

A Reply to Professor Thomas

BRYAN H. WILDENTHAL*

I count it as a great honor indeed that a scholar of George Thomas's distinction has felt motivated to write the response that he has offered to my lead article in this issue of the *Ohio State Law Journal*.¹ This honor has been compounded by the singularly rewarding scholarly experience of revising my article as Professor Thomas has drafted his response, accompanied by a lively and friendly correspondence in which each of us has provoked and enlightened the other's thinking about the issues involved. As he notes, we have "worked together on the evidence, exchanging ideas and occasionally causing each other to modify a position."²

Thomas, in 2001, published one of the most thoughtful articles in recent years to touch upon whether the Fourteenth Amendment was understood when it was proposed and ratified—and is properly understood today—to nationalize or "incorporate" the Bill of Rights against the states.³ He was kind enough in that article—which broadly rejected the incorporationist view of the Amendment—to respectfully acknowledge the work of an essentially unknown junior professor—me—supporting the incorporationist reading.⁴

Thomas today, in the most honorable scholarly tradition, has open-mindedly reconsidered several significant aspects of his views expressed in 2001. He generously credits my lead article, for example, with "demonstrat[ing] the skewed readings of [such earlier anti-incorporationists as Charles] Fairman [and Raoul] Berger."⁵

* Associate Professor, Thomas Jefferson School of Law, San Diego; Social Science Research Network (SSRN) Author Page, <http://ssrn.com/author=181791>. This Reply was originally posted on SSRN in October 2007 and remains available for free download at <http://ssrn.com/abstract=1019308> (for my other published scholarship, see the Author Page cited above).

¹ See 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) [hereinafter Wildenthal, *Revisiting* (2007)]; George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007) [hereinafter Thomas, *Riddle* (2007)].

² Thomas, *Riddle* (2007), *supra* note 1, at 1631.

³ George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) [hereinafter Thomas, *When* (2001)].

⁴ See *id.* at 181 & n.131, 183 n.139, 191 n.176 (citing and discussing 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 (2000) [hereinafter Wildenthal, *Lost Compromise* (2000)]; see generally Thomas, *When* (2001), *supra* note 3, at 180–216 (rejecting the incorporation theory).

⁵ Thomas, *Riddle* (2007), *supra* note 1, at 1632. He thinks I may be too gentle with William Winslow Crosskey, the notoriously opinionated pro-incorporationist scholar of

Thomas argued in 2001, among other points: (1) that there was “absolute silence” regarding the incorporation issue, on the part of “proponents and opponents” of the Amendment, “during the ratification process” outside of and after the congressional debates;⁶ (2) that this allegedly complete silence “severely undermines the argument that the state legislatures intended to ratify [an] Amendment that [totally] incorporated the Bill of Rights”;⁷ and (3) that “the States only ceded as much sovereignty to the federal government in the . . . Amendment as they intended to cede.”⁸ Given his ultimate conclusions, this suggested that Thomas demanded what I refer to in the lead article as “proof of specific, affirmative confirmation at the state level”—perhaps in every single one of the required ratifying minimum of three-fourths of the states—of the incorporationist reading.⁹

But Thomas now agrees that we should not demand such a stringent level of proof. He agrees with the “metric” proposed in the lead article “that allows the question to be answered without direct evidence of the intent of the ratifying legislatures.” This metric asks “whether Congress ‘clearly, publicly, and candidly conveyed to the country’ its intent to incorporate the Bill of Rights.”¹⁰ As Thomas now helpfully puts it, in terms with which I heartily agree: “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.”¹¹ As I put it: “We need only require proof of fair public notice and legal ratification.”¹²

Thomas also now seems to concede that the public discourse during the ratification struggle was not, in fact, as completely “silent” on incorporation as he—and other scholars—have previously contended. He credits the lead article with discussing “two neglected pieces of evidence from th[at] public

the 1950s—though we agree that “Crosskey present[ed] the evidence [on incorporation] more objectively than Fairman and Berger.” *Id.*; see also Wildenthal, *Revisiting* (2007), *supra* note 1, at 1553 n.147.

⁶ Thomas, *When* (2001), *supra* note 3, at 208; see also *id.* at 204 (asserting that “[t]he silence during the ratification debates about incorporating the criminal procedure rights [of the Bill of Rights] was total”).

⁷ *Id.* at 208.

⁸ *Id.* at 204; see also *id.* at 154–55.

⁹ Wildenthal, *Revisiting* (2007), *supra* note 1, at 1613; see also *id.* at 1601 (discussing Thomas’s 2001 argument in this regard).

¹⁰ Thomas, *Riddle* (2007), *supra* note 1, at 1632–33 (quoting Wildenthal, *Revisiting* (2007), *supra* note 1, at 1612); see also Thomas, *Riddle* (2007), *supra* note 1, at 1632 (“agree[ing] . . . one should not demand ‘specific, affirmative confirmation at the state level’”) (quoting Wildenthal, *Revisiting* (2007), *supra* note 1, at 1613).

¹¹ Thomas, *Riddle* (2007), *supra* note 1, at 1632.

¹² Wildenthal, *Revisiting* (2007), *supra* note 1, at 1613.

discourse”¹³: the essay by Kentucky jurist and commentator Samuel Smith Nicholas¹⁴ and the public letter widely distributed by Secretary of the Interior Orville H. Browning.¹⁵ Thomas himself very helpfully discussed the latter evidence in his 2001 article, though he did not then note—as he now seems to concede—that it may weigh in favor of the incorporationist understanding.¹⁶ I also view the *New York Times* editorial of May 25, 1866, as an important and relatively neglected piece of evidence bearing on the relevant discourse—though concededly only in an indirect and implicit sense.¹⁷ I would note that while I highlight the foregoing pieces of evidence, because they have not previously been fully analyzed by scholars, they are only examples of a broader array of evidence bearing—either explicitly or implicitly, directly or indirectly—on the discourse outside Congress. Several scholars have previously pointed to significant additional evidence at least suggesting that the incorporationist understanding in Congress may have been widely shared out in the country during ratification.¹⁸

I credit Thomas with significantly influencing my own views on the incorporation issue—both in his present response and in his 2001 article, which continues to have great value. While he has not shaken my basic confidence in the thesis set forth in the lead article, he has given me pause and forced me to reconsider and rephrase many points. The final version of my article contains countless changes—to its great benefit—prompted by his thoughtful critiques.

We continue, however, to disagree on some basic issues. The lead article contains replies at various appropriate points, mostly in footnotes, to Thomas’s arguments. This Reply sketches a few more.

Thomas concedes the importance of Representative Bingham and Senator Howard.¹⁹ Yet he also suggests that their views on incorporation may not have been broadly shared by other Republicans in Congress.²⁰ I disagree with any such broad suggestion, and with several specific aspects of Thomas’s discussion in this regard—though some of our differences may

¹³ Thomas, *Riddle* (2007), *supra* note 1, at 1632.

¹⁴ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1590–95; Thomas, *Riddle* (2007), *supra* note 1, at 1647–49, 1656.

¹⁵ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1604–08.

¹⁶ Compare Thomas, *When* (2001), *supra* note 3, at 207–08, with Thomas, *Riddle* (2007), *supra* note 1, at 1648–49, 1656.

¹⁷ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1576–78.

¹⁸ See *id.* at 1589 & n.262 (citing sources). Thomas acknowledges some of this additional evidence. See Thomas, *Riddle* (2007), *supra* note 1, at 1647.

¹⁹ See Thomas, *Riddle* (2007), *supra* note 1, at 1639–42, 1646.

²⁰ See *id.* at 1642–47.

strike readers as minor quibbles.²¹ I certainly would not associate Thomas with the unfortunate Bingham- and Howard-bashing of such scholars as Fairman and Berger.²² Thomas's views are fair, thoughtful, and moderate, even where I think he may be mistaken. For the most part, I am content to let our accounts of Bingham, Howard, and the debates in Congress stand as they are.

I am prompted to emphasize some disagreements I have with Thomas's treatment of Senator Howard, the Senate debates, and the historical understanding of "privileges" and "immunities" as discussed, most notably, by Michael Kent Curtis. As I discuss in the lead article, Curtis—a scholar whom both Thomas and I admire—has, in my view, though Thomas disagrees, made a convincing case that "[t]he 'privileges' and 'immunities' of American citizens were widely understood during [the Civil War era] to include many, perhaps all, of the specific guarantees of the Bill of Rights."²³

I think Thomas misses the extent to which Howard's crucial speech in May 1866 corroborates Curtis's view.²⁴ Rather counterintuitively, Thomas seems to view the Senate's reaction to Howard's speech as confirming Thomas's own view that "'privileges or immunities' . . . had little to do with the first eight amendments."²⁵ Thomas notes that "Senate opponents of the Fourteenth Amendment challenged the proponents to give a meaning of privileges and immunities," and that "no proponent responded to the challenge" by "expound[ing] Howard's theory of incorporation."²⁶ He notes that Howard took the time, even on the hurried final day of debate, to

²¹ Compare, e.g., Wildenthal, *Revisiting* (2007), *supra* note 1, at 1540 n.100 (discussing Rep. Hotchkiss), with Thomas, *Riddle* (2007), *supra* note 1, at 1645 (same), and Wildenthal, *Revisiting* (2007), *supra* note 1, at 1547–48 & n.131 (discussing Rep. Price), with Thomas, *Riddle* (2007), *supra* note 1, at 1643 (same, ultimately agreeing that it is "fair to count Price in the incorporation camp," at least "for free speech"). I would not quarrel too much with Thomas's discussion of the merits, or demerits, of Bingham's *Barron*-contrarian views and their basis in Articles IV and VI. See *id.* at 1640–42. As Thomas notes, "the plausibility of Bingham's theories . . . does not matter." *Id.* at 1642. The only relevant point is what such views tell us about the likely Republican understanding of the Fourteenth Amendment. I would reiterate that I think Bingham actually understood *Barron* much better than most scholars have given him credit for—especially as he meditated on the decision over time and honed his views in the crucible of debate. His views on Article IV also seemed to evolve. See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1542 & n.111, 1552–56 & n.147, 1622–23 & n.374.

²² See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1535–36, 1565–68.

²³ *Id.* at 1562 & n.176. But see Thomas, *Riddle* (2007), *supra* note 1, at 1633, 1635.

²⁴ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1561–63.

²⁵ Thomas, *Riddle* (2007), *supra* note 1, at 1635.

²⁶ *Id.* at 1633 (first two quotations); *id.* at 1646 (third quotation); see also *id.* at 1642 (conceding that "[i]t is difficult to be much clearer than" Howard was); *id.* at 1646 (referring to Howard's "crystal clear presentation").

respond to a question about the meaning of “abridge” in Section 1. But Thomas finds it curious that no Republican—neither Howard nor anyone else—“took the bait” on privileges and immunities.²⁷

As I discuss in the lead article, however, it is not surprising that Republicans disdainfully ignored the claimed confusion of a few diehard opponents about the meaning of a key clause that Howard had already expounded at length—in a speech that seems to have expressed the consensus views of the Republican supermajority.²⁸ By contrast, Howard had not previously given a lengthy speech explaining the meaning of “abridge.”²⁹ If anything, the apparent lack of any felt need to recap Howard’s speech supports the conclusion that his understanding was widely shared. Thomas says that “[a]lmost no effort was made to question, or explain, the meaning of ‘privileges or immunities.’”³⁰ Indeed, that is true—*aside from Howard’s speech*. And it suggests that, at least with regard to the Bill of Rights guarantees emphatically included by Howard, there was little genuine concern or “confusion”—except, perhaps, from a few opponents looking to make trouble—about what the phrase would, at a minimum, embrace. Thomas finds this conclusion “too facile.”³¹ But it seems quite likely to me that supporters of the Amendment shared Senator Poland’s view—stated two weeks after Howard’s speech, and three days before the close of debate—that it had been “so elaborately and ably discussed on former occasions” that

²⁷ *Id.* at 1633.

²⁸ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1586–87 & n.256; see also *id.* at 1561–78 (discussing evidence that Howard spoke, and was understood to speak, on behalf of the Joint Committee and the Republican caucus, when he formally introduced the Amendment).

²⁹ Howard’s response on “abridge” is easily explained—Crosskey did so fifty-three years ago—by the fact that Howard was challenged on a specific alleged inconsistency on that point. Howard had suggested “abridge” was unclear as used in Section 2 regarding the right to vote—“which [Howard] pointed out was ‘indivisible’ and, so, ‘incapable of abridgment.’” William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 79 n.122 (1954) (quoting CG (39:1) 3039 (June 8, 1866)); see also Wildenthal, *Revisiting* (2007), *supra* note 1, at 1511 n.1 (noting my method of citing the *Congressional Globe*). Howard responded, very briefly, that “it is easy to apply the term ‘abridged’ to the privileges and immunities of citizens, which necessarily include within themselves a great number of particulars.” CG (39:1) 3039 (June 8, 1866). No comparable reason existed for Howard to recap his discussion of the general scope of the Privileges and Immunities Clause—as Thomas himself agrees at a later point in his response. See Thomas, *Riddle* (2007), *supra* note 1, at 1646 (noting that “[i]t is understandable that Howard did not wish to repeat his crystal clear presentation”).

³⁰ Thomas, *Riddle* (2007), *supra* note 1, at 1639.

³¹ *Id.* at 1646 (referring specifically to a similar argument by Crosskey).

there was little point in continuing “to attempt to argue [it] at length and in detail.”³²

The most important disagreement Thomas and I have focuses on the application to the available evidence of the metric on which we agree in general principle—asking, essentially, whether the ratifying states were placed on sufficiently fair notice about the incorporationist reading of the Amendment. Thomas asserts that I “flinch” in applying this metric.³³ He argues that I ultimately rely instead on what he suggests are inappropriate “presumptions” or “parlor tricks”—such as privileging congressional over state ratification evidence and placing undue weight on a “plain text” argument.³⁴ I take the jousting in good humor, as Thomas intends it. But I do not think he has unhorsed me.

With regard to privileging the congressional evidence, the lead article already offers a partial reply to Thomas’s concern—and to a related criticism offered by Kurt Lash.³⁵ Thomas concedes that my approach is at least “defensible” to the extent it is contingent—as it is—on fair public notice of Congress’s understanding.³⁶ The point of my textual analysis,³⁷ likewise, is not to claim that text alone can resolve the issue. It is that the text is fully consistent with the incorporationist understanding strongly supported in Congress—an understanding unrebutted, at worst, by the record outside Congress, even assuming that record is “silent.”

Our disagreement boils down to whether the evidence is, in fact, sufficient to conclude that the states were placed on fair notice. Thomas asks how I can “find fair notice from silence”—“a bridge too far” in his view.³⁸ But my argument “proceed[s]” only *arguendo*—and only in part—“on the

³² CG (39:1) 2961 (June 5, 1866), *quoted in* Wildenthal, *Revisiting* (2007), *supra* note 1, at 1569.

³³ Thomas, *Riddle* (2007), *supra* note 1, at 1634.

³⁴ *See id.* at 1634, 1657.

³⁵ *See* Wildenthal, *Revisiting* (2007), *supra* note 1, at 1613 n.342; *see generally id.* at 1609–15.

³⁶ Thomas, *Riddle* (2007), *supra* note 1, at 1634. Contrary to Thomas’s suggestion, *see id.* at, I do not think my “version” of this argument differs substantially from those of David Kyvig or Richard Aynes in this regard. If Aynes’s version of the argument “makes nonsense of the notion of sovereignty,” *id.* then so does mine—though I do not think either actually does. And if my version is “defensible,” then so are those of Kyvig and Aynes. Indeed, my version of the argument is actually, in at least one sense, somewhat more extreme and generalized than that of Aynes. *See* Wildenthal, *Revisiting* (2007), *supra* note 1, at 1610 n.333.

³⁷ *See* Wildenthal, *Revisiting* (2007), *supra* note 1, at 1615–20.

³⁸ Thomas, *Riddle* (2007), *supra* note 1, at 1634.

stipulation that there was, essentially, silence *out in the country* on the incorporation issue, during ratification.”³⁹

I do not stipulate, even *arguendo*, that *Congress* or the newspapers reporting on Congress were silent. In fact, as I have shown, they were far from silent.⁴⁰ It is primarily from Congress’s very explicit, public, and widely reported discussion of the issue that I discern a reasonable basis for fair notice. Congress was, of course, composed of representatives of the states—though not at that time, concededly, the Southern states recently in rebellion, whose ratifications of the Amendment were also sought. But everyone, in any event—including Southerners—could read about Congress’s understanding in the *Globe* and in prominent newspapers.

I agree, of course, that to the extent there was silence outside Congress, such silence makes the argument for the incorporationist understanding weaker than it otherwise would be. Leaving aside assumptions and stipulations, I concede, in point of fact, that the evidence for incorporation outside Congress “seems vague and scattered”—“[w]hat we *mostly* have is silence—*except for* the congressional debates, the news coverage of them, and some additional commentary outside Congress, such as the Nicholas essay.”⁴¹ Thomas and I agree, in any event, that “it is for readers to weigh the evidence.”⁴²

But even if the silence outside Congress were complete, what I find “a bridge too far” is the notion—evidently still embraced by Thomas—that mere silence can negate and override a meaning publicly and explicitly expressed in Congress and fully consistent with the text. As I argue in the lead article, if the states—despite being so placed on fair notice of an amendment’s meaning—chose to go ahead and ratify it, then it should be interpreted in light of Congress’s understanding, despite any silence at the state level. It should even be so construed despite “any contrary, possibly self-serving views expressed at the state level”—no compelling examples of which, however, have been shown in the case of the Fourteenth Amendment.⁴³

Furthermore, as noted above, the record outside Congress during ratification is *not*, in fact, completely silent on incorporation. The Nicholas essay, for example, proves that at least one prominent state-level figure—and not just on the East Coast, to answer another concern of Thomas⁴⁴—

³⁹ Wildenthal, *Revisiting* (2007), *supra* note 1, at 1609 (emphases added).

⁴⁰ See generally *id.* at 1532–89.

⁴¹ *Id.* at 1600 (emphases added).

⁴² Thomas, *Riddle* (2007), *supra* note 1, at 1634; see also Wildenthal, *Revisiting* (2007), *supra* note 1, at 1615.

⁴³ See Wildenthal, *Revisiting* (2007), *supra* note 1, at 1614.

⁴⁴ Cf. Thomas, *Riddle* (2007), *supra* note 1, at 1634 & n.30; Wildenthal, *Revisiting*

understood very clearly that Congress intended to nationalize the Bill of Rights. The Browning letter, while not explicitly confirming that understanding, proves that the most cogent objections to such a goal—those most likely to have political traction—were, in fact, widely and energetically raised against the Amendment. And, as noted above, that does not exhaust the evidence outside Congress during ratification.

Finally, Thomas explores some fascinating post-ratification evidence bearing on the meaning of the Amendment—especially the perennial puzzle posed by the 1869 decision in *Twitchell v. Pennsylvania*.⁴⁵ Thomas does not respond to the relatively few bits of post-ratification evidence that I discuss in the lead article—understandably, as they are beside the point of his main argument.⁴⁶ Likewise, I prefer to postpone to future articles—dealing in depth with the 1867–73 period—a thorough response to the post-ratification points that Thomas raises, including those on *Twitchell*.

For the time being, I generally stand by my discussion of *Twitchell* in my 2000 article, essentially endorsing Akhil Amar's analysis.⁴⁷ *Twitchell*'s lawyer raised not only a Sixth Amendment claim on behalf of his state death-row client, but a generic due process claim as well—but only under the *Fifth*, not the Fourteenth, Amendment. Thomas acknowledges that due process claim, and Amar's argument, which I endorse, that *Twitchell* thus “proves too much—and therefore nothing at all.”⁴⁸ But I do not think he fully comes to grips with what it signifies. *Twitchell*'s lawyer had no need to be familiar with the incorporation theory to argue—and the Supreme Court had no such need to hold—that *Twitchell* was entitled to invoke the Due Process Clause, which the Fourteenth Amendment expressly imposed on the states. Yet *Twitchell*'s lawyer, however inexplicably or incompetently, did not invoke the Fourteenth Amendment. And the Court, however hard-heartedly—or perhaps because the Justices viewed *Twitchell*'s claim as meritless in any event—declined to deviate from strict procedural propriety by addressing a claim, and an Amendment, not raised.

Thomas asks, with seeming incredulity, whether “[w]e are to believe that the Court knew that the Sixth Amendment was now part of the Fourteenth

(2007), *supra* note 1, at 1594 n.273.

⁴⁵ 74 U.S. (7 Wall.) 321 (1869). See Thomas, *Riddle* (2007), *supra* note 1, at 1649–54; see also Wildenthal, *Revisiting* (2007), *supra* note 1, at 1527 n.57 (discussing how post-ratification evidence should be weighed).

⁴⁶ For my limited discussion of post-ratification materials, see, primarily, Wildenthal, *Revisiting* (2007), *supra* note 1, at 1619, 1622–25.

⁴⁷ See Wildenthal, *Lost Compromise* (2000), *supra* note 4, at 1083–84 & n.124 (citing, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992)).

⁴⁸ Amar (1992), *supra* note 47, at 1255, quoted in Wildenthal, *Lost Compromise* (2000), *supra* note 4, at 1084; see also Thomas, *Riddle* (2007), *supra* note 1, at 1650.

but refused to connect the dots for the lawyer who based his argument on the wrong Due Process Clause.”⁴⁹ But it is simply a fact that the Court *did* refuse to connect the dots in that way, despite the inarguable language of the Fourteenth Amendment. We may never know whether the Justices were simply not thinking about the incorporation theory when they decided *Twitchell*, or thought about it and consciously rejected it, or simply chose not to raise it *sua sponte*. But that is all, in any event, utterly irrelevant to the true puzzle of *Twitchell*. Speculating that the Justices were unaware of or rejected the theory does nothing whatsoever to explain why the Justices chose not to consider *sua sponte* the plainly applicable language of the Fourteenth Amendment Due Process Clause.

Thomas argues that Chief Justice Chase, had he known of the incorporation theory, would have eagerly engaged in “judicial activism” by touting the theory *sua sponte*.⁵⁰ But again, that misses the point. Forget about the incorporation theory. What about the Fourteenth Amendment itself? We know for a fact that Chase had no interest in even raising the Amendment itself *sua sponte*—because he did not, even though it lay there in plain view. If the inattention to the incorporation theory in *Twitchell* disproves the prevalence or validity of that theory, one might as well argue that the inattention to the Fourteenth Amendment in *Twitchell* disproves the existence and recent ratification of that Amendment. It is in that sense that *Twitchell*—or the anti-incorporationist argument based on *Twitchell*—“proves too much.”

My best guess, at this point, is that what we see in *Twitchell* is a busy Court—distracted, as always, by a myriad of other cases and issues, and disinclined to raise issues not pressed by the lawyer—disposing of a weak, last-gasp claim by a death-row inmate. It is true, as Thomas points out, that the Court granted oral argument before the full bench when it need not have done so.⁵¹ But that seems easily explained by the fact that it was a death-row appeal. The Justices may have wanted to ensure that *Twitchell* and his lawyer at least had every chance to raise any points that might have been missed in the paper record. They provided that chance. It may be, in the unlikely event that the incorporation theory actually would have made a difference for *Twitchell*, that the lawyer blew that chance. But as I have said before, it does not seem very convincing “to treat as an important refutation of incorporation the Court’s mere silence in a case where the Fourteenth Amendment itself was not even raised and the underlying Bill of Rights claim that might have been raised via the Fourteenth Amendment lacked substantial merit.”⁵²

⁴⁹ Thomas, *Riddle* (2007), *supra* note 1, at 1650–51.

⁵⁰ *See id.* at 1651–52.

⁵¹ *See id.* at 1650–51.

⁵² Wildenthal, *Lost Compromise* (2000), *supra* note 4, at 1084 n.124.

But still, I agree with Thomas that *Twitchell* should make incorporationists uneasy—it does me. It suggests a surprising lack of attention to the incorporationist potential of the freshly ratified Amendment. Thomas has presented some fascinating research and analysis, especially regarding Twitchell’s lawyer. In this, as in so many respects, Thomas has made a valuable contribution to the ongoing scholarship on the “riddle” we both seek to solve—the meaning of the Fourteenth Amendment in relation to the Bill of Rights. Let the debate continue—as I am sure it will.