

McDONALD V. CHICAGO, THE FOURTEENTH
AMENDMENT, THE RIGHT TO BEAR ARMS
AND THE RIGHT OF SELF-DEFENSE

*Richard L. Aynes**

THE SUPREME COURT OF THE UNITED STATES HAS GRANTED certiorari in the case of *McDonald v. City of Chicago* to consider this question:

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.¹

This case follows and seeks to build upon *District of Columbia v.*

* John F. Seiberling Chair of Constitutional Law and Director of the Constitutional Law Center the U.S. Congress created at the University of Akron in commemoration of the bicentennial of the U.S. Constitution. See The University of Akron, Constitutional Law Center, <http://www.uakron.edu/law/cclaw.php>. Comments and suggestions can be sent to raynes@uakron.edu.

The author is one of eight law professors who write in the area of the Fourteenth Amendment and submitted an amicus brief supporting petitioners in *McDonald v. Chicago*. Those faculty members are Prof. Richard L. Aynes, University of Akron Law School; Prof. Jack M. Balkin, Yale Law School; Prof. Randy E. Barnett, Georgetown University Law School; Prof. Steven G. Calabresi, Northwestern University School of Law; Prof. Michael Kent Curtis, Wake Forest University School of Law; Prof. Michael A. Lawrence, Michigan State University College of Law; Prof. William W. Van Alstyne, William and Mary Law School, and Prof. Adam Winkler, UCLA School of Law.

The author also joined amicus briefs in the Seventh Circuit below and in the Ninth Circuit case of *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *en banc reh'g granted*, 575 F.3d 890 (9th Cir. 2009). In all three briefs, the amici did not address the specific gun regulations at issue, but rather limited their submission to the question of the meaning and understanding of the Fourteenth Amendment. In all three cases the brief submitted is congruent with this author's scholarly work.

Portions of this essay previously appeared in Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1323–24 (2009) and Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010), available at <http://www.ssrn.com/abstract=1485023>.

¹ 130 S. Ct. 48 (2009).

*Heller*² which held that the Second Amendment protects both the right to self-defense³ and what has been termed an individual right to bear arms.⁴ Of course, *Heller*'s application is limited to the federal government and has no direct application to the states. Yet all knew, as surely as night follows day, that the question of applying *Heller* to the states would be the next inevitable step in the litigation.

At one level, *Heller* was a monumental decision. It was the first case in modern times where the Court squarely considered whether there was an individual right to bear arms under the Second Amendment and it was the first time in which the Court indicated there was a constitutional right to engage in self defense.⁵ On the other hand, this case could also be viewed as simply reigning in an "outlier."⁶ Justice Scalia's opinion, by recognizing a right to have arms but reassuring lower courts that this would not interfere with traditional regulation of those arms, displaced only "outlier" regulations and crafted an opinion which paralleled the views of the majority of people in the

² 128 S. Ct. 2783 (2008).

³ *Heller* speaks of the "inherent right of self-defense." *Id.* at 2817. From my point of view, a more direct approach is that of the Ohio Court of Appeals in *State v. Hardy*, 397 N.E.2d 773, 776 (Ohio Ct. App. 1978). In that case, the Court held that for the state to command, by its criminal law, that one should submit to death rather than act in self-defense would be to deprive one of life without due process of law under the Fourteenth Amendment. Of course, the framers of the Fourteenth Amendment wanted to provide what James Madison has called "double security" and this same right was one of the privileges or immunities of U.S. citizens. One could also consider the possibility of protection of the right to self defense under Article IV and the Ninth Amendment.

⁴ *Heller*, 128 S. Ct. at 2798–99.

⁵ *Id.* This was not the first time the self defense issue had been before the Court. In the case of *Engle v. Isaac (Engle II)*, 456 U.S. 107 (1982), this question was raised in the context of jury instructions. See *Bell v. Perini*, 635 F.2d 575 (6th Cir. 1980); *Isaac v. Engle (Engle I)*, 646 F.2d 1129 (6th Cir. 1980); see also *id.* at 1140 ("On the merits of this case, I believe that the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists.") (Merritt, J., dissenting); *id.* at 1136 (proof of self-defense disproves criminal intent) (Edwards, J., concurring). Though the Supreme Court avoided reaching that issue by holding that trial counsel waived the issue by not entering a proper objection, the majority recognized that Petitioner Bell's argument that self-defense negated the element of "unlawfulness" was "a colorable" claim and "at least plausible." *Engle II*, 456 U.S. at 122. The author of this essay was not counsel in the state court proceedings, but was co-counsel for two of the three respondents in the U.S. District Court, the Court of Appeals for the Sixth Circuit, and argued the case before the Supreme Court. In a case which followed, *Martin v. Ohio*, 480 U.S. 228 (1987), the Court again avoided the issue. The author of this essay was co-counsel on an amicus brief filed in *Martin*.

⁶ See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996) ("[C]onstitutional adjudication frequently involves the justices' seizing upon a dominant national consensus and imposing it on resisting local outliers."). When applied to *Heller*, part of the "outlier" analysis is to think about the District of Columbia as more analogous to a state than a city. Richard L. Aynes, *Self-Defense, the 2nd Amendment, and the U.S. Supreme Court*, AKRON LAW, Fall 2008, at 2, 7, available at http://works.bepress.com/richard_aynes/40/.

nation.⁷

Extending *Heller* to the states would have both a greater and a smaller impact than *Heller* itself. It would have a greater impact, because it would apply to all fifty states and encompass more people and a much larger geographical region than *Heller* which only applies to the District of Columbia and other federal enclaves. Yet it can be said to have a smaller impact because while it may conflict with laws of a city like Chicago, it would be largely congruent with the state laws and most city regulations across the country.⁸ Though it is easy to see how the rationale of *Heller* could be extended and enforced against the states by the Fourteenth Amendment,⁹ the purpose of this essay is to illustrate how the right to bear arms could be reasonably enforced against the states *even without* reference to *Heller*.

I. A CONGRESS OF LAWYERS

A majority of the members of the Thirty-Ninth Congress were lawyers¹⁰ and judges.¹¹ As late as the 1830s, would-be lawyers were studying *Blackstone's Commentaries*¹² and a copy could be found in law

⁷ *Id.*

⁸ *Id.*

⁹ The McDonald brief on the merits does a good job of setting forth a road map under which this should logically happen. The Amicus brief by the National Rifle Association is particularly strong in outlining ways in which *Heller* may have already foreshadowed the result in *McDonald*. Nevertheless, at a young age I learned that it is very difficult to predict the outcome of a contested case, even after oral argument.

¹⁰ Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1025 & n.34 (2008) (counting at least 160 members of the Thirty-Ninth Congress who were lawyers); *see also id.* at 1025 n.34 (indicating that in the Thirty-Eighth Congress all nineteen members of the Ohio delegation were lawyers).

¹¹ A quick review of the membership of the Thirty-Ninth Congress suggests at least twenty-five members held judicial positions before coming to the Congress. Territorial Delegate Allen A. Bradford (R-Col.) had served as a Judge of the Sixth Judicial Circuit in Iowa and as a Justice on the Territorial Supreme Court of Colorado. WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 581 (New York, Harper & Bros. 1868). Representative Henry H. P. Bromwell (R-Ill.) was a judge of the County Court in Illinois. *Id.* at 581. Robert S. Hale (R-N.Y.) served as a Judge for Essex County, New York. *Id.* at 594. Representative George S. Shanklin (D-Ky.) was President Judge of the Eighteenth Judicial District of Pennsylvania. *Id.* at 614. Rufus P. Spalding (R-Ohio) was a Justice of the Supreme Court of Ohio. *Id.* at 615. Representative Lawrence S. Trimble (D-Ky.) was a Judge of the Equity and Criminal Court of the First Judicial District of Kentucky (1856-1860). *Id.* at 618. Lyman Trumbull (R-Ill.), the Supreme Court of Illinois (1848-1853). *Id.* at 618-19. Benjamin F. Wade (R-Ohio), a Justice of the Peace and a Circuit Judge. *Id.* at 620. Representative Martin Welker (R-Ohio) was a Judge of the Ohio Court of Common Pleas for the Sixth District (1851-1856). *Id.* at 621. Senator George H. Williams (R-Oregon) was a Judge of the First Judicial District of Iowa and Chief Justice of the Territorial Court of Oregon. *Id.* at 622.

¹² DAVID HERBERT DONALD, LINCOLN 53 (1995) (noting that in the 1830s Lincoln

offices even in the west.¹³ The lawyers in the Thirty-Ninth Congress and the ratifying legislatures studied the long-standing common law as articulated by William Blackstone: “Self-Defense therefore, as it is justly called the *primary law of nature*, so it is not, *neither can it be in fact, taken away by the law of society.*”¹⁴ In addition to the legal right to act in self defense, part of the reason for not holding such action to be a crime was the balance in culpability between one who seeks to take the life of another and one acting in self-defense. As summarized by the Ohio Supreme Court during the Civil War, one may “save his own life by sacrificing the life of one who persists in endangering it.”¹⁵

Further, it would be futile to attempt to outlaw self-defense, because in most cases self-defense is not only a normal, rightful response, but also a reflexive one. As Justice Oliver Wendell Holmes later indicated, “detached reflection cannot be demanded in the presence of an uplifted knife.”¹⁶ Indeed, actions in self-defense are often based on the “instinct” for self-preservation and arise “spontaneously.”¹⁷ Moreover, no one would accept a state’s command that they suffer current death because of fear of a penalty of future death.¹⁸

One of the many attacks launched upon slavery by William Jay, the son of American’s first Chief Justice, John Jay, and an early leader of the

acquired a copy of *Blackstone’s Commentaries* and “went at it in good earnest”; see also 1 THE SALMON P. CHASE PAPERS 126–28 (John Niven ed., 1993) (diary entry for June 26, 1841, referring to Blackstone’s work as “a model”). “Before the establishment of law schools, the American lawyer began with a legal apprenticeship and the study of the *Commentaries on the Laws of England* by Sir William Blackstone. . . . The study of *Blackstone’s Commentaries* and apprenticeships remained the primary means of legal education in America until the late 1800’s.” Jessica J. Sage, *Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession*, 31 FLA. ST. U. L. REV. 707, 710, 714 (2004).

¹³ DONALD, *supra* note 12, at 102 (noting that one of the few sets of books in Lincoln’s law office was a set of *Blackstone’s Commentaries*).

¹⁴ 3 WILLIAM BLACKSTONE, COMMENTARIES *4 (emphasis added), *quoted with approval* in *Reed v. State*, 11 Tex. Ct. App. 509, 517 (Tex. Ct. App. 1882); see also 1 BLACKSTONE, *supra*, at *121, *143–44 (writing of “the natural right of resistance and self preservation”). Of course, lawyers who were well-read might find similar sentiments in many other sources. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 455 (London, n. pub. 1690) (“Self defense is a part of the law of nature.”); 2 JAMES WILSON, WORKS 496 (Philadelphia, n. pub. 1804) (concluding, in a lecture from the 1790s, that the “defense [of] one’s self” is “justly called the primary law of nature”).

¹⁵ *Stoffer v. States*, 14 Ohio St. 47, 53 (1864), *overruled on other grounds*, *Mead v. McGraw*, 19 Ohio St. 55, 62 (1869).

¹⁶ *Brown v. United States*, 256 U.S. 335, 343 (1921).

¹⁷ *Stoffer*, 14 Ohio St. at 52–53 (1864), *overruled on other grounds*, *Mead v. McGraw*, 19 Ohio St. 55, 62 (1869); see also *State v. Hardy*, 397 N.E.2d 773, 776 (1978) (“A legitimate act of self-defense is much more a *mere reflex action* than one committed voluntarily.” (emphasis added)).

¹⁸ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 47 (Boston, Little, Brown & Co. 1881).

anti-slavery movement, was that it denied the right of self-defense to the person held in slavery:

No right is more sacred, or more universally admitted, than that of self-preservation; but the wretched slave . . . is denied the right to self-defense against the brutality of any person¹⁹

In interpreting the Civil Rights of Act of 1866, Justice Noah Swayne on the Circuit noted:

Where crime is committed with impunity . . . those unprotected by other sanctions [are compelled] to rely upon physical force for the vindication of their . . . rights. There is no other remedy and no other security.²⁰

II. GENERAL PRINCIPLES: THE BILL OF RIGHTS APPLIED TO THE STATES

There is an old adage about not being able to see the forest for the trees. This is often the case in discussions about the Privileges or Immunities Clause of the Fourteenth Amendment or enforcing the concepts contained in the Bill of Rights against the States. There are some natural reasons for this.²¹ However, while I will use details to support general claims, in this portion of the essay I want to step back from the trees and look at the forest.

The Fourteenth Amendment did not just spring, full-form, from the head of the drafters of the Amendment. Rather, like the

¹⁹ WILLIAM JAY, AN INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION AND AMERICAN ANTI-SLAVERY SOCIETIES 132 (New York, Leavitt, Lord & Co., 2d ed. 1835); *see also* State v. Mann, 13 N.C. (2 Dev.) 263 (1829) (reversing a conviction for assault and battery for shooting a slave in the back and indicating that “[t]he power of the master must be absolute, to render the submission of the slave perfect”). This, of course, suggests that one of the “incidents” or “badges” of slavery was the purported denial of a right to act in self-defense. Thus, the right of self-defense may also be protected by the Thirteenth Amendment.

²⁰ United States v. Rhodes, 27 F. Cas. 785, 787–88 (C.C.D. Ky. 1866) (No. 16,151).

²¹ One factor is that as people disagree at a general level, they dig deeper and deeper into the details to try to establish an accurate point of view. Another factor is that people who have not worked in a given area for any length of time may bring new and important insights, but they may also lack context and understanding. Finally, there is an interesting commentary upon Justice Bushrod Washington by Justice Joseph Story which includes, in part, this observation: “He read to learn, and not to quote; to digest and master, and not merely to display.” 2 LIFE AND LETTERS OF JOSEPH STORY 31 (William W. Story ed., London, John Chapman 1851). In far too many cases it appears that people who write about these matters have not followed Justice Washington’s path. As a result, quotations are often shorn of their context and misinterpreted or misconstrued.

Declaration of Independence, it was a product of many years of controversy and discussion. While Section 1 author John Bingham, may have crafted the specific language, he was, like Thomas Jefferson, also recording the consensus of the enlightened people of his generation.

The right of individuals to act in self-defense was considered so non-controversial that it was often used as a measuring stick for what the government could do. For example, in the 1836 Chancellor Kent wrote that:

The municipal law of our own, as well as of every other country, has likewise left with individuals the exercise of the natural right of self defense, in all those cases in which the law is either too slow, or too feeble to stay the hand of violence.²²

Then, without citation but in what seems to be a paraphrase of Blackstone, Kent wrote:

The right of self-defence in these cases is founded on the law of nature, and is not, and cannot be superseded by the law of society.²³

During the Civil War one of the most influential publications in the country and “the leading national magazine”²⁴ was *Harper’s Weekly*, which had a national circulation of over 120,000.²⁵ In June of 1861 it referred to the “natural rights of self-defense, belonging to society as to the individual.”²⁶ Later, in August of 1861 *Harper’s* paraphrased Senator Orville H. Browning (R-Ill) as similarly referring to “the right of self-defense inherent in States as in persons.”²⁷ The pervasiveness of this view is demonstrated by President Grant’s post-war memoirs:

[T]he right to resist or suppress rebellion is as inherent as the right of self-defense, and as natural as the right of an individual to preserve his life when in jeopardy.²⁸

Nevertheless, differences in approaches to gun possession did exist, as shown by the disbanding of the armies at the end of the war. The

²² 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 12 (New York, O. Halsted 1827).

²³ *Id.*

²⁴ DOUGLAS L. WILSON, LINCOLN’S SWORD: THE PRESIDENCY AND THE POWER OF WORDS 142 (2006).

²⁵ *The Lounger; A Word to Bostonian*, HARPER’S WKLY., Jan. 4, 1862, at 3, col. 1.

²⁶ *The Lounger; A Reasonable Word*, HARPER’S WKLY., June 15, 1861, at 370, col. 2.

²⁷ *The Lounger; Two Kentuckians*, HARPER’S WKLY., Aug. 3, 1861, at 482, col. 4.

²⁸ PERSONAL MEMOIRS OF U.S. GRANT 639 (New York, Charles L. Webster & Co. 1894).

rebel soldiers were required to surrender their muskets²⁹ while Union soldiers were authorized to keep their arms after discharge from the army.³⁰

The Civil Rights Act of 1866, re-enacted by Congress after the adoption of the Fourteenth Amendment, was seen as applying the Bill of Rights against the States.³¹ It is well-known that the Civil Rights Act was designed to overcome the virulent Black Codes adopted by the white southern rebel ruling class. In the debates over the Civil Rights Act, Representative Josiah Grinnell (R-Iowa) “attacked a Kentucky Black Code that forbade [B]lacks to ‘keep’ or ‘buy’ a ‘gun’—even ‘a musket which he has carried through the war.’”³² Likewise, Representative Samuel C. Pomeroy (R-Kan.) indicated that every man

should . . . have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant³³

Similarly, the two versions of the Freedman’s Bureau Act were intended to enforce the Bill of Rights, including the right to bear arms, against the states.³⁴ It has been recognized that the Freedman’s Bureau

²⁹ Officers were often allowed to keep their swords and, in some cases, side-arms.

³⁰ AKHIL REED AMAR, *THE BILL OF RIGHTS* 265 (1998) (quoting a speech by Representative Josiah Grinnell (R-Iowa)); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 40 (1865) (statement of Sen. Henry Wilson (R-Mass.)) (indicating that former rebel soldiers in Mississippi were “traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are being done in other section of the country”).

³¹ *See generally* the analysis and sources cited in Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010), available at <http://www.ssrn.com/abstract=1485023>.

³² AMAR, *supra* note 30, at 265. Similarly, conservative Republican James Dixon (R-Conn.), who would join the Democrats in 1868, viewed the Civil Rights Act of 1866 as protecting the freedom of speech nation-wide. CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866) (“Congress has given us, in the civil rights act, a guarantee for free speech in every part of the Union.”).

³³ AMAR, *supra* note 30, at 265.

³⁴ Aynes, *supra* note 31 (manuscript at 5–25) (discussing the history of the Freedman’s Bureau and Civil Rights Act of 1866 in detail). There are individuals who argue that the right to bear arms provision of the Freedman’s Bureau was simply a non-discrimination provision. However, as explained in the cited article, this ignores the fact that the prefatory words call not only for “equal” protection but for “full” and “equal” protection. There would have been no need to use the word “full” if this had been only a non-discrimination provision. Further, as exemplified by consideration of the right to free speech, the problem with speech in white elite controlled south was that there *was* equality: no one could talk, preach, or belong to an organization, including the Republican Party, opposed to slavery. The point is that no one who has even a passing knowledge of the history of those times can believe that the Thirty-Ninth Congress or the ratifiers would have been content with a continuation of the rule preventing free speech for everyone on certain topics. The problem was not equal treatment (no one could speak

Act and, more frequently, the Civil Rights Act, were intended to be constitutionally protected from repeal by the Fourteenth Amendment.³⁵ Some writers—such as Raoul Berger—have argued that there is an “identity” between the Civil Rights Act of 1866 and the Amendment.³⁶ Though this is incorrect—there is an overlap, but not an identity—even if it were true, it would do such advocates no good because the Civil Rights Act itself was seen as enforcing the Bill of Rights against the States.³⁷

To address the monumental issues facing the nation, Congress formed the Joint Committee of Fifteen on Reconstruction, made up of leading members of the House and Senate, to consider possible

on certain issues), but the lack of the substantive right. The same principles apply to the Second Amendment as well. The freedom of speech issues were dominant before and during the war. After the war, the murders of unionists in the New Orleans and Memphis “riots,” along with terrorists’ attacks on Republicans, led to a focus upon the right to bear arms for self-defense.

³⁵ *Id.*

³⁶ RAOUL BERGER, GOVERNMENT BY JUDICIARY 31–33 (Liberty Fund, Inc. 1997) (1977). The difficulty with Berger’s claim is that most of the sources he cited support the view that there was an overlap between the Civil Rights Act and the Amendment, but not that they were identical. The closest Berger came to citing a source supporting his view was the statement by Representative George R. Latham (Unconditional Unionist—W. Va.) that the Civil Rights Act “covers exactly the same ground as [the] amendment.” *Id.* at 32. Of course, they could cover the “same” ground and the Amendment could still go further than the statute. To actually support Berger’s claim Latham would have had to say that they “only” cover the same ground.

This argument is also made by the Respondent City of Chicago in its brief upon the merits in the Supreme Court. Brief for Respondents City of Chicago and Village of Oak Park at 65, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Dec. 30, 2009), 2009 WL 5190478. They do not cite Berger for this proposition, but cite the discredited work of Charles Fairman and Latham’s speech as their only authority. *Id.*

As demonstrated by the amicus brief filed by the Calguns Foundation, both Charles Fairman’s and Raoul Berger’s work is seriously flawed. Brief for Calguns Foundation, Inc. as *Amicus Curiae* in Support of Petitioners *passim*, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 23, 2009), 2009 WL 4099512. See generally AMAR, *supra* note 30; PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 1–154 (1999). Also consider Michael Kent Curtis’s NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) and numerous exchanges between Curtis and Berger in a large number of law review articles.

For an example of Fairman, Berger, and others mistaking the author of an opinion, mistaking the trial court for a state supreme court, not recognizing dicta, not recognizing that the dicta could be reasonably interpreted in a different way, and not recognizing that the case had been reversed on appeal, see Richard L. Aynes, *Article IV and Campbell v. Morris: Wrong Judge, Wrong Court, Wrong Holding and Wrong Conclusion?* (U. of Akron Legal Research Paper No. 09-13, 2009), available at <http://www.ssrn.com/abstract=1510809>.

Further, there is both an irony and evidence of unfairness in crediting the obscure, one-term Congressman Latham and being unwilling to credit men like Fessenden, Bingham, and Howard who were leaders in Congress and well known as actors on the national stage. See Biographical Directory of the United States Congress 1774–Present, <http://bioguide.congress.gov> (last visited January 9, 2010).

³⁷ Aynes, *supra* note 31.

solutions.³⁸ It was well balanced between the different factions of the Republican Party and three members of the Democratic Party. The Joint Committee was chaired by Senator William P. Fessenden (R-Maine), who has been described by a leading expert on Reconstruction as a “conservative.”³⁹ But the Joint Committee was clearly controlled by moderates.⁴⁰ In speaking of the composition of the Joint Committee in the Congressional Campaign of 1866, Congressman, General, and future President James Garfield indicated that the people on the Joint Committee were “the truest and best men in Congress.”⁴¹

It is important to emphasize that, as they developed the terms of the Fourteenth Amendment, these Congressmen were not writing on a clean slate. They were writing based on 30 years of anti-slavery debates, litigation, struggles for free speech and freedom of the pulpit, countless platforms of a variety of political parties, and the collective, shared experiences of their generation.

As a prelude to their proposals, they held hearings and produced a lengthy report. Approximately 150,000 copies of this document were published, and it was not only summarized in newspapers, but distributed across the country.⁴² There were over 80 amendments proposed in Congress at various times to deal with Reconstruction, all of which were referred to the Joint Committee, and public discussions outside of Congress.⁴³ As the Joint Committee worked to craft this constitutional amendment, it is clear they built on all the background,

³⁸ See BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 37 (1914).

³⁹ MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869*, at 32 (1974).

⁴⁰ KENDRICK, *supra* note 38, at 155–197. The members of the Joint Committee were Senator William P. Fessenden (R-Me.), Chair; Senator Jacob M. Howard (R-Mich.); Senator James W. Grimes (R-Iowa); Senator George H. Williams (R-Or.); Congressman Justin S. Morrill (R-Vt.); Senator Ira Harris (R-N.Y.); Senator Reverdy Johnson (D-Md.); Congressman Thaddeus Steven (R-Pa.); Congressman John A. Bingham (R-Ohio); Congressman Roscoe Conkling (R-N.Y.); Congressman George S. Boutwell (R-Mass.); Congressman Elihu B. Washburn (R-Ill.); Congressman Henry T. Blow (R-Mo.); Congressman Henry Grider (D-Ky.); and Congressman Andrew J. Rogers (D-N.J.). *Id.*

⁴¹ *Speech of the Hon. J. A. Garfield, of Ohio, at Toledo, August 22, 1866*, in *SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY* at 18 (n.p., M. Halstead & Co. 1866).

⁴² KENDRICK, *supra* note 38, at 264–65.

⁴³ See Richard L. Aynes, *Ohio and the Drafting and Ratification of the Fourteenth Amendment*, in *2 THE HISTORY OF OHIO LAW* 370, 377 (Michael Les Benedict & John R. Winkler eds., 2004) (discussing an estimate by Democratic candidate for Governor in Ohio, George W. Morgan); see also HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* 53 (1978) (indicating, without citation of a source, that more than seventy amendments were introduced into the Thirty-Ninth Congress).

thoughts, and ideas that had been discussed before and after the Civil War.⁴⁴

Harper's Weekly, for example, wrote in 1861 that while Unionists were fighting a war they were already planning what was going to happen afterward.⁴⁵ That is, “the North, after conquering this rebellion, *means to have guarantees for its rights.*”⁴⁶ One of the items set forth was the constitutional right “of going freely every where in the country, and of freely expressing every where his opinion.”⁴⁷ How these views would play out after the war was made clear in a column on August 6, 1864:

The people of the United States, therefore, in their Constitution have forbidden Congress to abridge either of these rights [freedom of press and freedom of speech]; and *what they would not suffer their supreme legislature to do, they will not permit to to any local assembly.*⁴⁸

Harpers also explained that such planning was important because application of the Bill of Rights to the States could have prevented the Civil War and could now prevent a future war:

It was the knowledge that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South, slavery would be destroyed by the common-sense of the Southern people, which made Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years.⁴⁹

Similarly, *Harpers* editorialized that:

The slave-drivers and their political allies at the North knew equally well that if the constitutional right of discussion were allowed the horrors of the system would be known, and the outraged decency and humanity of the American people would sweep away the inquiry in a flood of wrath.⁵⁰

⁴⁴ My work on telling the story of the work of the Joint Committee on Reconstruction is found in Aynes, *supra* note 43, at 370–401.

⁴⁵ *The Lounger; “Rights” and Wrongs*, HARPER’S WKLY., Aug. 17, 1861, at 514, col. 3. The text between notes 41 and 45 is taken from Aynes, *supra* note 10, at 1030–1040.

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Liberty and Union*, HARPER’S WKLY., Aug. 6, 1864, at 498, col. 2 (emphasis added).

⁴⁹ *The Truth Confessed*, HARPER’S WKLY., Jan. 16, 1864, at 34, col. 2. Moreover, “[n]o man’s life was safe below Mason and Dixon’s line *who exercised the right, guaranteed to him by the Constitution, of saying what he thought upon public affairs.*” *The Lounger; The Union-As-It-Was*, HARPER’S WKLY., Oct. 18, 1862, at 658, col. 3 (emphasis added).

⁵⁰ *Slave Children*, HARPER’S WKLY., Jan. 20, 1864, at 66, col. 3. As a result “these gentry

The Republicans believed that had free speech been allowed to flourish, slavery would have been abolished and the war averted.⁵¹ Further, states could no longer punish people for expressing opinions that the state did not like, expel by threats of violence, or deny them access to the courts.⁵²

Building upon such prior discussions, Representative John A. Bingham (R-Ohio) (in the Joint Committee) and Senator Jacob M. Howard (R-Mich.) (by amendment in the Senate) together authored the whole of Section 1 of the Fourteenth Amendment. Bingham was the floor manager in the House and Senator Howard was the floor manager in the Senate.

Some claim that Bingham was not clear about his desire to use the Fourteenth Amendment against the states. But that claim is not credible. Even the Respondent City of Chicago uses—apparently without noticing the irony—the cases of *Barron v. City of Baltimore*⁵³ and *Livingston v. Moore*⁵⁴ for the proposition that the Bill of Rights does not apply to the states.⁵⁵ Bingham cited both of those cases as the reason the Fourteenth Amendment was necessary: to overcome those decisions; saying that these cases made “plain the necessity of adopting this amendment.”⁵⁶ His speech was summarized in *The New York Times* as “simply a proposition to arm Congress . . . with the power to enforce the Bill of Rights.”⁵⁷ The speech was also published in pamphlet form with the subtitle indicating the speech was “in support of the proposed amendment to enforce the Bill of Rights.”⁵⁸

In a post-ratification explanation of the drafting process, Bingham

hung, and burned, and tarred and feathered, and mobbed every citizen who chose to speak or was suspected of wishing to speak.” *Id.*

⁵¹ The discussion of the officially sponsored mob action to expel Massachusetts Judge Samuel Hoar and his daughter from South Carolina because he wanted to contest South Carolina law against African-American citizens of Massachusetts was a frequently discussed event in Congress. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (statement of Rep. John M. Broomall (R-Pa.)).

⁵² MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 271–88 (2000) (on the free speech battle over Hinton Helper’s *Impending Crisis*); *id.* at 289–99 (on the free speech battle over Rev. Daniel Worth).

⁵³ 32 U.S. (7 Pet.) 243 (1833).

⁵⁴ 32 U.S. (7 Pet.) 469 (1833).

⁵⁵ Brief for Respondents City of Chicago and Village of Oak Park at 54, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Dec. 30, 2009), 2009 WL 5190478.

⁵⁶ CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866).

⁵⁷ *Thirty-Ninth Congress, First Session*, N.Y. TIMES, Mar. 1, 1866, at 4–5.

⁵⁸ Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 72 & n.84 (1993).

indicated that upon re-reading *Barron v. City of Baltimore*⁵⁹ he noticed Chief Justice Marshall's suggestion that *if* the Bill of Rights had been intended to apply to the states it would have used the same formulation as Article I, Section 10 and began with "No State shall . . ."⁶⁰ Bingham indicated that he followed Marshall's formulation when he drafted Section 1 of the Fourteenth Amendment.⁶¹ In that same speech, Bingham further indicated that "the privileges and immunities of citizens of the United States . . . are *chiefly* defined in the *first eight amendments to the Constitution* of the United States."⁶²

Of course, given the major political shifts that began in 1872 and the Panic of 1873, post-ratification explanations are not without their problems.⁶³ However, even independent of Bingham's explanation, we can do the analysis ourselves. We can read Marshall's admonition in *Barron* and note the parallel between Article I and Section 1 and reach the same conclusion. This structural/textual analysis is fully consistent with the presentations of Bingham and Howard upon the floor of Congress in 1866.

It is sometimes claimed that Bingham's views cannot be said to represent those of the House, because no one stood up to say "amen" or "me too." This view, of course, misconceives the nature of the legislative process during the 1860s.

In a Congress with a majority of members who were serving their first or second term,⁶⁴ Bingham was one of the veterans. He had served from 1855-1863 and was then re-elected to serve beginning in March 1865. Thus, by the time he was proposing the Fourteenth Amendment, he had served in Congress for almost ten years.⁶⁵ He had formerly been Chair of the Judiciary Committee and in 1865-1866 was Chair of the House Committee on Reconstruction. Bingham is listed by Michael

⁵⁹ 32 U.S. (7 Pet.) 243 (1833).

⁶⁰ *Id.* at 248.

⁶¹ *Id.*

⁶² CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (emphasis added).

⁶³ Nevertheless, some post-ratification explanation can be reliable and the key to their reliability would be whether they are consistent with the person's pre-ratification views. For a fuller discussion of how these issues changed people's views and priorities see Aynes, *supra* note 31.

⁶⁴ Aynes, *supra* note 10, at 1026 & n.38. Forty percent of the Thirty-Ninth Congress were in their first terms and many others had been freshman members of the Thirty-Eighth Congress. *Id.*

⁶⁵ It is difficult to determine Bingham's "seniority" in the Thirty-Ninth Congress. But by the Fortieth Congress we are told he ranked eighth in seniority. BENEDICT, *supra* note 39, at 31. Benedict also indicates that in the Thirty-Ninth Congress Bingham was the second-ranking member on the Reconstruction Committee. *Id.* at 36. It is unclear whether Benedict is referring to the Joint Committee on Reconstruction or the House Committee on Reconstruction.

Les Benedict as one of eleven “Representatives with pre-eminent influence” in the House of Representatives.⁶⁶ Benedict also indicated that Bingham “braved Steven’s and Butler’s wrath, ultimately having a greater influence on the course of Reconstruction than the radical leaders themselves.”⁶⁷ The overriding point is that Bingham was not just another Congressman, but rather a leader and important force of his own right.

The Committee was composed of the leaders of Congress and when Bingham spoke to the House, he was not speaking as an individual or rogue Congressman but rather as a representative of these “truest and best men.” Further, in spite of his difference with Thaddeus Stevens (R-Pa.), Stevens was one of Bingham’s most consistent supporters in the votes by the Joint Committee on Reconstruction. Of course, all of the Republican members of the Committee unanimously voted to report out the final draft of the Amendment, including Stevens. Once the matter was presented to Congress, though Stevens spoke on the merits, it was clearly Bingham who was what we would call the “floor leader.” However, Stevens was present and participated in the debates and could have “corrected” any misstatements of Bingham, had he made any. Indeed, throughout the 1866 debates on the Civil Rights Act and the Fourteenth Amendment Bingham specially indicated that he wanted to enforce the Bill of Rights against the states by an amendment no less than seven times.⁶⁸

Furthermore, one does not have to look far for corroboration of Bingham’s view. James F. Wilson (R-Iowa), Chair of the House Judiciary Committee, and Bingham agreed that the Bill of Rights should be enforced against the states. Their disagreement in the debate over the Civil Rights Bill was that Wilson—along with the majority of the House—thought this enforcement power already existed, while Bingham thought it required a Constitutional Amendment.⁶⁹ In a discussion of the first version of the Fourteenth Amendment that was

⁶⁶ *Id.* at 31.

⁶⁷ *Id.* at 36.

⁶⁸ Aynes, *supra* note 58, at 66–74.

⁶⁹ See Aynes, *supra* note 58, at 79–81. Wilson made a similar point during the campaign of 1866 when he indicated that northerners going south should be able to have “the same” free speech rights as the Union soldiers enjoyed when they were in the South during the war and as they enjoyed in the North. CURTIS, *supra* note 36, at 144 (citing BURLINGTON HAWK EYE, Sept. 13, 1866, at 1, col. 2). Note that Wilson did not seek the same rights as white southerners or rebel soldiers enjoyed. Rather, he sought the same rights as Union soldier enjoyed when they invaded the states in rebellion.

brought to Congress, Representative Giles S. Hotchkiss (R-NY), having heard a speech in which Bingham declared he wanted to enforce the Bill of Rights against the states, said: “I have no doubt that I desire to secure every privilege and every right to every citizen in the United States that the gentlemen who reports this resolution desires to secure.”⁷⁰ Similarly, in the same debate, Congressman Ignatius Donnelly (R-Minn.) stated:

There is an amendment offered by the distinguished gentlemen from Ohio [Mr. Bingham] which provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution. Why should this not pass? Are the promises of the Constitution mere verbiage? Are its sacred pledges of life, liberty, and property to fall to the ground through lack of power to enforce them?⁷¹

Many of the points made about Bingham could also be made about Senator Howard (R-Mich.) who was the floor manager in the Senate. Howard was a founder of the Republican Party in Michigan, the former Attorney General of that state, and a “respected” Senator.⁷² Howard was personally chosen by Senator Fessenden to make the presentation on the floor of the Senate and, contrary to claims by some who would undermine Howard’s speech, Fessenden was actually in the Senate listening to Howard’s presentation.⁷³

Howard quoted long portions from Justice Washington’s Circuit opinion in *Corfield v. Coryell*⁷⁴ on the meaning of the Privileges and Immunities Clause of Article IV and then stated:

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their extent and precise

⁷⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

⁷¹ *Id.* at 586.

⁷² BENEDICT, *supra* note 39, at 184.

⁷³ 2 FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICE OF WILLIAM PITT FESSENDEN 61–62 (1907) (“Mr. Fessenden . . . gave the amendment to the charge of Senator Howard.”); *id.* at 62 (“Mr. Fessenden was in his seat and participated in the debate, explaining why some of the amendments were thought necessary.”).

On Fessenden’s presence in the Senate during the debates see CONG. GLOBE, 39th Cong., 1st Sess. 2761 (casting a vote on an amendment to a bill to authorize the building of a railroad bridge between Wisconsin and Minnesota); *id.* at 2762 (asking Senator Henderson two questions on two different occasions about the same bill); *id.* at 2763 (noting his disagreement with Senator Sumner about the propriety of taking up the discussion on the Fourteenth Amendment and making a statement on the process which fills two columns of the Globe). It should be noted that the 2-column statement of Senator Fessenden is only approximately two columns before Senator Howard began his speech. *Id.* at 2764.

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

nature—to these should be added the personal rights guaranteed and secured by the *first eight* amendments of the Constitution;⁷⁵

The Privileges or Immunities Clause provides a solid textual basis for many rights already recognized and some that have never been recognized. Though he did not mention it by name, Howard described the Court's decision in *Barron* and indicated that one purpose of the Amendment was to overcome that decision.⁷⁶

Howard's standing in the Senate is also shown by the alteration of the Amendment's text in the Senate. Rather than moving into obscurity, one of the first things that happened after Howard's speech was that the Republicans chose him for another leadership role on the Fourteenth Amendment. After various Republican caucuses in which the Amendment was discussed, Howard, Fessenden, and James W. Grimes (R-Iowa) were designated as a committee of three to prepare the proposals based upon the discussion in the caucus.⁷⁷ It was caucus leader Benjamin Wade (R-Ohio) who made the initial motion to add a citizenship clause.⁷⁸ But Howard (R-Mich.) had a different view and it was Howard's view that prevailed over the leader of the Republican caucus.⁷⁹ Fessenden also took an active role, obtaining the addition of the words "or naturalized" to the citizenship clause.⁸⁰

These post-caucus proceedings show Howard's standing in the Senate and, equally as important, Fessenden's willingness to intervene if he disagreed with Howard. Yet, there was no intervention by Fessenden on Howard's description of the meaning of the Privileges or Immunities Clause. If this was a matter of discussion in the Republican caucus, it must have been satisfactory because there was no post-caucus

⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2765.

⁷⁶ Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010) (manuscript at 46 & n.152) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866)), available at <http://www.ssrn.com/abstract=1334687>; accord Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010), available at <http://www.ssrn.com/abstract=1354404>.

⁷⁷ BENEDICT, *supra* note 39, at 184–85.

⁷⁸ *Id.* at 185–87. An account of the roles and views of various Senators in altering the Amendment's text, including the views that the Citizenship Clause was merely declaratory of what the law was, can be found in Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 110 (David E. Kyvig ed., 2000) [hereinafter Aynes, *Unintended Consequences*, in UNINTENDED CONSEQUENCES]. For an updated version see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 290–300 (2006).

⁷⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2764–65.

⁸⁰ *Id.* at 3040.

discussions, no clarification or disavowal of Howard's speech and no proposed amendment with respect to the Privileges or Immunities Clause, like there was with other portions of the proposed amendment.⁸¹ Because the Amendment avoided all radical proposals and was the product of the moderates, it became the basis upon all members of the party could rally around.⁸² Except for the portions amended in the Senate, there was simply nothing controversial in the proposal and no reason for extended discussion.

For purposes of this essay, it is well worth mentioning the opposition of Democratic Senator Reverdy Johnson (D-Md.),⁸³ who I will focus upon because he represented the slaveholder in *Dred Scott* and, in the Joint Committee, voted *against* reporting out the Amendment.⁸⁴ In a June 8, 1866 speech Senator Johnson professed support for the Citizenship Clause and the Due Process Clause.⁸⁵ He made no mention of the Equal Protection Clause, but he opposed the Privileges or Immunities Clause upon the claimed ground that "I do not

⁸¹ Professor Thomas appears to look for a chorus of Senator who will stand up and say "me too" to Howard's speech. George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010) (manuscript at page 10), available at <http://www.ssrn.com/abstract=1392961> (noting that Howard's speech "dropped into the pond . . . without leaving a ripple"). But this is not how the legislative process worked. Howard spoke for the entire Joint Committee, including its Chairman Senator Fessenden and four other members of the Senate, excluding Senator Johnson (D-Md.). Their unanimous support for the Amendment in the Joint Committee needed no further statements beyond their votes in the Senate which were also unanimous. The vote by the entire Senate was also overwhelming, 33 to 11, with five Senators absent. (Of those absent, only one was a Republican.)

⁸² Aynes, *supra* note 43, at 385.

⁸³ It should be recalled that Johnson voted against the Amendment in the Joint Committee and in the Senate. Likewise, Thomas A. Hendricks (D-Ind.) also voted against the Amendment in the Senate. Additionally, Congressman Benjamin M. Boyer (D-Pa.) voted against the Amendment as originally passed by the House and then, after the alteration of the Amendment's text by the Senate, voted against it the second time it was before the House. This should not be surprising since every Democrat voted against the Amendment.

It also bears mentioning that while any textual analysis, case analysis, or logical position advanced by any member of the minority might be helpful, their claims that they did not understand the Amendment would not be credited by the overwhelming majority of the Congress, nor should they be credited by reasonable scholars today. In the Senate, the Republican held a 32-man majority: 44 Republicans to 12 Democrats. In the House it was 109: 155 Republicans to 46 Democrats. Aynes, *supra* note 10, at 1022. On problems in relying upon Senator Johnson in particular see *infra* notes 88–90, and accompanying text, as well as Aynes, *supra* note 31.

Of further note: the merit brief of the Respondent City of Chicago cites the two Democratic Senators (Johnson and Hendricks) for these same propositions, without revealing their party or personal history. Brief for Respondents City of Chicago and Village of Oak Park at 66, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Dec. 30, 2009), 2009 WL 5190478.

⁸⁴ KENDRICK, *supra* note 38, at 114.

⁸⁵ CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

understand what will be the effect of that.”⁸⁶ As Professor Wildenthal documents, Senator Johnson moved to strike the clause from the Amendment and his views were not even considered worthy of debate or a roll-call vote in rejecting the motion.⁸⁷

This is particularly interesting for multiple reasons. First, like President Johnson who helped to sponsor, along with some of his appointed Provisional Governors, a short-lived conservative counter-fourteenth amendment, whose primary changes were to the Privileges or Immunities Clause, Senator Johnson apparently had a real fear of that clause. Thus, we see a convergence between leading opponents (President Johnson, Senator Johnson, leading anti-war Democrat Vallandigham, as well as the Provisional Governors under President Johnson) of the Privileges and Immunities Clause and the proponents of the Clause in the Congress as *all* seeing it as an important portion of Section 1.⁸⁸

Second, we have to take Johnson’s claim of “not understand[ing]” the effects of the Privileges or Immunities Clause with a large amount of skepticism. In part, this is because he not only heard Howard’s speech but undoubtedly heard Bingham and others discuss the effect in the Joint Committee. Further, because Johnson argued *Dred Scott* he knew the Chief Justice’s conclusion was that if African Americans were U.S. Citizens their privileges and immunities under Article IV would give them “the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁸⁹ This is confirmed by Senator Johnson’s post-ratification actions: when he frequently represented KKK terrorists and Democrats opposed to Republicans and republican governments, he conceded that the Privileges or Immunities Clause included the right to bear arms.⁹⁰

A look at the ratification process produces no different result. If we look at the plain language of Section 1 and ask what the rights of U.S. citizens are, the most natural meaning is the Bill of Rights and other provisions of the Constitution such as habeas corpus, the right to

⁸⁶ *Id.*

⁸⁷ Wildenthal, *supra* note 76 (manuscript at 300 & n.486).

⁸⁸ Professor Thomas thinks this is true as well. Thomas, *supra* note 81.

⁸⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

⁹⁰ Aynes, *supra* note 58, at 98 n.263. It is possible, of course, that Senator Johnson was referring to not knowing the meaning and effect of the non-Bill of Rights privileges and immunities. But, if so, that does not support Professor Thomas’s analysis.

access the courts, and related matters. If one asked the same question during the Nineteenth Century, the average person at the time would have answered: the Bill of Rights.⁹¹

Beyond the language of the Amendment, in this pre-electronic age one of the major attractions of the times was politics. Many individuals had their own subscription to the *Congressional Globe*. Further, Congressmen were entitled to 25 copies of the *Globe*⁹² which they apparently gave to political allies.⁹³ Thus, with a Congress of 235 members, there were 5,640 copies of the *Globe* that could be distributed to their political allies. This is more than enough copies for each member of Congress to distribute to the state legislative members whose districts overlapped with his own and thus have the entire legislature covered, if they so desired.

We also know that thousands of “reprints” of the speeches of Congressmen were sent to constituents and others, by the speaker, by other congressmen, and by political parties. During General William T. Sherman’s Atlanta campaign, as the Presidential election of 1864 approached, “[p]amphlets of political speeches flooded the camp.”⁹⁴

The use of pamphlets was a critical part of political communication during the Civil War and Reconstruction era. In speaking of Secretary of War Edwin Stanton, historian T. Harry Williams pointed out the importance of this form of communication and tied it to the ability of government officials, including Congressmen, to “frank” the documents to key political players:

Pamphlet writers formed an essential part of Stanton’s propaganda machine. He knew the efficiency of this medium of dissemination *in an America which read avidly all the political documents franked out of Washington*.⁹⁵

These pamphlets were often circulated in large numbers. For example, after President Johnson vetoed the Freedman’s Bureau bill,

⁹¹ E.g., Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 540 (1891).

⁹² HANS L. TREFOUSSE, RUTHERFORD B. HAYES 39 (2002).

⁹³ For example, the papers of John Sherman (R-Ohio) contained lists indentifying supporters of Republicans and Democrats in Ohio as well lists of individuals and institutions to whom government publications could have been sent. John Sherman Collection at the Rutherford B. Hayes Presidential Center, <http://www.rbhayes.org/hayes/mssfind/487/shermanj.htm> (last visited January 9, 2010) (listing the documents as part of the collection).

⁹⁴ LORLE PORTER, A PEOPLE SET APART: SCOTCH-IRISH IN EASTERN OHIO 693 (1998).

⁹⁵ T. HARRY WILLIAMS, LINCOLN AND THE RADICALS 235 (1965) (emphasis added). For other examples see Aynes, *supra* note 31 (manuscript at 50).

Congressman John Lynch (R-Maine) indicated that 100,000 copies of Senator Trumbull's (R-Ill.) reply would be "sent to the Country".⁹⁶ When the Report of the Joint Committee on Reconstruction was completed, 150,000 copies were distributed across the nation.⁹⁷ One such pamphlet that received widespread circulation was Bingham's Fourteenth Amendment speech of February 25, 1866 with the sub-title: "In support of the proposed amendment to enforce the Bill of Rights."⁹⁸

Moreover, there were accounts of the speeches of both Bingham and Howard in *The New York Times* and other newspapers. In that era, when newspapers printed each other's stories, the New York newspapers dominated the national press.⁹⁹ Thus, the fact that these speeches were summarized or printed in New York inevitably means they were printed elsewhere as well.

While these various versions of print media probably were most effective for the members of the legislature who were called upon to ratify the Amendment, the common people probably received most of their information from public speeches. The Amendment was considered the "campaign platform" of the Republican Party in the Congressional Election of 1866.

⁹⁶ GAILLARD HUNT, ISRAEL, ELIHU, AND CADWALLADER WASHBURN 119 (1925) (quoting John Lynch's letter of February 21, 1866 to Israel Washburn).

⁹⁷ KENDRICK, *supra* note 38, at 264-65.

⁹⁸ ONE COUNTRY, ONE CONSTITUTION, AND ONE PEOPLE: SPEECH OF HON. JOHN A. BINGHAM, OF OHIO, IN THE HOUSE OF REPRESENTATIVES, FEBRUARY 28, 1866: IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS (Washington, Cong. Globe Office 1866) (emphasis added), available at <http://www.archive.org/details/onecountryonecon00bing>.

⁹⁹ J. CUTLER ANDREWS, THE NORTH REPORTS THE CIVIL WAR 9 (1955). Because of the scattered nature of the press accounts, it has been difficult for people to access them. Nevertheless, a wealth of writing and research does provide examples of press accounts which support the interpretation of the Fourteen Amendment as applying the Bill of Rights against the States. See, e.g., HUNT, *supra* note 96; JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984); Curtis, *supra* note 76 (manuscript at 7-8); Wildenthal, *supra* note 76. Most recently, David T. Hardy took up the subject in *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695 (2009).

Professor George Thomas embarked upon an interest experiment in trying to trace Fourteenth Amendment information through electronic data bases. Thomas, *supra* note 81. However, he failed to account for other forms of communication, see *supra* note 92-98, and accompanying text, and further, could not even replicate his own results. Thomas, *supra* note 81. Moreover, he mistakenly thought he was searching over 3,000 newspapers when, in fact, the data base he was using contained only 64 newspapers of the approximately 4,000 papers that existed in 1868. Aynes, *supra* note 31 (manuscript at 57-59). Moreover, David T. Hardy has recently demonstrated that many errors occur because the newspaper was scanned and Thomas would miss even some of the document contained in the very limited data base for that reasons. David T. Hardy, *Originalism and Its Tools: A Few Caveats*, 2010 AKRON STRICT SCRUTINY 1, <http://strictscrutiny.akronlawreview.com/files/2010/01/originalism-and-its-tools-a-few-caveats.pdf>.

Unfortunately, we have more difficulty documenting what was said on the campaign trail. One problem is that candidates delivered a great many speeches. In one election, for example, future President Garfield was said to have given fifty speeches.¹⁰⁰ But I have previously shown that speeches of Bingham's published by the *Cadiz Republican* (at a time when Cadiz was a more important town than one might think), the *Cincinnati Commercial*, and the *Cincinnati Gazette* not only support the view that the Bill of Rights was to be enforced against the states, but were also entirely consistent with the speeches made on the floor of Congress.¹⁰¹ Not surprisingly, we can also find speeches of Judiciary Chairman Wilson¹⁰² and Congressman James Garfield¹⁰³ which are identical to or consistent with their speeches in the Congress. Indeed, one would have to be a pretty poor political figure to say something in a public speech that could be contradicted by what one knew was printed in the *Globe*.

Further, though we do not have as much information on the ratification process as one might like, we do know from what we have that the enforcement of portions of the Bill of Rights by the Amendment was clearly known to the legislatures of, among others, Ohio, Pennsylvania, Massachusetts.¹⁰⁴

In addition, there were at least seven legal treatises published in the time between the proposal of the Amendment in 1866 and its ratification in 1868. Four of those treatises make no mention of the Fourteenth Amendment at all.¹⁰⁵ The three treatises which did treat

¹⁰⁰ 1 THEODORE CLARKE SMITH, *THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD* 150–52 (1925).

¹⁰¹ Aynes, *supra* note 31 (manuscript at 12 & n.60); Aynes, *supra* note 43, at 388–89, 388 n.60, 389 n.61.

¹⁰² See *supra* note 69; see also Aynes, *supra* note 31 (manuscript at 14–15).

¹⁰³ Aynes, *supra* note 31 (manuscript at 16–17).

¹⁰⁴ CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT passim* (1997); Aynes, *supra* note 31 (manuscript at 10–11).

¹⁰⁵ Those treatises were WILLIAM ALEXANDER DUER, *A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES DELIVERED ANNUALLY IN COLUMBIA COLLEGE* (New York, Harper & Bros. 1868); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Boston, Little, Brown & Co. 1868); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (George F. Comstock ed., Boston, Little, Brown, & Co., 11th ed. 1867); WILLIAM B. WEDGWOOD, *THE GOVERNMENT AND LAWS OF THE UNITED STATES* (New York, J.W. Schermerhorn & Co. 1867).

This may be a puzzle to some. The most likely answer is that the time from the writing of the treatise to the publication may be such that the Amendment was not proposed by Congress and/or ratified by the states when the manuscript had to be submitted to the printers. But there may be other reasons. Justice Cooley, for example, was an elected Judge who may not have wanted to take a position upon a matter which might lose him voters. Whatever the reason, we

the pending Amendment unanimously concluded that the end result would be to enforce the first eight amendments against the states.¹⁰⁶ No contemporaneous treatise (1866-1868) presented any other interpretation of the Amendment.

Though they each arrive at their conclusion in a slightly different way, one of them, like Bingham and Howard, focused upon overruling *Barron*. This was a treatise published in 1868 while the Fourteenth Amendment was pending and obviously written when it had not yet been adopted, John Norton Pomeroy, Dean of the Law School and Chair of Political Science at New York University, illustrated this problem with a right of protection by the “due process” clause which existed in both the state constitutions and the federal Constitution. Because of *Barron*, Pomeroy noted:

[I]n a case arising under the clause in a state constitution . . . the Supreme Court of the United States cannot pass directly and independently upon the question whether a given state statute, or a given act done under the authority of the state, is opposed to this clause, but must defer to, and be controlled by, the judgments of the courts of the same commonwealth which have settled the construction given their own organic law.¹⁰⁷

Pomeroy concluded that:

Here is plainly a vast field open for injustice and oppression by individual states, which the nation has now no means of preventing.¹⁰⁸

Pomeroy found this “result” to be “dismaying,” and noted that a “remedy is needed.” He then observed that such a remedy is “easy and the question of its adoption is now pending before the people,”

know that these commentators made no comment and did not even include the text of the Amendment in their books.

¹⁰⁶ TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 401–09 (Boston, Little, Brown & Co. 1867); GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 290 (Washington, D.C., W.H. & O.H. Morrison 1868); JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 145–52 (New York, Hurd & Houghton 1868). For an analysis of the position taken in each treatise and biographical information on the authors see Aynes, *supra* note 58, at 83–94.

¹⁰⁷ POMEROY, *supra* note 106, at 150. It is worth noting that in Pomeroy’s hypothetical, he did not describe the state constitution as having equal protection or non-discrimination provisions. Though it is possible to strain to read some of his statements as evidencing non-discrimination concerns, this is an error and has never been the predominant reading by scholars familiar with Pomeroy’s work.

¹⁰⁸ *Id.*

thereafter referring to section one of the Fourteenth Amendment by name.¹⁰⁹ Thus, like others who endorsed the Amendment, Pomeroy saw it as a means of providing double security for the rights of citizens—once by the state and a second time by the nation.

The Amendment itself was the central issue of the Congressional elections of 1866 and the Republicans won by overwhelming majorities.¹¹⁰ In spite of the opposition of the most racist President in U.S. history and of the Democratic Party, which chose to campaign almost exclusively upon race, the Amendment was ratified, often with approval by overwhelming majorities in the individual state legislatures.¹¹¹

Though the full extent of the contours of the Privileges or Immunities Clause is subject to interpretation, there should be no controversy that at the core these provisions included the Bill of Rights. As summarized by Randy Barnett:

There is now a scholarly consensus that the original meaning of “privileges or immunities” included the Bill of Rights.¹¹²

We might have a vibrant discussion about whether the privilege or immunities (rights of U.S. citizens) include a “right to family life”¹¹³ or the Jacksonian Democrats’ anti-monopoly views. But at the core, there should be no dispute that they include the Bill of Rights.

The same general principles that enforce the other provisions of the Bill of Rights against the states apply to the Second Amendment as well. There is absolutely no evidence that the framers or ratifiers of the

¹⁰⁹ *Id.* at 151; *see also id.* at 149 (discussing the “rule of interpretation” of *Barron v. Baltimore* and indicated that while it is “firmly established” that “*the rule itself is certainly an unfortunate one*” (emphasis added)).

¹¹⁰ The majorities in the new Congress were veto-proof and enough to propose constitutional amendments. Aynes, *supra* note 10, at 1022 (44 to 12 in the Senate; 155 to 46 in the House). This Republican victory was termed “overwhelming” in 4 ROBERT FRIDLINGTON, *THE SUPREME COURT IN AMERICAN LIFE* 12–13 (1987) (describing noteworthy events from 1866).

¹¹¹ In Ohio, for example, the vote for ratification in the Senate was 21 to 12 and in the House it was 54 to 25. Aynes, *supra* note 43, at 393. In Connecticut, the first state to ratify the Amendment, the vote was 11 to 6 in the Senate and 107 to 84 in the House. *See* JAMES, *supra* note 99, at 13. South Carolina, the last of the states to ratify, which Secretary of State Seward considered necessary to complete ratification, passed the proposal by a vote 23 to 5 in the Senate and 108 to 12 in the House.

¹¹² RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 292 (2008); *see also* CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 446–47 (2d ed. 2005) (“[M]ost of the substantive guarantees of the Bill of Rights have been . . . made applicable to the states [and] this debate is now over for all practical purposes.”).

¹¹³ *See* Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1323–24 (2009).

Fourteenth Amendment developed or supported a concept of “selective” incorporation (application) of the rights included in the Bill of Rights against the States. Indeed, as far as could be determined, the first use of that term did not occur until 1949 in Justice Frankfurter’s concurring opinion in *Adamson v. California*.¹¹⁴ Frankfurter was hostile to the very term he coined and he had previously expressed the wish that the Fourteenth Amendment had never been adopted.¹¹⁵

III. CONTEXT: ACTIONS OF INDIVIDUALS IN THE THIRTY-NINTH CONGRESS

The extent to which members of the Thirty-Ninth Congress put the principles they learned as aspiring lawyers and articulated on the floors of Congress into action can be seen by their response to the violence threatened by white, elitist slaveholders in the Congress.

It is perhaps generally known that violence and threats of violence were part of the life of the pre-Civil War Congress in disputed matters concerning slavery. But what may not be so well known is that northern men, particularly those from the west (what we now call the Midwest) were ready to act in self defense. As part of that context, one can consult incidents involving two members of Congress: Congressman Lewis D. Campbell and Senator Benjamin F. Wade. Wade came to the Western Reserve in the Ashtabula area at a time when it was still a frontier and Campbell was born in Warren, Ohio in 1811, when it too was still considered part of the frontier.¹¹⁶ We may surmise that in that situation they gained experience with firearms and we know from their subsequent actions that they believed in the right of self defense.

The story about Campbell is relatively brief.¹¹⁷ Campbell was said to have been “a militant antagonist of the slave power.”¹¹⁸ At the same time, he was a “social favorite” and “popular with the southern

¹¹⁴ *Adamson v. California*, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring).

¹¹⁵ Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1217–19 (1995) (collecting sources).

¹¹⁶ Biographical Directory of the United States Congress 1774–Present, *supra* note 36. Wade moved from Massachusetts to Andover, Ohio in 1821. *Id.*

¹¹⁷ James E. Campbell, *Sumner-Brooks-Burlingame, or, The Last of the Great Challenges*, 34 OHIO ARCHAEOLOGICAL & HIST. Q. 435 (1925), available at <http://publications.ohiohistory.org/ohstemplate.cfm?action=detail&Page=0034435.html&StartPage=435&EndPage=473&volume=34¬es=&cnewtitle=Volume%2034%20Page%20435>.

¹¹⁸ *Id.* at 455.

members” of the House.¹¹⁹ One day after the caning of Charles Sumner (R-Mass.), which is discussed more fully below, Campbell was walking down Pennsylvania Avenue when one of his southern friends told him that that very day slaveholders were going to “challenge” him.¹²⁰ Campbell made no reply, but after they passed a shooting gallery Campbell invited his friend to go there with him. Campbell asked the owner of the shooting gallery to replace the normal target with “a lighted candle.”¹²¹ Campbell proceeded to “snuff that candle with a rifle ball, ‘off-hand’ three times in succession.”¹²² No challenge or attack was ever made on Campbell and no mention of it was ever made again. This was attributed to the fact that “the certainty of death has a tendency to cool the ardor of the most persistent duelist.”¹²³

Benjamin Franklin Wade, was known as “Bluff” Ben Wade. In that era the word had an entirely different connotation than our own and referred to being plainspoken, forthright and bold.¹²⁴ Wade had helped found the Ohio Republican Party and was himself a candidate for President in the Republican Convention in Chicago in 1860.

Wade had been a practicing lawyer and a judge who was elected as a Whig and then a Republican to the U.S. Senate (1851-1869).¹²⁵ By the time of the consideration of the Fourteenth Amendment, Wade was the President *Pro Tem* of the Senate and the leader of the Senate Republican Caucus. While he played no role in the drafting of the Amendment, he did play a role in the alteration of the Amendment’s text in the Senate.¹²⁶ Once Andrew Johnson was elevated to the position of President, there was no Vice President. Under the terms of succession at the time, had Johnson been impeached or otherwise unable to continue as President, Wade would have become President of the United States.

Early in his career in the Senate, Wade witnessed a slaveholder

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 200 (2d ed. 1983) (defining “bluff” as “rough and hearty; plain and frank; somewhat boisterous and unconventional,” providing an example from Tennyson, and including, among its synonyms, “open, bold, abrupt, frank, plainspoken, blunt, brusque [and] rough”).

¹²⁵ 3 CARRINGTON TANNER MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO 851 (1934). Wade was born in Massachusetts in 1800. He first came to Ohio in 1821 and returned permanently in 1825.

¹²⁶ Aynes, *Unintended Consequences*, in UNINTENDED CONSEQUENCES, *supra* note 78, at 114–15.

making an attack upon a northern Senator who made no response to the “taunts and insults” of the slaveholder.¹²⁷ Wade let it be known that if a slaveholder ever made such statements about him or his state, Wade “would brand him a liar.”¹²⁸ A Senator from a southern state made such statements and, true to his word, Wade branded him a “liar.” When an intermediately tried to obtain an apology from Wade, Wade rejected the effort and insisted that the slaveholder owed an apology to Wade and to Ohio. “The matter [was] thus closed, and a fight was looked upon as certain.”¹²⁹

The next day a friend of the southern Senator met with Wade to discuss the possibility of a duel. Rather than being conciliatory, Wade responded:

“I now take this opportunity to say what I then thought, and you will, if you please, repeat it. Your friend is a foul-mouthed old blackguard.”

“Certainly, Senator Wade, you do not wish me to convey such a message as that?” [said the friend.]

“Most undoubtedly I do; and will tell you for your own benefit, this friend of yours will never notice it. I will not be asked for either retraction, explanation, or a fight,” [was the reply from Senator Wade.]

The next day Wade came to his seat in the Senate and, apparently with some flourish, drew from under his coat two large pistols which he laid inside his Senate desk, thereby announcing his intention to act in self-defense if necessary.¹³⁰ Wade’s “plucky” action was of such surprised to the fire-eaters that his biographer indicates “[n]o further notice was taken of the affair of the day before. Wade was not challenged, but ever afterwards treated with the utmost politeness and consideration by the Senator who had so insultingly attacked him.”¹³¹

One of the most famous acts of violence in Congress was the caning of Massachusetts Senator Charles Sumner (R-Mass.) by Representative Preston Brooks (D-S.C.) on the floor of the Senate while it was in recess. In his capacity as a Senator, Charles Sumner had

¹²⁷ L.P. BROCKETT, MEN OF OUR DAY 245 n.* (Philadelphia, Zeigler, McCurdy & Co. 1868).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

made a speech on the floor of the U.S. Senate in which he compared South Carolina Senator Andrew F. Butler (D-S.C.) to “Don Quixote who had chosen [the harlot Slavery] as a mistress to whom he has made his vows.”¹³² Two days later, while the Senate was in recess and Sumner was sitting at his desk writing, Butler’s younger cousin, Preston Brooks (D-S.C.), attacked Sumner from behind beating him over the head thirty-times or more with a gold-headed cane until Sumner lay unconscious on the floor covered in blood and unable to return to the Senate for three years.¹³³

It has been suggested that Brooks did not challenge Sumner to a duel, because duels were between “social equals” and that “someone as low as this Yankee Blackguard deserved a horsewhipping—or a caning.”¹³⁴ However, the biographical backgrounds of Sumner and Brooks suggests that Sumner was Brooks’ social equal, if not his superior.¹³⁵

The real reason for the surprise assault upon an unarmed man is far more likely acknowledged by the appellation given Brooks by the North: “Bully Brooks.”¹³⁶ We often associate a bully with cowardice and there is reason to think this may well have been the motive of Brooks in launching a surprise attack with a weapon against an unarmed and unsuspecting man.¹³⁷ At the time of the assault, Brooks and Sumner were close in age, with Brooks being around forty-seven years

¹³² JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 150 (1988). The order of the words has been changed slightly in the interest of clarity.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ The illogic of slavery is shown by a comparison of the backgrounds of Sumner and Brooks. Sumner was a controversial person. But he was a man upon the national stage while Brooks could only become so by his violent attack upon Sumner. Sumner was educated at “the Boston Latin School; graduated from Harvard University in 1830 and from the Harvard Law School in 1833; admitted to the bar the following year and commenced the practice of law in Boston, Mass.; lectured at the Harvard Law School 1836-1837; traveled extensively in Europe 1837-1840.” *Biographical Directory of the United States Congress 1774-Present*, *supra* note 36. While in Europe, Sumner learned French, German and Italian and later, in 1844-1855, edited and annotated several volumes of Francis Vesey’s *Reports of Cases Argued and Decided in the High Court of Chancery*. 9 *DICTIONARY OF AMERICAN BIOGRAPHY*, pt. 2, at 209 (Dumas Malone ed., Charles Scribner’s Sons 1964) (1935). Brooks had “attended the common schools and was graduated from South Carolina College (now the University of South Carolina) at Columbia in 1839; studied law; was admitted to the bar in 1845.” *Biographical Directory of the United States Congress 1774-Present*, *supra* note 36. In 1856 when the attack took place, Brooks had been a Representative for less than three years and Sumner had been a Senator for five years.

¹³⁶ *See, e.g., The Ovation to Bully Brooks*, N.Y. TIMES, Sept. 4, 1856; *Letters to the Editor; Bully, Brooks*, N.Y. TIMES, May 27, 1856.

¹³⁷ Brooks’ act was denounced as both “brutal and cowardly” and Senator Wade’s speech was said to portray “the cowardice, the meanness, [and] the infamy of the deed.” BROCKETT, *supra* note 127, at 252-53.

old¹³⁸ and Sumner being approximately fifty-five. But Sumner, like Lincoln, was over six feet tall in an era when that was highly unusual¹³⁹ and from his photographs, *appears* to have been of fuller proportions than the lanky Lincoln.¹⁴⁰ In contrast, Brooks appears to have been a man of average height and weight.¹⁴¹

Ultimately, we cannot clearly assess the ability of Brooks or Sumner to engage in a physical struggle. But it seems likely that if approached in the open, Sumner, whether Brooks was armed with the cane or not, would have been able to defend himself against Brooks. At the very least, it appears unlikely that Sumner would have sustained such severe injuries. Since it seems unlikely that Brooks could have bested Sumner in a fair fight (as admitted by Brooks' secret attack), one can only conclude that Brooks chose the only way he thought he could prevail—by denying Sumner any opportunity for self-defense.¹⁴²

The lesson was not lost on those who valued free speech and democracy. William Cullen Bryant, editor of the *New York Evening Post* wrote:

Are we to be chastised as they chastise their slaves? Are we too, slaves, slaves for life, a target for their brutal blows, when we do not comport ourselves to please them?¹⁴³

The answer was not long in coming; Senator Wade took the floor to denounce the actions that had occurred:

Mr. President, if the hour has arrived in the history of this Republic when its Senators are to be sacrificed and pay the forfeit of their lives for opinions' sake, I know of no fitter place to die than in this

¹³⁸ His older cousin, Senator Butler, was approximately 60 years old at the time and probably no match for Sumner.

¹³⁹ By the time he was twenty-two years old, Lincoln was nearly six feet and four inches tall, "a head taller than almost anybody else in the New Salem[, Illinois] community." DAVID HERBERT DONALD, "WE ARE LINCOLN MEN": ABRAHAM LINCOLN AND HIS FRIENDS 10 (2003).

¹⁴⁰ I do not mean to imply that Sumner was stronger than Lincoln. In his youth Lincoln was described as a man of "immense strength and courage." DAVID HERBERT DONALD, LINCOLN 41 (1996).

¹⁴¹ Brooks had been a Captain in the regiment that fought in the Mexican War.

¹⁴² Later Congressman Brooks challenged Congressman Anson Burlingame (R-Mass.) to a duel. When the later accepted and named Canada as the location, Brooks used the location to avoid the duel. ALBERT G. RIDDLE, THE LIFE OF BENJAMIN WADE 249 n.* (Cleveland, Williams Pub. Co. 1888). Burlingame was a "bitter foe of slavery", a "fine rifle shot" and was known as as somewhere who would fight. Campbell, *supra* note 117, at 455. While it appears that contemporaneously most people thought it was Brooks who was making excuses to avoid meeting Burlingame, Campbell's 1925 account argues that it was Burlingame who sought to avoid a conflict by naming a location to which he knew Brooks would object.

¹⁴³ MCPHERSON, *supra* note 132, at 150.

chamber, with our Senate robes around us; and here, if necessary, I shall die at my post, and in my place, for the liberty of debate and free discussion.¹⁴⁴

Fire-eater Robert A. Toombs (D-Ga.) witnessed the assault without intervening and stated his approval of the actions by Brooks. In response, Wade, whose seat was near that of Toombs, gained the floor and “arose within arm’s length of the savage [Toombs], face livid, eyes flashing, hands clenched” and turning to Toombs, said, in part:

It is true that a brave man may not be able to *defend* himself against such an attack. A brave man may be overpowered by numbers on this floor, but sir, overborne or not, live or die, I will vindicate the right and liberty of debate and the freedom of discussion upon this floor, so long as I live. If the principle now here announced prevail, *let us come armed for the contest*, and although *you are four to one* I AM HERE TO MEET YOU.¹⁴⁵

It was thought that Toombs must respond to Wade, but Toombs remained silent. When Wade’s friends inquired as to what he would do if challenged by Toombs, Wade replied that though his constituents were unanimously opposed to dueling, these were exceptional times and he would make an exception if Toombs challenged him, choosing rifles at 30 paces.¹⁴⁶ Of course we do not know what the result would have been. But Wade was known as a “dead shot” and Wade’s friends said: “Pin a paper to Toombs’ bosom the size of a quarter coin and Wade’s bullet would certainly cut it.”¹⁴⁷ Toombs no doubt heard of Wade’s response, knew of his skills with a rifle, and found a way to act conciliatory to Wade and avoid any conflict.

Finally, in 1860, when tensions were high and violence was threatened by slaveholders, Wade was scheduled to make a public speech supporting the announcement of Lincoln’s election as President. When one of his companions noted that there was a possibility of mob action and he might not be able to make the speech, Wade revealed that he was carrying a pistol, saying: “I have six shots; . . . I shall make my speech.”¹⁴⁸

These events, largely lost to history, show northern anti-slavery

¹⁴⁴ BROCKETT, *supra* note 127, at 253.

¹⁴⁵ RIDDLE, *supra* note 142, at 245 (emphasis added).

¹⁴⁶ *Id.* at 247 n.*.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 380.

and abolitionist congressmen standing up to slaveholders and being willing to use both rifles and pistols to defend not only their lives but their constitutional rights. These events were well-known to members of the Thirty-Ninth Congress, including John Bingham with whom Wade helped found the Ohio Republican Party. They were played out on the national stage and were well-publicized. They were well known to anyone who followed contemporary events in the nation and part of the nation's shared experience.

The views of the "right" of self defense continued throughout the era before war. In 1857 even moderate Republican and future Fourteenth Amendment author John A. Bingham (R-Ohio) took the position that:

[B]y the Constitution . . . MEN are not PROPERTY, and cannot be made property, and have the right to defend their personal liberty even to the inflection of death!¹⁴⁹

When President Lincoln issued his famous Emancipation Proclamation in its final version he "enjoined[ed] upon the people so declared to be free to abstain from all violence, *unless* in necessary self-defense."¹⁵⁰ Notice that that President Lincoln relied upon "self-defense" for these individuals all of whom were still behind enemy lines and under the control of at least de facto state governments that forbade self-defense by people held in slavery.

Fourteenth Amendment author Congressman John A. Bingham (R-Ohio) went even further than Lincoln. In 1862, before the Emancipation Proclamation, Bingham condemned laws by white slaveholders that made it a crime to "whisper" to a slave that "there is a God that . . . sometimes condescends to clothe with superhuman power the good right arm of an outraged man when he strikes for the liberty of himself, his wife, and children."¹⁵¹

On the campaign trail in 1866, General and future President Rutherford B. Hayes told the people that the terms of the Fourteenth

¹⁴⁹ CONG. GLOBE, 34th Cong., 3d Sess. app at 139 (1857). Lest Bingham's position be misunderstood, he was not denying that state laws could enforce slavery as a property right. However, consistent with Justice McLean's position on the bench, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 537 (1857) (McLean, J., dissenting), he was emphasizing that in every case where the *United States Constitution* acts upon people held in slavery, it acted upon them as persons and not as property.

¹⁵⁰ *Final Emancipation Proclamation, January 1, 1863*, in 1 ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-1865 at 424, 425 (Don Edward Fehrenbacher ed., 1989).

¹⁵¹ CONG. GLOBE, 37th Cong., 2d Sess. 1203 (1862).

Amendment were “few in number [and] *easily understood*.”¹⁵² The conservative Republican Governor of Ohio, a former Major General in the Union Army, told the legislature that “[a] simple statement of [the effects of the Fourteenth Amendment] is their complete justification.”¹⁵³ Professor Rosenthal notes that an editorial in *The New York Times* termed Howard’s speech regarding the Fourteenth Amendment “clear and cogent.”¹⁵⁴ Further, Professor Thomas notes that “[q]uite a few newspapers” simply quoted the Amendment, acting as if the “meaning was clear enough.”¹⁵⁵ On May 27, 1866, only two days after Senator Howard’s speech, the *Chicago Tribune* indicated that debate would be short because the subject was “already thoroughly discussed and *understood*.”¹⁵⁶

When contemporaries indicate that the meaning of the Amendment is clear, one would think that scholars should devote their time to trying to understand that clear meaning, rather than trying to find ways to claim the words or the meaning was confusing.

One of the ironies of the Court’s various decisions is that it recognizes as “fundamental” and protects rights that are not specifically mentioned in the U.S. Constitution.¹⁵⁷ Yet in contrast, rights such as the right to bear arms, that are specifically mentioned in the Constitution have not been so recognized.

¹⁵² *Speech of Gen. R. B. Hayes, at Cincinnati, September 7, 1866, in SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY, supra note 41, at 28.*

¹⁵³ 1 Ohio Executive Documents 282 (1867), *quoted in* JAMES, *supra* note 99, at 162.

¹⁵⁴ Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2010) (manuscript at 388 & n.111), *available at* <http://www.ssrn.com/abstract=1358473>. While Professor Rosenthal cites this editorial to make a different point, it is obvious that the writer of the editorial had read the whole speech.

¹⁵⁵ In mentioning the newspapers, Professor Thomas used the words “indulge an assumption that its meaning was clear enough.” Thomas, *supra* note 81 (manuscript at 25).

¹⁵⁶ *From Washington; Status of the Reconstruction Report*, CHICAGO TRIB., June 1, 1866, at 2, col. 4, *quoted in* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, pt. 1, 1295–96 (1971) (emphasis added). For a discussion of the flaws in Farman’s own analysis of the Amendment see BRANDWEIN, *supra* note 36, at 76–131; Aynes, *supra* note 115.

¹⁵⁷ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (right to act in self-defense); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to have children and to avoid having children by procuring contraceptives); *In re Winship*, 397 U.S. 358 (1970) (right to a proof beyond a reasonable doubt standard at trial); *Virginia v. Loving*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy in one’s own marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to pursue a profession of one’s choice and right to raise one’s children as he or she sees fit).

IV. CONCLUSION

Given David Kyvig's insight about the affect of combing multiple provisions into one amendment and the binary choice that such a combination imposed upon the ratifiers,¹⁵⁸ good faith requires that we make efforts to harmonize the views of the framers and the ratifiers where we can reasonably do so. Fortunately, as this narrative demonstrates, this is not difficult to do.

The pre-war and war grievances of the Republicans were summarized by the claims that the white slaveholder elite had violated "every" right secured in the Constitution. If we look to the discussion of the abuses which the Amendment was to correct, we find claimed violations or calls for the protection of: "inalienable rights,"¹⁵⁹ "personal rights,"¹⁶⁰ "personal liberty,"¹⁶¹ "every right and privilege belonging to a freeman,"¹⁶² "rights of men,"¹⁶³ "every constitutional right upon every inch of United States soil,"¹⁶⁴ and "natural rights."¹⁶⁵ With the exception of "natural rights,"¹⁶⁶ these terms are generally broad enough to encompass the rights protected by the Bill of Rights. Even when only one example—often free speech—is given, it is often made clear that this is only the chief right of the "rights of men" or other general rights that are under discussion.¹⁶⁷ These general claims can all be harmonized with the framers' actions in the Congress.

Examples can be found of claimed violations of almost every provision of the Bill of Rights¹⁶⁸ and one can see that it would have been impossible to redress these grievances without some mechanism

¹⁵⁸ DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 166-67 (1996).

¹⁵⁹ *Speech of Gen. R. B. Hayes, at Cincinnati, September 7, 1866*, *supra* note 152.

¹⁶⁰ CONG. GLOBE., 39th Cong., 1st Sess. app. at 67 (1866) (statement of Rep. Garfield).

¹⁶¹ *Id.*

¹⁶² *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 123 (1873) (Bradley, J., dissenting).

¹⁶³ *The Lounger; Of Liberty of Speech*, HARPER'S WKLY., July 20, 1861, at 451, col. 1.

¹⁶⁴ *The Lounger; A Mass Meeting*, HARPER'S WKLY., June 6, 1863, at 354, col. 4.

¹⁶⁵ Aynes, *supra* note 43, at 390 (quoting John Sherman (R-Ohio)).

¹⁶⁶ Some of the provisions of the Bill of Rights were not considered natural rights.

¹⁶⁷ *The Lounger; Of Liberty of Speech*, *supra* note 163. In the pre-Civil War period the right most often claimed to have been violated was the right to freedom of speech and related rights such as freedom of the pulpit, the right of petition, and the right of free assembly. After the War, the attacks by officials of local governments and terrorists caused the right to bear arms to be the most mentioned violation.

¹⁶⁸ One exception might be the Third Amendment, prohibiting the quartering of troops in peacetime. However, the fact that it has not yet become a grievance did not mean that the framers could not act in advance to prevent a grievance from arising.

for enforcing the Bill of Rights against the states. Further, the grievances were not limited to the Bill of Rights, but also included matters such as the right to interstate travel, the right to settle in an area *and* express one's opinions even if contrary to the original residents, the right to access the courts, and a variety of similar rights. Thus, the entire history of the nation leading up to the action of the Joint Committee on Reconstruction is consistent with the adoption of some language that would allow enforcement of the Bill of Rights *plus* other rights of U.S. citizens.

Furthermore, Howard specifically stated that among the privileges or immunities are the rights contained in the "first eight amendments"; Bingham stated that they will protect the "Bill of Rights"; they both indicated that the purpose of the Amendment was to overcome the Supreme Court's decision in *Barron*. The presentations by Bingham in the House and Howard in the Senate are consistent in indicating that the Amendment would enforce the Bill of Rights against the states. This reinforces what we would think: that they were both being faithful in reporting what the Committee thought the meaning of the Amendment was. The fact that no other Republican member of the Joint Committee disputed their presentation is powerful evidence of the consensus among the leadership of Congress. The Amendment was passed by significant majorities in both the House (120 to 32) and the Senate (33 to 11), and public statements made by the framers are certainly strong evidence of the public understanding of the terms used in the Amendment.

There are, in addition, many sources contemporary to the ratification of the Fourteenth Amendment that indicate the framers and ratifiers thought the Amendment supported an individual right to bear arms.¹⁶⁹ As Professor Amar points out, ironically both abolitionists Joel Tiffany and pro-slavery activist Roger Taney reached the same conclusion: "if free blacks were citizens, it would necessarily follow that

¹⁶⁹ AMAR, *supra* note 30, a 257–66; Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 966 n.177 (1984) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1837–38 (1866) (statements of Rep. Clarke)).

Many of the relevant sources are cited in Stephen P. Halbrook's book, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (1998). See also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

they had a right of *private arms* bearing.”¹⁷⁰ Judge Timothy Farrar, former law partner of Daniel Webster, specifically included the right to “keep and bear arms” as one of the rights protected under Article IV that could not be “infringed by individuals or States, or even by the government itself.”¹⁷¹

As Professor Akhil Amar has noted:

[B]etween 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns.¹⁷²

According to Professor Amar, the result was:

Reconstruction Republicans recast arms bearing as a core *civil* right Arms were needed . . . to protect one’s individual homestead. Everyone—even nonvoting, nonmilitia-serving women—had a right to a gun for self-protection.¹⁷³

Thus understood, the analysis in support of recognizing the right to have arms for purposes of self-defense is far more compelling under the Fourteenth Amendment’s Privileges and Immunities Clause than under the Second Amendment itself.

Given the overlapping support between the grievances sought to be addressed, the plain meaning of the language, the legislative history, the history of the debates for ratification, *McDonald v. City of Chicago* should be an easy case for the Court to resolve. Whether that will actually be the case, only time will tell.

¹⁷⁰ AMAR, *supra* note 30, at 263.

¹⁷¹ FARRAR, *supra* note 106, at 145.

¹⁷² AMAR, *supra* note 30, at 266.

¹⁷³ *Id.* at 258–59 (emphasis in original).