handed way. For example, Thaddeus Stevens explained the point of the Fourteenth Amendment as “allow[ing] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate *equally* upon all.”<sup>59</sup> If a state wanted to abolish free speech or free exercise of religion for all citizens, under the equal rights reading of Section 1, it could do so. What states could not do is what Mississippi did in its Black Code of 1865 when it limited the rights of only blacks. To be sure, the equal-rights approach is not inconsistent with incorporation. One could believe both that the Section 1 privileges and immunities included the Bill of Rights and that states had to apply those rights equally to all.

From here, I consider whether there exists a sufficient critical mass of discourse about incorporation that would allow one to assume that it was part of the obligations that the states agreed to assume when they ratified the Fourteenth Amendment. The story naturally begins with John Bingham of Ohio, who was the principal exponent of incorporation. He started from the premise that the Constitution already created an obligation on the part of state actors to comply with the Bill of Rights. He deployed two theories to support his premise. One is that the Article VI Supremacy Clause makes the Bill of Rights binding on state actors.<sup>60</sup> Article VI requires state judges to apply the Constitution of the United States as the supreme law of the land. It also requires state judges, legislatures, and executive officials to take an oath to support the federal Constitution.<sup>61</sup>

Though Bingham’s expression of this argument is intertwined with arguments drawn from Daniel Webster and George Washington, and is difficult to decipher, I think he is arguing that once the Bill of Rights was ratified, it became a part of the Constitution subject to Article VI. On this account, *Barron* did not—could not—withdraw the rights granted by Article VI. All *Barron* did was to refuse to allow a remedy for violations of those rights by state actors. Bingham’s Fourteenth Amendment would thus

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<sup>58</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

<sup>59</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens, R-Pa.).

<sup>60</sup> *Id.* at 1090 (Rep. John Bingham, R-Ohio).

<sup>61</sup> U.S. CONST. art. VI, cl. 3.

constitute “an express grant of power” that would enforce “these great canons of the supreme law” against state actors.<sup>62</sup>

The problem with Bingham’s Article VI argument is that it simply assumes the outcome that Bingham desired. Article VI is silent about what constitutes the Constitution of the United States, and *Barron* clearly held that the Bill of Rights was not part of the federal Constitution where state actors were concerned. Thus, until *Barron* was effectively overruled by the Fourteenth Amendment, the Constitution of Article VI did not include the Bill of Rights.

Bingham’s second theory is the one that attracted the most attention on the floor of Congress and in modern scholarship. Bingham argued that every American had the right to life, liberty, and property. These rights come to us from two provisions in the Constitution, both of which were, he said, already binding on state actors:

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

No person shall be deprived of life, liberty, or property without due process of law.<sup>63</sup>

Bingham did not explain how the Fifth Amendment’s Due Process Clause came to be binding on the states. Crosskey argues that Bingham and other Republicans read its passive voice to bar deprivation of life, liberty, or property *by anyone*, which would obviously include state actors.<sup>64</sup> That seems a plausible reading of the Due Process Clause even though it is contrary to *Barron*.

The “privileges and immunities” clause in Article IV, Section 2 is, of course, binding on the states. The problem is figuring out what it protects. On the standard account, Section 2 refers to a preexisting set of privileges and immunities, probably derived from natural law. Within that set of privileges and immunities, states are forbidden from discriminating between their own citizens and citizens of other states. Assuming, as was surely the case, that owning real property was an Article IV privilege, a state could not forbid ownership of its real property by citizens of other states. States would also likely have to provide citizens of other states the same rights to sue, to contract, and to have a fair trial as they provide their own citizens. But, as Justice Bushrod Washington held in his capacity as circuit judge, the right to take oysters from New Jersey beds was not a privilege of citizens in the

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<sup>62</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (Rep. John Bingham, R-Ohio).

<sup>63</sup> *Id.* at 1089.

<sup>64</sup> Crosskey, *supra* note 3, at 16–17.

“several states,” and New Jersey could thus forbid a Delaware citizen from taking New Jersey oysters.<sup>65</sup> (Imagine New Jersey having oyster beds!)

Bingham expands the standard account of Article IV by pairing “privileges and immunities” with the right to due process as against state actors. At one point he defined “immunity” as the “[e]xemption from unequal burdens,” but continued: “Ah! say gentlemen who oppose this amendment . . . 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 . . .”<sup>66</sup> Later in the same speech, he asks, “Is the bill of rights to stand in our Constitution hereafter, as in the past five years with eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it be enforced.”<sup>67</sup> He means, of course, enforced against state actors. The critical move here is to assume that the Fifth Amendment Due Process Clause bound state actors, *Barron* notwithstanding.

Ultimately, the plausibility of Bingham’s theories that the Bill of Rights already bound state actors does not matter. The point is to assess how widespread was the discussion, in and out of Congress, about the Fourteenth Amendment making the Bill of Rights enforceable against state actors. When Bingham said that it was essential that “the bill of rights” be enforced by the amendment he had proposed, this puts into play the notion that the amendment incorporated the Bill of Rights.

Jacob Howard introduced the amendment in the Senate, and he embraced incorporation. He relied on the plain meaning of Section 1 to assert that the “privileges or immunities of citizens of the United States” included both natural law rights and “the personal rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>68</sup> It is difficult to be much clearer than that.

Not much else was said about Section 1 in the Senate. Michael Curtis asserted that Senator Edgar Cowan of Pennsylvania “believed that Bill of Rights liberties limited the states.”<sup>69</sup> Cowan said that the Constitution already protected “the great principles of English and American liberty.”<sup>70</sup> Could that include all the rights in the first eight amendments? Yes. Must it? No. Cowan could have had in mind a more limited set—perhaps as limited as the right to due process of law. He said that the Due Process Clause already

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<sup>65</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 550–51 (E.D. Pa. 1825) (No. 3230).

<sup>66</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Rep. John Bingham, R-Ohio).

<sup>67</sup> *Id.* at 1090.

<sup>68</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Jacob Howard, R-Mich.).

<sup>69</sup> CURTIS, *supra* note 4, at 51.

<sup>70</sup> CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Edgar Cowan, R-Pa.).

provided a remedy for wrongs done in the Southern states.<sup>71</sup> Due process was likely, at the time, to have had a largely procedural cast—the right to a trial, for example. It could, of course, also entail substantive rights, such as the right to serve on juries or own property. It could also entail rights in the first eight amendments. The problem is that we just do not know what Cowan had in mind.

What about the House? Here there is more evidence that members understood Bingham's theories. Wildenthal follows Crosskey to argue that Hiram Price of Iowa embraced incorporation of at least free speech because he saw Section 1 as protecting "freedom of speech from state suppression."<sup>72</sup> Perhaps, but Price's principal concern seemed to be ensuring that out-of-state citizens have the same speech rights as in-state citizens, an argument he made several times. For example:

A citizen of a slave State could come into a free State at any time during the last quarter of a century and express his opinion on any subject connected with State rights or any other which agitated the public mind; but if a citizen of a free State visiting a slave State expressed his opinion in reference to slavery he was treated without much ceremony to a coat of tar and feathers and a ride upon a rail.<sup>73</sup>

Wildenthal reads this as an assertion that Section 1 would guarantee free speech without regard to whether the particular state gave free speech rights to its own citizens. When I first read Price, I took him to mean that slave states would have permitted criticism of slavery from their own citizens but not from citizens of free states. If that is what he meant, then he is expressing only a concern with equal rights and is opaque on incorporation. However, given the mountain of evidence that anti-slavery speech was harshly condemned in the South,<sup>74</sup> I am persuaded that my reading is less likely to be correct. Thus, I think it fair to count Price in the incorporation camp for free speech. Indeed, perhaps we can count him more broadly than just for free speech, though the argument here is thin. Later in the same speech, he said that if the amendment was "designed to protect a citizen" of a free state "in going into a southern [s]tate where slavery has cursed the soil and the inhabitants, then I am most decidedly in favor of it."<sup>75</sup> "[T]o protect a citizen" might entail broader protections than free speech.

James Wilson of Iowa said, "I find in the bill of rights which the

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<sup>71</sup> *Id.*

<sup>72</sup> Wildenthal, *supra* note 2, at 1547–48.

<sup>73</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1866) (Rep. Hiram Price, R-Iowa).

<sup>74</sup> *See, e.g.*, Wildenthal, *supra* note 2, at 1596–99.

<sup>75</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1866) (Rep. Hiram Price, R-Iowa).

gentleman [Bingham] desires to have enforced by an amendment to the Constitution that ‘no person shall be deprived of life, liberty, or property without due process of law.’”<sup>76</sup> Wilson’s reference to “the bill of rights” that Bingham sought to have enforced against the states is most naturally read as the first eight amendments. Moreover, two years earlier, in the Thirty-eighth Congress, Wilson had embraced Bingham’s theory that the Bill of Rights already bound state actors, both as a matter of the Supremacy Clause and Article IV, Section 2.<sup>77</sup> Wilson thus belongs in the group that publicly acknowledged Bingham’s intent to incorporate.

A little less clear is Robert Hale of New York. As part of his argument against the Fourteenth Amendment, Hale said that the Bill of Rights already limited the power of both federal and state legislatures.<sup>78</sup> But Bingham produced a copy of *Barron v. Baltimore* to show that the Supreme Court had rejected Hale’s view of the applicability of the Bill of Rights to state actors.<sup>79</sup> As Hale voted for the amendment, it is fair to take him at his word that the Bill of Rights should be enforceable against state actors, though he did not openly acknowledge that he understood that to be the effect of the amendment.

Even less clear is Martin Thayer of Pennsylvania, who said that Section 1 “simply brings into the Constitution what is found in the bill of rights of every State of the Union.”<sup>80</sup> State constitutions were not uniform—several, for example, did not require a grand jury indictment—making it hard to know what Thayer was referencing. One natural reference was the right to due process. Bingham had, after all, explicitly laid that right before the Congress, and the right to due process was likely found in all of the state constitutions of that era. Later, during the debate on the civil rights bill, a speaker imputed to Thayer the view that the first eleven amendments are “grants of power” that Congress can enforce on the states. Curtis said that Thayer “accepted the characterization as correct.”<sup>81</sup> That claims a little too much. The speaker asked if he had misstated Thayer’s position, and Thayer’s response was “I do not know that the gentleman has misstated my position,”<sup>82</sup> hardly a robust embrace of incorporation. But at least Thayer did not reject the statement that he believed the first eleven amendments applied

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<sup>76</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Rep. James Wilson, R-Iowa).

<sup>77</sup> *Id.* at 1202.

<sup>78</sup> *Id.* at 1064 (Rep. Robert Hale, R-N.Y.).

<sup>79</sup> Wildenthal’s treatment of this exchange is excellent. Wildenthal, *supra* note 2, at 1540–41.

<sup>80</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (Rep. Martin Thayer, R-Pa.).

<sup>81</sup> CURTIS, *supra* note 4, at 80.

<sup>82</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866).

to the states.

Whatever Thayer's precise intent, he should count as part of the general incorporation discourse in the House. To be sure, like almost everyone else who spoke, he spoke more clearly about equal rights. Two sentences after his reference to the state bills of rights, he emphasized that Section 1 deserved support because it was "necessary for the equal administration of the law."<sup>83</sup>

Crosskey puts Giles Hotchkiss, William Kelley, Thaddeus Stevens, and John Farnsworth in the incorporation camp. Hotchkiss of New York said, "I have no doubt that I desire to secure every privilege and every right to every citizen in the United States that the gentleman who reports this resolution [Bingham] desires to secure."<sup>84</sup> But the very next sentence seems to limit his agreement to equality of treatment. "As I understand it, his object in offering this resolution . . . is . . . no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another."<sup>85</sup>

William Kelley of Pennsylvania said that the "powers to be imparted" by the Fourteenth Amendment "are already to be found in the Constitution."<sup>86</sup> John Farnsworth said that all of Section 1 was "already in the Constitution" except for the Equal Protection Clause.<sup>87</sup> Thaddeus Stevens said that the provisions in Section 1 "are all asserted in some form or other, in our Declaration or organic law."<sup>88</sup> But none of these statements tells us the *specific content* of the Section 1 rights that were already in the Constitution. Those speakers could be referring to Article IV privileges and immunities; the Article IV, Section 4 guarantee of a republican form of government; or the Necessary and Proper Clause. One, two, or all three of those provisions could entail some, all, or none of the Bill of Rights guarantees.

When Kelley first rose to speak on the amendment, he said that the rights contained in Section 1, which he did not define, had been in the Constitution "from the hour of its adoption. They *preceded* the amendments proposed by the first Congress . . ."<sup>89</sup> If the rights in Section 1 preceded the Bill of Rights, "the powers to be imparted" by the Fourteenth Amendment would seem to be a reference to other parts of the Constitution. Readers pointed out to me that Kelley might very well have believed that the rights in the Bill of

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<sup>83</sup> *Id.* at 2465.

<sup>84</sup> *Id.* at 1095 (Rep. Glen Hotchkiss, R-N.Y.).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1057 (Rep. William Kelley, R-Pa.).

<sup>87</sup> *Id.* at 2539 (Rep. John Farnsworth, R-Ill.).

<sup>88</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens, R-Pa.).

<sup>89</sup> *Id.* at 1057 (Rep. William Kelley, R-Pa.) (emphasis added); Crosskey, *supra* note 3, at 60 (failing to quote Kelley's complete statement, specifically that the Section 1 rights "preceded the [Bill of Rights]").

Rights were natural law rights that preceded the Constitution itself. True enough, but his remarks do not reference incorporation and thus do not add to the “noise” about incorporation.

Nor did Stevens contribute to the incorporation discussion. He followed his comment about Section 1 already being in our “organic law” by asserting that the amendment would allow Congress to require that a state law that “operates upon one man shall operate *equally* upon all.”<sup>90</sup> Then he provided a series of examples of what Section 1 would protect, none of which implicates the Bill of Rights. For example, he said that the amendment would require that “[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree.”<sup>91</sup>

The strategy of the amendment’s opponents, most of whom were Democrats, was in part to attack the vagueness of the meaning of “privileges and immunities.” When Senators Johnson and Hendricks complained that the meaning was unclear, no one rose to expound Howard’s theory of incorporation. It is understandable that Howard did not wish to repeat his crystal clear presentation, but a little strange that none of the other proponents used Howard’s theory to rebut the claim of lack of clarity. Crosskey dismisses this argument by assuming that everyone knew the proponents intended the incorporation of the first eight amendments; the only question opponents were raising, he says, was what additional privileges and immunities were being protected.<sup>92</sup> It is too facile an assumption for me.

So here is my congressional scorecard: Bingham intended the Fourteenth Amendment to enforce the pre-existing obligations of state actors created by the Bill of Rights. Howard intended “privileges or immunities” to include the first eight amendments. James Wilson understood Bingham’s intent to enforce against the states the pre-existing obligations under the Bill of Rights. Hale and Thayer are a little less clear, but both can be squared with Bingham’s incorporation theory. Farnsworth is opaque. Price probably contemplated free speech as one of the rights protected by Section 1 and perhaps other rights as well. We do not know what “great principles” of law Cowan had in mind. Stevens and Hotchkiss focused on an “equal rights” reading of Section 1. Kelley did not say anything indicating that he saw Section 1 as incorporating the Bill of Rights. The remainder of the Congress, Crosskey concedes, “simply did not speak on the point, either one way or the other; and neither did they say anything from which their views on the subject can be inferred.”<sup>93</sup>

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<sup>90</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens, R-Pa.).

<sup>91</sup> *Id.*

<sup>92</sup> Crosskey, *supra* note 3, at 79–80.

<sup>93</sup> *Id.* at 71.

## VI. PUBLICITY AND RATIFICATION

Michael Kent Curtis, whose *No State Shall Abridge*<sup>94</sup> is one of the best treatments of the origin, development, and interpretation of the Fourteenth Amendment, has collected evidence from the campaign of 1866 relevant to the Fourteenth Amendment. No statements specifically embraced total incorporation, though several called for the protection of free speech and press in the South.<sup>95</sup> The evidence that bears directly on other protections created by Section 1 phrased them at a high level of generality—such as “rights to life, liberty, and property”<sup>96</sup> and “protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”<sup>97</sup> The closest to an explicit embrace of broad incorporation that Curtis cites is an editorial in the *Dubuque Daily News* that said Section 1 protected “the privileges rightly conferred on every citizen by the federal [C]onstitution.”<sup>98</sup> This is perhaps an elegant statement of incorporation, but it could just as easily be understood as a restatement of the language of Section 1—“privileges or immunities of citizens of the United States”—being recast as privileges “conferred . . . by the federal [C]onstitution.”

Wildenthal discusses an essay published in 1867 by Samuel S. Nicholas, a conservative Kentucky Democrat and jurist.<sup>99</sup> The chief target of his essay is not the Fourteenth Amendment, but the Civil Rights Act of 1866. Indeed, the difficulty with the evidence is that when Nicholas speaks of the “recent attempt in Congress to treat [the Bill of Rights guarantees] as guaranties against the State governments,”<sup>100</sup> it is not clear whether he is referring to the Civil Rights Act or the Fourteenth Amendment. Wildenthal points to evidence that Nicholas meant the Fourteenth Amendment, while arguing that it ultimately makes no difference because it shows incorporation discourse in any event.<sup>101</sup>

One piece of evidence that Nicholas meant only the Civil Rights Act is that he accuses Congress of “stolid ignorance of Constitutional law.”<sup>102</sup> That criticism makes sense if he was discussing the Civil Rights Act, but less so if

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<sup>94</sup> CURTIS, *supra* note 4.

<sup>95</sup> *Id.* at 132–33.

<sup>96</sup> *Id.* at 140.

<sup>97</sup> *Id.* at 144.

<sup>98</sup> *Id.* at 132.

<sup>99</sup> 3 S. S. NICHOLAS, CONSERVATIVE ESSAYS, LEGAL AND POLITICAL (1867).

<sup>100</sup> *Id.* at 48–49.

<sup>101</sup> Wildenthal, *supra* note 2, at 1593–94.

<sup>102</sup> 3 S.S. NICHOLAS, *supra* note 99, at 49.

he was referring to an amendment that would *change* the constitutional law. On balance, however, I agree with Wildenthal. I think that, considering the context, Nicholas was upbraiding Congress for passing an amendment that was inconsistent with foundational constitutional principles running deeper than any specific amendment. He was, in effect, complaining about the seismic shift in our frame of government that he saw in Section 1.

I applaud the careful attention Wildenthal gives to Nicholas. It adds to the evidence that some in the country were aware that Congress was seeking to change the frame of government. President Johnson's Secretary of the Interior, Orville Browning, published a letter predicting that the Fourteenth Amendment would lead federal courts to "annihilate" the role that state courts had traditionally played.<sup>103</sup> This also adds to the incorporation discourse, as Wildenthal demonstrates. But two things strike me about all of the evidence during the ratification process—there is very little of it and most of it is quite vague. Yes, the frame of government was changing, but in what ways? Perhaps the Fourteenth Amendment was a vehicle for the Radical Republicans to rewrite state laws in general. Crosskey concluded that there may have been "considerable inattention to the amendment at the time of its adoption and, consequently, some unawareness of the true tenor of its various provisions."<sup>104</sup>

Wildenthal concedes, *arguendo*, that there was essentially "silence out in the country on the incorporation issue, during ratification."<sup>105</sup> Crosskey agrees. This could have been, as Wildenthal believes, because incorporation was non-controversial.<sup>106</sup> But I believe that, at least in the Southern and border states, many would have feared the prospect of Radical Republicans drafting legislation to enforce the federal Bill of Rights. Mississippi in 1865, for example, could square its state right of free speech with its atrocious Black Code. I would wager that Democrats in Mississippi would not have relished the idea of free speech being enacted into federal law by the Radical Republicans.

In 1866, politics was truly local. If Democratic candidates in Mississippi, Alabama, Georgia, and South Carolina had been aware of Bingham's incorporation thesis, I think they would have campaigned ferociously against turning control over their rights to the Radical Republicans and federal judges. In the second half of the twentieth century, George Wallace advanced his political career by condemning usurpation of state sovereignty by federal

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<sup>103</sup> Orville Browning, Letter to the Editor, CINCINNATI COM., Oct. 26, 1866, at 2.

<sup>104</sup> Crosskey, *supra* note 3, at 119.

<sup>105</sup> Wildenthal, *supra* note 2, at 1609.

<sup>106</sup> *Id.* at 1601–02.

judges.<sup>107</sup> In 1968, Wallace ran for president on a platform that included calling the Supreme Court a “sorry, lousy, no-account outfit.”<sup>108</sup> He secured almost ten million popular votes and forty-six electoral votes, carrying five Southern states.<sup>109</sup> Nothing suggests that a usurpation charge aimed at the federal judiciary and Radical Republicans would not have played well in the Southern and border states in 1866. Indeed, given that eleven states had just tried to secede from the Union, Wallace’s argument would have played even better a hundred years earlier. But except for Browning and Nicholas, no evidence of that argument exists. Nor does evidence exist of politicians campaigning for or against incorporation. That only two voices—Browning’s and Nicholas’s—were raised in opposition to the increased federal power in the Fourteenth Amendment and Civil Rights Act remains surprising to me.

To Wildenthal what is surprising is that the Republicans did not campaign on the theme of nationalizing the Bill of Rights.<sup>110</sup> He might be right that the Republican silence is more puzzling than the silence of the opponents of the Fourteenth Amendment. Earl Maltz finds the lack of Republican conversation on the issue a “puzzling anomaly” that means incorporation is “not proven beyond a reasonable doubt.”<sup>111</sup>

Wildenthal’s own metric is whether the pre-ratification evidence clearly, publicly, and candidly conveyed Congress’s intent to incorporate the rights in the first eight amendments. Has he met that metric? I am doubtful. Post-ratification evidence increases my doubts.

## VII. POST-RATIFICATION DEVELOPMENTS

By expanding the scope of my inquiry to 1869, I take advantage of Wildenthal, who explicitly limited his review of the evidence to the period 1866–67. But the incorporation story cannot be told, in my opinion, without including a few events from the years following 1867. Wildenthal will not have adequate space to address fully the points I hope to make in this section. His silence on any issue should not, therefore, be taken as agreement.

One year after the Fourteenth Amendment was ratified, the Supreme Court heard an urgent appeal in a state death case, *Twitchell v. Commonwealth*.<sup>112</sup> Noting that an appeal under the Judiciary Act would

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<sup>107</sup> Richard Pearson, *Former Alabama Gov. George C. Wallace Dies*, WASH. POST, Sep. 14, 1998, at A01.

<sup>108</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 243 (1983).

<sup>109</sup> Pearson, *supra* note 107.

<sup>110</sup> Wildenthal, *supra* note 2, at 1609.

<sup>111</sup> EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* 117 (1990).

<sup>112</sup> 74 U.S. (7 Wall.) 321 (1869).

normally be heard by a single Justice, the Court allowed it “to be argued before the full bench because of the urgency of the case, and the momentous importance of the result to the petitioner.”<sup>113</sup> Twitchell claimed that Pennsylvania failed to follow the Sixth Amendment command that he be informed of “the specific nature of the accusation, so as that he might be enabled to prepare for a defence,” and that the failure to comply with the Sixth Amendment meant that the warrant for his execution was “not a due process of law.”<sup>114</sup>

In a unanimous opinion written by Chief Justice Salmon P. Chase, the Court refused to reach the merits of the appeal because it lacked jurisdiction to hear a case from a state court about the scope of the Fifth and Sixth Amendments. *Barron v. Baltimore* had settled the question, and the Court reaffirmed *Barron*. Quoting from *Barron*, the Court stressed that “[t]he Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States.”<sup>115</sup>

Leaving aside, for a moment, the incorporation question, the *Twitchell* Court’s decision to quote that sentence from *Barron* is odd, coming only a year after the Fourteenth Amendment was ratified. With the Fourteenth Amendment part of the Constitution, regardless of what Section 1 is held to mean, it was no longer true that the federal Constitution had nothing to do with the government of the individual states. On the incorporation point, in an earlier article, Wildenthal followed Akhil Amar who argued that *Twitchell* “proves too much—and therefore nothing at all.”<sup>116</sup> What this catchy phrase means is that *Twitchell* lost because he located his due process argument in the Fifth Amendment rather than the Fourteenth. In one sense, Amar and Wildenthal are right. *Barron* was still good law as to the Fifth and Sixth Amendments.

But Amar and Wildenthal’s argument requires us to believe that the Court would let a formality prevent it from reviewing a case that it appeared willing to review. It had, after all, already departed from the formal rule that a single Justice could decide whether to hear the appeal. It is true that nineteenth century courts were exceedingly formal, but consider how far this argument takes formality. We are to believe that the Court knew that the Sixth Amendment was now part of the Fourteenth but refused to connect the dots for the lawyer who based his argument on the wrong Due Process

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<sup>113</sup> *Id.* at 325.

<sup>114</sup> *Id.* at 323–24.

<sup>115</sup> *Id.* at 326 (quoting *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)).

<sup>116</sup> Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1084 (2000).

Clause. And then, according to Amar and Wildenthal, the Court affirmed Twitchell's death sentence because his lawyer forgot to say, "Oh by the way, the Sixth Amendment applies to the states through the Fourteenth." The sheer inhumanity that this argument entails is reason enough to reject it and conclude, instead, that the Court was not aware of incorporation theory.

Pragmatic political considerations support this conclusion. Chief Justice Salmon P. Chase had sought the Republican nomination for president in 1860 and finished fourth on the first ballot. When Lincoln needed two delegates to win the nomination on the fourth ballot, they came from Chase's delegation.<sup>117</sup> Appointed Secretary of the Treasury by Lincoln, he watched Lincoln's popularity plummet during the early years of the war and then began maneuvering to achieve the nomination in 1864.<sup>118</sup> When those efforts failed, he accepted Lincoln's appointment as Chief Justice of the Supreme Court. While a sitting Chief Justice, he sought the presidency again in 1868. He wrote the Court's opinion in *Twitchell* six months later.<sup>119</sup>

It would have been helpful to Chase's political ambitions to embrace the position that Jacob Howard took in the Senate: The "privileges or immunities of citizens of the United States" include "the personal rights guaranteed and secured by the first eight amendments of the Constitution."<sup>120</sup> We know that Chase appreciated the importance of the Fourteenth Amendment because he had correctly predicted that Congress would seat senators and representatives from the Southern states that ratified it.<sup>121</sup> Thus, in my view, had Chase known of the incorporation theory of Bingham and Howard, he would have written a very different opinion from the one he wrote.<sup>122</sup>

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<sup>117</sup> JOHN NIVEN, SALMON P. CHASE, A BIOGRAPHY 220 (1995).

<sup>118</sup> *Id.* at 290–345.

<sup>119</sup> *Id.* at 426–32.

<sup>120</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

<sup>121</sup> JAMES, FRAMING, *supra* note 4, at 169.

<sup>122</sup> As this Response was going to press, Richard Aynes helpfully sent me circumstantial evidence suggesting that Chase probably knew of Bingham's incorporation theory. See, e.g., Harold M. Hyman, *Salmon Portland Chase*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 136 (Kermit L. Hall ed., 1992) (asserting that Chase believed that the Thirteenth Amendment incorporated the Declaration of Independence and the Bill of Rights not only against the states but also against private actors). I did not change my contrary speculation in the text for two reasons. First, I did not have time to explore and evaluate the new evidence. Second, as I indicate in the text, I cannot explain why a politician-judge like Chase could have had Bingham's theory in his mind and then written an opinion explicitly reaffirming *Barron*. It makes no sense. Aynes's intriguing evidence, to me, only deepens the *Twitchell* mystery. Hopefully, Wildenthal and I will have another shot at the Fourteenth Amendment riddle, and we can pay particular attention to the *Twitchell* enigma.

Why did the Court not know about incorporation? Members of the Court had the opportunity to mingle with members of Congress much more than today. The Court met in the Old Senate Chamber, which was next to the chamber where the Senate debated the Fourteenth Amendment.<sup>123</sup> Four of the Justices roomed at the National Hotel, where four Senators and seven Representatives also roomed.<sup>124</sup>

Would something as visible and important to the future of the country as Section 1 of the Fourteenth Amendment not have come up in informal conversations? If it did, we must assume that the Bingham-Howard view was not widely held, not discussed, or, again, that the *Twitchell* Court was aware of incorporation and chose not to mention it. If Section 1 was not a topic of informal conversation between justices and congressmen, it is hard to believe that the public discourse was informed by the theory of incorporation.

Wildenthal thinks that I read too much into the silence in *Twitchell*. For him, the failure of the defendant or the Court to raise the Fourteenth Amendment Due Process Clause, which undoubtedly applied to the states, shows that no one was thinking about due process. But my point is not about the lack of due process talk—whether due process required better notice than *Twitchell* received depends on one's interpretive account of due process. The Sixth Amendment notice provision requires no similar interpretation. When *Twitchell* lodged his notice argument in the Sixth Amendment, and squarely faced the *Barron* barrier that the Court ultimately found persuasive, the most logical move to avoid *Barron* was to remind the Court what Howard and Bingham had said about incorporation. That there was no incorporation talk by anyone, Wildenthal concedes, should make incorporationists "uneasy." It makes me doubt that there was any kind of general understanding in the country about what Bingham and Howard intended Section 1 to do.

Finally, here is a *Twitchell* argument that I know Wildenthal will entertain because the first step is his idea. The one inference that we can draw from *Twitchell* with certainty is that *Twitchell*'s lawyer, William Wheeler Hubbell, did not mention incorporation. Seeking background on Hubbell, I uncovered a monograph that he published in 1863 in the midst of the Civil War. Entitled "The Way to Secure Peace and Establish Unity as One Nation," the monograph included proposed amendments to the Constitution that Hubbell believed could be embraced by both the Union and Confederate states and would, thus, end the bloody Civil War. Article 17 provides:

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<sup>123</sup> THE SUPREME COURT A TO Z 207 (Kenneth Just ed., CQ Press 2003) (1998).

<sup>124</sup> CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88 68 (1971) (noting that Justices Nelson, Clifford, Miller, and Davis roomed at the National by the late 1860s); PERLEY POORE, CONGRESSIONAL DIRECTORY, SECOND SESSION, FORTY-FIRST CONGRESS 116–19 (1869) (providing addresses of members of Congress).

The Constitution of the United States, and its Amendments, are hereby declared to constitute the People of the United States, One Nation, and are the supreme law of the land, together with all laws made to carry them into effect. And all other powers not prohibited to the States, are inherent in and reserved, to be exercised by the States, or the people thereof, respectively.<sup>125</sup>

It is clear that Hubbell thought that the amendments to the Constitution, the existing ones and the new ones he proposed, should be binding on the states. It also appears that he understood *Barron* and thus knew that a constitutional amendment was necessary to make the states subject to the amendments.

Six years later, Hubbell had an opportunity to turn his incorporation idea into law. He merely had to ask the Supreme Court to ratify John Bingham's vision of the Fourteenth Amendment. How are we to understand Hubbell's failure to argue incorporation? Notice that he appeared to assume in 1869 that the Sixth Amendment bound the states without an assist from the Fourteenth Amendment. As this is contrary to his apparent understanding in 1863, it raises the possibility that he thought incorporation so obvious that he did not have to spell it out for the Court. But this is not satisfying for three reasons. First, lawyers love to belabor the obvious. Second, obvious or not, he would have wanted credit for being the first to make the argument. Third, nineteenth-century formalism would have required the Fourteenth Amendment as a "bridge" to the Sixth Amendment. Yet Hubbell never mentioned the Fourteenth Amendment.

That leaves, I think, only one possibility. Hubbell argued in 1869 that the Sixth Amendment applied directly to the states, expecting to lose, because he thought he had no good argument. But that necessarily means that he did not understand the Fourteenth Amendment to make the Bill of Rights binding on the states. And if a constitutional theorist who had promoted the concept of incorporation did not share Bingham's understanding, it is unlikely that the members of the Court would have had even an inkling about what Bingham was attempting to do.

The truth is that no one on the *Twitchell* Court understood the Fourteenth Amendment to incorporate the Sixth. The great clarity about incorporation that Amar believes ran, like water, through the halls of Congress did not seep into the Old Senate Chamber. Crosskey concedes this much, noting the "rather shocking, but by no means unique, indication of the inalertness of the men who composed the Court of the period."<sup>126</sup> He offers no evidence that

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<sup>125</sup> WILLIAM WHEELER HUBBELL, *THE WAY TO SECURE PEACE AND ESTABLISH UNITY AS ONE NATION* (1863).

<sup>126</sup> Crosskey, *supra* note 3, at 113.

the Chase Court was especially “inalert.”

Amar signals the weakness of his argument here. After dismissing *Twitchell* as having no significance for the incorporation debate, Amar drops a footnote that begins, “*Twitchell* is perhaps explicable as an unthinking reflection of the notion that Section 1 would have its main application in the Southern states.”<sup>127</sup> But if the Supreme Court that sat in the same building as Congress indulged “unthinking reflection” that Section 1 did not generally incorporate the Bill of Rights, or was “inalert” to this possibility, how are we to believe that the state legislatures knew of incorporation?

Charles Fairman found several state constitutions or statutes that suggest “inalertness” to incorporation, though some of the inconsistencies are, to my mind, trivial.<sup>128</sup> For example, the lack of a grand jury clause in a dozen or so state constitutions<sup>129</sup> is not very probative on the intent of the ratifying legislatures. Those states could have known about incorporation and decided to ratify the amendment because, on balance, the benefits outweighed the harm of having to provide grand juries. Or as Wildenthal puts it in an earlier article, “Given the political imperatives for Republicans supporting ratification of the Fourteenth Amendment, it is doubtful whether anyone considered or cared much about the relatively minor particulars in which some states were not already in conformity with the Bill of Rights.”<sup>130</sup>

But Wildenthal’s argument does not explain the five states that took action to modify or eliminate their grand jury requirements *after the Fourteenth Amendment was ratified*.<sup>131</sup> I concede that there was no reason to expect states without grand jury requirements to rush to a convention to change their constitutions, but why would states that already provided grand juries change their laws to flout the Fourteenth Amendment? Wildenthal dismisses these actions as limited to the rather unimportant right of grand

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<sup>127</sup> AMAR, *supra* note 35 at 207 n.\*.

<sup>128</sup> For an example of a trivial difference, the 1846 New Jersey Constitution required that the amount in controversy in civil suits exceed fifty dollars to trigger the right to a jury trial, rather than twenty dollars as required by the Seventh Amendment, proof to Fairman “that the Fourteenth Amendment was not regarded as bringing Amendments I to VIII in its wake.” Fairman, *supra* note 3, at 88.

<sup>129</sup> See Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1476 (2000).

<sup>130</sup> *Id.* at 1478.

<sup>131</sup> See CALIF. CONST. art. I, § 8 (1879) (requiring it); COLO. CONST. art. II, § 23 (1876) (permitting legislature to abolish grand jury requirement); GA. CONST. of 1868 (not mentioning grand juries), WIS. CONST. § 8 (1870) (replacing requirement of grand juries with general due process requirement); KAN. STAT. ANN. § 82 (1868) (permitting prosecutors to proceed by information). A comparison of the two requirements is available at <http://www.legis.state.wi.us/lrb/bb/05bb/191-242.pdf> (last visited July 27, 2007).

juries.<sup>132</sup> Perhaps. But where was the discussion about incorporation?

I found only two cases relevant to incorporation that were decided within the period I am analyzing. They reach opposite conclusions. In *Rowan v. State*, the Wisconsin Supreme Court held that prosecution for a felony upon an information did not violate the Fourteenth Amendment.<sup>133</sup> The defendant did *not* make the incorporation argument that he was entitled to a grand jury because the Fifth Amendment was now part of the Fourteenth. Instead, he argued that due process of law required an indictment. If incorporation had been known to Rowan's lawyer, he would have argued the specific language of the Fifth Amendment grand jury clause, as imposed on the states through the Fourteenth Amendment, rather than the vague language of "due process of law." The court easily rejected the due process argument:

[T]he words "*due process of law*," in this [Fourteenth] amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights.<sup>134</sup>

In *United States v. Hall*,<sup>135</sup> a federal court in Alabama articulated the incorporation position as clearly as had Jacob Howard. The narrow holding was that Congress had the authority to pass legislation designed to protect free speech and encourage citizens to vote. In reaching that conclusion, the court wrote:

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, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation.<sup>136</sup>

It is difficult to be clearer than that. What are we to make of the fact that *Hall* was never cited for its point about incorporation? It is yet one more sound of silence. Moreover, *Hall* is additional evidence of the "inalertness" of lawyers. The court commented that the case "seems to have been argued for the defense, without reference to the recent amendments to the

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<sup>132</sup> Wildenthal, *supra* note 129, at 1477–80.

<sup>133</sup> 30 Wis. 129 (1872).

<sup>134</sup> *Id.* at 149.

<sup>135</sup> 26 F. Cas. 79 (C.C. Ala. 1871) (No. 15,282).

<sup>136</sup> *Id.* at 82.

constitution.”<sup>137</sup>

Amar argues that the evidence of silence shows that “many informed men simply were not thinking carefully about the words of Section One at all.”<sup>138</sup> This concession does not trouble Amar who presses the case for incorporation on the ground that the text and debate in Congress were clear enough. Wildenthal sets a higher bar for himself than does Amar. Wildenthal, appropriately, asks the hard question: did Congress clearly, publicly, and candidly convey its intent to fasten the first eight amendments on the states?

If Congress was conveying that intent, Orville Browning, Samuel Nicholas, and a federal court in Alabama seemed to be listening. But the message did not get to the Wisconsin Supreme Court; the United States Supreme Court; the lawyers representing Twitchell, Hall, and Rowan; or the legislatures or constitutional conventions in the states that modified or eliminated their grand jury requirements after 1866.

### VIII. THE TRUTH ABOUT INCORPORATION

It is time to tell the truth about the incorporation riddle. It cannot be conclusively solved without *ex ante* presumptions. If one presumes that the only intent that matters is that of Bingham because he was the drafter and no one in Congress denied his reading of Section 1, then incorporation of the Bill of Rights must be accepted. If one seeks to show, as Wildenthal does, that Congress clearly, publicly, and candidly conveyed its intent to incorporate, we need more than Bingham. If so, we can, in my view, count a few others in the Thirty-Ninth Congress. And we can count the *Hall* opinion. Is that enough?

After reviewing the evidence in greater detail than I did in 2001, and reflecting on Wildenthal’s work and that of other incorporation supporters, I am now convinced that a plausible case can be made that Congress intended incorporation of most of the rights in the first eight amendments. Moreover, I now think that the sounds of silence during the ratification process are not a conclusive rejection of incorporation. But I remain unsure if there is enough evidence to show a clear communication to the states and the country.

I doubt that any one piece of evidence of the sounds of silence is, by itself, sufficient to counteract the evidence that at least five or six members of Congress understood Section 1 to incorporate the Bill of Rights. But when one adds up all of them, it becomes difficult to conclude that Congress clearly, publicly, and candidly conveyed its intent to the country. I think it

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<sup>137</sup> *Id.* at 81.

<sup>138</sup> Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1250 (1992).

unlikely that state legislatures in Sacramento, California, and Des Moines, Iowa, for example, knew what Chief Justice Chase and the other members of the *Twitchell* Court did not know.

I do not claim that the evidence presented here settles the question. History cannot settle all questions, and I believe the Fourteenth Amendment riddle is one of them. Fairman and Berger do not persuade that history settles the incorporation question in the negative. Crosskey, Curtis, Amar, Wildenthal, and others, do not persuade that history settles the question the other way.

It turns out that the Fourteenth Amendment riddle can be conclusively solved using existing evidence only by a magician's parlor trick. Writers who claim that history settles the incorporation question, including my 2001 rejection of incorporation, become magicians who distract the reader while they quietly put into place the presumptions that will provide clear proof. Even Wildenthal, whose work I greatly admire, eventually retreats to what is close to a "plain text" presumption. Now unburdened of any agenda, I can expose the trick for what it is. All efforts to solve the Fourteenth Amendment riddle to date have, alas, failed.