

THE FOURTEENTH AMENDMENT: RECALLING WHAT THE COURT FORGOT

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I. OVERVIEW

This Article is about forgetting and recalling aspects of the Fourteenth Amendment. In Part II, I briefly address some uses of our constitutional past. Both the best account of the past and what to make of that account are intensely controversial. Part III will look at the general history of the Fourteenth Amendment and at four specific issues: incorporated fundamental rights; less textually explicit fundamental rights; the state action doctrine that seriously limited the congressional effort to protect fundamental rights from private terrorism; and the forgotten second section of the Fourteenth Amendment. Part IV will look at the history and role of the Court. First, it looks at the historical context in which demands for strict construction, original intent, and original meaning as the test of constitutional meaning arose. Then, in the context of Fourteenth Amendment history, Part IV will look at the claim that the original expectations (narrowly understood) of people at the time should be, as an initial matter at least, the sole test. It will explain why that approach is unsatisfactory, looking particularly at equal protection and other issues. Part V will briefly address the claim that the Fourteenth Amendment—and, by similar logic, the Thirteenth Amendment ending slavery—was an unconstitutional constitutional amendment.

II. THE USES OF THE PAST

The idea of forgotten constitutional provisions suggests the need to remember forgotten history. Constitutional history has many uses. History provides vicarious experience. Thomas Jefferson thought that citizens needed to study history to provide them with the knowledge required to maintain a free, republican government. According to Jefferson:

History by apprizing them of the past will enable them to judge of the future; it will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men; it will enable them to know ambition under every disguise it may assume; and knowing it, to defeat its views. In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, and wickedness insensibly open, cultivate, and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe their minds must be improved to a certain degree.¹

History also provides perspective. If things are bad today, the past was often worse, and things (sometimes) got better. Albion Tourgée was the lawyer who challenged state-imposed railroad segregation in *Plessy v. Ferguson*.² He lost the case.³ In *Plessy*, according to Tourgée, the Court validated the triumph of caste—“the legal subjection of one class to the domination and control of another.”⁴ The result was disappointing, but not a great surprise. Writing from the perspective of the 1890s, Tourgée said that the Supreme Court had “always been the consistent enemy of personal liberty and equal right”⁵

To many of his contemporaries, Tourgée and other crusaders for progressive change were fools. But, as Tourgée knew, history shows that the future may reveal things differently. In the introduction to his book, *A Fool's Errand*, Tourgée wrote:

The life of the Fool is full of the poetry of faith. . . . He differs from his fellow-mortals chiefly in this, that he sees or believes what they do not, and consequently undertakes what they never attempt. If he succeed in his endeavor, the world stops laughing, and calls him a Genius: if he fail, it laughs the more, and derides his undertaking as *A Fool's Errand*. So the same individual is often both fool and genius . . . a fool

1. Thomas Jefferson, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS 274 (Merrill D. Peterson ed., 1984).

2. Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENT. 187, 187 (1996).

3. *Id.*

4. *Id.* at 193 (quoting OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 334 (1965)).

5. *Id.*

to one century and a genius to the next. . . .⁶

In addition to providing vicarious experience and consolation, history can provide inspiration. As Russell Baker noted, the human and fallible heroes of the past have failed to keep up with the times as a result of being dead. Still, those who struggled for religious toleration, free speech, representative government, democracy, an end to slavery, women's rights, gay rights, and racial tolerance are inspiring. They provide a reminder that historical moments exist in which humane change triumphs and individual efforts matter.

The call to remember forgotten constitutional provisions has all of these advantages, but more is involved. People search the past and argue about its meaning in an effort to change the present and control the future.⁷ History is a major battleground in the battle over what kind of Constitution we will have. Movement conservatives have often looked to one version of history both to resist progressive changes or to legitimate their proposed radical changes (or gradual changes in a radical direction) in constitutional law. Liberals and progressives look to forgotten constitutional provisions to legitimate a different constitutional understanding or to conserve progressive constitutional changes of the past seventy years.

A. *Constitutional Provisions: Forgetting and Recalling*

There are better and worse accounts of the meaning of the past. It is important to keep two questions separate. One very difficult problem is to produce an accurate and meaningful historical account. The other problem is applying the history to law. Should past expected application of a constitutional provision, as opposed to a broader constitutional principle, control the meaning of our Constitution today? What, for example, should

6. *Id.* at 199 (quoting ALBION TOURGÉE, A FOOL'S ERRAND, BY ONE OF THE FOOLS 3 (New York, Fords, Howard & Hulbert, 1880)).

7. *E.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 9 (1986) (discussing how the crusade against slavery shaped the Fourteenth Amendment on the Bill of Rights question); Fred Arthur Bailey, *Free Speech and the Lost Cause in the Old Dominion*, 103 VA. MAG. HIST. & BIOGRAPHY 237 (1995) (describing how Virginia citizens rewrote the history leading to the Civil War to protect the pre-Civil War elite and to protect Southern schoolchildren from northern ideas); C. Vann Woodward, *American Attitudes Toward History* 1–20 (1955), *reprinted in* THE HISTORIAN AS DETECTIVE 24–38 (Robin W. Winks ed., 1981).

the Fourteenth Amendment mean for blacks,⁸ women,⁹ gays,¹⁰ or the poor?¹¹

Several of the Fourteenth Amendment's key clauses and historic purposes were long forgotten and still are. The Privileges or Immunities Clause has been so completely forgotten that Professor Akhil Amar calls it "the lost clause."¹² It was designed to provide protection for fundamental rights across the nation. One of its purposes was to require the states to obey the guarantees of the federal Bill of Rights. The Court generally rejected application of the Bill of Rights to the states until the 1930s, but by the end of the 1960s, the Warren Court had largely, and often appropriately, achieved that result by selective incorporation of Bill of Rights liberties through the Due Process Clause.

By the time the Warren Court acted, the history that supported application had been largely forgotten. That fact fueled conservative claims that requiring states to obey the Bill of Rights was another example of rampant Warren Court judicial activism. Still, one purpose of Section 1 of the Fourteenth Amendment was to require states to obey the Bill of Rights.

Because the Privileges or Immunities Clause has been largely

8. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing the separate but equal doctrine), and *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding an African-American's conviction for cohabitation with a white woman), with *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954) (abolishing the separate but equal doctrine), and *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a statute preventing marriages between persons based solely on race violated the Fourteenth Amendment).

9. Compare *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (upholding Illinois's right to refuse to grant women licenses to practice law), and *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan's right to refuse to grant bartending licenses to women), with *Reed v. Reed*, 404 U.S. 71 (1971) (holding that the Fourteenth Amendment prohibits discrimination based on gender), and *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Fourteenth Amendment prohibits Virginia's maintenance of a military college exclusively for males).

10. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia's sodomy criminalization statute) with *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding a Texas statute making same-sex anal sex a crime unconstitutional under the Fourteenth Amendment).

11. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Fourteenth Amendment requires indigent defendants to be provided with legal counsel in criminal prosecutions).

12. Akhil Reed Amar, *Lost Clause*, THE NEW REPUBLIC, June 14, 1999, at 14.

forgotten by the Court (though not by commentators), its role in protecting other basic rights that are less explicitly set out in the text of the Constitution has also been forgotten by the Court. The Fourteenth Amendment theory that would have allowed Congress to protect American citizens against politically inspired Klan terrorism has been largely forgotten by the Court and most constitutional law casebooks. The Court's state action doctrine, combined with its long refusal to recognize that the Fourteenth Amendment expanded the protection of Bill of Rights liberties beyond the federal government, helped to undermine congressional statutes designed to protect fundamental rights from private terrorists. The Court has entirely forgotten this more protective reading of congressional power to enforce the Fourteenth Amendment. Judicial amnesia is not surprising: the Court's decisions played a significant role in enabling politically motivated terrorism. The desire not to face that ugly fact is understandable. In 2003, the Court discussed the history of the Klan in *Virginia v. Black*, and did not mention the Court's role in hobbling federal statutes aimed at protecting citizens' exercise of fundamental constitutional rights—such as speech, press, assembly, association, and the right to possess arms—from Klan terrorism.¹³

The Court, Congress, and the nation have largely forgotten Section 2 of the Fourteenth Amendment. As a result, in the 1890s when the former Confederate states began passing politically motivated laws designed to disenfranchise blacks and poor whites, they did not lose—as they should have—a substantial part of their representation in the House of Representatives and a substantial part of their power in the Electoral College. Disfranchisement continued until the 1960s. Today, states are again experimenting with facially neutral, politically motivated laws designed to purge poor and disproportionately black voters from the voter rolls. In the first reaction to Reconstruction, Republican and Populist voters were targeted. Today, similar classes are targeted because they tend to vote Democratic. The Post-Reconstruction Supreme Court approved the disfranchisement of the 1890s. The new and more “movement conservative” Supreme Court appears poised to approve this second, more subtle effort as well.

The first Reconstruction was followed by a long period of reaction. To some degree, the same is true for the Second Reconstruction. The Supreme Court did little to advance, and later torpedoed, efforts of the first Reconstruction. The Warren Court, along with President Lyndon

13. *Virginia v. Black*, 538 U.S. 343, 352–57 (2003).

Johnson and Congress, helped to advance the second, to the great dismay of its many critics. The long reaction against the Second Reconstruction has featured attacks, directly or by implication, on the decisions of the Warren Court.

III. THE FOURTEENTH AMENDMENT: HOW ITS PRIMARY PROVISIONS WERE FORGOTTEN AND ITS ENFORCEMENT WAS HOBBLLED

A. *The Fourteenth Amendment Remembered in Context*

The Fourteenth Amendment emerged from overlapping struggles over slavery, civil liberty, and race that led to the Civil War. When the 39th Congress convened shortly after the end of the Civil War, it confronted immediate problems. One was restoration of the rebellious states to the Union. With the abolition of slavery, Southern states, like a number of Northern ones, still denied blacks the right to vote. Under the newly amended Constitution, the former slaves would be counted as full persons—not three-fifths of a person—for purposes of representation in the House of Representatives and the Electoral College. This would swell the representation of the former Confederate states. Once the Southern states resumed their places in Congress, the old Southern elite could wield its enhanced political power in combination with Northern Democrats to control the nation. In any case, no new security for liberty and equality would be possible in the foreseeable future. Congress faced other problems as well.

Under a pre-Civil War understanding of the Constitution—one rejected by virtually all Republicans—once they were fully restored to the Union, the Southern states would have extremely broad power over the rights and liberties of all residents, including the newly freed slaves, white Republicans, and Unionists. Nor were these worries merely theoretical.

After they ratified the Thirteenth Amendment as they were required to do, Southern states and localities passed Black Codes. These Codes denied newly freed blacks many basic rights, including freedom of movement, freedom to contract, freedom to own property, the right to testify against whites, and freedoms to preach, to speak, to assemble, and to possess firearms.¹⁴ These restrictions were enforced by cruel punishments.

14. See CONG. GLOBE, 39th Cong., 1st Sess. 516–17 (1866) (containing Ordinance of Opelousas, La., cited by Rep. Eliot that limited freedom of movement for blacks and forbade public meetings and preaching without permission); 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY,

Some codes required Americans of African descent to sign annual contracts to perform agricultural labor unless they could get a license from a local magistrate certifying skills to pursue another trade. Other codes specified how black children could be taken from their parents and used as apprentices.¹⁵ For Republicans, the Codes, which denied blacks the right to hold property, to contract, to teach, and to preach, were “in violation of the rights of a freeman.”¹⁶ The Fourteenth Amendment provided two reciprocally reinforcing safety devices against such abuses: it guaranteed basic liberties and it guaranteed equality.

The pre-war constitutional order had sanctioned slavery, which Republicans saw as an “institution of outrage and wrong and crime against humanity.”¹⁷ As most Republicans saw it, post-Civil War Southern states had repudiated slavery in name, but not in fact.¹⁸ The Southern elite were resurrecting slavery under a different name. The resurrection was supported by invocations of “states’ rights.”

A new birth of slavery threatened more than blacks. An unreconstructed South threatened the liberty and safety of Southern Republicans and loyalists. Republicans feared that the Southern states, with a new form of slavery, would revert to their pre-Civil War despotic behavior. As Republicans had said again and again, slavery had been “contrary to the genius of free government.”¹⁹ It undermined liberty for whites as well as blacks. Its influence had contaminated the Constitution. It “gave the lie direct to its declaration of rights.”²⁰ In the interest of protecting slavery, slave states had outlawed anti-slavery speech and tolerated mob suppression of Republicans and other opponents of slavery. As John Bingham and other leading Republicans noted, mobs had driven politically active Republicans from their homes.²¹ A new form of slavery

SOCIAL, RELIGIOUS, EDUCATIONAL AND INDUSTRIAL, 1865 TO THE PRESENT TIME 279–81 (1906) (containing the Ordinance of St. Landry Parish regulating freedmen in Louisiana).

15. ORVILLE VERNON BURTON, *THE AGE OF LINCOLN* 267–70 (2007) (describing elements of Black Codes, including the use of African-American children as indentured apprentices).

16. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull).

17. *Id.* at 1006 (statement of Rep. Clarke).

18. *See, e.g., id.* at 470 (statement of Rep. Broomall).

19. *Id.* at 866 (statement of Rep. Newell).

20. *Id.*

21. *See* MICHAEL KENT CURTIS, *FREE SPEECH*, “THE PEOPLE’S DARLING

seemed equally threatening.

Discussions in Congress are one source that illuminates the public understanding of the meaning of the Fourteenth Amendment. Republicans explicitly said that they were determined not to return to the abuses of the past. They would not accept “the ancient order of things, when liberty of speech was abridged, and the bludgeon used to silence the voice eloquently pleading for the oppressed of the land.”²² Again and again, in debates on the Thirteenth Amendment and Reconstruction in the 39th Congress, Republicans referred to suppression of speech and democratic rights in the South before the war. Slavery could not be secure, said Representative Plants in 1866, “if men in the slave States were permitted to discuss the matter in any form . . . [so] freedom of speech and the press must be suppressed as the highest of crimes; and no man could utter the simplest truths but at the risk of his life.”²³ Congressman Donnelly called for the enforcement of the “sacred pledges of life, liberty, and property” and of “all the guarantees of the Constitution.”²⁴ The alternative was a revival of “the old reign of terror . . . in the South, when no northern man’s life was worth an hour’s purchase.”²⁵ Nor had the subversion of free speech and free religious expression been limited to the South. Before the war, mobs in Northern states had repeatedly attacked anti-slavery speakers, meetings, and newspapers—a fact Republican congressmen and senators recalled from 1864 to 1866.²⁶

Republicans were looking for reform. Instead of reform, however, Republicans saw renewed invocations of state sovereignty and states’ rights, renewed defiance of fundamental rights, and renewed efforts to reduce blacks to a state of semi-slavery. “In not a single southern State,” complained Representative Ward, “have they done justice to the freedmen.

PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 285 (2000) (“Today, it would cost a man his life to rise deliberately in the Legislature of Virginia and announce a sentiment in favor of emancipation”) (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1861 (1860) (statement of Rep. Bingham)).

22. CONG. GLOBE, 39th Cong., 1st Sess. 911 (1866) (statement of Rep. Cullom).

23. *Id.* at 1013.

24. *Id.*

25. *Id.*

26. See CURTIS, *supra* note 21, at 131–54, 216–40 (describing incidents of suppression of abolitionist free speech and the reaction to them); CURTIS, *supra* note 7, at 38 (“[s]lavery . . . ‘throws types into the rivers when they do not print its will’” (quoting CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson))).

In not one have they passed just and equitable laws that will protect him in his rights. The courts are rebel, the jurors rebel, Legislatures rebel Freedom of speech, as of old, is a mockery.”²⁷

For the great many Republicans who shared these views, the issue went far beyond the rights of blacks to contract, testify, and own property. It went to the heart of free government; a government in which citizens enjoyed—throughout the land and in every state—all the rights, liberties, privileges, and immunities contained in the Constitution. These included not only those in the Bill of Rights, but also some less clearly defined rights, such as the right to liberty and the pursuit of happiness, a basic equal right to own property and contract, and substantial equality with other state citizens.

To a remarkable degree, Republicans thought Americans had, or should have, these rights. They reached this result by various routes. Some invoked structural reasoning—seeing how the Constitution needed to be interpreted to attain its objectives now that the incubus of slavery had been removed. Under a widely held Republican view, by virtue of citizenship people born in the country were entitled to fundamental constitutional rights, to protection by the government, and to equality with other citizens of their states as to fundamental interests. For many Republicans, not only did all citizens have these rights, but possession of the rights also meant they had a right to exercise the rights and be protected in doing so.²⁸

This protection could and should come from the national as well as state governments. From 1866 to the 1870s, when they legislated to protect basic rights, Republicans repeatedly applied the laws enforcing the Fourteenth and Fifteenth Amendments to all sections of the nation. They rejected limiting the application of the laws to one section or to particular states or areas that were at the moment engaging in flagrant denials of the rights.²⁹

Republicans in Congress in 1866 believed that the meaning of the Constitution had to be understood in light of a changed post-Civil War world, a world in which slavery had been abolished. They gave the

27. CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866).

28. See CURTIS, *supra* note 7, at 49–56, 80–81.

29. See, e.g., Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866); Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140, 141; Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13. Each of these laws was worded to broadly apply to all citizens.

Constitution what they considered its true meaning, not the meaning they thought had been distorted by slavery. Slavery, said Representative Hill, had “coiled its slimy length upon the bench where jurists sat . . . and with serpent guile it hissed forth decrees and judgments which will eternally disgrace the jurisprudence of the age”³⁰ Even before the Fourteenth Amendment, Representative Anderson insisted that (contrary to *Dred Scott v. Sandford*) free blacks were citizens of the United States and were “entitled to the best protection we can afford them.”³¹ Anderson said that Congress needed to make the Thirteenth Amendment fully effective. “We are today interpreting the Constitution from a freedom and not from a slavery stand-point. The old interpretation of the Constitution was from a slavery stand-point.”³² “[T]he *Dred Scott* case is old now,” said Representative Thayer, “and as for Hobb and Fogg, they were before the flood. The war . . . has made a new slate in many things relating to law”³³

Republicans generally rejected the doctrine that states’ rights or state sovereignty allowed the states, as before the Civil War, largely unfettered control over fundamental rights of persons and citizens. “Hitherto,” said Senator Howe of Wisconsin, “we have taken the Constitution in a solution of the spirit of State rights. Let us now take it as it is sublimed and

30. CONG. GLOBE, 39th Cong., 1st Sess. 1469 (1866) (statement of Rep. Hill). For an argument that the Amendment was merely designed to secure equality under rights states choose to accord and emphasizing states’ rights concerns, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 114–19 (1988). For a discussion critical of Professor Nelson’s use of evidence on this point and responding by expanding the context, see Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and The Fourteenth Amendment*, 38 B.C. L. REV. 1, 56–65 (1996). For a recent discussion of the Bill of Rights issue, 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) and authorities cited, particularly AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998), and Richard Aynes, *On Misreading Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993). For a different perspective, see George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007).

31. CONG. GLOBE, 39th Cong., 1st Sess. 1478 (1866) (statement of Rep. Anderson).

32. *Id.*

33. *Id.* at 282.

crystallized in the flames of the most gigantic war in history.”³⁴ Congressman Newell rejected the invocation of states’ rights. To those invoking it, states’ rights still meant “the right of an oligarchy to deprive the people of their liberties”³⁵ States, he said, needed to respect the Constitution and “human rights.”³⁶ Senator Nye responded to the invocation of “states’ rights” by asking, “Why do you not talk about State wrongs?”³⁷

Still, as always, there were cross currents. Congressman Hale, for example, told Congressman John A. Bingham—the author of Section 1 of the Fourteenth Amendment, except for the Citizenship Clause—“that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States.”³⁸ Still, Hale thought the states were legally obligated to obey the commands of the federal Bill of Rights.³⁹ Hale said the system of decentralized government served to protect individual rights. Virtually all Republicans believed in a federal system and did not want Congress to be able to preempt all state laws. Pre-war ideas of states’ rights were generally repudiated, but Bingham’s early version of the Fourteenth Amendment, which seemed to a number of Republicans to allow Congress unlimited legislative power over virtually all state matters, was tabled. Republicans wanted to preserve the states, the federal system, and protect fundamental rights. States were to be kept “within their orbits”—orbits that would keep them from colliding with the fundamental rights of citizens and persons.⁴⁰

Some expressly declared their belief in an evolving Constitution. Congressman Plants thought that even “without any formal amendments the Constitution has changed, and will continue to change, with the ever-changing wants and will of the people.”⁴¹ According to Plants, the understanding of the Constitution, like that of the Bible, was shaped by

34. *Id.* at 163.

35. *Id.* at 868.

36. *Id.*

37. *Id.* at 2526.

38. *Id.* at 1065.

39. *Id.* at 1063, 1065. For Bingham’s rejoinder on the Bill of Rights issue, see *id.* at 1064.

40. CURTIS, *supra* note 7, at 69 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge)).

41. CONG. GLOBE, 39th Cong., 1st Sess. 1011 (1866).

“what the prevailing sentiment makes it by interpretation.”⁴² Plants had an optimistic vision of the constitutional future: “All laws founded on caste will be repealed. All races and all sexes will be enfranchised.”⁴³ And so, eventually, it was to be. Many read the constitutional text in light of its principles and ideals. “[T]he fundamental principles of government as proclaimed by our fathers may not change,” explained Senator Wiley of West Virginia, “but their application may be made more complete.”⁴⁴ “This is an age of progress,” he explained, “progress of ideas, of science, of philosophy, of civilization, of law, of liberty.”⁴⁵

In response to the Black Codes, Congress passed the Civil Rights Act of 1866. After declaring persons born in the country to be citizens, it continued:

[S]uch citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .*⁴⁶

Fundamental rights such as those in the Bill of Rights had often been described as provisions for the security of persons and property.⁴⁷ So the Civil Rights Act could be and was read by a number of Republicans not merely as an antidiscrimination provision, but as consistent with their idea that states were required to respect the liberties contained in the federal

42. *Id.*

43. *Id.* at 1015.

44. *Id.* at 3439.

45. *Id.*

46. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866) (emphasis added).

47. CURTIS, *supra* note 7, at 71–73 (noting references to the right for security of person and property as including Bill of Rights-type liberties); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *1–12; Curtis, *supra* note 30, at 50–52 (explaining that the right for the security of person and property was used “as a shorthand summary of Bill of Rights liberties”); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 923, 932 (1986) (discussing Chancellor Kent and leaders in the 39th Congress who cited and relied on him); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449–50 (1856) (referring to rights in the Bill of Rights as rights of person and property).

Bill of Rights.⁴⁸ Liberty and equality were reciprocally reinforcing conceptions. Of course, when the Fourteenth Amendment later made all persons born in the nation citizens and guaranteed rights to all citizens and liberties to all persons, it provided very important and very substantial equality.

The Civil Rights Bill was challenged as unconstitutional. In support of the power to pass it, Republicans in Congress relied on the Thirteenth Amendment, which they read not merely to outlaw chattel slavery, but as guaranteeing full and meaningful freedom and allowing Congress to enforce it. Though some Northern states that prohibited slavery had passed laws like the Black Codes, supporters of the Civil Rights Act saw such discriminations as badges of slavery.⁴⁹

Republicans advanced other justifications for the Civil Rights Act as well. With the abolition of slavery, they insisted blacks were now citizens of the United States. Every government had inherent power to protect its citizens, and the fact of national citizenship entitled citizens to liberty and equal rights.⁵⁰ States had broad power to define property rights, rights to

48. CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866) (statement of Sen. Dixon) (“Congress has given us, in the civil rights act, a guarantee for free speech in every part of the Union.”); CURTIS, *supra* note 21, at 371–72 (citing *The Civil Rights Bill in the Senate*, N.Y. EVENING POST, Apr. 7, 1855, at 2). *But cf.* CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (statement of Rep. Thayer) (Section 1 protected the principles protected by the Civil Rights Act); *id.* at 2468 (statement of Rep. Kelly) (suggesting that provisions of Section 1—which include requiring states to accord due process—may already be in the Constitution); *id.* at 2539 (statement of Rep. Farnsworth) (suggesting that all provisions in Section 1 except equal protection are in the Constitution already, which would include the Due Process Clause as a limit on the states).

49. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (statement of Sen. Sherman) (declaring that the Thirteenth Amendment guaranteed “liberty to every inhabitant of the United States”).

50. *See, e.g., id.* at 215 (statement of Rep. Davis) (“I believe the black man in this country is entitled to citizenship, and by virtue that citizenship is entitled to protection to the full power of this Government where ever he may be found, on the face of God’s earth . . .”). Citizenship carried with it basic rights. Statements by some that the Civil Rights Bill did not go beyond securing equality of rights are often qualified. For example, Senator Trumbull sometimes said the bill would not operate in states that did not discriminate in civil rights, but later was more precise: “Each state, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases . . .” *Id.* at 1760. Congressman Shellabarger said:

testify, etc., provided they did not violate fundamental rights. But they could not define property and testimony to deny black men their right to equality. In search of power to protect the rights of citizens, Republicans also often appealed to what they saw as ignored parts of the Constitution and forgotten interpretations—parts that, as they saw it, provided protection for American citizens and allowed Congress to ensure that protection.⁵¹

The Fourteenth Amendment was an attempt to transcend old understandings of the constitutional rights of Americans and of the federal system. It attempted to give the nation a new birth of constitutional freedom. One common theme leading up to the passage of the Amendment was the need for “irreversible guarantees of liberty,”⁵² which would secure protection for the “rights of men—men of all classes and conditions.”⁵³ Representative Bingham and many others emphasized the need to put guarantees in the Constitution, “thus placing [them] above the power of South Carolina to repeal [them].”⁵⁴ Together with Bingham, others emphasized the need to enforce all the guarantees in the Constitution,⁵⁵ to give citizens “protection in their natural and personal

[E]xcept so far as [the Civil Rights Bill] confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is . . . to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinction based on race . . .

..

Id. at 1293.

51. See, e.g., *id.* at 1263 (statement of Rep. Broomall) (noting that the government had been held incompetent to protect the liberty of the citizen in the states and giving his interpretation of the Preamble, the general welfare clause of Article I, Section 8, and the privileges and immunities clause of Article IV, section 2 as supporting a different interpretation); *id.* at 1062–63 (statement of Rep. Kelley) (federal power to protect the rights, liberties, privileges, and immunities of the humblest citizen should have been understood to be in the Constitution from the beginning but need to be made explicit).

52. *Id.* at 112 (statement of Rep. Wilson).

53. *Id.* at 207 (statement of Rep. Farnsworth).

54. *Id.* at 123 (statement of Rep. Bingham); see also *id.* at 404 (statement of Rep. Lawrence) (speaking on the need to make “fundamental changes in our organic law and ingrafting on it irreversible guaranties”).

55. See, e.g., *id.* at 586 (statement of Rep. Donnelly) (proclaiming that the Constitution should be “a shield and a protection, over the head of the lowliest and poorest citizen in the remotest region of the nation”).

rights enumerated in the Constitution.”⁵⁶

Bingham faced a serious obstacle in convincing his colleagues. Leading Republicans thought Congress already had the power to enforce the rights enumerated in the Bill of Rights so as to protect citizens in the states, giving it an alternative power to pass the Civil Rights Bill.⁵⁷ By this view, states were already legally bound to respect the liberties in the Bill of Rights. For some of these people, Bingham’s Section 1 of the Fourteenth Amendment was unnecessary and did not accomplish much. In the end, however, virtually every Republican agreed to the proposed Fourteenth Amendment as necessary, or at least as useful, to further a reading of the Constitution that protected rights of American citizens and other persons throughout the nation and within all the states.

Senator Nye of Nevada, like many other Republicans, thought that states already (before the Fourteenth Amendment) needed to conform to “the enumeration of personal rights in the Constitution.”⁵⁸ “In the enumeration of natural and personal rights to be protected,” Nye continued:

the framers of the Constitution apparently specified everything they could think of—“life,” “liberty,” “property,” “freedom of speech,” “freedom of the press,” “freedom in the exercise of religion,” “security of person,” &c.; and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that the “enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated.” This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law. Congress has no power to invade them

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

56. *Id.* at 1032 (resolution of Rep. McClurg).

57. *Id.* at 1294 (statement of Rep. Wilson); *id.* at 1153 (statement of Rep. Thayer).

58. *Id.* at 1072 (statement of Sen. Nye).

....

While slavery existed as a political power, it was not possible to adopt a true construction of the fundamental law. It was not possible to assert with success or vindicate the power of Congress The power of Congress is not a dangerous power, for it is only a power of protection.

. . . No State government that does not accord in spirit and form with the principles of the Constitution is legitimate It never was anything else than the offspring of the political heretic, State sovereignty It has been trying ever since it was born to overthrow the principles embraced in the Declaration of Independence. It has sought with great pertinacity and success to regulate public opinion by mobs.⁵⁹

John A. Bingham initially proposed a constitutional amendment that gave Congress power to enforce privileges or immunities and equal protection in the rights of life, liberty, and property. Several Republicans feared that the Bingham's equal protection proposal would allow Congress to pass preempting laws on all subjects of state legislation. A second objection was that any law passed under the first Bingham proposal could be repealed by a subsequent Congress.⁶⁰ Bingham's first attempt was tabled. What emerged from the Joint Committee and became the final version made all persons born in the nation citizens of the United States and of their states, and it provided that no state shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of equal protection, or of life, liberty, or property without due process of law. Section 5 gave Congress the power to enforce the amendment.

B. The Amendment's Privileges or Immunities Clause: Forgotten or Perhaps Just Ignored

The Framers accepted the virtues of a federal system with a substantial role for the states. They were unwilling to have the federal government take over virtually all state law issues. But theirs was a

59. *Id.* at 1072–73.

60. *Id.* at 1095 (statement of Rep. Hotchkiss) (“Now, I desire the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman [John A. Bingham] wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.”).

transformed vision of federalism, with states required to respect the fundamental rights of American citizens. Citizens' fundamental rights would be protected by the national law. While the plan for national protection of fundamental rights was comparatively clear, the mechanism by which that protection would occur was somewhat less clear. Both Congress and the Court could deal with state laws that violated fundamental, national rights. But, beyond the liberties in the Bill of Rights, due process, and equal protection, just what would these rights be? Could Congress also deal with private action that attacked Fourteenth Amendment rights? When they later confronted this issue, most Republicans thought so, but some dissented.⁶¹ At any rate, much of the vision for national protection of fundamental rights was quickly forgotten or simply ignored by the Supreme Court.

1. *The Bill of Rights*

The Fourteenth Amendment was crafted to secure equal protection and due process to all persons and to protect the privileges or immunities of citizens of the United States, including rights in the Bill of Rights. It required states to respect these rights. The Privileges or Immunities Clause protected these rights for citizens, and the Due Process Clause protected many basic rights for all persons—including the procedural protections of the Bill of Rights, such as jury trial, confrontation, and the privilege against self-incrimination.

John Bingham's plan to require states to obey the Bill of Rights under the Fourteenth Amendment followed precedent. In *Barron v. City of Baltimore*, Chief Justice Marshall had said the rights in the Bill of Rights limited only the federal government.⁶² Had the Framers intended these rights to limit the states, Marshall said the list would have been prefaced with "no state shall."⁶³ John Bingham, the primary author of Section 1, said that he re-read *Barron*, and he prefaced Section 1 with *Barron's* suggested words: "No state shall . . ."⁶⁴ The language was consistent with that used in the original Constitution to put limits on the states in the

61. See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 3809, 3884 (1870) (vote on the Enforcement Act); CONG. GLOBE, 42d Cong., 1st Sess. 779, 808 (1871) (vote on the KKK Act).

62. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 248–49 (1833).

63. *Id.* at 250.

64. CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham).

interest of liberty in Article I, Section 10.⁶⁵ It also followed the “no state shall” form James Madison used when he attempted, albeit unsuccessfully, to protect “the invaluable privileges” of free press, religious freedom, and jury trial from the states.⁶⁶

The words “privileges” and “immunities” were an appropriate collective description of fundamental rights of United States citizens, including those in the Bill of Rights. In proposing his bill of rights to the first Congress under the Constitution, James Madison had referred to the rights of press, conscience, and jury trial as “invaluable privileges.”⁶⁷ His usage was not unique; it was common. Before the framing of the Fourteenth Amendment, the words “privileges” and “immunities” had long and widely been used to describe liberties such as those in the Bill of Rights—speech, press, jury trial, immunity from unreasonable search and seizure, etc.⁶⁸ These liberties had commonly been described as privileges, immunities, or rights of American citizens.⁶⁹ The Fourteenth Amendment referred to “privileges or immunities of citizens of the United States,” making clear that the rights protected were national, not simply local, rights.⁷⁰

Both John A. Bingham, the primary author of Section 1, and Jacob Howard, who explained the amendment to the Senate on behalf of the Joint Committee that proposed it, clearly signaled that the privileges or immunities of citizens of the United States included rights in the Bill of Rights.⁷¹ They also said that the privileges and immunities of citizens of the United States were not limited to those in the first eight amendments;

65. U.S. CONST. art. I, § 10.

66. 1 ANNALS OF CONG. 441 (Joseph Gales ed., 1789) (statement of Rep. Madison).

67. 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, 1103–04 (2000).

68. *Id.* at 1110.

69. *Id.* at 1110–11.

70. U.S. CONST. amend. XIV, § 1 (emphasis added).

71. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard); *see id.* at 1033–34, 1088–89 (statement of Rep. Bingham) (discussing the earlier version of his amendment); *id.* at 2542 (statement of Rep. Bingham) (discussing the final version of his amendment); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham). For detailed press accounts of Howard’s speech, *see, e.g., Senator Howard’s Speech*, PHILA. INQUIRER, May 24, 1866, col. 2, at 8; N.Y. TIMES, May 24, 1866, col. 5, at 1.

they included other constitutional rights as well.⁷² Since the rights to be protected went beyond those in the Bill of Rights, a simple reference only to the Bill of Rights would not have been appropriate.

The Due Process Clause should also be read to protect the criminal procedure guarantees of the Bill of Rights for all persons. These are literally process guarantees, and a pre-Civil War Supreme Court case had suggested that due process would be measured in part by those processes required by the Constitution.⁷³ Basic due process and criminal procedure rights were secured to all persons.

Finally, the slave state suppression of anti-slavery speech and press, as well as anti-slavery religious expression, had been major grievances of Republicans and opponents of slavery. The suppressions were enforced by searches, seizures, and cruel punishments. Alleged fugitive slaves had been denied a civil jury trial. Republicans and others had repeatedly described these suppressions of speech, press, and religious expression as violating the constitutional rights or privileges of American citizens.⁷⁴

The idea that the Fourteenth Amendment was designed to ensure that states respected the rights in the Bill of Rights is supported by multiple sources: the text of Section 1; a common historic usage of the words “privileges” and “immunities”; the way “no state shall” limits on the states in the interest of liberty were phrased in Article I, Section 10 of the Constitution; Chief Justice Marshall’s instance that “no state shall” was the way to craft a provision to require states to obey the Bill of Rights; John Bingham’s later statement that he explicitly followed Chief Justice

72. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (stating that, in addition to those in the Bill of Rights, privileges or immunities include fundamental rights of free citizens that cannot be fully defined); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham) (privileges or immunities are chiefly defined in the first eight amendments).

73. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855); see 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1136–37 (1953) (at the time of the framing of the Fourteenth Amendment, the decision in *Murray’s Lessee* established that the criminal procedure and other process rights in the Bill of Rights were encompassed in due process); see also William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 6–7 (1954) (arguing that the holding in *Murray’s Lessee* means that the process guarantees of the first eight amendments are included in due process).

74. See generally CURTIS, *supra* note 21, at 271–99; CURTIS, *supra* note 7, at 105–06.

Marshall's instructions; the statements of the Fourteenth Amendment's two leading proponents in Congress; the widely expressed aspirations of Republican congressmen in the 39th Congress to see that the liberties in the Bill of Rights were respected; the history of suppression of those rights in the interest of slavery; and the fear that the South was seeking to re-institute slavery under another name and to resume prior despotic practices.

History rarely speaks with just one voice, and diversity existed among the many individuals who discussed the Fourteenth Amendment. Still, the preponderance of the evidence strongly supports the idea that the Fourteenth Amendment in general and the Privileges or Immunities Clause in particular were designed to protect fundamental rights, including rights in the Bill of Rights. Not a single person explicitly contradicted Bingham and Howard on the Bill of Rights, though a few did say things that can be read as inconsistent with this reading.⁷⁵ Reading the Fourteenth Amendment to protect Bill of Rights liberties responds to

75. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866) (statement of Rep. Latham) (suggesting an identity between the Civil Rights Act and Section 1); *id.* at 2539 (statement of Rep. Farnsworth) (suggesting that all of Section 1 was already in the Constitution, except for equal protection); *id.* at 2511 (statement of Rep. Eliot) (seemingly reading the Privileges or Immunities Clause as an antidiscrimination provision); see also *The Great Meeting*, DAILY CHAMPION (Atchison, Kan.), Aug. 21, 1866, at 2 (speech of Sen. Pomeroy) (stating Section 1 makes the “idea embodied in the Civil Rights Bill a part of the fundamental law” and referring specifically to the citizenship provision); *Hamlin*, PHILA. PRESS, Oct. 4, 1866, at 1 (speech of Hannibal Hamlin) (Section 1 “embodies the civil-rights bill, which says that every child born under our flag shall be an American citizen,” and is designed to “give every man in the country complete protection for his person and property . . .”). Suggestions that the Fourteenth Amendment was essentially identical to the Civil Rights Act do not, as is sometimes supposed, negate application of the Bill of Rights to the states. The Civil Rights Act secured to citizens the full and equal benefit of all laws and provisions for the security of persons and property, a phrase that could encompass the protections of the Bill of Rights, especially since many Republicans already considered the states bound by these guarantees. See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866). The suggestion of identity implies that the Civil Rights Act had a provision forbidding states to deny persons life, liberty, or property, without due process of law. This provision (and other Bill of Rights liberties limiting the states) could be found in the full and equal benefit of all laws and provisions for the security of person and of property—this phrase was often used to include liberties in bills of rights. That would be so if one assumed that states were already required to obey the guarantees of the Bill of Rights, including the Fifth Amendment Due Process Clause—a view a number of Republicans held.

major historic grievances that existed and were complained about for at least thirty years before the Civil War. These grievances were expressed again and again in 1865 and 1866—particularly suppression in the interest of slavery of liberties listed in the Bill of Rights. In 1866, Republicans added denial of equal civil rights to black citizens to these grievances.

The Fourteenth Amendment was designed to protect the rights of citizens and persons, and the Privileges or Immunities Clause had been expected to do much of the work. Still, the Supreme Court initially rejected application of the Bill of Rights to the states.⁷⁶ Only much later did the Court begin to require states to obey the guarantees. For many years, the Court reduced the Privileges or Immunities Clause to a virtual nullity.⁷⁷ Finding it did not protect fundamental rights in the Bill of Rights was also one of the two ways the Court torpedoed congressional statutes designed to enforce the Fourteenth Amendment.

2. *Other Less Textually Explicit Rights*

Throughout the 39th Congress, invocations of natural rights, of inalienable rights, and of the Declaration of Independence were common.⁷⁸

76. *See, e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (holding the Fifth Amendment protection against self-incrimination does not apply to the states); *Hurtado v. California*, 110 U.S. 516, 534–35 (1884) (holding that due process under the Fourteenth Amendment does not include a right to a grand jury indictment and, though that guarantee can be found in the Fifth Amendment, it is not applicable to the states).

77. *Palko v. Connecticut*, 302 U.S. 319, 324–26 (1937) (holding that the Due Process Clause only encompasses those “privileges” and “immunities” in the Bill of Rights that are fundamental—those that “have been found to be implicit in the concept of ordered liberty”); *Twining*, 211 U.S. at 96 (explaining that decisions such as the *Slaughter-House Cases* “gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended”); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–76 (1873) (holding that the Fourteenth Amendment describes each citizen as having national citizenship and state citizenship, and that the Privileges or Immunities Clause only protects rights inherent in the former, while states have power to regulate and protect the latter).

78. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (discussing the connection between the goals of the Declaration of Independence and the proposed Amendment); *id.* at 1319 (statement of Rep. Holmes) (referring to “the right to life, liberty, and the pursuit of happiness”); *id.* at 1616 (statement of Rep. Moulton) (referring to efforts to secure civil rights to blacks and Union citizens in the South “for the purpose of establishing liberty and equality on the principles of the Declaration of Independence”); *id.* at 305 (statement of Rep. Delano)

Before, as well as after, the congressional passage of the Fourteenth Amendment, Republicans said that rights to liberty and equality were the birthright of American citizens. In his acceptance speech in December of 1865, Speaker Colfax called for guarantees for the protection of inalienable rights.⁷⁹ Representative Hale said that blacks were citizens and the Declaration of Independence applied to all citizens. According to Representative Farnsworth, the Equal Protection Clause was necessary so every subject can “have and enjoy equal rights of ‘life, liberty, and the pursuit of happiness’”⁸⁰ Senator Stewart of Nevada said all members of the Union party “are agreed that all men are entitled to life, liberty, and the pursuit of happiness” and would endorse the means needed “to secure these inalienable rights to every American citizen.”⁸¹ Speaker after speaker during the congressional debates emphasized both liberty and equality.⁸²

The Fourteenth Amendment reflected a widespread pre-existing belief that people had certain inalienable, fundamental rights.⁸³ These were essentially rights of freedom—rights that a citizen of a free government should have. They included rights in the Bill of Rights but also went beyond those specifically listed.⁸⁴ Typically, no one attempted a comprehensive definition of all rights essential to personal freedom. Republicans invoked rights that were not specified in the Constitution.⁸⁵ These included not only freedom of movement and travel, the right not be arrested as a vagrant for want of a long term labor contract, and equality of

(“I accept in their full force and effect the principles of the Declaration of Independence”); *id.* at 393 (statement of Rep. McDougal) (asserting that the Thirteenth Amendment “authorizes Congress to pass a law in aid of its terms” and describes such a proper law as one “declaring that no State legislation or legislation of Congress should effect to deprive any person, regardless of color, of his right to life, liberty, and the pursuit and enjoyment of his happiness”); *id.* at 903 (statement of Rep. Cook) (calling for a constitutional amendment to “make the grand enunciation of the fathers of the Republic, that God created all men equal, and endowed them with inalienable rights, among which are life, liberty, and the pursuit of happiness . . . living, practical truths.”); *id.* at 41 (statement of Sen. Sherman) (advocating protection of blacks in their natural rights).

79. *Id.* at 5.

80. *Id.* at 2539.

81. *Id.* at 2798.

82. *See supra* note 78.

83. *See* CURTIS, *supra* note 7, at 89.

84. *Id.* at 82.

85. *Id.*

rights to make contracts, testify, and hold property, but also rights to teach, preach, and assemble.⁸⁶ These contractual rights and the right to testify, like all rights, were not beyond government regulation, and states retained broad power to define contractual and property rights. Regulations of property and contracts that seemed reasonable to people at the time are plainly irrational by modern standards—for example, today most of us see laws excluding married women from these rights as unreasonable.

Today, many reject the idea that the reference of liberty in the Due Process Clause has substantive content—protecting at least some irreducible minimum of liberty and the right to property. For example, dissenting in *Moore v. City of East Cleveland*, Justice White wrote, “[T]he substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.”⁸⁷ The Privileges or Immunities Clause is a natural place to find substantive rights, including less textually explicit ones.

Still, a number of leading Republicans also seem to have read the Due Process Clause as protecting substantive rights as well as equal enjoyment of civil rights. Senator Henry Wilson complained about Southern laws that severely limited where blacks could live, subjecting them to arrest as vagrants and to being sold for labor to pay off their fines if they lived in the wrong place or lacked a residence. Senator Edgar Cowan—a Republican who later deserted the party on the Fourteenth Amendment issue—cited the Due Process Clause of the Fifth Amendment for the proposition that “the rights of no free man, no man not a slave, can be infringed in so far as regards any of the great principles of English and American liberty”⁸⁸ Cowan claimed (mistakenly, if *Barron* was good law) that there was “ample remedy now” against such Southern laws under

86. *Id.* at 35 (describing some of the rights denied to blacks by the South’s Black Codes); *id.* at 66 (discussing basic rights some saw in Article IV, Section 2’s privileges and immunities and quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (Article IV, Section 2 protects fundamental rights)); *id.* at 135 (complaints in convention of Southern unionists about denial of rights to assemble, to free press, to exercise of religion, to jury trial, and to travel). See *supra* note 14 for provisions of the Black Codes that abridged the right to speak, preach, and assemble.

87. *Moore v. City of East Cleveland*, 431 U.S. 494, 543–44 (1977) (White, J., dissenting).

88. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Cowan).

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the Due Process Clause of the Fifth Amendment.⁸⁹ Though Cowan said no man could be “deprived of his rights without the ordinary process of law,” he seems not to have limited the Due Process Clause to guaranteeing process. Instead he invoked it as preventing arrest, trial, and punishment under laws that he saw as infringing on liberty. Senator Henry Wilson concurred in this interpretation of the Constitution.⁹⁰

Both John Bingham, the primary author of Section 1 of the Fourteenth Amendment, and James Wilson, the chairman of the Judiciary Committee in the House of Representatives, saw the Civil Rights Bill of 1866 as an effort to enforce rights in the Bill of Rights, particularly due process. The Civil Rights Bill provided that all persons born in the nation were citizens and guaranteed to all citizens the same rights that white citizens had to contract, sue, and testify; to hold and acquire real and personal property; and to the full and equal benefit of all laws and provisions for the security of person and property.

Bingham insisted a constitutional amendment was necessary before Congress could enforce the Bill of Rights, as he believed the Civil Rights Bill attempted to do. James Wilson thought enforcement was justified even before the Constitution was amended. Wilson responded to Bingham:

He says we cannot interpose in this way for the protection of rights. Can we not? What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that “no person shall be deprived of life, liberty, or property without due process of law.” I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

....

89. *Id.*

90. *Id.* Senator Wilson concurred that the Constitution provided those protections only “so far as the Constitution can do it,” but argued that the Amendment was necessary to allow Congress the power to pass legislation offering further protection and to nullify the Black Codes. *Id.*

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy.⁹¹

For Wilson, due process encompassed liberty and property rights and rights necessary to the maintenance and enjoyment of life, liberty, and property. The rights to sue and testify fit easily within a Due Process Clause that is read only to guarantee process rights. The rights to hold and convey real and personal property, to free speech, and to freedom of religion, are not process rights.

John Bingham and others also read due process to require equality in the application of laws—to encompass equal protection principles. That approach, as well as a substantive rights approach, could explain protection of substantive rights to property and contract. A mere equality approach would allow Congress to secure equal enjoyment of rights defined by state law. Still, Republicans followed a consensus view that fundamental rights were beyond the power of states to define out of existence. Southern state suppression, by law, of anti-slavery speech, press, and religion applied to all. No one got to speak against slavery—white or black, Southerner or Northerner. Republicans were particular targets. Still, Republicans saw these laws as violating the right to free speech, press, and religion.

Bingham saw the Civil Rights Bill as an effort to enforce the entire Bill of Rights—not just one of the rights. For Bingham and others who believed American citizens possessed fundamental rights including those in the Bill of Rights, these fundamental rights would be encompassed in the Civil Rights Bill's reference to the “*full and equal benefit of all laws and provisions for the security of person and property.*”⁹²

By 1866 it was common to describe the rights in the Bill of Rights as provisions for the security of person and property. For example, Chancellor Kent, who was cited in debates in the 39th Congress, described the right to “personal security” as protecting guarantees of liberty that had been “transcribed into the constitutions in this country from Magna Charta, and other fundamental acts of the English Parliament.”⁹³ His

91. *Id.* at 1294 (statement of Rep. Wilson).

92. CURTIS, *supra* note 7, at 78 (emphasis added).

93. 2 KENT, *supra* note 47, at *12; *see also* Curtis, *supra* note 30, at 51 (“Kent explicitly equated the right to personal security and liberty with many guarantees included in bills of rights For Kent, many of these rights were enshrined in state law and the Federal Constitution”); Kaczorowski, *supra* note 47, at 923 & n.295, 932

examples listed a number of rights protected by the Bill of Rights.⁹⁴ The *Dred Scott* case had referred to the rights in the Bill of Rights as rights of “person and property.”⁹⁵ During the debate on the Freedman’s Bureau Bill, Senator Trumbull explained that the bill’s reference to the “laws and provisions for [the] security of person and of property” included the constitutional right to bear arms.⁹⁶

A great many Republicans believed that a proper understanding of the Constitution required states to respect the rights contained in the Bill of Rights, although, as John Bingham understood, *Barron v. City of Baltimore* held the opposite.⁹⁷ For those who thought states were already required to obey the Bill of Rights (as well as those who thought Congress had legislative power to protect the rights), these rights would be included in the Civil Rights Act’s reference to the “full and equal provision of all laws and proceedings for the security of person and of property.”⁹⁸ Senator Dixon, a Republican from Connecticut, read the Civil Rights Act to protect the Bill of Rights’ liberties in all the states.⁹⁹ “Congress has given us,” he said, “in the civil rights act, a guarantee for free speech in every part of the Union.”¹⁰⁰ Those who equated Section 1 of the Fourteenth Amendment with the Civil Rights Bill seem to have shared Senator Dixon’s view.¹⁰¹ That is so because they must have found in the general language of the Civil Rights Bill a ban on states depriving any person of life, liberty, or property without due process of law.

3. *Defining Less Textually Explicit Rights*

One problem is what to make of the idea of less textually explicit fundamental rights encompassed under general headings like privileges,

(discussing Chancellor Kent and leaders in the 39th Congress who cited and relied on him).

94. 2 KENT, *supra* note 47, at *12.

95. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449–50 (1856); *see also* CURTIS, *supra* note 7, at 72.

96. CURTIS, *supra* note 7, at 104.

97. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 249–51 (1833) (holding that if the Framers intended the Bill of Rights to limit the states, they would have used the “no state shall” language used in the rest of the Constitution).

98. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866).

99. CURTIS, *supra* note 21, at 371–72.

100. CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866) (statement of Sen. Dixon).

101. *See, e.g., id.* at 2883 (statement of Rep. Latham).

immunities, or liberty. As we have seen, Republicans frequently invoked the Declaration's rights to liberty and the pursuit of happiness, and a number of individuals equated these rights and equality to the rights in Section 1. The rights in the Declaration were basic human rights.

The history of the Fourteenth Amendment supports the application of its text to protect basic rights—"privileges or immunities of citizens of the United States," including rights necessary to secure life, liberty, and the pursuit of happiness.¹⁰² The "no state shall" language, language used in Article I, Section 10 to establish judicially enforceable rights and precedent enforcing those rights, strongly suggests judicial enforcement. So do the reasons given for changing the form of the Amendment from a simple grant of power to Congress to a limit on the states plus enforcement power.

Reading constitutional clauses in light of the principles of the Declaration, as some Justices have done, is not a new idea. It is at least as old as the framing of the Fourteenth Amendment. In his dissent in *Olmstead v. United States*, Justice Brandeis invoked the phrases of the Declaration in support of a reading of the Fourth Amendment that went beyond its literal words.¹⁰³ Indeed, Justice Brandeis found a right to privacy, not in the literal words of the Fourth and Fifth Amendments, but in their larger purposes:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁰⁴

Similarly, Justice Stevens's eloquent dissent in *Bowers v. Hardwick* invoked the Declaration's principle of equal liberty against a newly minted "crime against nature" law that targeted only sex acts between people of

102. U.S. CONST. amend. XIV.

103. *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

104. *Id.* at 478 (emphasis added).

the same sex.¹⁰⁵ “Although the meaning of the principle that ‘all men are created equal’ is not always clear, it surely must mean that every free citizen has the same interest in ‘liberty’ that the members of the majority share.”¹⁰⁶ In *Poe v. Ullman*, Justice Harlan cited the passage quoted above from Justice Brandeis’s dissent to support the right of married couples to use birth control devices.¹⁰⁷ Though these decisions were dissents, the dissents were later accepted as the more accurate statement of the law.

Of course, identifying the content of rights included in the privileges or immunities of citizens of the United States requires judgment. Republicans in 1866 often treated less textually explicit rights as being recognized by or as emanating from the text. In giving content to rights to be inferred from the privileges or immunities of citizens of the United States, or from the liberty of the Due Process Clause, there are at least four alternatives.

One could simply reject the idea that the rights were judicially or legally enforceable. The change in the form of the Fourteenth Amendment from an earlier “Congress shall have the power” version to the later one explicitly limiting the states (and conferring power to enforce on Congress) was designed to ensure judicial enforcement.¹⁰⁸ The form of the Amendment followed that used for other judicially enforceable constitutional rights.

One might limit the rights to those specifically mentioned, for example, in the Bill of Rights or perhaps in the Civil Rights Act.¹⁰⁹ The problems with that approach are that it was rejected by leading framers of the Amendment, and a broader view is consistent with the text.¹¹⁰

105. *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting).

106. *Id.* at 218.

107. *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478).

108. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1095 (Rep. Hotchkiss on the need to craft the amendment so as to allow judicial enforcement). *See supra* Part III.A.

109. The most extreme version of this approach seeks to limit rights protected by the Fourteenth Amendment to the equal rights to testify, bring court actions, possess property, and enter contracts specified in the Civil Rights Act. This approach is not even consistent with the language of the Civil Rights Act itself, which gave all citizens the full and equal benefit of all laws and provisions for the security of person and property.

110. *See supra* note 71 and accompanying text (remarks of Sen. Howard and Rep. Bingham).

One could, like Justice Scalia, insist on an unbroken tradition recognizing the less textually explicit right at the most specific level.¹¹¹ This is consistent with the original expectations approach. The problem with that approach is that, before the Fourteenth Amendment was ratified, Republicans thought citizens had rights belonging to all free men, though they were not all specifically spelled out in the Bill of Rights.¹¹² Of course, at the specific level of the tradition dealing with free African-Americans, many rights the Framers thought black people had were rights that had been denied, and in some cases continued to be denied, by a number of states.¹¹³ Still, they believed newly freed blacks were citizens and American citizens had these rights—tradition to the contrary as to free blacks notwithstanding. On the other hand, if one looks at an evolving tradition, by 1860 many states had moved away from racist laws on issues such as the right to settle in the state and to testify against whites.¹¹⁴

The Privileges or Immunities Clause specifically protected constitutional rights of American citizens against states. Because it recognized that American citizens had these basic rights, the Privileges or Immunities Clause, together with the Amendment's Citizenship Clause, indicates that basic rights belong to all American citizens. Whatever the original Constitution may have meant, the Constitution as amended by the Fourteenth Amendment should be read as a guarantee that all citizens should be protected in their fundamental rights—including rights less explicit in the text.

Finally, one might appeal to the general principles invoked and use multi-factorial reasoned judgment in seeking to give content to the rights. Among other sources, courts should look at landmarks in the history of English and American liberty, the Declaration of Independence, and evolving understanding shown by state constitutions and decisions,¹¹⁵

111. *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989). That case discussed the rights of a natural father to visitation with a child adulterously conceived. *Id.* at 113–15. In determining such a parent's rights, Justice Scalia stated, "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127–28 n.6.

112. CURTIS, *supra* note 7, at 82.

113. William Wiecek, *Preface to the Historical Race Relations Symposium*, 17 RUTGERS L.J. 407, 424–25, tbl. 1–2 (1986) (highlighting the rights denied and granted to blacks in various states).

114. *Id.* at 425, tbl. 2.

115. See Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and The Doctrine*, 114 HARV. L. REV. 26, 123–24 (2000).

including decisions by state legislatures and state courts related to the asserted underlying right.¹¹⁶

This approach lacks the illusion of certainty promised by a “shock the Framers” test, a test that “movement conservative” judges follow unless they decide not to. It involves recognizing and resolving tensions between individual rights and the democratic process, between the world view of the past and that of the present, between stability and change, between logic and prudence, and a host of other factors. Like every other prescription for deciding cases made to fallible human judges, it is subject to abuse and needs to be constrained by considerations that should restrain judges. Decisions such as *Lawrence v. Texas*¹¹⁷ and *Griswold v. Connecticut*,¹¹⁸ which protect the sexual privacy of adults are not cases of judges imposing merely personal values or thwarting the—often entirely imaginary—contemporary will or moral judgments of the people.¹¹⁹ Instead, these cases are supported by basic principles of the privacy of the home; by the equal rights of citizens of the United States, by the decisions of most state legislatures and many state courts, in the case of *Lawrence*; also by the rationales of cases like *Griswold* and *Eisenstadt v. Baird*¹²⁰ upholding a right to engage in non-procreative sex; and a host of other factors.

C. Protection: Against State Action or Against State Action and Private Suppression of Fourteenth Amendment Rights

What form would the protection take? State laws that violated the privileges or immunities of citizens of the United States, due process, or equal protection could be voided by laws passed by the Congress¹²¹ or by

116. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 569, 573 (2003) (protecting the right of consenting adults to engage in private sexual acts of oral or anal sex).

117. *Lawrence*, 539 U.S. 558.

118. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that married couples have a privacy right to use contraception).

119. See *Schochet v. State*, 541 A.2d 183, 206 (Md. Ct. Spec. App. 1988) (Wilner, J., dissenting) (rejecting a claim that a ban on oral sex between consenting adults in private was supported by public morality), *rev'd*, 580 A.2d 176 (Md. 1990).

120. *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (holding there is an equal right to privacy for married and unmarried citizens alike).

121. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard) (discussing congressional enforcement of the Fourteenth Amendment).

the courts.¹²² What if private terrorist groups, such as the Ku Klux Klan, conspired to use violence in order to deprive citizens of their rights to speech, political association, and other constitutional and legal rights? The evidence is conflicting, but the better constitutional analysis would have followed that of the great majority of Republicans and resulted in the acceptance of congressional protection.

Early on, the Court embraced an approach that severely restricted the ability of the elected Congress to protect fundamental individual rights from suppression by “private” political terrorists. The current Court, repudiating a contrary view expressed by most of the Justices in a Warren Court decision, has also invoked the state action limit on national power to protect American citizens from private violence motivated by hostility to constitutional rights.¹²³ In doing so, the Court invoked some of the pertinent history, but it also left out a lot of the story.

From the 1850s through the Fourteenth Amendment debates, Republicans and others protested private violence that had been used to silence anti-slavery and Republican speech, press, petition, assembly, and religious expression.¹²⁴ Mob suppression of anti-slavery speech had not

122. See, e.g., *id.* at 2459 (statement of Rep. Stevens) (noting that Section 1 could be enforced even if the Civil Rights Act was repealed).

123. Compare *United States v. Morrison*, 529 U.S. 598, 627 (2000) (finding no congressional authority under the Commerce Clause or Section 5 of the Fourteenth Amendment to reach the private action of violence against women) with *United States v. Guest*, 383 U.S. 745, 759–60 (1966) (holding that Congress could regulate private interference with interstate travel via the Fourteenth Amendment). In his concurrence, Justice Clark stated his belief that “there can be no doubt that the specific language of [Section] 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.” *Id.* at 762 (Clark, J., concurring). Justice Brennan also concurred that Section 5 could reach any private conspiracy that infringed on a right secured by the Constitution. *Id.* at 777 (Brennan, J., concurring). Seven members of the Court opined that Congress could reach purely private action to enforce Section 1 guarantees. *Id.* at 761–86 (Warren, C.J., Brennan, Clark, Black, Fortas, Douglas, & Harlan, J.J., concurring). Many of the ideas supported here—the Bill of Rights as limiting the states, the key roles of the citizenship clause and the *Prigg* precedent, and the power to protect citizens’ rights against private attacks—were suggested by the first Justice Harlan. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 28–35, 46, 54 (1883). On the relation of egalitarian values to substantive liberty, see generally Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007).

124. See CURTIS, *supra* note 7, at 31.

been limited to the South. When they complained about suppression of speech, Republicans often alluded to these events. They saw the violence as an attack on the constitutional rights of American citizens.

As the Civil War approached, Southern suppression of anti-slavery and Republican speech became pervasive. Mobs and vigilantes (as well as state statutes) made it impossible for Republicans to express their political views in the South.¹²⁵ In the Lincoln-Douglas debates, both Lincoln and Douglas recognized that Republicans could not campaign in the Southern states.¹²⁶ This history of private as well as state suppression of anti-slavery expression was familiar to Republicans, and they spoke of it often.¹²⁷ Senator Nye referred to the practice: “[i]n years gone by, when the little band of humanitarian philosophers who advocated natural rights were beset by mobs”¹²⁸ Representative McCullom rejected the old order in which “the bludgeon [was] used to silence the voice eloquently pleading for the oppressed of the land”¹²⁹ “[F]or the last thirty years,” said Representative Price, “a citizen of a free State dared not express his opinion on the subject of slavery in a slave State.”¹³⁰ Senator Howe noted that “opinion and speech ought to be free,” but “[w]hoever raised his voice against [slavery] has been silenced or banished.”¹³¹ Campaigning for Republicans in the congressional elections of 1866 (in which the Fourteenth Amendment was a major issue), Representative James Wilson defended the Amendment as necessary to secure First Amendment rights. He clearly referred to private violence.

We must still guarantee . . . the liberty of going into any part of the United States and causing their type to speak as freely as when our army was there [The boys who had fought the war] must have the same liberty of speech in any part of the South as they always have had in the North. He would have no more cross road committees to wait

125. *See id.* at 30–32.

126. *CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858*, 290–91, 301 (Paul M. Angle ed., 1958). For early discussions of the nature of free speech, see CURTIS, *supra* note 21, at 255–58.

127. *See, e.g.*, CURTIS, *supra* note 7, at 38–39, 144.

128. CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866).

129. *Id.* at 911.

130. *Id.* at 1066.

131. *Id.* at 167.

upon liberty loving men. . . .”¹³²

Examples of politically inspired mob violence were familiar to Republicans. Elijah Lovejoy’s anti-slavery press had been repeatedly seized by a mob and thrown into the Mississippi River.¹³³ Lovejoy was killed in Alton, Illinois, defending his fourth press from a mob.¹³⁴ In Philadelphia, a mob burned down Pennsylvania Hall—a hall that had been built so abolitionists and others would have a place to express their views.¹³⁵

Benjamin Hedrick was a professor of chemistry at the University of North Carolina.¹³⁶ In 1856 he publicly supported Republican John C. Frémont for President.¹³⁷ Hedrick’s sympathies were reported in the *Raleigh Weekly Standard*, and as a result of his support, he was fired from his university job and a mob drove him from the state.¹³⁸ The Raleigh paper was proud of its achievement. “Our object,” the paper crowed, “was to rid the University and the State of an avowed Frémont man; and we succeeded. And we now say . . . that no man who is avowedly for John C.

132. CURTIS, *supra* note 7, at 144 (quoting James Wilson of Iowa). Complaints about violent suppression of rights to speech and assembly in the South after the Civil War were commonplace in the discussions of Reconstruction after Congress adjourned. *Id.* at 133 (“The rights of the citizen, enumerated in the Constitution, and established by the supreme law, must be maintained inviolate.” (quoting N.Y. DAILY TRIB., Sept. 4, 1866, at 1, col. 4)); *see, e.g.*, ILL. ST. J., Sept. 3, 1866, at 1 (citing a speech of Durant, which noted “that the liberty of speech and the liberty of the press is dead in New Orleans, and . . . American citizens were slaughtered . . . without provocation”); *Reply of Gov. Hamilton*, N.Y. DAILY TRIB., Sept. 4, 1866, at 1 (speech of Andrew Jackson Hamilton referring to the need to protect the constitutional rights of every citizen); *The Appeal of the Loyal Men of the South*, PHILA. PRESS, Sept. 7, 1866, at 1 (referring to the suppression of free speech and assembly by slavery before the war and noting outrages inflicted on supporters of the Republican Party and the Union by former rebels in the South in 1865 and 1866: “To still the voice of liberty . . . midnight conflagrations, assassinations and murders in open day, are called to their aid. A reign of terror through all these ten States makes loyalty stand silent . . . Strong men hesitate openly to speak for liberty . . .”); *Speech by Gov. Yates*, ILL. ST. J., Sept. 21, 1866, at 2 (citing inability of Northerners to go South and “express your sentiments freely in safety” and citing the lack of safety in the South “for colored men or for loyal white men.”).

133. CURTIS, *supra* note 21, at 216–40.

134. *Id.* at 216.

135. *Id.* at 248–50.

136. *Id.* at 290.

137. *Id.*

138. *Id.*

Frémont for President ought to be allowed to breathe the air or to tread the soil of North Carolina.”¹³⁹

In debates in Congress on the eve of the Civil War, Senator Henry Wilson recounted another example—a Virginian driven from Norfolk for attempting to vote for Frémont, the Republican candidate.¹⁴⁰ John Bingham cited other examples, including a man driven from Virginia for attending the Republican Convention and a mob that kept people from holding a Republican meeting in Wheeling, Virginia.¹⁴¹

Republicans often said the nation needed to protect its citizens against these outrages. Sometimes they referred to state action, but often their remarks were not limited in that way. Early in the 39th Congress, Congressman Garfield said personal rights and liberties needed to be “in the keeping of the nation,” and that the rights to life, liberty, and property should “no longer [be] left to the caprice of mobs or the contingencies of local legislation.”¹⁴² According to Representative Windom, before the rebel states were restored to the Union, the nation needed to “protect its humblest defender in all the rights of citizenship.”¹⁴³ Speaking about Section 1 of the Fourteenth Amendment, Representative Orth said it “[s]ecures to all persons born or naturalized in the United States the rights of American citizenship.”¹⁴⁴

A basic theme was that allegiance and protection were reciprocal. A government that could call on citizens to defend it on the battlefield also must have the power to defend the citizen. Could it be, asked Senator Trumbull, “at last that we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection?”¹⁴⁵ He answered his own question: “This Government has certainly some power to protect its own citizens in their own country.

139. *Id.* (citation omitted).

140. *Id.* at 283.

141. See Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause,”* 36 AKRON L. REV. 617, 640 (2003).

142. CONG. GLOBE, 39th Cong., 1st Sess. app. 67 (1866). On other complaints about mob action, see, for example, CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson) (complaining about slavery throwing newspaper types in the river “when they do not print its will”).

143. CONG. GLOBE, 39th Cong., 1st Sess. 3167 (1865).

144. *Id.* at 3201.

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

Allegiance and protection are reciprocal rights.”¹⁴⁶ Representative Broomall made a similar point:

[T]here are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth’s surface I owe allegiance to my country, there it owes me protection. . . .¹⁴⁷

146. *Id.* See Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1404 (2006). “[T]he scope of the state action doctrine is limited by democratic principles, and . . . it should not be applied in cases where it would weaken the right of the people to govern themselves.” *Id.* at 1457.

147. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866); see generally Huhn, *supra* note 146, at 1427–60 (discussing the Supreme Court’s interpretation of Section 5 of the Fourteenth Amendment—that it applies only to state action). The Waite Court repeatedly held that Section 5 only allowed Congress to enforce the Fourteenth Amendment against state action. See *The Civil Rights Cases*, 109 U.S. 3 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875). Prior to the adoption of the Fourteenth Amendment, some congressmen emphasized the limited reach of the Civil Rights Bill. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Shellabarger noting, somewhat dubiously, that the Civil Rights Act was limited to color of law and did not “usurp the powers of the States to punish offenses generally against the rights of citizens . . .”). The anti-Klan acts did not punish offenses generally, but only those taken with a specific intent to deny constitutional rights. The sections reaching private action were not conditioned on state action or state inaction. Some suggest that state inaction (failure to protect) was a form of state action and that that theory was embraced by congressional Republicans.

[W]hen they passed the so-called Ku Klux Klan Act, Republicans had developed a carefully reasoned constitutional argument that State failure to protect rights guaranteed by the Fourteenth and Fifteenth Amendments amounted to such State action as justified congressional intervention. And that intervention could take the form of positive congressional enactments to punish individual wrongdoers.

Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 50 (1978) (a sympathetic reading of the Waite Court decisions). A different way of looking at Waite Court decisions is to focus not on conceivable theories Congress might have been able to use, but on those it did use and on who won and who lost under the statutes passed by Congress.

In practical effect, though, according to Benedict, the Court was willing to “releas[e] undoubted criminals upon technicalities of statutory construction” all in the name of protecting federalism, when they could not find the requisite state action element no matter the gravity of violence used to usurp blacks of their constitutional

Did the change to the “no state shall” form mean that the Congress could legislate to protect citizens from state action, but not from private action? An earlier version of Bingham’s amendment giving Congress power to enforce equal protection in life, liberty, and property had been tabled, based in part on the fear that all subjects of state law were encompassed in life, liberty, and property and that Congress might be able to preempt all state laws. Another fear was that laws passed enforcing rights could simply be repealed. Bingham described the final version of his amendment as arming Congress with the power “to protect by national laws the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”¹⁴⁸ Senator Howard also referred to protection against state laws.¹⁴⁹

In the 1870s, facing Klan violence, Republicans split on congressional power to protect citizens against private violence aimed at constitutionally protected activity, such as freedom of speech or political association. Almost all, however, concluded that Congress could directly protect citizens from private action taken with the specific intent to prevent the exercise of constitutional rights, as well as private action taken to prevent the enjoyment of constitutionally mandated equal protection of the laws.¹⁵⁰ A murder or assault is not usually inflicted to punish or prevent the exercise of constitutional rights. That would typically remain entirely a state matter. But, by the predominant Republican view, a Klan murder or whipping of a Republican political activist done for the specific purpose of deterring the exercise of constitutional rights would be something Congress could punish directly. As Senator Edmunds of Vermont noted in 1871:

The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice.

rights. *Id.* at 79 (noting, additionally, that viewed in light of views of federalism at that historical moment, the decisions of the Waite Court were more balanced than critics have been willing to admit). A different way of looking at Waite Court decisions is to focus not on conceivable theories Congress might have been able to use, but on those it did use and on who won and who lost under the statutes passed by Congress. Congress did not condition prosecution of private individuals who conspired to deny constitutional rights on state action or state inaction.

148. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

149. *Id.* at 2765 (statement of Sen. Howard) (“It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of citizens of the United States.”).

150. *See supra* note 61 (votes on the Enforcement and KKK Acts).

The slaying of men there, as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter. The one is to be expelled or slain and the other is to be reduced to what they consider to be his normal condition.¹⁵¹

How did Republican supporters of the acts respond to the state action syllogism that confronted them? The syllogism says that the Fourteenth Amendment only reaches state action. Klansmen are not the state and their actions are not state action; therefore, the Fourteenth Amendment does not enable Congress to reach Klan violence.¹⁵² First, Republicans believed that citizens actually had the rights in the Bill of Rights and the right to equal protection, and these were, as every school child naïvely believes, rights of American citizens.¹⁵³ The limit on the federal government in the original Bill of Rights and on the states in the Fourteenth Amendment was a constitutional recognition that Americans had these rights.¹⁵⁴ Bingham insisted that the second version of his amendment was stronger than the first because it explicitly limited the states and provided Congress with the power to enforce its provisions.¹⁵⁵ Congress could “disperse by force, if need be, combinations . . . engaged in trampling under foot the life and liberty, or destroying the property of the citizen. The people of their United States are entitled to have their rights guarantied to them by the Constitution of the United States, protected by national law.”¹⁵⁶ Since Americans have these rights, they have a right to have their exercise of them protected—against private as well as government attack. A right presumes a remedy. Since the federal Constitution recognizes and secures these rights, the federal government

151. CONG. GLOBE, 42d Cong., 1st Sess. 702 (1871).

152. CURTIS, *supra* note 7, at 158–59.

153. *Id.* at 48.

154. *See* Curtis, *supra* note 141, at 652–54. Bingham explained that he had used the “no state shall” form to put the amendment in the form that *Barron* said would require states to obey the Bill of Rights. *Id.* at 653. On *Prigg* and federal power, see *id.* at 659–61 and CURTIS, *supra* note 7, at 81, 159, 235 n.49; see also Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 352 n.187, 353 n.195 (2003).

155. CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871).

156. *Id.* at 85.

can protect them.¹⁵⁷

There was direct precedent for this proposition. The Fugitive Slave Clause had forbidden state laws or regulations that sought to free people who were, in fact, fugitive slaves. Instead of being freed by state law, the slaves were to be delivered up to the person to whom the service of the slave was due. From this limit on state action, the Court found a right of the slave owner to get his slave back. Since a right requires a remedy, *Prigg v. Pennsylvania* held that Congress could legislate directly to protect the slave owner's right.¹⁵⁸

The Court later said that Congress could punish as criminals those private persons who aided the slaves who were fleeing and seeking their freedom.¹⁵⁹ There was, of course, a significant difference between the Fugitive Slave Clause and the Fourteenth Amendment: the Fourteenth Amendment had an enforcement section.¹⁶⁰

The Court should have followed the Republican majority that created anti-KKK acts and charted a middle course. It also should have rejected broad congressional power to legislate and preempt all subjects of state legislation. Instead, federal power would have been limited to protection of constitutional rights, punishing "private" action only when taken with the specific intent to deny or impair those rights or equal privileges and immunities. Senator Edmunds explained, "We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud"¹⁶¹ But it would reach a conspiracy against a man

157. *Id.*; see also Curtis, *supra* note 141, at 658 (detailing the views of Bingham and others about congressional power to protect these rights). On congressional power and lessons from history on the subject, see Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004); and Huhn, *supra* note 146, at 1437–41.

158. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 542 (1842); see also *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1366–67 (1964) (discussing *Prigg* as precedent for reaching private action that interfered with constitutional rights).

159. *Ableman*, 62 U.S. (21 How.) at 526.

160. On the other hand, one could argue that the requirement of delivery supports finding a right for slave owners before the Civil War—a right to be enforced against private persons.

161. CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

“because he was a Democrat, . . . or because he was a Catholic, or because he was a Methodist”¹⁶²

Second, the Court could have ruled on federalism grounds that federal law could not limit the ability of the states simultaneously to prosecute the criminal conduct. Similarly, it could have held on federalism grounds that state laws effectuating the historic function of punishing crimes against individuals could only be preempted when they obstructed the application of the federal law or made it impossible. This approach would have honored the objective of congressional Republicans to protect basic rights of American citizens while at the same time protecting the role of the states. It would have provided crucially needed double security for individual rights threatened by private terrorism.

Even if one accepted the state action syllogism for the second sentence of Section 1, that should not have precluded congressional enforcement against Klan terrorism aimed at constitutional rights. The Fourteenth Amendment also made all persons born in the nation citizens, and this provision was not prefaced by “no state shall.”¹⁶³ American citizens *by virtue of citizenship* should be seen as having rights to free speech, press, association, etc., which again could be protected under the *Prigg* rule. Indeed, in the years before the Civil War, Republicans and others had repeatedly described these rights as rights of American citizens.¹⁶⁴

The Supreme Court saw it differently. It embraced the state action syllogism. The Fourteenth Amendment limits only states—Klansmen and other private terrorists are not states—therefore, Congress may not enforce

162. *Id.* The section of the 1870 Reconstruction Act reaching private violence required specific intent. “[I]f two or more persons shall . . . conspire . . . , or go in disguise upon the public highway, or upon the premises of another, . . . with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony. . . .” Act of May 31, 1870, 16 Stat. 140, § 6. The act of April 20, 1871, 17 Stat. 13, § 2, punished private action “with intent to deny any citizen of the United States the due and equal protection of the laws” or “equal privileges or immunities under the laws”

163. *See* U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

164. *See* Curtis, *supra* note 67, at 1110–18.

the Fourteenth Amendment directly against the Klan and similar terrorist groups. In 1876, in *United States v. Cruikshank*,¹⁶⁵ and in 1883, in *Harris v. United States*,¹⁶⁶ the Supreme Court held that Congress could enforce the rights in the Fourteenth Amendment (rights the Court had decimated) only against state action. Congress could not reach those “private” persons who used terror to deter the exercise of Bill of Rights liberties because first, the Klan was not the state, and second, the Bill of Rights was merely a limit on the national government.¹⁶⁷ *Harris* declared a provision of the Ku Klux Klan Act unconstitutional because it was directed exclusively at private persons.¹⁶⁸

In the *Slaughter-House Cases*, *Cruikshank*, and subsequent cases, the Court held that almost all fundamental rights came, if it all, from the states.¹⁶⁹ No national fundamental rights to speech, press, etc. existed.¹⁷⁰ All that existed was a limit on federal power, leaving the matter to the states.¹⁷¹ Americans may have thought their Constitution gave them rights of free speech, press, religion, and assembly even before the Fourteenth Amendment and certainly after. But they were mistaken. All it gave them was a limit on federal action. There was no general American right to free speech, press, and assembly, or to free exercise of religion. Decision after decision, effectively until the 1930s, the Court decimated claims that the Bill of Rights protected citizens against state laws that would have infringed their national Bill of Rights liberties, if they had had any.¹⁷²

According to the *Slaughter-House* and *Cruikshank* decisions, privileges or immunities of citizens of the United States were few and not of much use to the people the Fourteenth Amendment was designed to protect. The *Slaughter-House* majority announced that United States citizens had, for example, rights to visit the sub-treasuries, to be protected

165. *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875).

166. *Harris v. United States*, 106 U.S. 629, 640 (1882).

167. *See id.* at 639.

168. *Id.*; *accord* *Baldwin v. Franks*, 120 U.S. 678, 688 (1887).

169. *See* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1873); *Cruikshank*, 92 U.S. at 555.

170. *See Slaughter-House*, 83 U.S. at 78–79; *Cruikshank*, 92 U.S. at 555.

171. *See Slaughter-House*, 83 U.S. at 78–79; *Cruikshank*, 92 U.S. at 555.

172. *See, e.g., Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 538 (1922)

(“[T]he Constitution of the United States imposes upon the states no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence.”).

on the high seas and in foreign nations, and to petition (the national) government.¹⁷³ The Court's view was ludicrous. Newly freed slaves and their Republican allies would be protected by the Privileges or Immunities Clause in their trans-Atlantic crossings and once they arrived in Paris, but not in Alabama, Mississippi, Louisiana, North Carolina, or South Carolina.

By the Court's view, the Constitution allowed Congress to make criminals out of private persons who sought to help a slave seeking freedom. However, it did not allow Congress to make criminals of those private persons who used terror to deter the former slaves and their allies from enjoying and exercising freedoms listed in the Bill of Rights or the equal citizenship promised by the Fourteenth Amendment.

During the Warren Court era, most of the Justices indicated that Congress could reach private violence aimed at the exercise of constitutional rights.¹⁷⁴ The Warren Court Justices wrote during the Second Reconstruction, as the nation confronted again the ugly reality of political terrorism. The Supreme Court rejected that view in *United States v. Morrison* and *City of Boerne v. Flores*.¹⁷⁵ Chief Justice Rehnquist was in the majority in both cases.¹⁷⁶ The evidence the Court marshaled to support its restrictive view included the change of the Fourteenth Amendment from the "Congress shall have the power" to the "no state shall" form; the concern expressed by several congressmen that the original version allowed Congress to legislate on all matters covered by state law; Congressman Hale's objection to the original Bingham version on federalism grounds; Congressman Bingham's statement that the amendment would allow Congress to protect Fourteenth Amendment rights when they were denied or abridged by state law; Congressman Garfield's state action argument against a proposed anti-Klan law; and the authority of the early Justices who embraced the state action syllogism and had been appointed by Republican presidents.¹⁷⁷

173. *Slaughter-House*, 83 U.S. at 79–80.

174. See *United States v. Guest*, 383 U.S. 745, 762 (Clark, J., concurring), 777 (Brennan, J., concurring) (1966).

175. *United States v. Morrison*, 529 U.S. 598, 627 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

176. *Morrison*, 529 U.S. at 601; *City of Boerne*, 521 U.S. at 509.

177. *Morrison*, 529 U.S. at 621–22 (supporting the state action doctrine by invoking the authority of the judges declaring and applying it who had been appointed by Republican presidents from Lincoln through Chester Arthur); *City of Boerne*, 521 U.S. at 520–24 (reciting portions of the congressional debates on the Fourteenth Amendment, including statements from Congressmen Bingham, Garfield, and Hale).

Though accurate, as far as it goes, the Court's presentation left out much of the story. It ignored the Citizenship Clause and the widespread Republican view of rights of citizens and the right to be protected in those rights. It ignored the widely held view of Republicans and others in the years before the Civil War that the Bill of Rights meant that American citizens had these rights, and that private suppression of these rights was inconsistent with the rights of American citizens. That congressmen had been unwilling to give Congress power to regulate each and every subject that had previously been controlled by states—property, contract, domestic relations, rules of evidence, etc.—falls far short of showing that they also rejected federal power to reach private violence engaged in with the specific intent of deterring rights such as speech, press, and political association. When they crafted Reconstruction statutes, Republicans in Congress did not seek to punish all violent crimes, but only those engaged in with the intent to deprive persons of constitutional rights.¹⁷⁸ In those cases, they sought to provide power to punish private persons as well as those who acted under color of state law. Those Republicans from the 39th Congress who were still in Congress when the Ku Klux Klan Acts were passed strongly supported these acts. “Nearly every member of Congress who had voted for the Fourteenth Amendment also voted for the Ku Klux Klan Act.”¹⁷⁹

The Court's recent analysis also ignores the *Prigg* precedent cited in the 39th Congress. From Article IV, Section 2's limit on state laws, the Court in *Prigg* inferred a right to recover a slave.¹⁸⁰ The Court also held that the inferred right gave Congress the power to enforce it—even, as the Court later suggested, against private persons.¹⁸¹ The Court also ignored the long history of private violence aimed at political expression and the Republican concerns about it that were often expressed in 1865 and 1866.

James Garfield, who made a state action argument cited by the Court, still voted for legislation that reached private persons who acted with intent to deprive persons of equal privileges or immunities or equal protection.¹⁸²

178. See CURTIS, *supra* note 7, at 157–59 (describing Republican concern with mob and Klan violence and the impact on constitutional rights). See *supra* note 162 setting out specific intent language in the anti-Klan Reconstruction statutes.

179. Huhn, *supra* note 146, at 1441.

180. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612–14 (1842).

181. *Id.*

182. CONG. GLOBE, 42d Cong., 1st Sess. app. 149–54 (1871) (statement of Rep. Garfield) (criticizing the KKK Act for reaching private persons and espousing the state

Congressman Hale—whose 39th Congress statements on an earlier version of the Amendment were cited by the Court to support its state action analysis—later insisted that reaching private actors was consistent with the final form of the Fourteenth Amendment.¹⁸³

Justice Bradley, who later invoked the state action syllogism, had earlier written Judge Woods in favor of upholding a Reconstruction statute directly aimed at private violence engaged in with the specific intent of deterring the exercise of Bill of Rights liberties.¹⁸⁴ Judge (later Justice) Woods followed Bradley's advice and analysis in the case of *United States v. Hall*.¹⁸⁵

In short, when it embraced a broad state action syllogism in *United States v. Morrison*, the Court ignored the expressed views of most Republican supporters of the Fourteenth Amendment—as well as the *Prigg* precedent, the devastating effect Klan violence had on democracy and fundamental rights, how Court decisions it relied on contributed to that result, and the substantial evidence that would support an approach more protective of constitutional right—while at the same time protecting the traditional role of the states. There is also reason to be dubious of the Rehnquist Court's reliance on decisions by post-Civil War Justices. These are the same Justices who—with no careful attention to the natural reading of the text, to relevant history, to original intent, to original meaning, to ethical aspirations, or to the structural requirements of democratic government—freed states to violate the liberties in the Bill of Rights. Instead, the Court read the Privileges or Immunities Clause to protect Americans in visiting sub-treasuries, on the high seas, and in foreign lands.

From the point of view of democratic government and equal rights, *Morrison* was a double disaster. First, it ratified and praised Court decisions that had nullified laws passed by the democratically elected Congress. Second, the laws such as those that the Court gutted in *Cruikshank* and struck down in *Harris* were laws that attempted to protect due process, democracy, and equal rights from political terrorists or from lynch mobs motivated by the specific intent to deprive persons of equal protection and due process of law. The Court presented significant

action syllogism); CONG. GLOBE, 42d Cong., 1st Sess. 808 (1871) (Rep. Garfield voting “yea” for the Act).

183. 3 CONG. REC. 979–80 (1875).

184. See *United States v. Cruikshank*, 92 U.S. 542, 559 (1875).

185. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282); CURTIS, *supra* note 7, at 160, 171–72.

historical evidence to support its result, but missed substantial historical evidence that pointed in a different direction. Most of all, however, the Court failed to come to grips with structural concerns—with the harm the nineteenth-century decisions had done to democracy and representative government.

IV. SECTION 2 AND THE FORGOTTEN CONSEQUENCES OF ABRIDGING THE RIGHT TO VOTE

Section 2 of the Fourteenth Amendment provides:

Representatives shall be apportioned among the several States according to their respective numbers But when the right to vote at any election [for president and vice president, for congress, for the executive or judicial officers of a state, or members of a state legislature] is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for the participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.¹⁸⁶

The immediate context of Section 2 was the Thirteenth Amendment's abolition of slavery, converting slaves from three-fifths of a person to whole persons. In light of recent events and those of the prior thirty years or so, Republicans in 1866 believed that the continued ascendancy of the Republican Party was crucial to the protection of republican government, liberty, Southern Republicans, and the freedmen.¹⁸⁷ Republican idealism

186. U.S. CONST. amend. XIV, § 2.

187. See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1866) (statement of Rep. Stevens); William W. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 45–46 (discussing the multiple goals of Stevens' proposal and the failure of his attempt to base congressional representation on the number of electors of each state rather than on population). For scholarly discussions of Section 2, see Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RES. L. REV. 965, 965–76 (1965) (describing the history of Section 2 and unsuccessful efforts to obtain judicial enforcement); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 109 (1960) (discussing the history of Section 2 and analyzing a workable approach to judicial enforcement); see generally Gabriel J. Chin, *Reconstruction, Felon Disfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth*

coincided with political self-interest.

Thaddeus Stevens was a leader of the Republicans in the House and a member of the Joint Committee that proposed the Fourteenth Amendment.¹⁸⁸ He warned his colleagues that without a constitutional change, the former Confederate states would enjoy increased representation based on two-fifths of four million recently freed slaves.¹⁸⁹ According to Stevens, the South would be entitled to a total of eighty-three representatives in Congress.¹⁹⁰ Of this total of eighty-three, thirty-seven would be provided based on disfranchised blacks. Compared to their pre-war, three-fifths advantage, the former Confederate states would have an increase of thirteen new congressmen and thirteen additional votes in the electoral college.¹⁹¹

The prospect of winning the war and losing the peace was unacceptable to virtually all Republicans. While many would have preferred simply to give black men the vote, in 1866 only six Northern states allowed blacks to vote, and one of these, New York, imposed a \$250 freehold estate qualification that applied only to blacks.¹⁹² In 1865, shortly before the 39th Congress convened, three states defeated black suffrage by referendum.¹⁹³ An amendment providing for black suffrage was unlikely to be ratified.¹⁹⁴ So Republicans considered other alternatives.

Representation based on voters was considered and defeated in the Joint Committee on Reconstruction because of its negative effect on New

Amendment?, 92 GEO. L.J. 259 (2004) (arguing for a reading of Section 2 limited to race discrimination and that the Section has been repealed by implication by the Fifteenth Amendment, noting the failure of the Court to give Section 2 significant meaning, and finally noting significant problems of scope once the Section is taken literally (or I would argue, in light of the clear statements of its leading sponsors)); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961) (examining the intent of the Framers of Section 2 and their expectations as to its operation).

188. See CURTIS, *supra* note 7, at 85.

189. CONG. GLOBE, 39th Cong., 1st Sess. 73–74 (1866).

190. *Id.* at 74.

191. Van Alstyne, *supra* note 187, at 46.

192. See *id.* at 70.

193. See *id.* (Connecticut, Minnesota, and Wisconsin).

194. CONG. GLOBE, 39th Cong., 1st Sess. 70 (1866) (statement of Rep. Thornton).

England states.¹⁹⁵ Instead, the Committee reported and the Congress considered a provision based on racial discrimination: whenever the elective franchise was denied or abridged in any state on account of race or color, all persons of such race or color would be excluded from the basis of representation.¹⁹⁶ This provision would have invited evasion—literacy tests, property tests, and other facially neutral ways to disfranchise blacks—while the disfranchising state would still get to count blacks for purposes of representation.¹⁹⁷ It was unacceptable to the Congress, and Section 2 eventually emerged.

Under Section 2, when the right to vote for the specified offices was denied or abridged for any male over twenty-one years of age for any reason other than participation in rebellion or other crime, the representation of the state was to be proportionally reduced.¹⁹⁸ The penalty was triggered not only by race or caste discrimination—literacy tests, educational tests, property qualifications, tests based on the ability to read and “understand” the state constitution, and a host of other methods of denying the right to vote would be covered. As Thaddeus Stevens explained when the Committee proposal was presented to the Congress,

If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government¹⁹⁹

Section 2 was a penalty imposed on states that departed from universal male suffrage.²⁰⁰ As Senator Howard explained: “No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion.”²⁰¹

195. See Van Alstyne, *supra* note 187, at 47.

196. *Id.* at 47–48.

197. CONG. GLOBE, 39th Cong., 1st Sess. 406–407 (statement of Rep. Eliot) (expressing his dissatisfaction with the pre-Section 2 proposal).

198. U.S. CONST. amend. XIV, § 2.

199. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

200. *Id.*

201. *Id.* at 2767 (statement of Sen. Howard).

According to Senator Howard, “abridge” was simply an intensive form of the prohibition of the denial of the right to vote.²⁰² A state that allowed some persons to vote for members of the state legislature, but not for Congress, would abridge the right of suffrage.²⁰³ All those persons would be excluded from the basis of representation, and the representation of the state in Congress and in the electoral college would be proportionally reduced.²⁰⁴

Section 2 was a strongly democratic provision. It was designed to induce all states to move toward universal male suffrage and to penalize those that did not. Thaddeus Stevens told his colleagues that it was the most important provision in the Fourteenth Amendment.²⁰⁵ His was a widely held view. Today, after the Nineteenth Amendment and the vote for women, the meaning of Section 2 should be broadened. Disfranchising male or female voters should produce the penalty and would uphold the spirit and purpose of Section 2. Both widespread and effective terrorism and legal obstacles that practically abridge the franchise should trigger Section 2 protection. A state that is unable or unwilling to protect the right to vote from pervasive terrorism is denying or abridging that right. Obviously, a state that uses literacy tests, property tests, tests with costs that deter a significant number of the poor from voting, or other means to disfranchise a substantial number of voters violates Section 2.

Had Section 2 functioned as it was intended—to produce universal male suffrage or to punish states that refused to provide it with substantial loss of political power—it might have changed the course of American political history in a more progressive direction. In some ways, Section 2 was stronger than the Fifteenth Amendment. That Amendment prohibited states from discriminating against voters based on race, but the former Confederate and some other states found facially “neutral” ways to avoid the ban—literacy tests, poll taxes, and read and “understand” the Constitution provisions.²⁰⁶ None of those ruses should have been immune from punishment under Section 2.

But Section 2 was never enforced. Terrorism and later laws deprived blacks and many poor whites in the South of the right to vote. The withdrawal of federal troops, which had provided some protection for

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 2459.

206. U.S. CONST. amend. XV.

democratic elections, was followed by an increased wave of Klan terrorism designed to drive blacks and their Republican allies from the polls.²⁰⁷ Democrats controlled Southern elections for about fifteen years.²⁰⁸

In the 1890s, the Populist revolt and cooperation among Populists, blacks, and Republicans threatened Democratic hegemony. The old elite and their allies responded, first with a renewed wave of violence, and then with state laws that disfranchised blacks and in some cases the poor.²⁰⁹ The disfranchisement laws required literacy tests, tests of the ability to read and “understand” the Constitution, poll taxes, all-white Democratic primaries, and similar devices.²¹⁰

In contrast to current efforts to rob the poor and many blacks of the right to vote, the old Southern elite was quite open about what it was up to. Future Virginia Senator Carter Glass explained that the purpose of the Virginia Constitution Convention of 1901–1902 was to discriminate to the greatest extent constitutionally possible to eliminate “every negro voter who [could] be gotten rid of, legally”²¹¹ The rollback was a smashing success. Of 1,330,000 people who registered to vote following Reconstruction, 703,000 were black and 627,000 were white.²¹² By 1905, black voters had been removed as a political force in the South. For example, black registration in Louisiana dropped from over 130,000 to 1,342 between 1896 and 1904.²¹³ Black registration in Virginia dropped from 21,000 to 10,500 between 1901 and 1903.²¹⁴ In Alabama’s black belt counties, black registration dropped from 79,311 to 1,081 between 1900 and 1901.²¹⁵

While Section 2 was designed to protect universal manhood suffrage, leaders of the constitutional counterrevolution in the South openly avowed

207. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 105–08 (2000) (discussing the combination of terrorism and laws to suppress black, Republican, and Populist voters).

208. *Id.*

209. *Id.* at 105–16.

210. *Id.* at 111–12.

211. *Id.* at 112.

212. 2 MICHAEL KENT CURTIS ET AL., *CONSTITUTIONAL LAW IN CONTEXT* 1739 (2006).

213. KEYSSAR, *supra* note 207, at 114.

214. MICHAEL PERMAN, *THE STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908*, at 313–14 (2001).

215. CURTIS, *supra* note 212, at 1739.

their opposition to manhood suffrage. In the Virginia disfranchising Constitutional Convention of 1901–1902, R.L. Gordon attacked the Fifteenth Amendment as standing for the false proposition that “the colored man is the equal of the white man.”²¹⁶ He went on to “put [himself] on record here as being opposed to . . . manhood suffrage.”²¹⁷

The Supreme Court had done much to destroy federal laws designed to protect citizens from politically inspired private violence. It now accepted Southern disfranchising laws that were not facially discriminatory. The Court clearly held that a state constitutional convention wishing to disfranchise blacks was not a problem, provided that it used facially neutral ways of doing so.²¹⁸ Today, discovery of such an overt intent would make the provision unconstitutional, but the candor of the late nineteenth and early twentieth centuries is in short supply.²¹⁹

Enforcing Section 2 of the Fourteenth Amendment today would raise a host of problems even if the Court were inclined to use it to protect universal suffrage. How, in an age of voter picture identification requirements (that often require purchase of birth certificates and substantial travel by those who lack one) and other devices that limit the right to vote, would one show that the right to vote is being denied—as opposed to the purity of the ballot being protected? One solution would be to show a reduction in voting after provisions that impose significant economic or other barriers to the right to vote and to shift the burden of proof to the state. The state would be required to show the reduction in voting merely reflected fraud and that the newly minted (and often politically inspired) requirements did not restrict voting access by qualified voters. When voting restrictions result in economic barriers, a court should require the state to show it had affirmatively taken action to lift the newly imposed economic barriers. For example, the state could provide free birth certificates if the certificates were required by a voter identification law and could provide transportation assistance to reach remote locations that

216. KEYSSAR, *supra* note 207, at 105.

217. *Id.*

218. *See Williams v. Mississippi*, 170 U.S. 213, 225 (1898). While the Court’s role was significant and deplorable, the retreat from Reconstruction was a national phenomenon. For the inspiring and ultimately depressing story of the rise and defeat of democracy in the South, see ORVILLE VERNON BURTON, *THE AGE OF LINCOLN* 271–323 (2007).

219. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding an Alabama disfranchisement law for certain crimes unconstitutional because of racial motivation).

need to be visited in connection with the laws. The current Court, like its predecessors in the late Nineteenth Century, may be quite unreceptive to such concerns.²²⁰

A common theme reappears throughout this analysis of the Fourteenth Amendment. The theme consists of the United States Supreme Court repeatedly interpreting the Amendment in ways that frustrate the protection of the basic liberties and the equality of American citizens. For many years, in struggles involving blacks, the poor, and dissenters, the Court left those groups largely to the tender mercies of their state governments and of mobs. When the elected Congress attempted to extend racial equality, the Court frustrated its attempt. When Congress attempted to protect citizens from Klan violence, the Court frustrated its attempt. Things began to change in the 1930s and 1940s, and changed dramatically in the 1960s with the Warren Court and the great achievements of President Lyndon Johnson and the Congress. These changes became targets for a new “movement conservative” ideology that revealed remarkable hostility toward national protection of individual rights and equality.

V. HISTORY & THE COURT: THE WARREN COURT, THE REVOLT
AGAINST THE WARREN COURT, AND THE LONG BATTLE OVER
CONSTITUTIONAL MEANING

A. *The Warren Court*

Everything in the 1950s was segregated. The country had a racial caste system. Throughout much of the South, Americans of African descent were not allowed to vote. The Warren Court was a part, and only a part, of what changed all that. President Lyndon Johnson and the Congress deserve immense credit.

The Warren Court and the struggles of the 1950s and 1960s for racial equality and basic rights shaped a generation’s views. Many people admired the Warren Court and the great achievements of President Lyndon Johnson and the Congress.

To a remarkable degree, the jurisprudence of the Warren Court turned on the Fourteenth Amendment, both in equality and in applying Bill of Rights liberties to the states. The Court read the Fourteenth Amendment broadly as a charter of liberty and equality.

220. See, e.g., *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

As to race, the Warren Court took early dramatic steps toward dismantling the racial caste system. In 1954, the Court in *Brown v. Board of Education* struck down school segregation, though not much changed at first.²²¹ In 1968, in *Loving v. Virginia*, it struck down state bans on interracial marriage.²²² By 1964, the Court, President Lyndon Johnson (a Southerner), and Congress were all moving in the same direction—making a frontal attack on the racial caste system. Some of the most effective decisions of the Warren Court simply upheld laws passed by Congress—the Civil Rights Act of 1964 (based on a broad reading of the Commerce Clause)²²³ and the Voting Rights Act of 1965 (passed to enforce the Fourteenth and Fifteenth Amendments).²²⁴ Because of filibusters, these laws needed and had the support of super-majorities in Congress.

The Warren Court applied almost all of the then-unincorporated guarantees of the Bill of Rights to the states.²²⁵ It required that people accused of serious crimes who could not afford a lawyer at their trial²²⁶ or a transcript in order to appeal their cases²²⁷ be provided with both. It

221. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

222. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

223. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (upholding, under the commerce clause, the public accommodations section of the Civil Rights Act of 1964).

224. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (protecting the right to vote).

225. *See, e.g., Loving*, 388 U.S. at 10 (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“Under [the First] Amendment’s prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.”); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

226. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

227. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”).

broadly protected free speech, including speech and press about sex.²²⁸ It interpreted the Fourteenth Amendment to require one person, one vote in state elections²²⁹ and interpreted Article I, Section 2, clause 1 to require the same result in elections for the House of Representatives.²³⁰ The Court held that married couples had a right to use birth control.²³¹ Unlike the present, highly active Court, the Warren Court rarely struck down laws passed by Congress.²³² It interpreted statutes and constitutional rules to further rather than frustrate values of liberty and equality, an approach which is less common today.²³³ While the Warren Court typically upheld federal laws, its treatment of state laws—including those supporting the racial caste system—was another matter.

By applying the Bill of Rights to the states, the Warren Court gave new life to a crucial Reconstruction statute. The statute gave a damage action to persons who, under color of state law, were denied rights, privileges, and immunities of citizens of the United States.²³⁴ But that

228. *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966) (protecting the free speech rights of legislators commenting on public policy); *Memoirs v. Massachusetts*, 383 U.S. 413, 433 (1966) (Harlan, J., concurring) (“The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship.”); *N.Y. Times v. Sullivan*, 376 U.S. 254, 263–65 (1964) (holding that allegedly libelous speech about public officials cannot be silenced unless it is intentionally false or recklessly false, a protection required by the First and Fourteenth Amendments).

229. *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964) (“[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”).

230. *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964) (one person, one vote applied to congressional elections under Article I, Section 2).

231. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

232. On the crucial and underappreciated role of Congress in protecting rights and the great importance of Warren Court decisions upholding congressional protection, see Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005). For an analysis of Justices who are most likely to strike down federal statutes, see Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

233. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2177 (2007) (narrowly interpreting a statutory reporting period for unlawful employment practices).

234. 42 U.S.C. § 1983 (2000).

provision was neutered when the *Slaughter-House Cases*²³⁵ and its progeny found the rights, privileges, and immunities of citizens of the United States were a largely empty set.²³⁶ In those cases, the Supreme Court held that basic liberties such as those in the Bill of Rights were protected by state law, if at all. Americans did not have basic rights to free speech, protection against unreasonable searches and seizures, and the rest of the claimed liberties. Instead, they had a protection against federal invasion of those interests. Otherwise, the rights existed only to the extent that states chose to protect them under state law.

After more rights were incorporated, the list of protected rights, privileges, and immunities under Section 1983 grew. In *Monroe v. Pape*, the Court held that persons whose Bill of Rights liberties were invaded by state officers acting under color of state law had a damage action against those state officials who violated their rights.²³⁷ The ability of the citizen to hold government officials accountable for violations of fundamental rights—as Section 1983 and *Bivens*²³⁸ actions do—is a crucial protection for liberty and democracy.

B. *The Counterrevolution*

Decisions of the Warren Court (and, to a greater extent, the Civil Rights Acts of 1964 and the Voting Rights Act of 1965, which the Court upheld) provoked a political backlash and a counter ideology. These changes helped to transform national politics and to make the South a solidly Republican region for at least the next forty years. Race was a central issue, but by no means the only one. Other issues included school prayer, sexually explicit materials, and the rights of those accused of crimes. The Warren Court held the Constitution required the exclusion of evidence illegally seized by state officials and the exclusion of confessions obtained in violation of its *Miranda* rules. It applied these decisions to trials held after the decision and often to confessions obtained before. The result was to grant new trials to a number of people who had been convicted of serious crimes.

When he signed the Civil Rights Act of 1964—prohibiting discrimination in places of public accommodation and in employment based on race, religion, national origin, or sex—Lyndon Johnson told his

235. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

236. *Id.* at 76–79; e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876).

237. *Monroe v. Pape*, 365 U.S. 167, 191–92 (1961).

238. See *infra* notes 275–88 and accompanying text.

aide, Bill Moyers, that he had delivered the South to the Republican Party for his and Moyers' lifetimes.²³⁹

Senator Barry Goldwater became the 1964 Republican nominee. Senator Goldwater had opposed the Civil Rights Act of 1964 as a violation of "states' rights." Though he renounced segregation, Goldwater denounced the 1964 Act as a "threat to the very essence of our basic system" and a "usurpation of such power . . . which 50 sovereign states have reserved for themselves."²⁴⁰ Goldwater later opposed the Voting Rights Act of 1965, an act that reversed nearly seventy years of black disfranchisement and restored the right to vote to blacks in the South.²⁴¹ Goldwater said the act was unconstitutional and "unnecessary."²⁴² The "unnecessary" act had a dramatic effect. For example, in Mississippi, black registration changed from less than ten percent in 1964 to almost sixty percent in 1968; in Alabama it went from twenty-four to fifty-seven percent. In the South as a whole, registration by Americans of African descent rose to a record sixty-two percent.²⁴³

Goldwater lost the 1964 election overwhelmingly, but he carried the Deep South.²⁴⁴ The Goldwater campaign began a transformation of the Republican Party and national politics.²⁴⁵ A major theme of Goldwater's 1964 campaign was his attack on the Warren Court.²⁴⁶ In charting his states' rights approach in opposition to the national assault on the racial caste system, Goldwater had two brilliant legal advisers—William

239. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65*, at 404–05 (1998).

240. *Id.* at 357. For a discussion of the political issues in 1964 and 1968, see DONALD GRIER STEPHENSON, JR., *CAMPAIGNS & THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 163–89* (1999).

241. See KEYSSAR, *supra* note 207, at 264.

242. Joseph A. Loftus, *Goldwater Hits Vote-Rights Bill*, N.Y. TIMES, April 2, 1965, reprinted in PROQUEST HIST. NEWSPAPERS: THE NEW YORK TIMES (1851–2005) 24; *Candor on Voting Rights*, CHI. TRIB., April 4, 1965, reprinted in PROQUEST HIST. NEWSPAPERS: CHICAGO TRIBUNE (1849–1986) 24.

243. KEYSSAR, *supra* note 207, at 264.

244. See BRANCH, *supra* note 239, at 522. Goldwater carried five Deep South states. *Id.*

245. *Id.* at 523.

246. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 204, 233–34, 238, 391–92, 495 (2000) (discussing Goldwater criticisms of the Warren Court).

Rehnquist and Robert Bork.²⁴⁷ In Ronald Reagan, he had another gifted supporter. Reagan had also opposed the Civil Rights Act of 1964 and he would oppose the Voting Rights Act of 1965.²⁴⁸ A new “movement conservatism” was being born.²⁴⁹

In the Senate, both Republicans and Democrats supported the 1964 Civil Rights Act, but Goldwater’s states’ rights vision realigned the Republican Party and the politics of the nation.²⁵⁰ Many Southern Democrats—Strom Thurmond and Jesse Helms, for example—became Republicans; a few, like Robert Byrd of West Virginia who had joined the filibuster against the 1964 Civil Rights Act, remained Democrats.²⁵¹ Later, many people from both parties who had opposed the Voting Rights Act said that they had been wrong.²⁵²

When the values of racial equality clashed with “states’ rights,” Goldwater and Reagan chose “states’ rights”—opposing both the 1964 Civil Rights Act and the 1965 Voting Rights Act.²⁵³ “States’ rights” was not the full explanation—it rarely is. When the California legislature passed a bill prohibiting racial discrimination in the sale of housing, Ronald Reagan supported an initiative to repeal the law.²⁵⁴ For Reagan, at that time in his career, the right to discriminate in the sale of real property trumped the value of racial equality. Reagan’s views were shared by a majority of California voters—they voted to repeal the open housing law.²⁵⁵ The Warren Court later creatively interpreted the Civil Rights Act of 1866 to outlaw such discrimination.²⁵⁶

247. BRANCH, *supra* note 239, at 357 (“William Rehnquist, Phoenix attorney and future Chief Justice, and Robert Bork, Yale law professor and future Supreme Court nominee.”).

248. *Id.* at 523; LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 458 (1991).

249. *See, e.g.*, BRANCH, *supra* note 239, at 523.

250. *Id.* at 357.

251. *Id.* at 334–36.

252. *See, e.g.*, KEYSSAR, *supra* note 207, at 266 (discussing Strom Thurmond’s change of heart over the Act).

253. BRANCH, *supra* note 239, at 356–57, 523; Loftus, *supra* note 242.

254. *See* BRANCH, *supra* note 239, at 242 (detailing Reagan’s support of Proposition 14, the ballot initiative to repeal California’s Rumford Fair Housing Act of 1963).

255. *See id.* at 522–23.

256. *Jones v. Alfred A. Mayer Co.*, 392 U.S. 409, 438–39 (1968) (“If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent

The change in political alignment that was accelerated by the Goldwater movement began well before 1964 and the Warren Court, but it solidified between 1964 and 1968. When the Democratic Party endorsed a strong civil rights plank in its 1948 platform, the Deep South revolted and supported Strom Thurmond of the segregationist States' Rights Party.²⁵⁷

By 1968, with the temporary exception of Texas, Southern states all abandoned the Democratic Party and voted either for George Wallace or Richard Nixon.²⁵⁸ Race was not the only issue prompting the political realignment, but it was a major one. After Richard Nixon's election in 1968, Goldwater supporters, including William Rehnquist, were installed in the Nixon Justice Department.²⁵⁹ One of William Rehnquist's jobs was vetting Supreme Court nominees, and he was soon appointed to the Court.²⁶⁰

As a law clerk to Justice Robert Jackson, Rehnquist had written a memo about *Brown v. Board of Education* urging the Justice not to decide that state-imposed school segregation violated the Fourteenth Amendment. William Rehnquist wrote:

In these cases now before the Court, the Court is, as [John W.] Davis [the attorney representing the defendants resisting integration] suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which

negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.”).

257. Thurmond carried Alabama, Louisiana, Mississippi, and South Carolina. U.S. Electoral College, Historical Election Results, http://www.archives.gov/federal-register/electoral-college/votes/1941_1953.html (last visited Sept. 10, 2008).

258. U.S. Electoral College, http://www.archives.gov/federal-register/electoral-college/votes/1965_1969.html (last visited Apr. 10, 2008).

259. JOHN DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT*, at xiii (2001). William Rehnquist served as Assistant Attorney General for the Nixon Justice Department. *Id.*

260. *Id.* at 15–16.

commands intervention from one of any conviction. If this Court, because its members individually are “liberal” and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that “personal” rights are more sacrosanct than “property” rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that . . . in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah’s Witnesses . . . have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by “liberal” colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed . . .²⁶¹

At any rate, the transformation of the Republican Party that began with the Goldwater campaign helped to create a solid Republican South, realign national politics, empower “movement conservatives,” and eventually transform the Supreme Court.

Accurately describing legal “movement conservatism” is a challenge. Like any large movement there will be exceptions, cross-currents, and changes over time. Here, of necessity, only a few topics are broadly discussed. In many ways, movement conservatism can be understood as a reaction against the methods and values of the Warren Court. Justices Scalia and Thomas were icons of movement conservatism, although they may be on their way to being replaced by Chief Justice Roberts and Justice Alito. While Justice Kennedy has sometimes joined the Court’s growing movement conservative block, still on issues ranging from criminally prosecuting gay adults for having sex at home²⁶² to the death penalty for the young,²⁶³ he often charts a different course. In addition, he has

261. *Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 314–15 (1986) (memorandum submitted by the Hon. Howard M. Metzenbaum).

262. *Lawrence v. Texas*, 539 U.S. 558 (2003).

263. *Roper v. Simmons*, 543 U.S. 551 (2005).

periodically committed the sin of citing decisions from the European Court of Human Rights.²⁶⁴

Movement conservatives portray themselves as the interpreters of the true meaning of the Constitution—strictly construing the Constitution in accordance with its original intent or original meaning. Sometimes they appeal to original expectations of people at the time as the true test. They accuse judges of substituting their personal judgments for those enshrined in the Constitution. Of course, the political claim that movement conservative judges—even as to novel questions—consistently follow original meaning, understanding, or expectations is false.²⁶⁵ Like all other judges, their judicial philosophy is too complex to be reduced to simple formulas. Instead, they choose precedents to be demolished, those to be respected, and new precedents to be established, based on their complex judgment of what the appropriate decision is.²⁶⁶ In that, of course, they exercise the sort of discretion that they claim their judicial philosophy avoids.

In spite of the difficulty and of changes with the times, it is possible to see continuing themes in movement conservatism. One is hostility to the use of federal power to promote equality in fact. In 1964 and 1965, movement conservatives opposed the use of federal power to secure civil rights from denial based on race, religion, national origin, or sex, and opposed the use of federal power to secure the right to vote. In 2000, the Court struck down the use of federal power to deal with gender-motivated violence, and it established rules that limited and hobbled congressional power.²⁶⁷

In the 1960s and beyond, movement conservatives opposed the one person, one vote decision. In 2004, they held that political gerrymanders, even those that gave political power for the foreseeable future to a political

264. *Lawrence*, 539 U.S. at 573.

265. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (Scalia, J.) (“Justice Blackmun . . . argu[es] that our description of the ‘understanding’ of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant.”).

266. *See, e.g., Printz v. United States*, 521 U.S. 898, 925 (1997) (Scalia, J.) (“Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court.”).

267. *See United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act of 1994 exceeded federal power both under the Commerce Clause and under Section 5 of the Fourteenth Amendment).

minority, were effectively beyond judicial correction.²⁶⁸

For many years, movement conservatives opposed the doctrine by which states were required to obey almost all of the guarantees of the federal Bill of Rights. Those who attacked the rule requiring states to obey the Bill of Rights included Ronald Reagan's Attorney General Ed Meese, his assistant Gary McDowell, Republican Senator John East of North Carolina (who introduced a bill to deny the federal courts or the Supreme Court the power to enforce the Bill of Rights), a number of "conservative" judges or persons nominated for judgeships, columnist George Will (who announced that the Court took a radically wrong turn when it incorporated the First Amendment into the Fourteenth), and Raoul Berger, who became a "conservative" icon.²⁶⁹ A guest editorial column in the Wall Street Journal described the incorporation of the Bill of Rights as a limit on the states as "Flim Flam Under the 14th."²⁷⁰ Today, few openly call for freeing the states from obeying the Bill of Rights, although movement conservatives sometimes insist that requiring the states to obey the Establishment Clause is a mistake.²⁷¹

Still, hostility to holding government to account persists. In 1976, the Court considered a damage action brought under 42 U.S.C. § 1983 by a newspaper photographer who claimed his picture was falsely included in a notorious shoplifter flyer that the Louisville, Kentucky police chief posted

268. See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (failing to find the Equal Protection Clause; or Article I, Section 2; or Article I, Section 4 provided limits on state gerrymanders).

269. Michael Kent Curtis, *Conceived in Liberty: The Fourteenth Amendment and the Bill of Rights*, 65 N.C. L. REV. 889, 889–91 (1987) and sources cited therein.

270. *Id.* at 890 (citing Charles E. Rice, *Flim Flam Under the 14th*, WALL ST. J., July 31, 1985, at 18, col. 4).

271. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) for the historical case that a nonestablishment principle should have been found in the Fourteenth Amendment. For an expression of skepticism, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80 (2002) (Thomas, J., concurring) ("On its face [the Establishment Clause] places no limit on the States with regard to religion Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through incorporation of the Establishment Clause."). Thomas focuses on the understanding at the time of the adoption of the Bill of Rights, not the understanding at the time of the adoption of the Fourteenth Amendment—a crucial flaw.

in conspicuous places around the city.²⁷² The photographer claimed, in accordance with earlier precedent, that stigmatizing him in this way, without notice or opportunity to be heard, violated his right to due process and entitled him to damages.²⁷³ Writing for the Court, Justice Rehnquist rejected the claim.²⁷⁴

The *Bivens* doctrine announced in 1971 provides an implied right to a damage action for people whose Bill of Rights liberties have been invaded by federal officers.²⁷⁵ The current Court has taken a restrictive view of *Bivens* actions and therefore construes individual rights under the doctrine narrowly.²⁷⁶ Justices Thomas and Scalia, the two Justices most wedded to some version of the “shock the Framers” test, announced that they would refuse to apply *Bivens* even to new cases clearly within the narrowest reading of its rationale.²⁷⁷ They would limit *Bivens* and the cases following its rule to new cases occurring under precisely the same circumstances.²⁷⁸

The Court considered Master Sergeant Stanley’s *Bivens* action in 1987.²⁷⁹ Stanley, a former member of our armed forces, had been fed LSD without his knowledge or consent as part of a federal government experiment to learn of the drug’s effect on subjects who were unaware they had ingested it.²⁸⁰ According to the allegations of the complaint, which must be taken as true on a motion to dismiss, the drug had destroyed his mental health, his marriage, and his career.²⁸¹ Justice Scalia, writing for the Court, held that the soldier had no right to recover the damages he suffered as a result of being made the unwitting subject of the government’s drug experiment.²⁸² Such injuries arose out of and were

272. Paul v. Davis, 424 U.S. 693, 694–96 (1976).

273. *Id.* at 697.

274. *Id.* at 713–14.

275. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

276. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63–64 (2001) (prisoner denied *Bivens* relief against a corporation hired to manage a halfway home under contract with the Bureau of Prisons, when its agent required him to climb stairs, a requirement known to be dangerous to him because of his heart condition, resulting in a heart attack, fall, and injury).

277. *Id.* at 75.

278. *Id.*

279. *United States v. Stanley*, 483 U.S. 669 (1987).

280. *Id.* at 671.

281. *Id.*

282. *Id.* at 685–86.

incident to military service; therefore, government officials were effectively immune from damages for the injury willfully inflicted on the hapless soldier.²⁸³ The matter was exclusively committed to the Congress.²⁸⁴

In *United States v. Stanley*, Justice Scalia did not engage in historical analysis.²⁸⁵ In *Boyle v. United Technologies Corp.*, the Court considered the case of the father of a Marine pilot who drowned after his helicopter crashed.²⁸⁶ The father sued the helicopter manufacturer on defective repair and design theories.²⁸⁷ In a remarkably “unoriginal” decision, Justice Scalia, writing for the Court, created a federal common law military contractor defense and preempted Virginia state law.²⁸⁸

While the most conservative movement conservatives often favor a more limited reading of rights, that is not always so. When the states’ interest in protecting the coastal environment severely limited the ability of a property owner to build in a fragile coastal area, the movement conservative approach insisted on compensation for the land owner.²⁸⁹ Nor do movement conservatives always insist on a limited reading of federal power. In general, they are more sympathetic to a broad reading of federal power when it preempts the right of tort victims to recover under state law.²⁹⁰ Indeed, as they have achieved far more influence in decisions of the Court, movement conservatives have been far more open to a selectively active judiciary.

VI. THE BATTLE OVER CONSTITUTIONAL MEANING: FROM STRICT CONSTRUCTION TO ORIGINAL MEANING

A. *The Critique*

As we have seen, the Warren Court’s decisions sparked a long rebellion that continues to this day. Part of that rebellion has focused on

283. *Id.* at 679, 684.

284. *Id.* at 683.

285. *United States v. Stanley*, 483 U.S. 669 (1987).

286. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502 (1988).

287. *Id.* at 502–03.

288. *Id.* at 504.

289. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

290. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). In this decision, Justice Breyer wrote for the majority and was joined by Justices Rehnquist, O’Connor, Scalia, and Kennedy, while Justices Souter, Thomas, and Ginsburg joined Justice Stevens in dissent. *Id.* at 863.

an allegedly better way to make constitutional decisions and to avoid the “evils” of the Warren Court. One prescription for a counterrevolution is reading the Fourteenth Amendment and the rest of the Constitution in light of its expected application at the time the provision in question was ratified. This oft-asserted claim is worth careful examination, even though its proponents are quite selective in its invocation and use.

Constitutional history and original understanding are important factors in determining how we should interpret the Constitution. While history is an important factor, it should not be the only factor. Rights including criminal procedure guarantees of the Bill of Rights, habeas corpus, and the other rights provided by incorporation of the Bill of Rights deal with ancient but recurring evils.²⁹¹ These rights should typically mean at least what they meant historically. But, if they are to fulfill their purposes, they cannot be limited merely to expected application. The right to counsel or to due process and equal protection would be fairly empty rights for indigents without the assistance of counsel and the ability to appeal unlawful convictions.

Still, in applying the Bill of Rights to the states, in the cases of the guarantee of jury trial and habeas corpus, history strongly warns of the importance of minimum national rights and against diluting these rights. When supposedly strict constructionist Justices, like some more liberal ones, shrank the right to trial by jury and ignored the historic meaning of jury trial, they departed from history and seriously impaired that right.²⁹²

291. For a use of the past to protect individual liberty, see the great opinion by Justice Scalia, who was joined by Justice Stevens, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (arguing that an American citizen accused of being involved in terrorism could not be held indefinitely without trial or access to a lawyer or anyone else in the outside world based on the unilateral decision of the President).

292. This possibility was invited by misconceived dicta in a footnote in *Duncan v. Louisiana*, 391 U.S. 145, 158–59 n.30 (1968). In *Duncan*, the Court suggested that incorporating the right to jury trial did not necessarily involve incorporating juries of twelve or unanimity since decisions under the Sixth Amendment “are always subject to reconsideration.” *Id.* In *Williams v. Florida*, 399 U.S. 78, 86, 103 (1970), the Court upheld a conviction by a unanimous jury of six, and in *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), it upheld a statute allowing jury verdicts by a ten-to-two vote and an eleven-to-one vote. However, in *Burch v. Louisiana*, the Court rejected a conviction by five of six jurors, belatedly noting that, after departing from the historic requirements of a jury trial, “it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.” *Burch v. Louisiana*, 441 U.S. 130, 139 (1979).

But when the Court held that, for a valid conviction, indigents must be provided with counsel, it supported rather than undermined the purposes of the guarantee of the right to counsel.²⁹³ This is true, regardless of how people may have expected the issue to come out in 1868. Society learns from experience. Through experience, the social world is perceived in new ways. As a result of changed social understandings, a new understanding regarding the application of constitutional principles is necessary.

The critiques of the Warren Court at the time and some more recent movement conservative critiques of the Court share a common element. In one form or another, they have insisted that the Warren Court failed to follow the Constitution and the law, but instead substituted its own values for those of the Constitution.²⁹⁴ These and later critiques of “judicial activism” suggest an alternative—a jurisprudence supposedly free of a judge’s personal values.²⁹⁵ First there was “strict construction” of the Constitution. Then it morphed into “original intent” and, more recently, into “original meaning.” A recurring argument was that an imperial court threatened democratic values; “strict construction” or “original intent” or “original meaning” would save us.

In locating basic rights such as those protected as privileges or immunities of citizens of the United States or the right to equal protection of the laws, no one believes that judges should simply impose their idiosyncratic views on the nation. The decision as to the principles embodied in the text should be understood in light of various factors—the resultant force of vectors whose strength depends on understanding issues and the constitutional principles in their social, as well as historical context. Important factors in understanding a principle would include the text of the Constitution; the original meaning of its words; its expressed ethical aspirations—such as establishing justice and securing the blessings of liberty; the inter-relation of various textual provisions of the Constitution and the transformative effect of later Constitutional amendments on earlier understandings; history, including the grievances that led to the provision; understandings of framers and the public at the time as to the principle established; expected applications; how the principle needs to be translated into the contemporary world; history as a warning of mistakes to avoid;

293. Gideon v. Wainright, 372 U.S. 335 (1965).

294. Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L.J. 1537, 1550 (2006).

295. The claim of neutrality is dubious. See Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 779 (2007).

sound public policy; emerging social consensus as evidenced by decisions on the issue in state legislatures and courts; and others. Daniel Farber suggests factors to consider:

- Supreme Court precedent establishing the right or analogous rights;
- Connections with specific constitutional guarantees;
- Long-standing, specific traditions upholding the right;
- Contemporary societal consensus about the validity of the right;
- Broader or more recent American traditions consistent with the right;
- Decisions by American lawmakers and judges recognizing the right; and
- Decisions by international lawmakers and judges recognizing the right.²⁹⁶

The problem, of course, is that considering multiple factors requires judgment as to why particular factors should control in a particular case.²⁹⁷ Judgment is inescapable, and justice and morality are factors to consider. As Charles Black wrote, “[T]he judge who decides the cases under law *cannot avoid* making—and acting upon—judgments of justice, morality, expediency, and fitness.”²⁹⁸

In contrast to a multi-factorial approach, advocates of (typically selective) original expectation invoke the supposed certainty of a hierarchical approach that sometimes gives primacy to original expectation.²⁹⁹ Because of selective application of the principle, of course,

296. DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 108 (2007).

297. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 151–57 (2002) (suggesting a method of balancing policies and the values they represent for deciding cases when types of argument pull in different directions).

298. CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 26 (1981).

299. See Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007). Original expectation relies on the meaning of the words of the Constitution when they were drafted—their 1791 meaning—and nonoriginalist precedents that “are well established, if they promote stability, and if people have

it does not deliver what it promises.³⁰⁰ Advocates of original expectation also invoke democracy.

The “anti-judicial activism” critique contains an important element of wisdom. One of the basic rights of citizens of the United States is to shape public policy through legislation, both at the state and national levels. Hyperactive courts can frustrate, and often have frustrated, this basic right by interpretations that unduly limit democratic choice.³⁰¹ Courts did that in the *Lochner v. New York* era when they treated the corporation as a person and then failed to recognize the power differential between the huge corporation and the worker.³⁰² As Karl Popper noted:

Freedom . . . defeats itself, if it is unlimited. Unlimited freedom means that a strong man is free to bully one who is weak and to rob him of his freedom. That is why we demand that the state should limit freedom to a certain extent, so that everyone’s freedom is protected by law. Nobody should be at the *mercy* of others, but all should have a *right* to be protected by the state.

Now . . . these considerations, originally meant to apply to the realm of brute-force, of physical intimidation, must be applied to the economic realm also. Even if the state protects its citizens from being bullied by physical violence . . . it may defeat our ends by its failure to protect them from the misuse of economic power. In such a state, the economically strong is still free to bully one who is economically weak, and to rob him of his freedom. . . . [U]nlimited economic freedom can be just as self-defeating as unlimited physical freedom, and economic

justifiably come to rely on them.” *Id.* at 298. The exceptions are less predictable and principles than proponents claim.

300. *Id.* at 297–99. According to Balkin, even by considering accepted precedent in applying the original expected application of the Constitution, the approach incorrectly identifies the source of political legitimacy as public acceptance, does not give equal deference to all precedents, and labels as mistakes civil rights laws and federal power to protect both citizens and their environment. *Id.*

301. *Lochner v. New York*, 198 U.S. 45 (1905). The great failure of the Court in *Lochner*-era cases was to refuse to recognize the legitimacy of considering the power differential between capital and labor and to treat the “giant corporation” as simply another person making a bargain.

302. *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down a statute that forbade discharging workers because they joined a union); *Godcharles v. Wigeman*, 6 A. 354, 355–56 (Pa. 1886) (holding legislation requiring the corporation to pay workers in cash, rather than scrip redeemable in the company store, to violate liberty of contract).

power may be nearly as dangerous as physical violence; for those who possess a surplus of food can force those who are starving into a “freely” accepted servitude, without using violence. . . . [A] minority which is economically strong may in this way exploit the majority of those who are economically weak.³⁰³

Courts also frustrate democracy when they fail to protect the right to vote and the conditions necessary for effective democratic choice. A current example is allowing political gerrymanders by which a minority of voters of one party are given something close to a permanent majority of the state legislature or congressional delegation. The current Court has a quite permissive approach to grossly abusive political gerrymanders.³⁰⁴

Sometimes courts frustrate democratic choice by statutory construction. Construing federal statutes to preempt state legislation in the absence of clear congressional purpose to do so is a major assault on the democratic process at the state level, though not one that seems to trouble most movement conservative judges.³⁰⁵ One might believe, mistakenly, that mere questions of allocation of power between the state and the nation do not have a very serious impact on the democratic process. However, because of the massive inertia and resistance to democratic change built into our constitutional structure, as well as vast corporate power to shape the law through executive action, that view is far too simple.

303. 2 KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 124–25 (1966).

304. See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion) (“We conclude that neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”).

305. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864–66 (2000). Federal Motor Vehicle Safety Standard 208, the Act at issue in *Geier*, did contain an express preemption provision covering certain non-federally defined safety standards, but also contained a saving clause that that should have protected the plaintiff’s common law claim. *Id.* Of course, federal courts are not the only culprit. Executive agencies often unwisely limit state power. For an example of the use of preemption to frustrate the ability of states to begin to take steps to protect their citizens from catastrophe, see John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can’t Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1; Adam Cohen, *Whatever Happened to (the Good Kind of) States’ Rights*, N.Y. TIMES, May 23, 2008, at A24 (describing how preemption can cripple the ability of states to protect their citizens).

B. Problems with the Critique

1. Original Meaning Paradoxes: Principles v. Expected Application

Despite its contributions, the original intent or original meaning critique is misguided. What sort of original meaning do we mean? If we accept a narrow understanding of original meaning—assuming we can find it—why should it always trump other factors?

One definition of original meaning is “the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters) (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.”³⁰⁶ It is possible under such an approach to equate original meaning with the specific expectations people would have had for the operation of the provision at the time it was adopted. Such an original expected application approach makes an appearance in the opinions of Justices Thomas and Scalia in *M.L.B. v. S.L.J.*³⁰⁷ It often appears as a presumably crucial factor in other cases such as *Bowers v. Hardwick*, in which the Court upheld the power of the state to prosecute two consenting gay adults for having oral sex in the privacy of the home.³⁰⁸

In *M.L.B. v. S.L.J.*, the Court considered the case of a mother in Mississippi whose parental rights had been terminated, permanently severing her bond with her children.³⁰⁹ The mother was poor and unable to purchase the transcript required to appeal her case.³¹⁰ The majority found she had a right—under both due process and equal protection—to be provided with a transcript so she could appeal the decision to permanently

306. Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1439 n.3 (2007) (quoting Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 185 (2006)).

307. *M.L.B. v. S.L.J.*, 519 U.S. 102, 133, 138–44 (1996) (Thomas, J., dissenting). The credit for the phrase “original expected application” goes to Professor Balkin. See generally Balkin, *supra* note 299.

308. *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986) (holding that there was no fundamental right of “homosexuals to engage in acts of consensual sodomy” because in 1868, when the Fourteenth Amendment was ratified, “all but 5 of the 37 States in the Union had criminal sodomy laws”).

309. *M.L.B.*, 519 U.S. at 107.

310. *Id.* at 109.

and irrevocably sever her bonds with her children.³¹¹

Justices Thomas and Scalia dissented.³¹² In their dissent they announced that they were inclined to overrule *Griffin v. Illinois*, a case holding that indigents who had been convicted of serious crimes were entitled to a transcript to allow them to appeal.³¹³ In *M.L.B.*, Justice Thomas invoked a “shock the framers” original expectation test.³¹⁴ If the particular result in the case would have “startled the Fourteenth Amendment’s Framers,” it should not be followed.³¹⁵ A more sophisticated approach (one that shares many of the same problems) would involve shocking the ratifiers or the public at the time the measure was adopted.

The “shock the framers” test tells us to look at what people in 1866–68 would have expected the Fourteenth Amendment to mean with respect to the specific issue that came before the Court in *M.L.B.* If, in 1868, they would have been shocked or surprised by the proposed constitutional protection, the claim of constitutional protection must be rejected. In a weaker form, the shock the framers test is a major and often determinative factor. In short, the specific application of the constitutional principle must be limited to (or treated as identical with) what people would have expected or at least not rejected in 1868.

If one strictly followed this approach, much of the jurisprudence of the Warren Court, and many later decisions as well, would be erroneous. As an original matter, they should not have been decided as they were. Claims of rights that *probably* should have been rejected when raised *if* one accepts a “shock the framers test” include protection against gender discrimination,³¹⁶ protection against racial segregation in education,³¹⁷ protection against the right of people of different races to marry,³¹⁸ protection of the right of the poor to have appointed counsel before being tried for serious crimes,³¹⁹ protection of the right to have and use birth

311. *Id.* at 120, 128.

312. *Id.* at 129 (Thomas, J., dissenting).

313. *Id.* at 139 (citing *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

314. *Id.* at 138.

315. *Id.* at 138–39.

316. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

317. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

318. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

319. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

control,³²⁰ protection of sexual privacy in *Lawrence v. Texas*,³²¹ and a host of others.

The “shock the framers” (or “shock the contemporary public”) approach implies that the Fourteenth Amendment has only one sort of meaning—the expectation that the framers of 1866, or the politically enfranchised public in 1866–1868, would have had with reference to the specific claim in question. By this view, the principle of the Amendment is the same as its expected application. If an application was not originally expected or would have been rejected, the Amendment may not be legitimately applied to supply protection. A judge deciding a constitutional case litigated in the 1960s or 1970s or today, should not—as an initial matter—decide against gender discrimination and should not protect the right to marry a person of a different race. That would be impermissible because gender discrimination and bans on interracial marriage were widely accepted in 1868. It is quite likely that the application of the Fourteenth Amendment to invalidate these laws in 1868 would have occasioned surprise or shock to people at the time.³²² Similarly, in *Bowers v. Hardwick*, the Court noted that at the time the Fourteenth Amendment was ratified “all but 5 of the 37 States in the Union had criminal sodomy laws.”³²³

The problem with this approach, as many have noted, is that the text

320. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

321. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

322. At the time of the Fourteenth Amendment, in 1866, thirty-one states outlawed interracial marriage and twelve allowed it. Loving Day, The Legal Map for Interracial Relationships 1662–1967, <http://lovingday.org/map.htm> (last visited Sept. 11, 2008). By 1868, the figures were thirty states outlawing it and thirteen allowing it. As late as 1945, thirty states still outlawed interracial marriage. *Id.* By 1966, seventeen states still outlawed interracial marriage; it was legal in thirty-three states. *Id.* Several leading Republicans in 1866 did not understand the bans to deny equality. Senator Fessenden, for example, insisted that the ban on interracial marriage did not discriminate based on color in violation of the Civil Rights Act’s equal right to contract (marriage) because both whites and blacks were forbidden to marry a person of a different race. CONG. GLOBE, 39th Cong., 1st. Sess. 505 (1866). Of course such laws were, as we now see, part of a racial caste system. *Cf., e.g., Speech of the Hon. J. A. Garfield, of Ohio*, CINCINNATI COM., Aug. 25, 1866, at 3 (suggesting that interracial marriage would remain a crime in Ohio).

323. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (citing various state criminal sodomy statutes in effect in 1868). The Court used this fact to show that no right to homosexual sodomy was “‘deeply rooted in the Nation’s history and tradition.’” *Id.* at 194.

of the Amendment contains principles: no person is to be deprived of equal protection of the laws; no state is to abridge the privileges or immunities of citizens of the United States.³²⁴ The principles should not be reduced simply to original expectation because the two are not always the same.³²⁵ A second problem is to decide what methods can reasonably be used to understand the meaning of the principle in the contemporary world.

Of course, speculation about what would shock people in 1868 is risky. To note one problem, Alexander Bickel suggests that the search for congressional purposes should be “twofold[.] One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what, if any, thought was given to the long-range effect, under future

324. U.S. CONST. amend. XIV.

325. MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 28–53 (1994) (discussing the differences between original constitutional interpretation and original constitutional specification, and defending the use of the former). See also the discussion of the originalism debate in Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); Ronald Dworkin, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115 (1997). For an elaborate discussion of the original expected application distinction, see Balkin, *supra* note 299. For a discussion of how scholarly originalism is changing now that movement conservatives often find themselves in the Court’s majority, see Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 607–13 (2004) (arguing modern scholarly originalism embraces a more active approach and is somewhat less inclined to invoke deference to democratic decision-making). See also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613–14 (1999) (discussing the history of the controversy over originalism and suggesting justifications for an original meaning approach). For a powerful critique of the claim that the Court has been typically counter-majoritarian and of the assumption that the legislature reflects the views of the majority, see generally Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) and Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991). Both articles were written before movement conservatives obtained their current strength on the Court. From my perspective, of course, not all of the Court’s majoritarianism is positive. See Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 319–28 (2003) (pointing out some of the reasons why our political process is not very democratic, because of democracy’s agency problems and failure to see what is required for a truly democratic constitutional arrangement).

circumstances, of provisions necessarily intended for permanence.”³²⁶ The problem, of course, is that future circumstances may not be foreseen, and long-range effects in an uncertain future may not be discussed.

Lawrence Lessig suggests that constitutional provisions enacted many years ago may need to be translated to be applied to the current world.³²⁷ Just as a literal translation of text in a foreign language may fail to communicate its meaning, so a constitutional provision may require translation into the present. His example is Justice Brandeis’s dissent in the wiretapping case of *Olmstead v. United States*.³²⁸ The majority found wiretapping not within the literal words of the Fourth Amendment.³²⁹ Justice Brandeis insisted on first looking at the purpose of the Fourth Amendment in the Framers’ world, and then applying that purpose in light of new technology of the twentieth century.³³⁰ Justice Scalia explains that his original expected application approach can accommodate technological change.³³¹ What it cannot accept as an original matter is “that the *very acts* that were perfectly constitutional in 1791 [or, of course, in 1868] . . . may be *unconstitutional* today.”³³²

In contrast to wiretapping, the Framers could and did discuss issues like the rights of women. What most could not and did not foresee, however, was the radically changed status and understanding of the role and capabilities of women.

The “only one type of meaning” approach—the expected meaning at the time—is too simple. To see why, first look at meaning in a more general context. Consider agency law. The agency metaphor was often invoked by those struggling for representative government and greater

326. Van Alstyne, *supra* note 187, at 68 (quoting Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955)).

327. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 109–21 (1999) (seeking fidelity to the past by “translat[ing] the commitments of the past into a fundamentally different context” and noting that in certain circumstances, ambiguity requires judicial choice).

328. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347, 353 (1967).

329. *Id.* at 466.

330. *Id.* at 472–74 (Holmes, J., dissenting).

331. ANTONIN SCALIA, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 140–41 (1997). The term “original expected application” was coined by Professor Balkin. See Balkin, *supra* note 299.

332. SCALIA, *supra* note 331, at 141.

democracy—from the Levellers in England in the seventeenth century to those who framed constitutions in the period of the American Revolution.³³³ The popular sovereignty metaphor treats the people as the principal and government officials as their agents or servants. Indeed, Alexander Hamilton invoked agency and popular sovereignty to justify judicial review.³³⁴

The law of agency recognizes that changed circumstances can change meaning from the expected original application. The *Restatement (Second) of Agency* gives an example that I will slightly adapt.³³⁵ The owner of a factory that has operated for twenty years at half capacity because of lack of orders plans to leave for six months to explore the rain forest. During these six months of time, he cannot be reached. The owner explicitly instructs his agent to order only the usual one-half supply of raw materials during his six-month absence. In the second month of his absence, conditions change in a totally unforeseen way. The factory now has sufficient orders to operate at full capacity for two years. The agent may be justified in ordering a full supply of raw materials. The explicit, specific direction gives way to the implicit general principle that underlies the original direction.

Consider the meaning of the Declaration of Independence and its

333. Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 367–68, 390, 392–93 (1991).

334. THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.”).

335. See RESTATEMENT (SECOND) OF AGENCY § 33 cmt. a, illus. 2 (1958). The illustration in its original form states:

P, the owner of a factory running on half time for lack of orders, before leaving for his vacation, directs his purchasing agent to “put in our usual monthly coal supply of 1000 tons.” The following day a large order comes in which will immediately put the factory on full running time. It may be found that A is authorized to purchase sufficient coal to keep the factory running, this depending upon whether or not P can easily be reached, the amount of discretion usually given to A, the condition of P’s bank balance, and other factors.

Id.

principle that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”³³⁶ As the controversy over slavery and race intensified in the years before the Civil War, people argued over the meaning of the Declaration. More and more Southerners explicitly rejected the Declaration.³³⁷ Another common approach was to read the Declaration in light of its supposed expected meaning at the time—an invocation of the “shock the Framers” doctrine.

Stephen A. Douglas argued that the Declaration had to be understood in light of its expected immediate application.

I believe that the Declaration of Independence, in the words “all men are created equal,” was intended to allude only . . . to men of European birth or descent, being white men . . . ; but the signers of that paper did not intend to include the Indian or the negro in that declaration . . . for if they had would they not have been bound to abolish slavery in every state . . . ? Remember, too, that at the time the Declaration was put forth every one of the thirteen colonies were slave-holding colonies; every man who signed the Declaration represented slave holding constituents. . . . Did those signers mean by that act to charge themselves and all their constituents with having violated the law of God . . . ?³³⁸

As Douglas saw it, people in 1776 did not consider slaves or blacks to be equal to white men. The meaning of the Declaration was its public meaning at the time: all white men are created equal.

Chief Justice Roger Taney took a similar approach to the Declaration in the *Dred Scott* decision. By his view, the Declaration needed to be interpreted consistent with its expected, immediate, and specific application:

The general words above quoted, [“all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is

336. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

337. See CURTIS, *supra* note 21, at 296 (quoting Sen. James Chestnut of South Carolina).

338. CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 62–63 (Paul M. Angle ed., 1958).

too clear for dispute, that the enslaved African race were not intended to be included, . . . for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted³³⁹

Abraham Lincoln rejected this expected, specific, immediate application approach in favor of an evolutionary one. Lincoln distinguished the principle from its expected immediate application.

I think the authors of that notable instrument [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that “all men are created equal” was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.³⁴⁰

The distinction between the principles of the Declaration and their

339. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856).

340. Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (June 26, 1857), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 398–99 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN: SPEECHES].

expected immediate application was commonly understood by Republicans who framed the Fourteenth Amendment. Speaking on May 8, 1866 about the proposed Fourteenth Amendment, Representative Thaddeus Stevens said that “[i]t cannot be denied that this terrible struggle [the Civil War] sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time.”³⁴¹ Schuyler Colfax, Speaker of the House in the 39th Congress, spoke during the election campaign of 1866, an election that was in good part a referendum on the proposed Fourteenth Amendment. He said that Section 1 was “going to be the gem of the Constitution . . . I love it . . . because it is the Declaration of Independence placed immutably and forever in the Constitution.”³⁴² Obviously, Colfax did not read the Declaration as limited to its expected immediate application.

Unless one translates the general words of the Fourteenth Amendment into a very specific, narrowly targeted statute, it also has two meanings—a principle meaning and an expected application of that principle in 1868.

Consider the Equal Protection Clause. The Court has the job of applying the Equal Protection Clause to cases that are brought before it. It must decide what it means. The Court has held that the Clause requires similarly situated persons to be treated alike and that a law be rationally related to a legitimate state purpose.³⁴³ The Court has long accepted that principle and applied it in cases. Applying the principle, cases at different times reached very different results—take, for example, *Plessy v. Ferguson* in contrast to *Brown v. Board of Education* and *Loving v. Virginia*. The

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

342. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 73 (1949) (quoting CINCINNATI COM., Aug. 9, 1866, at 2, col. 3); see also William E. Forbath, *Lincoln, the Declaration, and the “Grisly, Undying Corpse of States’ Rights”*: History, Memory, and Imagination in the Constitution of a Southern Liberal, 92 GEO. L.J. 709, 735 (2004) (discussing the use of the Declaration as instantiating “the Framers’ deferred commitment to freedom and equality”).

343. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40, 446 (1985) (holding that denial of a permit for a group home for mentally retarded people did not meet the rational basis test). For the view that the Equal Protection Clause was designed to forbid class legislation that arbitrarily singled out persons for disadvantages, see Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 260–61, 285–86 (1997).

result in such cases involves the principle—a major premise—and the Court's understanding of the social facts—a minor premise.

In *Plessy v. Ferguson*, for example, the Court considered segregation on railway cars.³⁴⁴ In light of the Justices' rather racist understanding of social facts, the Court found segregating by race to be rational and not subordinating—even as applied to Plessy, who was seven-eighths Caucasian. On the other hand, the Court explained that segregating red-headed people would not be rational.³⁴⁵ The outcome in *Plessy* did not reflect a uniform Northern consensus. As Paul Finkelman and others have demonstrated, a number of Northern states around this time had passed and enforced antidiscrimination statutes for transportation and places of public accommodation.³⁴⁶

By the time *Brown v. Board of Education* was decided, for the Court and for many in the nation, the predominant understanding of social facts related to race had changed.³⁴⁷ The Court's decision in *Brown* had immense moral impact that contributed to the transformation of race relations. That is so even though the Court's dramatic action was preceded by some earlier steps. President Roosevelt had issued an executive order forbidding employment discrimination in defense program plants based on race.³⁴⁸ World War II and its aftermath had dramatically highlighted the pernicious effects of racism. President Truman had integrated the military.³⁴⁹ By 1954, most states did not have state-enforced racial segregation in schools, but the Southern states and some others remained rigidly segregated.³⁵⁰ When the Court in *Brown* reconsidered its mistake in

344. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

345. *Id.* at 549. This discussion of equal protection relies in part on an earlier discussion in Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature after Lawrence v. Texas*, 43 WAKE FOREST L. REV. (forthcoming 2008).

346. Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 981–86 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

347. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

348. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

349. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); see also Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1616–20 (2004).

350. At the time of the *Brown I* decision in 1954, seventeen Southern and border states still required elementary schools to be segregated. 1954 to 1963 School

Plessy, the nation had almost seventy years of experience with segregation. The experience showed that segregation supported a racial caste system that subordinated Americans of African descent; that caste system infected virtually every area of life—civil and criminal justice, education, voting and democracy, employment opportunities, and a host of others.

As the Court's—and the nation's—understanding of social facts related to race changed, so did the Court's understanding of what sort of racial classifications violated the principle. If one accepts as valid challenges to classifications that are irrational and invidious (or foster a caste system) and applies that principle, considering social facts is simply inevitable. The alternative, of course, is to reduce the principle to a list of expected applications at the time.

A similar development occurred when the Court applied heightened scrutiny to gender discrimination. Initially, judges found all sorts of acts of discrimination against married women to be rational.³⁵¹ Under the common law as it was initially enforced in the states, married women could not enter contracts, lost control of their property to their husbands, were not entitled to their earnings, and could not file suit in their own names—husbands had to sue on their behalf.³⁵² Women were thought to be akin to children, unfit to manage their own affairs, and in need of male supervision and “protection.”³⁵³ In 1877, in *Bradwell v. Illinois*, the Court upheld an Illinois state decision denying a married woman the right to practice law.³⁵⁴ This was so although the woman otherwise met all the requirements to be admitted to the bar.³⁵⁵

The Court continued to defer to state statutes that grossly discriminated against women for quite some time. One can see this approach at work in the 1948 case of *Goesaert v. Cleary*.³⁵⁶ Michigan had passed a statute that prevented women from being bartenders unless the

Desegregation, <http://www.infoplease.com/ce6/history/A0858851> (last visited Sept. 11, 2008).

351. Sarah Grimké, *Legal Disabilities of Women*, in LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN 7–83 (1837) in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 527–28 (5th ed. 2003).

352. *Id.*

353. *See generally* PRESSER & ZAINALDIN, *supra* note 351, at 527–600.

354. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872).

355. *See id.* at 133.

356. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

bar was owned by the woman's husband or father.³⁵⁷ The rationale the Court accepted was that the law protected women from disorderly drunks. This end was supposedly accomplished if the woman was the daughter or wife of the owner, even if the owner was always absent from the premises.³⁵⁸ Women owners could not tend bar, even if they were black belts in karate or if they hired security guards to protect them. Still, women could be waitresses, taking drinks to the tables in very close proximity to the presumably unruly male patrons. Meanwhile, a woman who would be able to work in a safer place, behind the barricade of the bar, was not allowed an opportunity to work as a bartender.³⁵⁹ Because gender classifications did not get heightened scrutiny, the legislature could deal with only a part of the problem; it could proceed one step at a time.³⁶⁰ The Court was free to dream up an imagined rational basis for the decision, and the fit between the imagined purpose of the statute and the means adopted could be breathtakingly loose. Even quite irrational acts of discrimination against women were quite alright under this approach.

In *Reed v. Reed*, in the 1970s, the Court reconsidered its approach.³⁶¹ By this time, it understood that women were not like children and were typically capable in the same ways men were capable. In *Reed*, the Court used heightened rationality review and struck down, as a violation of equal protection, a rule preferring men over women as administrators of estates.³⁶² What had changed was not the principle against irrational and invidious discrimination—the Court's understanding of social facts had changed.

Asking constitutional history to simply and directly apply the values and assumptions of one era to solve problems of a much later era is problematic. It prevents courts from learning from experience and applying what they have learned when deciding cases. It ignores the progress that social and political movements (the abolitionist movement,

357. *Id.* at 465.

358. *Id.* at 466.

359. *See id.* at 467 (ruling that Michigan's law preventing women from being bartenders was not unconstitutional).

360. *See, e.g., Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (holding there is no requirement under low level rational basis that "all evils of the same genus be eradicated or not at all"); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem that seems most acute to the legislative mind.").

361. *Reed v. Reed*, 404 U.S. 71 (1971).

362. *Id.* at 76.

the women's rights movement, and others) have made in changing prior understandings.³⁶³ As Lawrence Lessig has recognized, there are significant problems in faithfully translating a meaning arrived at in one time into the context of a later and very different time.³⁶⁴

The people to consult about the original expectation of the application of the Equal Protection Clause are the people of 1866–68. Asking whether they would have been shocked by the current application of equal protection assumes that they would look at the question in light of their 1868-world understanding. To consider how the issue should be decided in the changed world of 1954, 1968, or of today would require finding a principle distinct from the 1868 expectation. The principle against a caste system or against irrational and invidious discrimination would not change; the major premise would stay the same. But a different understanding of social facts would require a different result.

In the gender cases (as in the race cases before), the Court was not imposing its unique views on the nation as a whole. Just as the national approach to race had evolved by 1954, so had the national approach to gender evolved by the 1970s. The Nineteenth Amendment had given women the right to vote in 1920.³⁶⁵ During World War II, women had performed all sorts of previously male-only jobs. In 1964, Congress passed Title VII of the Civil Rights Act, forbidding discrimination based on sex in

363. Balkin, *supra* note 299, at 331–32. E.F. Schumacher suggests in another context that most pressing human problems are not susceptible to a simple logical solution. These human problems are what he calls “divergent problems.” E.F. SCHUMACHER, A GUIDE FOR THE PERPLEXED 126 (1977). “These are not logical but *existential* questions [E]xperience has to be admitted as evidence” *Id.* The problem with excessive reliance on original expectation as limiting constitutional principles is that it rejects too much experience. Rejecting this simplistic logical approach leaves us to resolve tensions between opposites.

Our logical mind does not like [these pairs of opposites]: it generally operates on the either/or or yes/no principle, like a computer. So, at any time it wishes to give its exclusive allegiance to either one or the other of the pair, and since this exclusiveness inevitably leads to an ever more obvious loss of realism and truth, the mind may suddenly change sides It swings like a pendulum from one opposite to the other

Id. at 127.

364. LESSIG, *supra* note 327, at 109–21.

365. U.S. CONST. amend. XIX.

employment.³⁶⁶ The view that women were akin to children, unfit to file suits in their own names, to contract, or to perform male jobs such as the practice of law had been broadly repudiated.

Detailed exploration of the original understanding of the Equal Protection Clause is beyond the scope of this Article. It is worthwhile, however, to look briefly at both the underlying principles and the expected original application of the Clause for a couple of the leading sponsors of the Amendment.

The following is the explanation of the Due Process and Equal Protection Clauses that Senator Jacob Howard gave when he presented the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction, the committee that had crafted the proposed Fourteenth Amendment:

The last two clauses of the first section of the amendment disable a State from depriving . . . any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. . . . Ought not the time to be now passed when one measure of justice is meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States . . . ?³⁶⁷

Howard spoke specifically of blacks and whites. Part of the context of the Fourteenth Amendment was the Black Codes, which denied blacks rights to contract, own or rent property in towns, testify, freedom of movement, to custody of their children, and to possess arms.³⁶⁸ These Codes often set cruel punishments for blacks who transgressed them. Several of the Codes greatly limited the rights of blacks to free speech, assembly, and worship.³⁶⁹

366. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (2000)).

367. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

368. 1 MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 676 (2d ed. 2006).

369. See, CONG. GLOBE, 39th Cong., 1st Sess. 516–17 (1866) (statement of Rep. Eliot) (citing the Ordinance of Opelousas, La., prohibiting public meetings by blacks

Though Howard was clearly aware of these Codes and the problems facing blacks, he appealed to a broader principle—one against (presumably arbitrary and irrational) class legislation and against caste legislation. The question, of course, is how the principle should apply in concrete cases. Today we can and should see segregation and discrimination based on gender as two expressions of a caste system—one based on birth.

At the time, many people did not understand that segregation supported a caste system and that segregation was a form of irrational and invidious class discrimination. Though a number of Republicans opposed distinctions based on color, many accepted some segregation, at least for the time.³⁷⁰ The galleries of the Senate were segregated when the Fourteenth Amendment was passed. This was a step forward because blacks had previously not been allowed in the galleries.³⁷¹ Congress had also passed a law providing for separate schools for black children in the District of Columbia—another step forward because it provided for schooling.³⁷² On the other hand, in 1865 Congress prohibited segregation

and banning blacks from preaching without permission from the mayor); FLEMING, *supra* note 14, at 279–81 (reprinting the Black Code of St. Landry Parish, La., which limited public meetings, preaching, and attending black church services, and provided cruel punishments for violators); *see also* John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* WASH. U. L.Q. 421, 446 (describing Black Codes and the requirement of a long-term labor contract).

370. CONG. GLOBE, 39th Cong., 1st Sess. 279 (1866) (statement of Rep. Hale) (suggesting too much time was being spent on the Negro, expressing preference for the white race, but denying that “this is a white man’s government” and that blacks cannot be citizens). On segregation, *see infra* notes 371 and 372.

371. *Id.* at 766 (statement of Sen. Johnson) (“Why is that separate places [sic] for the respective races even in your own Chamber?”). For scholarly debate, *see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995) (finding *Brown I* an expansion of original understanding of the Fourteenth Amendment); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950–53 & nn.6–16 (1995) (supporting *Brown I* as consistent with original intent and relying heavily on evidence from later debates in 1875).

372. *See* CONG. GLOBE, 42d Cong., 2d Sess. app. 353 (1872) (statement of Sen. Bayard) (opposing a bill to integrate D.C. schools and citing an act of 1866 providing for schools for black children); *id.* at 2539 (statement of Sen. Sumner) (advocating a bill to integrate the schools of the District). Providing public education for black children, though in a segregated setting, was a step forward since earlier no provision had been made for black children. For a discussion of segregation in the North and early court decisions upholding it, *see* DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954*, at 70–73 (2005). While

on streetcars in Washington, D.C.³⁷³

Republican congressmen in 1866 generally regarded discrimination against blacks with reference to the rights to contract, own property, testify, etc. as impermissible. For many, if not most, however, it seems that segregation was sometimes permissible. But that should not matter. What was adopted was the principle—not the mistaken belief that segregation did not entrench a racial caste system and also establish (by our understanding) arbitrary class legislation. Once we recognize that it does, we cannot be loyal to the principle and uphold segregation. In fact, segregation entrenched a pernicious caste system. Its effects were pervasive: it affected and distorted criminal justice, the right to vote, employment opportunities, the ability to buy homes, access to education, and a host of other areas.

In 1868, married women were typically denied basic rights that the Civil Rights Act and then the Fourteenth Amendment's Equal Protection Clause extended to blacks—including contractual rights, control of property, the right to sue, and so on. Though legislative reform had begun in some states, the inferior status of married women was widely enforced in the states at the time of the Fourteenth Amendment.

Today, most people see gender discrimination as invidious class legislation; for states to deny employment and other opportunities based on sex is irrationally arbitrary and analogous to caste. That, however, was not the expected application of the Equal Protection Clause when it was discussed in 1866–68. Congressman Hale of New York spoke in opposition to an earlier version of the Fourteenth Amendment—one that gave Congress the power to secure equal protection of the rights to life, liberty, and property, but did not in its terms limit the states.³⁷⁴ Hale objected that the law would allow Congress to preempt state law on the rights of married women, among other subjects.³⁷⁵ Congressman Thaddeus Stevens then interjected his understanding of equal protection. In some respects,

most early decisions upheld segregation, a couple of trial court decisions went the other way. *See id.* at 70 n.15.

373. *See Finkelman, supra* note 346, at 993 (citing the Act of Mar. 3, 1865, ch. 119, § 5, 13 Stat. 536, 537, which prohibited segregation on D.C. streetcars); Frank & Munro, *supra* note 369 at 452–56 (highlighting the rejection of segregated transportation in the District of Columbia by Republicans in Congress who framed the Fourteenth Amendment).

374. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

375. *Id.* at 1064.

Stevens' views are quite modern. He assumed that equal protection dealt with classification, and to be entitled to equal treatment, the classes had to be similarly situated.³⁷⁶ He clearly thought black and white men were similarly situated and that married men and married women were not. The following is what Stevens said, followed by Hale's response:

STEVENS: When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.

HALE: . . . The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by a parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.³⁷⁷

Congressman Bingham also seems to have believed that state laws regarding married women would not be affected.³⁷⁸

The principle against class or caste legislation was accepted by people like Senator Howard and Representative Stevens. But they thought it did not apply because of then-widely held assumptions about the nature of gender differences. In another context (that of suffrage and Section 2 of the Fourteenth Amendment), Senator Howard explained that by "the law of nature . . . women and children were not regarded as the equals of men."³⁷⁹ The congressional debates and social practices of 1866–68 suggest that, for most, the class or caste principle was not expected to change the inferior role the law typically assigned to married women.

The Equal Protection Clause established the principle against class and caste legislation.³⁸⁰ The principle should not be read to accept the mistaken social fact that men and women are not equal, that women are inferior to men, or that the law of nature has excluded women from professions such as the practice of law. The problem is obvious. If we

376. *Id.*

377. *Id.*

378. *Id.* at 1089; *see also id.* at 1293 (statement of Rep. Shellabarger) (suggesting that for Congress to protect the right of married women to testify "would invade the rights reserved to the State").

379. *Id.* at 2767.

380. U.S. CONST. amend. XIV.

accept our current understandings of social facts about gender, we can either follow the principle of the Amendment against irrational class and caste legislation and apply it to gender discrimination, or we can refuse to apply the principle because of the way people in 1868 understood the social facts. We can choose original expectation only if we deny the principle or reject the application of the principle to the world as we understand it.

Similar problems of interpretation and invocations of a “shock the Framers” test arise under state laws. For example, the pre-Civil War Massachusetts Constitution limited voting to males.³⁸¹ A state statute provided that jurors would be chosen from the list of qualified voters.³⁸² The state constitutional provision was not changed in 1920 when the nation ratified the Nineteenth Amendment, which prohibited discrimination in the right to vote based on sex.³⁸³ However, in 1924, Massachusetts voters approved a constitutional amendment striking the word male as a limit on who could vote.³⁸⁴ Finally, pursuant to the supreme law of the land and the Massachusetts Constitution, women were voters. The state statute providing that jurors should be drawn from the list of qualified voters had been reenacted after the Nineteenth Amendment as part of a general reenactment. Still, the state excluded women from juries.³⁸⁵

In 1930, Genevieve Welsoky was prosecuted for a liquor violation, and she challenged the jury array for excluding women.³⁸⁶ First, her lawyer argued that because the qualifications for jurors set out in the statute were general, they were intended to include women if the constitutional limit on their right to vote was ever removed.³⁸⁷ Indeed, when the property limitations on male voting had been removed, the newly enfranchised men were held entitled to serve on juries without further changes in the law. Second, Ms. Welosky’s lawyer argued that since the statute was reenacted in December of 1920, after the ratification of the Nineteenth Amendment, the statute should be construed to include women.³⁸⁸

The literal text of the statute together with the state and federal constitutions supported her claim. Jurors were to be drawn randomly from

381. MASS. CONST. art. III.

382. MASS. GEN. LAWS ch. 234, § 1 (2000) (current version).

383. U.S. CONST. amend. XIX.

384. MASS. GEN. LAW ANN. amend. art. LXVIII, at 522 (West 1978).

385. *Commonwealth v. Welosky*, 177 N.E. 656, 661, 665 (Mass. 1931).

386. *Id.* at 658.

387. *Id.* at 659.

388. *Id.*

the list of qualified voters.³⁸⁹ Women were now on the list of qualified voters and were qualified to serve as jurors.³⁹⁰

Other factors also supported a reading of the statute's text to include women. As Tocqueville had noted years before, the jury is a democratic political institution.³⁹¹ The Nineteenth Amendment had extended political democracy to women, so having women serve on juries—the other great democratic political institution—made structural sense. By 1920, many of the old common law discriminations against married women had been repealed. This recognition of equality also supported reading the text to mean what it said—a person qualified to be a voter is qualified to be a juror.

The state statute, read together with the federal and state constitutions, contained a principle: people qualified to be voters were qualified to be jurors. Of course, the men who drafted the state statute originally assumed that jurors would be men, because the voters were men.³⁹²

The “shock the Framers” approach embraced by the state supreme court excluded women from jury service.³⁹³ Under this approach, the principle was the same as the expected application at the time of original enactment. Voters then were men, so jurors would be men. Statutes, the court explained, were to be interpreted not only based on their words, but in light of multiple factors, including the history of the times, contemporary customs and conditions, and the common law.³⁹⁴ The statute was not to be stretched to cover things “not within the principle and purview” on which it was founded.³⁹⁵ It should not be read to cover “diverse circumstances presumably not within the dominating purpose of those who framed and enacted [it].”³⁹⁶

389. *Id.* at 660.

390. *Id.* at 661.

391. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–83 (Phillips Bradley ed., Alfred A. Knopf 1945) (“The institution of the jury . . . places the real direction of society in the hands of the governed, and not in that of the government. . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.”).

392. *Welosky*, 177 N.E. at 661.

393. *Id.*

394. *Id.* at 659.

395. *Id.* at 658–59.

396. *Id.* at 659.

“When the suffrage has been . . . widened among male citizens, there has followed, without further legislation and without change in the phrase of the statute, a like extension of citizens liable to service as jurors.”³⁹⁷ This was simply an extension to persons of the same [male] class.³⁹⁸ But the Nineteenth Amendment extended the right to vote to an “entirely new class of human beings.”³⁹⁹ The Nineteenth Amendment wrought a “radical, drastic and unprecedented” change which should not be extended by application because “[i]t is unthinkable that those who first framed and selected the words for [the jury service statute] . . . had any design that it should ever include women within its scope.”⁴⁰⁰ A reenactment of essentially the same words did not change things.⁴⁰¹

Finally, the Massachusetts court rejected an analogy to blacks.⁴⁰² After the Fifteenth Amendment, the Supreme Court held that the Fourteenth Amendment meant that blacks could not be excluded from jury service.⁴⁰³ The Massachusetts court found the Fourteenth Amendment was focused on protecting the equality granted to the newly freed slaves; the purpose of the Nineteenth Amendment, in contrast, was simply limited to suffrage and did not expand the reach of equal protection for women.⁴⁰⁴ The Massachusetts decision is a negative precedent that warns us of what to avoid.

Allowing the Court to recognize both a basic principle and a changed societal understanding of social facts has been crucial in making the Constitution an inclusive document that protects groups previously left out. It allows the people to revere the document and its inclusive principles without tethering the people to an outdated understanding of their application—an application seen through a lens darkened by prejudice and bigotry.

If the Declaration of Independence is to be limited to the understanding of the immediate application of its principles to black slaves (or even free blacks), it becomes an announcement that all white men are

397. *Id.* at 661.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* at 663.

403. *Id.* (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

404. *Id.* at 663–64.

created equal. It becomes, as Lincoln observed, a mangled wreck.⁴⁰⁵ It loses its great, positive symbolic value. If, as Lincoln did, we distinguish the principle from the immediate expected application, we have a grand statement of human rights.

If the Fourteenth Amendment does not establish principles of equal protection from irrational and invidious discrimination against otherwise similarly situated classes—if it does not establish anti-caste and anti-class principles to be applied in light of our modern understanding of social facts—it also becomes a mangled wreck. If the principle against caste or class legislation is limited by original expectation, it allows practices that support a caste system. If we are stuck with a “shock the Framers” test that enshrines original expected application, we have a constitutional provision that can easily be read as saying that black people may be segregated and demeaned in many ways—so long as they have an equal right to contract.

By that approach, the Amendment loses much of its power as a symbol of constitutional liberty and equality. The same is true for gender discrimination. The exalted principle of the Equal Protection Clause disappears. Instead, judges have to see the principle through a lens darkened by irrational prejudices of a bygone age.

The constitutional message the “shock the Framers” or “expected application” test sends to previously excluded groups is clear and unfortunate: The Constitution is not at all what you think it is. It offers you only very limited protection. As a constitutional matter, segregation is fine; denying women and men equality because of gender is fine; sending people to jail who have been convicted in violation of the rule of law is fine—if they are too poor to afford a transcript to appeal; convicting adult gays and straights for the way they make love at home is fine. The Constitution does not speak to these matters. It is not about you. Your relief, if any, must come only from the political process. For many movement conservatives, however, historically and still today, not any political process will do—only the *state* political process.

The political process has done a great deal—both nationally and at the state level—to make us a nation committed to equality and liberty. But by one original expectation view, many of the great democratic gains at the national level were also illegitimate. Protection could only have

405. LINCOLN: SPEECHES, *supra* note 340, at 399 (“My good friends, read that carefully . . . and ponder well upon it—see what a mere wreck—mangled ruin—it makes of our once glorious Declaration.”).

legitimately come, if at all, from the state political process.⁴⁰⁶

Notice where this leaves those previously left out: the Constitution did not legitimately protect you. The Court was wrong. Congress did not legitimately protect you when it used its commerce powers to protect women (and men) against sex discrimination in employment. Congress was wrong. Still, we recognize that it may be impractical to undo all the constitutional mistakes from which you have benefited. We will leave some of these gains in place and reject others as seems to us to be prudent. You are not part of the great national compact of liberty, justice, and equality. You got here by mistake.

Of course, the idea that constitutional principles are different from, and not limited to, expected application is neither novel nor radical. What is radical is the movement conservative argument in the other direction. As the Court noted in *Weems v. United States*, in a passage quoted by Justice Brandeis in his *Olmstead* dissent:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.⁴⁰⁷

406. That seems to me to be the effect of Justice Thomas's reading of the Commerce Clause as to, for example, discrimination in employment based on gender, religion, or national origin. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). This may have been the view at the time of Senator Goldwater. See *supra* note 240.

407. *Olmstead v. United States*, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

2. *Dangers of Principle v. Application*

Are there dangers to following the principle (and a multi-factor analysis), but not always the expected application? Of course. No approach is free of danger. The Court could read principles and factors with too little attention to concerns that should constrain its actions. It could become too activist in a progressive or reactionary direction, unacceptably limiting the ability of the democratic political process to effectuate the popular will. As to progressive change, the Court often has been acting in concert with emerging national understandings.

If the Constitution (based on original expectation) reserved regulation of gender, race, contraception, and sexual orientation to the states, then it would have left decisions about school segregation to Mississippi, South Carolina, and the rest.⁴⁰⁸ Connecticut could continue to ban use of contraceptives and medical information about contraception.⁴⁰⁹ Mississippi could decide to keep a man who wants to improve his status as a nurse out of the state-owned, women-only nursing school located in his home town.⁴¹⁰ Texas could continue to treat the consenting adults, gay or straight, it can catch having oral or anal sex at home as felons.⁴¹¹

3. *How Original Application Originalists Selectively Escape from the Original Application Dilemma*

Because of its massive disruption of existing law, its ugly and exclusionary message, and the extreme unpopularity of many of its results, few original application originalists blindly follow their approach where it leads. They employ various methods to escape from the chains they tell us should have bound the “liberal” judges who mistakenly made progressive decisions. The result of the escape is to give judges considerable latitude to make policy choices—picking those “mistakes” they allow to survive and those rights they consign to the garbage heap of history.⁴¹² This sort of

408. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

409. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

410. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that a nursing school that restricted admission to women had to admit a male applicant).

411. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

412. Others have noted this problem. See, e.g., William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1255 (2002) (“Where the conservatives deserve criticism is in their attempts to claim that their decision-making avoids activism and takes the methodological high ground. The

judicial discretion is the very evil original expectations were supposed to save us from.

One “shock the Framers” approach says that many of the great protections for human rights the Warren Court and later Courts found in the Constitution are illegitimate mistakes. However, some of its advocates recognize practical reasons for not always following their relentless logic where it leads.⁴¹³ This approach leaves the precedents illegitimate, to be limited, undermined, or extinguished when the Court finds it prudent to do so. At times, “conservative” Justices seem to follow this approach.

Another approach is to blandly announce—without historical explanation or examination—that the Fourteenth Amendment, in keeping with its purpose, bans all racial classifications that fail to meet strict scrutiny. “Conservative” Justices also follow this approach.⁴¹⁴ This approach has the advantage of avoiding some of the most embarrassing effects of original application originalism. It also allows the movement conservative Justice to outlaw democratic decisions to use race to promote school integration at the local level.⁴¹⁵ However, it does not come to grips with inconvenient history. The ban on racial discrimination receives status as an honorary original meaning of the expected application sort, or the text is treated as clearly banning racial classifications—in spite of the likely expected application of the words at the time.⁴¹⁶

cases do not support this assertion. The conservatives’ record reflects a jurisprudence of judicial results, not of judicial method—nothing more and nothing less.”).

413. For a discussion of this issue, see Lash, *supra* note 306.

414. *E.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in part and dissenting in part) (suggesting that the text of the Equal Protection Clause “explicitly establishes racial equality as a constitutional value.”).

415. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007) (striking down a public school plan that assigned students to schools based on race).

416. *Casey*, 505 U.S. at 980 n.1 (Scalia, J., concurring in part and dissenting in part) (“The Court’s suggestion . . . that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text . . . that *explicitly* establishes racial equality as a constitutional value.”) (second emphasis added). There is, of course, another view that was expressed by some leading Republicans in the 39th Congress. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statements of Reps. Fessenden and Johnson). By this antique original expected application view, bans on interracial marriage do not deny equality because all races are treated alike; just as whites cannot marry blacks, blacks cannot marry whites. A view much like that was embraced by the Supreme Court. *See*

Finally, one can attempt to find a ban on school segregation or gender discrimination in the original expectations of the framers and ratifiers of the Fourteenth Amendment.⁴¹⁷ This is how I would like the historical inquiry to come out, but the evidence raises doubts.

4. *The Problems with the Constitutional Amendment Answer*

A common response to these concerns is to appeal to the provision for constitutional amendment. The democratic approach, we are sometimes told, is to leave original constitutional expectations in place unless and until they are changed by constitutional amendment. Claims that constitutional matters must be decided in accordance with the narrow expectations of those who were able to vote in 1787–1789 (the original Constitution), in 1789–1791 (the Bill of Rights), or in 1866–1868 (the Fourteenth Amendment) obviously do not meet our modern understanding of democratic legitimacy or popular sovereignty. The American political system at the time of the framing of the Constitution

Pace v. Alabama, 106 U.S. 583, 585 (1882) (upholding Alabama's ban on interracial marriage because it "applies the same punishment to both offenders, the white and the black"). The "whites and blacks are treated the same because members of neither race can marry the other" view is inconsistent with the principle of equal protection against caste systems.

Justice Scalia has expressed a cramped view of equal protection in discussing sodomy laws that departed from tradition and punished only same-sex oral or anal sex. He explained that the law was neutral and equal because "[m]en and women, heterosexuals and homosexuals, are all subject to [the] prohibition of deviate sexual intercourse with someone of the same sex." *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting). In this attempt, he relied on the fact that the Court in *Loving v. Virginia*, had found a discriminatory purpose, to maintain racial purity. *Lawrence*, 539 U.S. at 600 (citing *Loving v. Virginia*, 388 U.S. 1, 6, 11 (1967)). If applicable, Justice Scalia's views on rights when the text is not explicit would be contrary to the outcome in *Loving*. At the time of the Fourteenth Amendment, thirty-one states outlawed interracial marriage and twelve allowed it. *Loving Day, The Legal Map for Interracial Relationships 1662–1967*, <http://lovingday.org/map.htm> (last visited Sept. 11, 2008). By 1868, thirty states outlawed it and thirteen allowed it. *Id.* As late as 1945, thirty states still outlawed interracial marriage. *Id.* By 1966, seventeen states still outlawed interracial marriage; it was legal in thirty-three states. *Id.*

417. See McConnell, *supra* note 371, at 950–53 & nn.6–16 (supporting *Brown I* as consistent with original intent and relying heavily on evidence from later debates in 1875); John P. Frank & R. F. Munro, *The Original Understanding of Equal Protection of the Laws*, 50 COLUM. L. REV. 131, 136–42 (1950) (detailing congressional debates over the Amendment and the belief that discrimination in education was not compatible with the Amendment's aims).

was probably the most democratic in the world. But it fell far short of modern democratic standards. In 1868, when the Fourteenth Amendment was ratified, most blacks and all women were denied the right to vote.

The possibility of constitutional amendment hardly solves the democratic deficit. Imagine this for modern times. We are going to enact a constitution for the nation. In framing and ratifying the constitution we will exclude all women, almost all blacks, and many other people of limited means. Once the constitution has been established, it can only be changed by a vote of two-thirds of the Congress and three-fourths of the states or by adoption by a convention of three-fourths of the states.⁴¹⁸ In short, today people who represent an effective political majority in states with 4.5% of the nation's population will be able to veto changes in the Constitution.⁴¹⁹

Whatever else might be said in favor of this arrangement, it could hardly be defended as democratic. Nor could it be defended as supported by popular sovereignty unless one accepted a definition of the people that deeply offends modern democratic ideas. None of this supports simply turning all political decisions over to the courts. Indeed, it suggests that courts should be cautious. It does raise questions about the democracy rationale for a "shock the Framers" test, the rationale used in attacking the Warren Court, and more recent decisions supporting personal liberty and equality.

VII. THE LOST CLAUSE RESURGENT: AN UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT?

The Fourteenth Amendment was a major part of a peace treaty allowing for Southern states to be readmitted to the Union after the Civil War.⁴²⁰ Establishing the basis for the peace was not—and practically could not have been—settled as though the war had never happened, the South had never seceded, and blacks slaves had not been freed and transformed into free citizens. Because Southern representatives and senators had left the Congress with secession, the South was not represented in Congress

418. U.S. CONST. art. V.

419. Though the data is imperfect, it makes the point. See Appendix for an illustration provided by the U.S. Census Bureau, *The 2008 Statistical Abstract, Resident Population by Age and State: 2006*, available at www.census.gov/compendia/statab/tables/08s0016.pdf.

420. See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 270 (2004).

during the war.⁴²¹ When Congress passed the Thirteenth Amendment abolishing slavery, the South was not represented.⁴²² It was also not represented in the Congress that proposed the Fourteenth Amendment.⁴²³

The Southern states were required to ratify both Amendments as part of the settlement of the war.⁴²⁴ The alternative, of course, would have been to allow the losers to dictate the peace treaty—and to have their representation swelled either by three-fifths of their slaves or perhaps by all of their former slaves—assuming the Emancipation Proclamation (a war measure based on the unilateral action of the President) survived the peace.

When the provisional governments of the Southern states (except for Tennessee) rejected the Fourteenth Amendment, Congress reconstructed the Southern governments and enfranchised blacks in the Southern states. The new Southern state constitutions established a much more democratic electorate. As a result, the new legislatures that ratified the Fourteenth Amendment came from a far more democratic system than the legislatures they replaced. From the perspective of a modern democratic understanding of popular sovereignty, the ratification was more, not less, acceptable. In addition, as Akhil Reed Amar has powerfully argued, congressional Reconstruction and the process of amendment can be squared with constitutional principles, though not with the pre-Civil War political world.⁴²⁵

The claim that the Fourteenth Amendment was unconstitutional and should not be law because of how it was adopted—arguments that also seem to apply to the Thirteenth Amendment—tells us more about the reactionary radicalism of those making the claims than it does about a practical and constitutionally appropriate approach to reestablishing the United States as one nation. Still, it is sobering to recognize that the Amendments that did so much to bring the United States closer to the ideals of the Declaration of Independence and the ideals of liberty in the

421. Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 L. & SOC'Y REV. 315, 329 (2000) ("Southern states withdrew from Congress when they seceded in 1861.").

422. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 859 (2005).

423. *Id.*

424. *See id.*

425. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 364–80 (2005) (justifying congressional action based on constitutional analysis).

Bill of Rights could not have been proposed or ratified had the South not seceded.

VIII. CONCLUSION

History rarely speaks with one voice. Still, there are some lessons that can be drawn from it. First, the Fourteenth Amendment was, and should be read, as transformative. It transformed the pre-Civil War Constitution with semi-sovereign states into a Constitution that protected fundamental rights against state action, national action, and against private action specifically aimed at deterring the exercise of those rights. The understandings of 1789 or 1791 must be substantially revised in light of the Amendment. A new national citizenship provided for equality of citizens and barred a caste system. *Barron v. City of Baltimore* should no longer have been good law after 1868.⁴²⁶ *United States v. Cruikshank*—with its denial of national liberties and its state action syllogism that prevented Congress from punishing terrorism aimed at constitutional rights—never should have been good law.⁴²⁷ A states' rights reading of the Constitution to limit basic rights requires forgetting much of what the Fourteenth Amendment was about.

Second, the Amendment enshrined principles—for example, equal protection of the laws containing a principle forbidding caste or class legislation and birthright citizenship containing a principle that citizens should not be arbitrarily deprived of fundamental rights or equality because of an accident of birth. As understood today, the principles are sometimes in considerable tension with the application people would have expected at the time. Applying the principles in light of modern understanding of social facts—for example, that women are substantially equal to men, racial segregation fosters a caste system, and sexual privacy of consenting adults is a privilege of national citizenship—remains true both to the principles and to our modern ethical aspirations.

The opposite view purports to be democratic but, in a real sense, is anti-democratic because caste systems are at war with the equality at the heart of democracy. Expanding rights to protect new groups—blacks, women, the poor in the criminal justice system, and gays—is consistent with the arc of American history by which “we the people” have become an increasingly comprehensive group. When it found these rights and claims of equality basic, the Court was ratifying a national understanding

426. *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

427. *United States v. Cruikshank*, 92 U.S. 542 (1876).

achieved after years of struggle. At one time in history, basic rights and questions of equality were matters retained exclusively by the states. The Fourteenth Amendment should be understood as having changed all that.

Third, criminal procedure and free speech guarantees of the Bill of Rights should be read to be at least as protective as they were understood when the Fourteenth Amendment was enacted. This is so because the ancient evils the Amendment addressed continue to be a problem. In addition, the guarantees should not be degraded because they are crucial protections of democratic government. But, to have life and meaning, the guarantees cannot be limited to expected applications.

For reasons explained by Justice Black, the liberties in the Bill of Rights support democracy. As to some—free speech, free press, and the right to assemble, for example—this is obvious. But, as Justice Black noted in his dissent in *Adamson v. California*, it is true of other guarantees as well:

Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.⁴²⁸

The application of these guarantees to the states, along with the ability to sue state officials who violate them, helped and continue to help to protect political activists from brutal, as well as more genteel, ways to suppress dissent.

The Constitution is not simply the Constitution of 1791. It has been changed and transformed, including transformation by constitutional amendment and by political and social movements that have altered our understanding of how constitutional principles apply in our world. There are several ways one might understand this transformed Constitution.

The rights in the Bill of Rights and less textually explicit fundamental rights under the Privileges or Immunities Clause belong to all citizens. Many of our basic rights protect persons, whether they are citizens or not,

428. *Adamson v. California*, 332 U.S. 46, 70–71 (1947) (Black, J., dissenting).

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and are also no longer appropriately left to local option.

The enfranchisement of women in the Nineteenth Amendment, as well as legal changes in the status of women at the state and national level, undercut the idea that it is generally quite rational to use an accident of birth—gender—as a basis for discrimination unrelated to the ability of people to contribute to society.

The right to vote was not seen as a fundamental, national right in 1866. The right to vote should be seen as a fundamental privilege of adult American citizens today because of the added protections for the right to vote in Section 2 of the Fourteenth Amendment, in the Fifteenth Amendment, in the Nineteenth Amendment, as well as in the poll tax and eighteen-year-old vote amendments. Schemes to limit the right or to drain it of much of its meaning (as in extreme political gerrymanders or unnecessary obstacles to the right to vote or those that strike at the caste of economic class) should receive searching scrutiny.

At a minimum, the meaning of Section 2 of the Fourteenth Amendment should be enforced. When states come up with ingenious new methods of disfranchising voters, the states' representation in the House of Representatives and the Electoral College should be proportionally reduced. If Congress fails to act, the Court should.

Recalling forgotten constitutional provisions requires us to remember the specific problems that gave rise to them. But it requires us to remember more than that. It requires that we recall the principles as well as applications expected at the time and the great efforts in American history to secure the blessings of liberty and equality to an ever-expanding group of persons.

APPENDIX

2008 STATISTICAL ABSTRACT, RESIDENT POPULATION BY AGE AND STATE: 2006

<u>State</u>	<u>Population \geq 18 years of age (2006)</u>
Wyoming	393,000
Vermont	490,000
North Dakota	491,000
Alaska	488,000
South Dakota	587,000
Delaware	649,000
Montana	727,000
Rhode Island	831,000
Hawaii	987,000
New Hampshire	1,017,000
Maine	1,041,000
Idaho	1,072,000
Nebraska	1,323,000
Total	10,096,000
United States	225,662,000
%	4.47394776
