

## UNINTENDED CONSEQUENCES OF THE FOURTEENTH AMENDMENT AND WHAT THEY TELL US ABOUT ITS INTERPRETATION

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### I. INTRODUCTION

The Fourteenth Amendment has been compared to a “second American Constitution.”<sup>1</sup> Indeed, it is said that more litigation is based upon the Fourteenth Amendment or its implementing statutes than any other provision of the Constitution. As one would imagine for such an important charter of government, there is a substantial—and some might say overwhelming—body of scholarship on the “intent,” “meaning,” and “understanding” of the Fourteenth Amendment.<sup>2</sup>

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1. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 435 (1985).

2. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2nd ed., Liberty Fund, Inc. 1977); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 (1971) JACOBUS TENBROEK, EQUAL UNDER LAW (rev. ed., Collier Books 1965) (1951); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968); William W. Crosskey, *Charles Fairman, “Legislative History” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954). My own work includes Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994); Richard L. Aynes, *Charles*

Much of the literature, understandably, seeks to find out what the framers of the amendment or the ratifiers of the amendment “intended.” What did they want to accomplish by adopting this amendment? This article treats that issue as well, but begins with a different question: Does the amendment have consequences which were unintended by the framers? Over one and a quarter centuries ago, Justice Joseph Bradley answered that question in the affirmative: “It is possible that those who framed the article were not themselves aware of the far ranging character of its terms.”<sup>3</sup>

I suggest those unintended consequences include the effect of the Citizenship Clause on the force of the Fourteenth Amendment; the unintended impotency of the Privileges and Immunities Clause; the unintended neglect, for almost a century, of the Equal Protection Clause to offer protection to African Americans; the unintended effect upon the rights of corporations; and, finally, in what is more than a turn of the phrase, the possibility that the framers “intended” some of the unintended consequences of the amendment. The examination of those unintended consequences shed light upon the proper application of the Fourteenth Amendment to modern issues.

## II. THE CITIZENSHIP CLAUSE: AN UNINTENDED WEAKENING OF THE AMENDMENT

The question of who can be a citizen is fundamental to any society. As one might expect of a society of immigrants, this question has replayed itself throughout American history. The question of whether one could renounce foreign citizenship to become an American citizen was one of the principal controversies between the United States and Great Britain during the period leading up to and following the War of 1812. These controversies lingered in a variety of contexts in the United States, including questions about naturalization, loyalty, the exercise of voting rights, and similar matters.<sup>4</sup>

As liberal attitudes of the Revolutionary War era began to harden and more repressive trends emerged, the question of citizenship began to

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*Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995); and HISTORY OF OHIO LAW 370-401 (Michael Les Benedict & John F. Winkler, eds., 2004). No listing would be complete, of course, without reference to Justice Black’s path-breaking dissent in *Adamson v. California*, 332 U.S. 46, 68 (1949).

3. *Live-Stock Dealers and Butchers’ Ass’n. v. Crescent City Landing and Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408).

4. *See generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870 (University of North Carolina Press 1978).

loom large in the American drama over slavery. Some scholars, such as New York's Chancellor James Kent, articulated a theory of citizenship highly congenial to recognizing the rights of African Americans. According to Chancellor Kent: "If a slave, born in the United States, be manumitted or otherwise lawfully discharged from bondage, or if a black man be born within the United States and born free, he becomes thence forward a citizen."<sup>5</sup> Kent's position was shared by other important legal writers.<sup>6</sup> On the other hand, as southern states began increasing racial restrictions and depriving even free blacks of existing rights, proslavery advocates articulated theories suggesting that African Americans could not be citizens.<sup>7</sup> These legal scholars advocated a view that African Americans lacked the possibility of ever becoming citizens of the United States no matter what the place of their birth.

The resolution of this issue had particular importance for at least two questions. First, could African Americans use diversity of citizenship to escape less friendly state courts and litigate their claims in the federal courts? Second, were African Americans "citizens" within the meaning of Article IV, Section 2 which provided: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several states"?

In the political arena, the architects of the national anti-slavery strategy considered Article IV, Section 2 as a recognition of national citizenship. The first time the word "citizen" is used in the clause ("Citizens of each state") the words clearly refer to state citizenship.<sup>8</sup> The second use of the word "citizen" in "Privileges and Immunities of Citizens in the several states" contains no words limiting the terms to state citizenship.<sup>9</sup> Antislavery Republicans believed that the general references to "Citizens in the several states" referred to national

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5. John A. Bingham, CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866) (quoting JAMES KENT, 2 COMMENTARIES 257 (4<sup>th</sup> ed. 1840)).

6. See, e.g., TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 137 (Da Capo Press 1972) ("*Native Citizens* [include] . . . all persons born within the jurisdiction of the United States since our independence.").

7. See, e.g., *State v. Claiborne*, 19 Tenn. (Meigs) 331, 339-40 (1838) (holding that free blacks are not citizens of the United States under Article IV, Section 2 of the U.S. Constitution); THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858). See also *Amy (a woman of color) v. Smith*, 11 Ky (1 Litt.) 326, 334-35 (1822) (finding that after the adoption of the Constitution only white people can become citizens). But in his dissent, Justice Benjamin Mills concluded that because Amy had been a citizen of Pennsylvania she was a citizen under the Article IV, Section 2 Privileges and Immunities Clause. See *id.* at 344 (Mills, J., dissenting).

8. U.S. CONST. art. IV, § 2 (emphasis added).

9. *Id.* (emphasis added).

citizens.<sup>10</sup>

This national citizenship theory was a key part of Republican ideology. In the well-known debate between Fourteenth Amendment author John Bingham<sup>11</sup> and House Judiciary Chairman James Wilson over the constitutionality of the 1866 Civil Rights Act, both Bingham and Wilson agreed that national citizenship with national rights was created by Article IV, Section 2.<sup>12</sup> As early as 1859, Bingham argued that there was “an ellipses in the language employed in the Constitution, but its meaning is self-evident that it is ‘the privileges and immunities of citizens of the United States in the several states’ that it guarantees.”<sup>13</sup> What Bingham and Wilson disagreed about was whether those rights could be enforced by the federal government without a constitutional amendment.<sup>14</sup>

Bingham returned to Congress in 1865 and later assumed the chairmanship of the Judiciary Committee. He was a nationally prominent spokesman for the Republican party who gave the kick off campaign speech for President Ulysses Grant in 1872.<sup>15</sup> Bingham’s views on national citizenship were not ideosyncratic. Similar sentiments can be found in the speeches of Michigan Senator Jacob Howard, Ohio Congressman William Lawrence, Ohio Senator John Sherman, Indiana Senator Henry S. Lane, and Justice Bradley in his dissent in *The Slaughter-House* cases.<sup>16</sup> Adherence to the national citizenship theory is implicit in the views about national enforcement of the Bill of Rights articulated by Congressmen James Wilson of Iowa, John Kasson of Iowa, John F. Farnsworth of Illinois, Sidney Clarke of Kansas and others.<sup>17</sup>

These issues played out in the political arena, in Congress, and in the courts. The *Dred Scott* decision provided the most dramatic forum for discussion of the citizenship issue.<sup>18</sup> In that case, Chief Justice

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10. See Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 69-70.

11. For a biographical sketch of Bingham, see Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003) (citing a variety of other biographical studies).

12. See Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 79.

13. CONG. GLOBE, 35th Cong. 2d Sess. 984 (February 11, 1859).

14. See Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 72, n. 124.

15. *Id.* at 72-73.

16. See *id.* at 78-79 (overview of summaries and citations).

17. See *id.* at 79-80.

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). See DON E. FEHRENBACHER, *THE*

Roger Taney purported to hold that African Americans could not become citizens. In an often quoted line, Taney indicated that African Americans “had no rights which the white man was bound to respect.”<sup>19</sup> The *Dred Scott* decision became a political issue in and of itself. The attack upon the majority opinion was not simply one of legal correctness. Many popular and professional authorities argued that the Chief Justice’s language involving the citizenship of all African Americans was dicta and had no binding precedential value.<sup>20</sup>

To the extent that the *Dred Scott* decision may have decided Dred Scott’s fate, legal and political critics attempted to limit that decision to its own facts, arguing that it affected Dred Scott and Harriet Scott but no one else. The classic statement of the position limiting the precedential effect of *Dred Scott* was made by leading Illinois political figure and soon-to-be president, Abraham Lincoln. Through the use of rhetorical questions he conceded the decision was binding upon Dred and Harriet Scott: “But who resists it? Who has, in spite of the decision, declared Dred Scott free and resisted the authority of his master over him?”<sup>21</sup>

Finding that the decision lacked the indicia for predicting how similar cases should be decided, Lincoln argued that it was improper to treat the case as “having yet quite established a settled doctrine for the country.”<sup>22</sup> This was not simply campaign rhetoric. For example, the Ohio legislature passed a resolution concluding that “every free person, born within the limits of any state of this union, is a citizen thereof.”<sup>23</sup> Republicans, including Fourteenth Amendment author John Bingham, continued to believe that Chancellor Kent’s definition of citizenship, and not that of Chief Justice Taney, was correct. Indeed, during the Lincoln administration, Republican authorities not only ignored Chief Justice Taney but also demonstrated their lack of respect for Taney’s decision in *Dred Scott*.<sup>24</sup>

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DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (landmark book on the *Dred Scott* decision); Paul Finkelman, *The Dred Scott Case: Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996).

19. *Dred Scott*, 60 U.S. at 407.

20. See *infra* notes 25-26.

21. II THE COLLECTED WORKS OF ABRAHAM LINCOLN 400 (Roy P. Basler, ed. 1953) (quoting a speech on the *Dred Scott* decision at Springfield, Illinois on June 26, 1857).

22. Lincoln identified them as (1) unanimous decision; (2) no apparent partisan bias; (3) consistent with past decisions and government practices; and (4) based on accurate historical data. See *id.* at 401.

23. STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 296 (Herman V. Ames ed., 1906).

24. See, e.g., *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (reflecting the views of C.J. Taney in his capacity as circuit justice).

After *Dred Scott*, an advisory opinion by Maine Supreme Court Chief Justice John Appleton held that Taney was wrong and that “[n]o language can be found in the constitution which rests citizenship upon color or race.”<sup>25</sup> At the instigation of Secretary of Treasury Salmon P. Chase, a question was raised concerning African American citizenship. Even Lincoln’s conservative Attorney General Edwin Bates felt comfortable ignoring the conclusion of Taney’s *Dred Scott* decision and holding that African Americans could be citizens. In Bates’ official published opinion, he concluded:

And now, upon the whole matter, I give it as my opinion that the *free man of color*, mentioned in your letter, if born in the United States, is a citizen of the United States; and, if otherwise qualified, is competent, according to the acts of Congress, to be master of a vessel engaged in the coasting trade.<sup>26</sup>

This attitude continued well through Reconstruction. While the Fourteenth Amendment itself was pending, Congress defined citizenship in the Civil Rights Act of 1866: “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>27</sup> This definition was substantially the same as articulated by Chancellor Kent, Attorney General Bates, and the Lincoln administration but contrary to Chief Justice Taney’s *Dred Scott* opinion. The Congress simply rejected *Dred Scott* as binding authority.

President Johnson vetoed the Civil Rights Act. Among his objections Johnson thought Congress lacked the power to confer citizenship. He also doubted that former slaves “possess[ed] the requisite qualifications” to entitle them to the rights of U.S. citizens, and complained that the 1866 act’s recognition of citizenship for African Americans discriminated against a “large number[] of intelligent, worthy, and patriotic foreigners” who must wait for citizenship for five years and prove good moral character.<sup>28</sup> Congress, however, overrode the veto.

By this time, other courts had spoken on this subject as well.<sup>29</sup>

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25. Opinion of Judge Appleton, 44 Me. 521, 545 (1857).

26. Op. Att’y Gen., 10, 382, 413 (1862) (emphasis added). Bates acknowledged the existence of the *Dred Scott* decision, but construed it so narrowly as to have no adverse effect upon the rights of African Americans to be citizens. *Id.* at 412.

27. 14 Stat. 27 (1866).

28. *Veto Message*, CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

29. Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 160-61 (1993).

Indeed, members of Congress had expressed the sentiment that the Thirteenth Amendment, having abolished slavery, made former slaves citizens.<sup>30</sup> This sentiment was echoed judicially by Chief Justice Chase in his circuit decision in *In re Turner* in 1867.<sup>31</sup> In striking down Maryland apprenticeship laws as a form of involuntary servitude, Chase upheld the constitutionality of the Civil Rights Act of 1866 and concluded that African Americans “as well as equally with White persons are citizens of the United States,” ignoring *Dred Scott*.<sup>32</sup>

It is fair to say that by February 1866, when discussion of the Fourteenth Amendment began, the predominant sentiment in the Congress was that African Americans were citizens and that *Dred Scott* had no effect. Indeed, during the debates on the Amendment in the House, its primary author, John Bingham, concluded:

Every slave[,] the moment he is emancipated becomes a ‘free citizen,’ in the words of the Confederation, becomes a ‘free person,’ which embraces all citizens, in the words of our Constitution, becomes equal before the law with every other citizen of the United States.<sup>33</sup>

The citizenship clause was neither part of Bingham’s draft of Section 1 nor of the Amendment as initially proposed by the House.<sup>34</sup> In the view of many Republicans, and apparently the majority of the House of Representatives, there was no need for a citizenship clause. *Dred Scott* was wrongly decided and the citizenship views of Chancellor Kent were reinforced by the national citizenship theory of Article IV, section 2 and confirmed by an attorney general’s opinion and the Civil Rights Act of 1866. But there must have been doubts in the Senate. The citizenship clause arose in an obscure way from proceedings in the Senate. After initial debate, the Senate adjourned for a three-day closed caucus of the Republican members.<sup>35</sup> Though the exact transactions of that caucus are not known, the proposal to add the current citizenship clause to the Fourteenth Amendment emerged from it.<sup>36</sup>

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30. *But see* Bryan v. Walton, 14 Ga. 185, 198 (1853) (indicating that manumission of a slave signified nothing “but . . . freedom from the dominion of the master” and did not give former slaves the rights of freeborn white inhabitants).

31. *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

32. *Id.*

33. CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866).

34. CONG. GLOBE, 39th Cong., 1st Sess. 2764 (May 23, 1866); CONG. GLOBE 39th Cong., 1st Sess. 3042 (June 8, 1868).

35. *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 306 (Torchstone 1995); FAIRMAN, RECONSTRUCTION AND REUNION, *supra* note 2, at 1295-96; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, *supra* note 2, at 59-60, 67-68.

36. *See* FAIRMAN, RECONSTRUCTION AND REUNION, *supra* note 2, at 1295-98; MICHAEL LES

Bingham's fellow Ohioan, Senator Ben Wade first moved adoption of a clause defining citizenship. Wade treated the matter as declaratory, indicating that both the Civil Rights Act of 1866 and prior law required that "every person, of whatever race or color, who was born within the United States was a citizen of the United States."<sup>37</sup> Other Republican senators articulated similar sentiments. For example, conservative Republican Senator John B. Henderson of Missouri indicated that the citizenship clause "will leave citizenship where it now is."<sup>38</sup>

But Wade recognized that "the courts" had thrown a "doubt" over Republican views and proposed "to solve that doubt and put the question beyond all cavil for the present and for the future" by adopting a citizenship clause.<sup>39</sup> Senator Jacob Howard, the spokesman for the Fourteenth Amendment in the Senate, offered a substitute to Wade's original proposal, which defined the Citizenship Clause as it was ultimately adopted: "All persons born [or naturalized] in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State[] wherein they reside." Howard reiterated that the Citizenship Clause was "simply declaratory of . . . the law of the land already."<sup>40</sup>

The Citizenship Clause, along with a proposal from the caucus to amend Section 3 on the ability of former Confederates to hold office, was adopted by the Senate by a vote of thirty-three to eleven.<sup>41</sup> At the very least, the Citizenship Clause put into the Constitution what before was written in the Civil Rights Act of 1866. Those who thought that citizenship carried with it a bundle of rights may have been referring to the Citizenship Clause when they indicated that the Fourteenth Amendment "constitutionalized" the Civil Rights Act.<sup>42</sup> What

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BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 185-87 (Norton, New York 1974).

37. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

38. *Id.* at 3031.

39. *See id.* at 2768.

40. *Id.* at 2890.

41. *See id.* at 3149.

42. *See* examples cited in BERGER, *supra* note 2, at 22-36. *But see* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996), which reaches a widely different, and I think more accurate, conclusion about the significance of this result. For a thoughtful claim of the power of Congress to pass legislation under the citizenship clause, see Rebecca Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717 (2003) and Rebecca Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. Pitt. L. Rev. 281 (2000).



commentary exists about the Citizenship Clause reveals that it was thought to add no new law but simply to be a “declaratory” of existing law.<sup>43</sup> At the most it was intended to restate what the Republicans believed the law of the land to be; but if it meant more, it was designed to strengthen, not weaken, the Amendment.

However, just five years later, the United States Supreme Court in *Slaughter-House Cases* read the Privileges and Immunities Clause out of the Fourteenth Amendment.<sup>44</sup> Justice Samuel Miller used the Citizenship Clause and the contrasts between state citizenship and national citizenship, to create an argument which severely limited the effect of the Fourteenth Amendment.<sup>45</sup> The way in which Justice Miller accomplished this ironic, unintended use of the Citizenship Clause is a

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43. For example, in treating similar language in the Civil Rights Act of 1866 House Judiciary Chairman James Wilson of Iowa argued that it was only declaratory. Similarly, Ohio’s William Lawrence, a former judge, made this comment about the statutory citizenship clause: “This clause is unnecessary, but nevertheless proper, since it is only declaratory of what is the law without it.” CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

44. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 55 (1873). In *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999), the Supreme Court held that the Fourteenth Amendment privileges and immunities clause protects the right to travel between different states. It is too early to tell whether this is only an aberration or whether the Court has breathed new life into this long-dormant provision of the Fourteenth Amendment.

45. See Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2, at 627. Even Raoul Berger, who read the Fourteenth Amendment narrowly, rejected Miller’s use of the citizenship clause to limit the reach of the amendment. BERGER, *supra* note 2, at 45. An important look at *Slaughter-House* is found in Curtis, *supra* note 42. An interesting and novel way to read Justice Miller’s opinion as protecting a broader scope of Fourteenth Amendment protection is articulated in Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739 (1984). See also David S. Bogen, *The Slaughter-House Five: Views of the Case*, 55 Hastings L.J. 333 (2003); Kevin Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L.J. 643 (2000); and Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051 (2000). My reasons for rejecting that interpretation are set forth in Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2, at 653-55.

Three relatively new and important works relevant to these issues are: PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION, THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999) (providing a fresh approach to Justice Miller’s opinion and the *Slaughter-House Cases*); RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTER-HOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* (2003) (explaining the long struggle to implement sanitary regulations in New Orleans, but failing to come to grips with the issues concerning why Justice Miller misquoted the Constitution and prior decisions, as well as his failure to write a more narrow and limited decision); and MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003) (a significant biography that portrays Justice Miller in a sympathetic light, but fails to adequately address the common criticisms of Justice Miller’s *Slaughter-House* decision).

tale in an of itself.<sup>46</sup> It may be worth nothing that Miller did not embrace the Fourteenth Amendment, but rather supported President Johnson's conservative counter-amendment.<sup>47</sup> Unlike President Lincoln, Attorney General Bates, and the Republican Congress, Justice Miller, who often eschewed precedent, accepted *Dred Scott* as binding precedent on the issue of citizenship.<sup>48</sup> One puzzling aspect of Miller's opinion in *Slaughter-House* is that even though he was a keen observer of the political situation and the actions of the Congress, Miller acted as if he were unaware of the Citizenship Clause of the Civil Rights Act of 1866, writing that no definition was in the Constitution "nor had any attempt been made to define it by act of Congress."<sup>49</sup>

Thus, while key Republican leaders like Wade, Howard, or Bingham may have seen the Fourteenth Amendment Citizenship Clause as declaratory because it stated explicitly the ellipses in Article IV, Miller ignored such a possibility. With his contrarian views, Miller saw the limited purpose of the Citizenship Clause to be overruling *Dred Scott*.<sup>50</sup> By contrasting the rights of state citizens with those of federal citizenship, Miller created an opportunity to keep alive his view of federalism. To do so he became a textualist, contrasting the language of the Article IV, Section 4 Citizenship Clause with that of Section 1 of the Fourteenth Amendment. But, as previously noted, moderate Republicans such as John Bingham and James Wilson, supported by a majority of the Congress, had already publicly read that clause to create national citizenship. Comparing the *two* clauses, which both talked about national citizenship, would not support Miller's textual argument.

In the end, Miller appears to have resolved the dilemma by misquoting Article IV, Section 2. By reading Article IV, Section 2 as a reference to state citizenship, he was able to contrast state and federal citizenship and suggest that the Constitution implied different rights under each.<sup>51</sup> Miller began by contrasting the "citizens of the United States" language of Section 1 with a paraphrase of the "citizens *in* the several states" language of Article IV, Section 2. In this paraphrase, Miller changed "citizens in the several states" to read "citizens *of* the

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46. See generally Curtis, *supra* note 42; Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2.

47. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2, at 660.

48. *Slaughter-House Cases*, 83 U.S. at 73.

49. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2, at 660-61; *Slaughter-House Cases*, 83 U.S. at 72.

50. *Slaughter-House Cases*, 83 U.S. at 73.

51. *Id.* at 74-76.

several states.”<sup>52</sup> He then proceeded to purport to quote the text of Article IV, Section 2 itself but again changed the quoted material to read “citizens *of* the several states” instead of “citizens *in* the several states.”<sup>53</sup>

The misquotation continued throughout the opinion. Miller quoted at length the opinion of Justice Bushrod Washington in *Corfield v. Coryell*,<sup>54</sup> which he referred to as “the first and the leading case” on the interpretation of Article IV, Section 2.<sup>55</sup> While Justice Washington correctly quoted the language of Article IV, Section 2 in his opinion, when Miller copied the quotation into his own opinion he changed Washington’s “of” to an “in.”<sup>56</sup> A similar change in paraphrase appears in Miller’s reference to the Court’s holding in *Ward v. Maryland*.<sup>57</sup> Finally, Miller wrote the headnotes which appear before the opinion.<sup>58</sup> Even though Justice Bradley’s dissent brought Miller’s misquotation to his attention, Miller’s headnote 3 continued to misparaphrase Article IV, Section 2.<sup>59</sup>

With these misquotations, Miller was able to present a strong textual contrast between Article IV, Section 2 (protection of the rights which came about because of state citizenship) and Section 1 of the Fourteenth Amendment (protection of rights which came about because of federal citizenship). Though that was a distinction he could have made without resorting to textual argument, Miller claimed the contrast between his version of Article IV, Section 2 and the Citizenship Clause of the Fourteenth Amendment provided “explicit recognition in this amendment” of the distinction.<sup>60</sup>

Having made the distinction, Justice Miller assigned most of the “rights” that Americans claim into the category protected by state citizenship. Miller’s only illustrations of rights protected by national citizenship were those which preexisted and could be maintained without the Fourteenth Amendment.<sup>61</sup> In the hands of Justice Miller the Citizenship Clause, rather than strengthening the Amendment, as the Senate framers supposed, had the perverse and unintended effect of

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52. *See id.* at 74 (emphasis added).

53. *See id.* at 75 (emphasis added).

54. *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

55. *See Slaughter-House Cases*, 83 U.S. at 75.

56. *See id.* at 76.

57. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870).

58. *Slaughter-House Cases*, 83 U.S. at 37.

59. *Id.*

60. *See id.* at 74.

61. *See id.* at 76.

weakening the force and effect of the entire Amendment.<sup>62</sup>

### III. THE DUE PROCESS CLAUSE: AN UNINTENDED POTENCY

The framers of the Fourteenth Amendment were undoubtedly aware of the doctrine of “substantive” due process, or at least its twin “reasonableness,” which can be traced to English and American common law.<sup>63</sup> While Chief Judge Taney sought to use substantive due process to protect slavery, Republicans sought to use it to prohibit slavery in the territories. In its Philadelphia platform of 1856, the Republican party indicated that the Fifth Amendment Due Process Clause made it

our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery in the Territories of the United States by positive legislation, prohibiting its existence or extension therein. That we deny the authority of Congress, of a Territorial Legislature, of any individual, or association of individuals, to give legal existence to Slavery in any Territory of the United States, while the present Constitution shall be maintained.<sup>64</sup>

Consequently, the framers of the Amendment would not be surprised to discover that the Due Process Clause was not strictly procedural. Having acknowledged this much, it is clear that the framers of the Fourteenth Amendment did not envision the type of substantive role for the Due Process Clause developed through the doctrine of “substantive due process” and through the doctrine of selective incorporation. Indeed, when questioned on the floor of Congress about the meaning of the Due Process Clause, John Bingham replied that the “courts have settled that long ago, and the gentlemen can go and read

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62. I do not mean to suggest that the majority in *The Slaughter-House Cases* could not have reached the same result if the Citizenship Clause had never been adopted. To the contrary, Justice Miller could have fashioned the same distinctions between state and federal citizenship out of nontextual sources and utilized that distinction to reach that same result. Indeed, *Dred Scott* itself is based upon a “novel concept of dual citizenship.” Finkelman, *supra* note 18, at 28. Whether Miller would have done that or not is, of course, unknown. My point here is the irony of a clause that was designed to strengthen the amendment being used to weaken it.

63. For English common law, see *Bonham’s Case*, (1610) 77 Eng. Rep. 647, 652 (C.P.) (including Sir Edward Coke’s statement, “[W]hen an Act of Parliament is against common right and reason . . . the common law will . . . adjudge such Act to be void.”). For American common law, see *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). Even in this early school desegregation case, Chief Justice Shaw and the Supreme Court of Massachusetts indicated that this board of education’s rule-making power was limited by its “reasonable[ness].” *Roberts*, 59 Mass. at 209.

64. C. W. JOHNSON, PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS OF 1856, 1860, AND 1864, at 43 (C. W. Johnson ed., 1893).

their decisions.”<sup>65</sup>

Bingham could treat the Due Process Clause as one deserving little discussion for two separate reasons. First, while the framers undoubtedly anticipated adding additional substantive protections, they envisioned doing so through the Privileges and Immunities Clause. This is evident from an examination of congressional debates. As summarized by Professor Charles Fairman in a lecture at Boston University: “Congress, no doubt, meant . . . to establish some substantial rights even though the State might not itself have established them for its own citizens. These were the ‘privileges and immunities of citizens of the United States.’”<sup>66</sup>

Further, at the time the Fourteenth Amendment was proposed, every state in the Union had some sort of due process or due course of law clause.<sup>67</sup> The framers of the Fourteenth Amendment did not believe that they were creating a “new” provision because they acknowledged the existence of that provision in state constitutions. What the framers thought they were doing new was creating the enforceability of that provision by the federal government.

Enforceability was a two-part process. First, the framers wanted to provide a federal guarantee of due process of law as they did in Section 1. Second, they wanted to provide explicit authority for enforcement. These goals were a direct response to the antislavery debate. The national anti-slavery theory articulated by Chase and refined by people such as Ohio Attorney General Christopher P. Wolcott and John A. Bingham, began with the proposition that the fugitive slave clause was only a “compact” between the states that the federal government could not enforce without an enforcement clause.<sup>68</sup> Support for this view came from Chief Justice Taney, whose opinion in *Kentucky v. Dennison* held that the federal government could not enforce the Fugitive From Justice Clause of Article IV.<sup>69</sup>

The debate between Bingham and Wilson was one of theory and

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65. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

66. Charles Fairman, *What Makes a Great Justice?*, 30 B.U. L. REV. 40, 77 (1950).

67. Representative Martin F. Thayer of Pennsylvania suggested that the provisions of the Fourteenth Amendment were “found in the bill of rights of every State of the Union.” CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866).

68. See Aynes, *On Misreading John Bingham and the Fourteenth Amendemnt*, *supra* note 2, at 71-72, 76-78.

69. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 90-93 (1860) (fugitive from justice case) *overruled by* *Puerto Rico v. Brandstad*, 483 U.S. 219 (1987). The Court had reached a contrary decision in *Prigg v. Pennsylvania*, 41 U.S. 539, 626 (1842) (fugitive slave case). This was inconsistent in legal theory, but consistent in upholding the interest of slave holders.

consistency versus pragmatism. Bingham upheld the nonenforceability theory even if it meant that the Bill of Rights could not be enforced against the state through Section 2 of Article IV. Wilson was willing to throw the theory overboard, rely upon the proslavery precedent of *Prigg v. Pennsylvania*,<sup>70</sup> and legislate to enforce Section 2.<sup>71</sup> This issue was explicitly resolved by Section 5 of the Fourteenth Amendment which allows Congress to enforce the Fourteenth Amendment.<sup>72</sup> Thus, while the framers certainly would not have been surprised for the Due Process Clause to have a certain substantive component, they never intended for it to play the significant role it did in the late nineteenth and early twentieth centuries.

Like his friend Justice Robert Jackson, Fairman concluded that the Privileges and Immunities Clause would either mean “too much” or “almost nothing” and thought the Court made an appropriate decision when it concluded the clause would mean “too little.”<sup>73</sup> In spite of all of Frankfurter’s claim to rely upon historical records, his position was essentially the same. Frankfurter opposed the Privileges and Immunities Clause of the Fourteenth Amendment and wished that it had never been adopted.<sup>74</sup>

It has been suggested that the demise of the substantive reading of the Privileges and Immunities Clause in *The Slaughter-House Cases* “oblig[ated]” the justices to expand the Due Process Clause.<sup>75</sup> The argument continues that the Supreme Court “compensated” for the loss of the Privileges and Immunities Clause through an expanded reading of the Due Process and Equal Protection Clauses.<sup>76</sup> If Felix Frankfurter provided the fifth and majority vote to Justice Hugo Black’s dissent in

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70. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

71. See Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 76-78. Modern authors who argue that we should utilize *Prigg*’s precedent include Robert J. Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153 (2004).

72. Anti-slavery and abolitionist lawyers had long argued that the provisions of Article IV were unenforceable, except for the Full Faith and Credit Clause, because they did not have an enforcement clause. Consistency and planning for future contingencies required them to have the concern that their Fourteenth Amendment provisions would not be enforceable unless there was such a clause.

73. See Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, *supra* note 2, at 1240.

74. See generally Aynes, *Felix Frankfurter, Charles Fairman, and the Fourteenth Amendment*, *supra* note 2, at 1197-1273.

75. Edwin Borchard, *The Supreme Court and Private Rights*, 47 *YALE L.J.* 1051, 1063 (1938).

76. Patricia Allan Lucie, *White Rights As a Model for Black: Or—Who’s Afraid of the Privileges or Immunities Clause?* 38 *SYRACUSE L. REV.* 859, 861-62 (1987).

*Adamson v. California*, then the Bill of Rights would have have enforced against the states through the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>77</sup> This could have negated any attempt to stretch the Due Process Clause protections and forestall later attempts to expand its substantive protections. Ironically, it was the triumph of the Miller/Frankfurter view that the Privileges and Immunities Clause ought to be read narrowly that led to the transformation of the Due Process Clause into a far wider substantive role than its framers had envisioned.

#### IV. EQUAL PROTECTION FOR AFRICAN AMERICANS: A GOAL NOT INITIALLY MET

It is very clear that the Equal Protection Clause was designed to protect “all persons.” Debates in Congress reflect familiarity with provisions and debates over the Articles of Confederation and in the early Congresses, making distinctions between terms such as “citizens” and “persons.”<sup>78</sup> The Fourteenth Amendment framers made frequent references to the term “persons,” including noncitizens such as aliens, often as the “stranger at the gate.” In a highly religious era, the Biblical support for protecting aliens was strong. Exodus 22:21 of the King James Bible states: “Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt,” and Exodus 23:9 reads: “Also thou shalt not oppress a stranger; for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.”

Fourteenth Amendment author John Bingham argued that equality was the foundation of the original Constitution.<sup>79</sup> Even before proposing the Amendment, Bingham frequently made it clear that he thought due process and equal protection applied to all people. He believed these were “inborn” or natural rights which our Constitution had chosen to protect for all people. In his eloquent words:

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77. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting). Black indicated the rights were protected by both due process and privileges and immunities, but virtually all of his historical proof stemmed from the debates referencing the Privileges and Immunities Clause. *Id.*

78. CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862).

79. For example, on January 9, 1866, Bingham articulated the view that “the true intent and meaning of the Constitution of the United States [was] ‘[e]qual and exact justice to all men.’” CONG. GLOBE, 39th Cong., 1st sess. 157 (1866). Later in that same speech Bingham indicated that “the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons.” *Id.* at 158. Bingham’s purpose in proposing the Amendment was “to provide for the efficient enforcement, by law, of these ‘equal rights of every man.’” *Id.* The Ohio Constitution, applicable to the state in which Bingham spent all of his adult life, provided “that all men are born equally free and independent,” OHIO CONST. art. VIII, § 1 (1802) and “government is instituted for [the people’s] equal protection and benefit,” OHIO CONST. art. I, § 2 (1855).

No matter upon what spot of the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor; no matter whether wise or simple; no matter whether strong or weak, this new Magna Charta [the Fifth Amendment] to mankind declares the rights of all to life and liberty and property are equal before the law; that no person, by virtue of the American Constitution, . . . shall be deprived of life or liberty or property without due process of law.<sup>80</sup>

There are also frequent references during the debates to the equality provisions of the Fourteenth Amendment as ones that would protect white abolitionists, white unionists and others.<sup>81</sup>

At the same time, it would be inappropriate to ignore the fact that the Reconstruction Congress anticipated that African Americans would be the primary beneficiaries of the equality provisions of the Fourteenth Amendment. Indeed, even Justice Samuel Miller, in his narrow view of the Fourteenth Amendment, conceded that African Americans would benefit from the equal protection clause. According to Miller, "the one prevailing purpose" of these amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen[s]."<sup>82</sup>

It is therefore ironic that the Equal Protection Clause offered little or no benefit to African Americans. A leading scholar has noted that from the time of the *Slaughter-House* decision in 1873 to *Plessy v. Ferguson* in 1896, 150 Fourteenth Amendment cases came before the Supreme Court, of which only fifteen involved African Americans.<sup>83</sup>

The examples are well known. In *Blyew v. United States*, the Court held that a federal prosecutor could not use the 1866 Civil Rights Act as a basis to present a murder indictment in federal court even when Kentucky law prohibited black victims and witnesses from testifying in state court.<sup>84</sup> This case undermined the efforts of U.S. District Attorney

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80. To John Bingham, "persons" included "all persons, whether citizens or stranger, within this land" CONG. GLOBE, 39th Cong., 1st sess. 1090, 1292 (1866). Indeed, during the debate on the civil rights bill, Bingham unsuccessfully tried to substitute the word "inhabitants" for "citizens." *Id.* at 1292.

81. *See id.* at 1065 (John Bingham: need to protect "thousands of loyal white citizens in the United States").

82. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873).

83. CHARLES A. LOFGREN, *THE PLESSY CASE* 70 (1987) (citing CHARLES W. COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 48-55, 183 (1912) and adding two more cases Collins overlooked).

84. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1871). For an excellent analysis of this case and the facts behind it see Robert D. Goldstein, *Blyew: Variations on a Jurisdictional*



Benjamin H. Bristow and his ally, John Marshall Harlan to enforce the rights of African Americans and Republicans against white terrorism. It was also contrary to the decision of Circuit Justice Noah Swayne in *United States v. Rhodes*.<sup>85</sup>

In *United States v. Cruikshank*, the Court held that an armed, paramilitary force of whites could not be prosecuted by the federal government when they killed more than a hundred black Republicans during the Colfax Massacre.<sup>86</sup> The Reconstruction Congress had passed the Enforcement Act of 1870 which, among other provisions, outlawed conspiracies of private individuals to deny constitutional rights of citizens.<sup>87</sup> The Court rejected, either outright or through hypertechnical pleading requirements, claims that the Citizenship Clause, the First and Second Amendments, the Due Process Clause, the Equal Protection Clause, or the Fifteenth Amendment would support the enforcement of the statute against three convicted individuals.<sup>88</sup>

The Equal Protection Clause was not strong enough to prevent a punishment for fornication which was more severe for interracial couples than for couples of the same race.<sup>89</sup> Attempts to use the Equal Protection Clause to enforce the “equal” provisions of separate but equal failed in the context of education and transportation.<sup>90</sup>

There was a glimmer of hope that the Fourteenth Amendment would provide protection for African Americans in jury selections cases, beginning with *Strauder v. West Virginia*.<sup>91</sup> By a vote of seven to two the Court struck down a Virginia statute which explicitly excluded African American jurors from jury service.<sup>92</sup> In two other cases, *Ex parte Virginia* and *Neal v. Delaware*, the Court held that the Equal Protection Clause was violated even when there was no statute if uniform exclusion of African Americans from juries was the practice.<sup>93</sup> These seeming

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*Theme*, 41 STAN. L. REV. 469 (1989).

85. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

86. *United States v. Cruikshank*, 92 U.S. 542, 559 (1876). See also ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK, ch. 3 (Lawrence ed., University Press of Kansas, 2001).

87. Act of Apr. 20, 1871, ch. 22, 17 U.S. Stat. 13-15 (1870) (providing mechanism to enforce the provisions of the Fourteenth Amendment).

88. *Cruikshank*, 92 U.S. at 550-57.

89. *Pace v. Alabama*, 106 U.S. (16 Otto) 583, 585 (1883).

90. For education, see *Cumming v. Richmond Bd. of Educ.*, 175 U.S. 528 (1899), and *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908). For transportation, see *McCabe v. Atchison, T., & S.F. Ry. Co.*, 235 U.S. 151 (1914).

91. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

92. *Id.* at 312.

93. *Ex parte Virginia*, 100 U.S. 339, 349 (1879); *Neal v. Delaware*, 103 U.S. 370, 390 (1880).

gains, however, were largely nullified by *Virginia v. Rives* which held that the absence of African Americans from a jury, even if systematic, did not in and of itself create a violation of the Equal Protection Clause that a criminal defendant could challenge.<sup>94</sup>

Any hope from the jury cases was quickly brought to an end by the *Civil Rights Cases*.<sup>95</sup> In 1883, Justice Bradley, the son-in-law of abolitionist New Jersey Justice Joseph C. Hornblower who declared slavery unconstitutional in New Jersey, ruled the Civil Rights Act of 1875 unconstitutional, rejecting claims that it was authorized by the Thirteenth and Fourteenth Amendments.<sup>96</sup> Only Justice John Marshall Harlan's ringing dissent left any ray of hope for the future.<sup>97</sup>

While the Court was refusing to give meaning to the National Citizenship Clause, refusing to enforce the Bill of Rights against the state through the Privileges and Immunities Clause, refusing to apply the Equal Protection Clause to enforce equal treatment before the law, and refusing to fashion due process remedies for African Americans, it was using liberal construction in other contexts. In order to protect the right of employers to insist that new employees sign a "yellow dog contract" agreeing to never join a union as a condition of employment and the "right" of employees to sign such a contract, the court struck down both state and federal bans on such contracts.<sup>98</sup> Justice Miller, who used a crabbed construction of the Fourteenth Amendment's Privileges and Immunities Clause, nevertheless used a very liberal construction to find a right to interstate travel from the "structure" of the government in *Crandall v. Nevada*<sup>99</sup> and used the "limitations on [the] power which grow out of the essential nature of all free governments" to limit the power of the state to tax.<sup>100</sup>

In *Allgeyer v. Louisiana*, the Due Process Clause, powerless to protect the rights of African Americans, was found to prevent the state of Louisiana from requiring all corporations doing business with Louisiana residents to pay a tax.<sup>101</sup> The Court gave railroad regulators warning that the Due Process Clause would restrict the state regulatory power over railroads and notice to all state governments that the Due

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94. *Virginia v. Rives*, 100 U.S. 313, 323 (1879).

95. 109 U.S. 3 (1883).

96. *Id.* at 25.

97. *Id.* at 26 (Harlan, J., dissenting).

98. *Adair v. United States*, 208 U.S. 161, 180 (1908); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

99. *Crandall v. State of Nevada*, 73 U.S. 35 (1867).

100. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874).

101. *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

Process Clause would limit their regulations.<sup>102</sup>

While African Americans received almost no protection under the Equal Protection Clause, whites and corporations appeared to be its primary beneficiaries. This produced an unintentional result of the Fourteenth Amendment: the orphaning of African Americans. While it is true that many of the initial aspirations of the Amendment were recovered in the twentieth century, this neglect over a period of almost a hundred years was not only an unintended result of the Amendment, but a result contrary to its purpose.

#### V. PROTECTION FOR CORPORATIONS: AN ISSUE NOT CONTEMPLATED

In the 1920s, the view was advanced that a group of “corporation lawyers” had conspired to hide protection for corporations within the Amendment.<sup>103</sup> That view had long since been discredited.<sup>104</sup> It is no doubt true that some members of Congress who represented railroads tried to use the Fourteenth Amendment to their advantage.<sup>105</sup> Yet Fourteenth Amendment author John Bingham was not counsel for any railroad. In the only recorded case in which he was counsel involving a railroad, he represented a farmer who opposed the railroad’s interests.<sup>106</sup>

John Bingham continued in the Congress until 1872, six years after the Amendment had been proposed and four years after its ratification.<sup>107</sup> In his service as chair of the Judiciary Committee, he had occasion to point out his views on the meaning of the Fourteenth Amendment. For

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102. R.R. Comm’n Cases, 116 U.S. 307, 335 (1886); *Mugler v. Kansas*, 123 U.S. 623, 672-73 (1887).

103. CHARLES A. BEARD & MARY R. BEARD, 2 *THE RISE OF AMERICAN CIVILIZATION: 1877-1913* 112 (1927).

104. See Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 *YALE L.J.* 371 (1938); Louis B. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 *N.Y.U. L. Q. REV.* 19 (1938).

105. The story of Senator Roscoe Conkling and his selective use of excerpts from the *Journal of the Joint Committee* is a familiar one. See CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88 PART TWO* 725-28 (1987); HOWARD JAY GRAHAM, *EVERYMAN’S CONSTITUTION* (1962). As Fairman concluded, Conkling’s “performance was contrived and misleading.” See FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88 PART TWO* at 726. The Court did not rule upon this issue in *San Mateo v. Southern Pacific R.R.*, 116 U.S. 138 (1885). But in the argument of *County of Santa Clara v. Southern Pacific R.R.*, 118 U.S. 394 (1886), the Chief Justice made this announcement at the beginning of the oral argument: “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of [the] opinion that it does.” *Id.* at 396.

106. *Steubenville & Indiana R.R. v. Patrick*, 7 Ohio St. 170, 171 (1857) (indicating Bingham represented defendant landowners whose property had been condemned for use of a railroad).

107. Richard L. Aynes, *John A. Bingham*, 2 *AMERICAN NATIONAL BIOGRAPHY* 792-93 (1999).

example, he authored a majority report rejecting the argument that the Fourteenth Amendment gave women the right to vote.<sup>108</sup> He also articulated, in what is perhaps the clearest statement for modern ears, his view that the Fourteenth Amendment made the full Bill of Rights enforceable against the states.<sup>109</sup> There does not seem to be any trace of a statement by Bingham which would suggest that he contemplated the Fourteenth Amendment applying to corporations. Still, there also is no evidence indicating that the framers or the ratifiers intended to exclude artificial persons from the definition of person.<sup>110</sup>

In his massive study of the Fourteenth Amendment, Charles Fairman quoted a lecture of former Justice Benjamin R. Curtis as follows: "I suppose . . . that neither the framers of the Constitution nor the framers of the Judiciary Act had corporations in view."<sup>111</sup> Fairman added:

With equal truth one may add that the framers of the Fourteenth Amendment did not have corporations in view . . . . How far corporations would be entitled to protection under the Amendment was one of those questions left 'to the gradual process of judicial inclusion and exclusion.'<sup>112</sup>

Nevertheless, people have argued reasonably that at the time the Amendment was adopted, corporations were commonly understood to be artificial "persons."<sup>113</sup>

We know that when we draft rules and regulations they often have unintended consequences. It would seem that Bingham and his colleagues had simply overlooked the question of whether or not corporations would be protected within the meaning of words "persons." In this sense, the judicial conclusion that corporations were "persons" was an unintended consequence of the Amendment.

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108. Report No. 22 (Victoria C. Woodhull), CONG. GLOBE, 41st Cong., 3d Sess., *reprinted in* ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 466-72 (1974).

109. CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871).

110. In *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 78, 85 (1938) (Black, J., dissenting), Justice Black made a textual argument that the word "person" meant "human beings" and therefore did not include artificial person such as corporations. In 1871, Bingham introduced into the Congress legislation which would have protected the "privileges and immunities" of insurance companies. CONG. GLOBE, 41st Cong., 3d Sess. 1288 (1871). But since the Privileges and Immunities Clause applies only to citizens, it is possible to believe an insurance company was thought to be a person for due process purposes, but not a citizen for privileges or immunities purposes.

111. FAIRMAN, *supra* note 107, at 724.

112. *See id.* (quoting Justice Miller in *Davidson v. New Orleans*, 96 U.S. 97 (1878)).

113. *See County of Santa Clara v. Southern Pacific R.R.*, 118 U.S. 394, 396 (1886) (implying that the word person includes corporations).

## VI. THE PARADOX: DID CONGRESS INTEND THE UNINTENDED CONSEQUENCES OF THE FOURTEENTH AMENDMENT?

One somewhat paradoxical question is whether Congress intended the unintended consequences of the Fourteenth Amendment. This discussion necessarily begins with the question of the global concerns that Congress treated. Section 1 author John Bingham indicated that his purpose was to “perfect” the existing Constitution.<sup>114</sup> The Fourteenth Amendment itself was referred to as a new Magna Carta. In a general sense, the framers intended to improve society.

The structure of the Amendment borrowed from the format used in legislation, but it was *sui generis* in the constitutional amendment process. To understand this one must first look to the structure of the Amendment itself. The Amendment contains five Sections. Section 1 contains a citizenship clause, a clause providing privileges and immunities for U.S. citizens, and clauses providing for equal protection and due process for all “persons.”<sup>115</sup> This provision, in and of itself, is an intriguing bundle of rights, but they are arguably linked together in much the same way as the various protections enumerated in the Fifth Amendment of the original Constitution.

The same connection for the topics within Section 1 cannot be made between the topics covered by Section 1 and Section 2 or Sections 3 and 4. Section 2 treats the apportionment of members of the House of Representatives and provides a sanction for prohibiting males from voting.<sup>116</sup> Equally dissimilar is the disqualification provision for certain

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114. CONG. GLOBE, 39th Cong., 1st sess. 156 (1866) (“to introduce . . . that which will perfect it”). See also *Eloquent Speech of Hon. John A. Bingham*, CADIZ REPUBLICAN, August 15, 1866 p. 2 col. 3 (object of the amendment to “restore this Republic and perfect your Constitution”).

115. U.S. CONST. amend. XIV, § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

116. U.S. CONST. amend. XIV, § 2.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in

former Confederates in Section 3.<sup>117</sup> Also, standing on a seemingly independent basis are the provisions of Section 4 that guarantee the public debt of the United States, prohibiting compensation for lost slaves and prohibiting the payment of debt of those in rebellion.<sup>118</sup>

The only link between these various clauses—besides the fact that they are designed to deal with post-Civil War Reconstruction—is Section 5, which provides Congress with the power of enforcing them.<sup>119</sup> Some states have constitutional provisions requiring that disparate legislation on different subjects not be linked together.<sup>120</sup> If this principle were applied to the federal government, the Congress would not have presented the Fourteenth Amendment as one unified package. Indeed, in attempting to rescind Ohio's ratification of the amendment, the Democratic legislature objected, stating that "several distinct propositions are combined in the said proposed amendment."<sup>121</sup>

Precedent would seem to suggest the same result. The First Congress faced a similar situation when it proposed wide-reaching changes that resulted in the Bill of Rights. That Congress proposed

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rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Id.*

117. U.S. CONST. amend. XIV, § 3.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

*Id.*

118. U.S. CONST. amend. XIV, § 4.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

*Id.*

119. U.S. CONST. amend. XIV, § 5 "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

120. *See, e.g.*, OHIO CONST. art. II, § 15(D) ("No bill shall contain more than one subject, which shall be clearly expressed in its title.").

121. J. Res. of Ohio Legis. (Ohio Jan. 15, 1868).

twelve amendments.<sup>122</sup> Only ten were contemporaneously ratified, while two suffered apparent rejection. Had the Fourteenth Amendment framers imitated the action of the proponents of the Bill of Rights, they would have submitted four separate amendments with each having its own enforcement clause. This would have allowed the ratifiers to pick and choose among the various proposals.<sup>123</sup>

The Fourteenth Amendment framers could have found numerous political examples that illustrated processes that allow a ratification choice. Most important, of course, was the action of the first Congress, but other examples stood out as well. Congressmen commonly added “riders” to pending legislation so that legislation they wanted to pass could go through on the “coattails” of stronger legislation. They also had experience with so-called omnibus provisions, although many of them remembered the omnibus Compromise of 1850, which was rejected but then passed in its individual parts.<sup>124</sup>

The framers of the Fourteenth Amendment obviously made a reasoned choice to link these disparate amendments together. It has been suggested that the submission of an omnibus provision by Robert Dale Owen to Thaddeus Stevens was the impetus to combine several proposed amendments into one.<sup>125</sup> But there is other evidence suggesting that Owen was not alone in trying to link disparate provisions into one omnibus amendment. On January 25, 1866, John Bingham advocated adding to his original proposal a “provision that no State in this Union shall ever lay one cent of tax upon the property or head of any loyal man for the purpose of paying tribute and pension for life to those who rendered service . . . in the . . . atrocious rebellion.”<sup>126</sup> Similarly, an earlier resolution in the Senate linked several different versions together.<sup>127</sup> We can only surmise that the congressmen did this for the usual legislative reason: they thought they had a greater success of having these provisions all passed collectively than they were submitted individually. Stated in other language, they feared that if all of these provisions were presented separately, states might ratify some

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122. 1 Annals of Congress 948 (1789).

123. Of course, the framers of the original gave the ratifiers the same “binary” choice as the Fourteenth Amendment framers: accept or reject the entire proposal. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11 (1996).

124. DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861 108, 109, 111-13 (1976).

125. DUBOIS, *supra* note 35, at 301. *See also* DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 166-67 (1996). For Owen’s account, see Robert Dale Owen, *The Political Results from the Varioloid*, 35 ATLANTIC MONTHLY, June, 1875 at 660.

126. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866).

127. *See* CONG. GLOBE, 39th Cong., 1st Sess. 566 (1866).

and not ratify others as was done with the original proposal for the Bill of Rights.

Thus understood, the framers undoubtedly wanted to use the popular provisions of the Amendment to secure passage of its more controversial provisions. This means that some of the consequences anticipated by the framers may not have been intended by the ratifiers. In order to appreciate this strategy, one must appreciate what the people of 1868 thought was at stake.

#### A. Context

The modern reader may have trouble appreciating the dilemma faced by those proposing the Fourteenth Amendment and those called upon to ratify it. As has often been noted, the Congress and the ratifying legislatures were focusing upon their problems, not ours.<sup>128</sup> One lingering controversy—whether the Bill of Rights was incorporated by the Fourteenth Amendment—can help illuminate their dilemma.

Two of the leading opponents of what has been called the “incorporation doctrine” (enforcing the Bill of Rights against the states through the Fourteenth Amendment) were Justice Felix Frankfurter and his former pupil, Harvard Law Professor Charles Fairman. Both held in disdain the Fifth Amendment requirement that a grand jury indictment was necessary to commence criminal proceedings, the Fifth Amendment right against self-incrimination, and the Seventh Amendment requirement for jury trials in civil cases.<sup>129</sup>

In his landmark concurring opinion in *Adamson v. California*, Justice Frankfurter indicated that if the ratifiers of the Fourteenth Amendment had known that it would require them to use the grand jury provisions of the Fifth Amendment, they would not have ratified the amendment.<sup>130</sup> Two years later, in a 1950 private letter to Charles Fairman, Frankfurter reached the same conclusion, adding his aversion to common law civil jury trials as an added reason.<sup>131</sup>

The Fairman/Frankfurter view has been hotly disputed.<sup>132</sup> As

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128. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 6 (1988); CURTIS, *supra* note 2, at 13-15.

129. See Aynes, *Felix Frankfurter, Charles Fairman, and the Fourteenth Amendment*, *supra* note 2, at 1221 n. 149, 1222 n. 150.

130. *Adamson v. California*, 332 U.S. 46, 64 (1947).

131. See Aynes, *Felix Frankfurter, Charles Fairman, and the Fourteenth Amendment*, *supra* note 2, at 1235 n. 238.

132. CURTIS, *supra* note 2; Amar, *supra* note 2; Crosskey, *supra* note 2. My own efforts on this topic appear at Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 103.



Bryan Wildenthal has observed:

But the historical evidence collected by Justice Frankfurter himself . . . helps to demonstrate that applying the entire Bill of Rights to the states – even including the grand and civil jury requirements – would not have been viewed as a radical or unduly disruptive “innovation” in 1868, when the Fourteenth Amendment was ratified. Of the thirty-seven states in the Union at that time, all but one guaranteed civil jury trial as a matter of state constitutional right, in a manner at least substantially in accord with the Seventh Amendment.

There was, it is true, more divergence with regard to the grand jury. Still-twenty-three states in 1868 – nearly two-thirds – guaranteed grand jury indictment in full accordance with the Fifth Amendment . . . .<sup>133</sup>

But even assuming the premise of the Frankfurter/Fairman view, this section tests that view by considering the choices a state legislator in 1866 would face in determining whether to ratify the amendment or to preserve his state’s right to avoid grand juries and civil jury trials. In effect, the important question is whether the evils of providing grand juries and civil jury trials are greater than the evils that the Fourteenth Amendment was designed to cure. The choices facing legislators or voters for state legislators in 1866 can best be understood by considering the evils Sections 2, 3, and 4 of the Fourteenth Amendment were designed to overcome.

### *B. Apportionment*

The apportionment of representatives for the House of Representatives is of tremendous importance. It not only determines the fate of one House of the national legislature but also, through its direct influence on the electoral college, determines who becomes President. The question of whether to count slaves for apportionment purposes who could not vote was an issue that loomed large at the constitutional convention in Philadelphia. The question was compromised by calling for people held in slavery to be counted as three fifths of a person for both apportionment and taxation purposes.<sup>134</sup> One of the grievances of those opposed to the oligarchy they termed the “Slave Power” was that this made the votes of the slaveholding South more important than the

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133. Bryan Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1476-78 (2000) (footnotes omitted; but see his footnotes 104, 105, and 107 for detailed support).

134. U.S. CONST. amend. XIV, § 2, cl. 3.

same number of voters in the North.

After the war, slavery was abolished. An African American who had previously counted as only three fifths of a person for apportionment purposes, would now be counted as a full person. In spite of the initial steps Lincoln had taken toward very limited black suffrage in the South, the state governments established under Andrew Johnson all limited suffrage to white males.

The readmission of southern states counting African Americans as complete persons produced a striking anomaly: even though it had lost the war, the elite white South would return to the Congress with even more political power in the House of Representatives and the electoral college. African Americans would have no more right to vote after slavery than before slavery; but the white elite that had caused such a costly war would increase its political power by the addition of two fifths of the African American population in the apportionment process. This added strength, combined with disloyal elements of the Democratic party in the North, could undo the results of the Civil War, in which so many lives and so much treasure was spent.

The prospect of the loser in a civil war gaining increased political power “was unique in history.”<sup>135</sup> This issue could have been solved by a provision that required southern states to allow African Americans to vote. But the nation was not yet prepared for such an amendment. Instead, after much debate, Section 2 proposed to count the entire population of the state, but to reduce that number by the proportion of males over age twenty-one excluded from the apportionment to the entire number of males of that age. If all African Americans were excluded from voting, Section 2 could actually reduce the voting power of a southern state that limited votes to white males. In theory, this would force the states to choose between increased representation with black voters or reduced representations and the ability to exclude black voters.

The problem with the apportionment provision was that it did too much and it did not do enough. Any one who wanted a guarantee of voting rights was disappointed by its weakness. Anyone who disfavored African American voting would be disappointed by its potential penalty if African Americans were excluded. Idealists who supported race-neutral voting would be disappointed by the penalty provision’s implication: it authorized the exclusion of black voters as long as one was willing to pay the penalty. Those who believed voting was a state

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135. HAROLD HYMAN, *A MORE PERFECT UNION* 99 (1973).

matter would be offended by the federal attempt to “coerce” the states into allowing African Americans to vote.

There were many reasons people could be disturbed by Section 2. But if forced to choose between the objective Section 2 sought to achieve (prohibiting increased power for former rebels) and returning to the common law and federal rules for civil juries and grand juries, it was unlikely that voters and legislators would reject the Amendment in order to preserve jury innovations.

### *C. Confederate Officers*

Some of the concerns over the apportionment issue addressed by Section 2 were highlighted by the actions of the white South when voters elected former leaders of the Confederate States to positions in the Johnson government. Perhaps the most notorious example of this came from the state of Georgia where Alexander Stephens, former Vice President of the Confederate States, was elected in 1865 by the legislature to be a United States Senator.<sup>136</sup> Similarly, Herschel V. Johnson, who had served two terms as a Confederate Senator, was also elected by Georgia as a U.S. Senator that same year.<sup>137</sup>

It is easy to explain these actions now as voters turning to the (alleged) only men of ability available, the (alleged) “natural” leaders of the community. But to the majority of northerners these men were traitors who had caused the greatest war in the history of the North American continent. These men were part of the “Slave Power Conspiracy” to suppress free speech and destroy democracy. They were also thought to have been involved in war crimes that included the starvation and execution of war prisoners at Andersonville, the assassination of President Lincoln, and the execution of black Union soldiers. With over 350,000 Union soldiers killed and hundreds of thousands wounded, the North viewed men who had led the southern Confederacy as traitors who would again harm the Union if given a chance to return to the national Congress.

Section 3 made it impossible for “traitors” with blood on their hands to enter national positions of leadership. For Thaddeus Stevens, Section 3 contained the most important provisions of the amendment. He claimed that without Section 3 the Fourteenth Amendment “amounts to nothing.”<sup>138</sup> This was one of the most widely debated provision of the

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136. DUBOIS, *supra* note 35, at 496.

137. STEWART SIFAKIS, WHO WAS WHO IN THE CIVIL WAR 343 (1988).

138. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Stevens went on to say: “Give us the

Amendment.<sup>139</sup>

Northerners disagreed about the degree to which former Confederates should be disqualified from holding office. Their fear of the originators of the rebellion returning to power should not be viewed as unnatural, however. One has only to consider American reactions to the defeated in its later foreign wars. After World War I, the Allies had no intention of allowing the German Kaiser to remain in power. The Allies of World War II tried to structure the governments of Germany and Japan in such a way that the leadership of the Nazi party and the Japanese military would not return to power. In the aftermath of the second Gulf War members of Saddam Hussein's Baath Party were disqualified from running for its Parliament.<sup>140</sup> With all the loss of life in the the Civil War, one can imagine northerners acting upon the same concerns.

The question remains, which was the lesser evil facing the ratifiers? It is extremely unlikely that the ratifiers would view freedom from common rules for civil juries and grand juries as being more important than keeping leaders of the rebellion from participating in the national government.

#### *D. Securing the Public Debt*

Section 4 of the Amendment provided that the U.S. public debt, including payment of pensions and bounties to soldiers and their families, "shall not be questioned." Even during the war, northern Democrats talked openly of repudiating the war debt. While the Amendment was pending the Democrats formulated proposals to tax the bonds of those to whom the federal debt was owed and/or to pay off the debt in depreciated currency.<sup>141</sup> These efforts were challenged as endangering pensions and other claims of widows and orphans of Union soldiers.<sup>142</sup>

Joseph James thought that the provision guaranteeing the national debt "had more influence [in assuring the Amendment's passage] than many have assumed."<sup>143</sup> Indeed, James quoted the September 18, 1866 issue of the *New York Herald* as calling it "the great secret of the

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third section or give us nothing." *Id.*

139. KYVIG, *supra* note 125, at 168.

140. Richard A. Opper, Jr., *Iraqi Court Bars at Least 90 Candidates for Parliament*, THE NEW YORK TIMES, Dec. 25, 2005, at YT12.

141. *See id.* at 224.

142. *See id.* at 46.

143. JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 69 (1984).

strength of this constitutional amendment.”<sup>144</sup> Weighed in the balance, protection for the integrity of the war debt from repudiation by alliances of antiwar Democrats and former Confederates and insurance of the integrity of the pledged pensions to war veterans and the widows of war veterans were far more important to the voters of 1866-68 than questions of innovative grand jury and civil jury procedures.

#### *E. Repudiating the Confederate Debt*

The question of the Confederate debt was also a large one. A contemporary account estimated that the Confederate debt from the war was over \$2 billion, while individual states and local governments had incurred another billion dollars of debt.<sup>145</sup> In his testimony before the joint committee on Reconstruction, former Confederate General Robert E. Lee indicated that he thought Virginians were in favor of paying the Confederate debt and that he had “never heard any one in the State with whom I have conversed speak of repudiating any debt.”<sup>146</sup> In the North Carolina Convention of 1865 at first refused to repudiate the state’s Confederate debt until President Johnson intervened.<sup>147</sup> Even then, W.E.B. DuBois reported that “the leading newspapers . . . called the action ‘humiliating.’”<sup>148</sup>

One key concern was that if the Confederate debts were not treated as void, future rebellions could use the precedent to establish credit.<sup>149</sup> Further, it was felt that creditors who had aided the rebellion should be punished by the loss of the amount of the debt. An added fear was that loyal men of the southern states, white and black, would be taxed to pay the debts of rebels.<sup>150</sup> Republicans were also concerned that the leaders of the rebellion would regain political power by promising to pay the Confederate debt and supporting pensions to Confederate soldiers.<sup>151</sup>

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144. *Id.*

145. GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED 292 (1868), available at <http://www.hti.umich.edu/cgi/t/text/text-idx?c=moa;idno=AEW4768.0001.001> (last visited Apr. 9, 2006).

146. *Reconstruction Hearings, Virginia, North Carolina, South Carolina, Washington D.C.* 129 (Feb. 17, 1866).

147. DUBOIS, *supra* note 35, at 527.

148. *Id.*

149. See generally TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 532 (Fred B. Rothman & Co. 1993) (1872).

150. CONG. GLOBE, 39th Cong., 1st Sess. 429 (1886) (showing John Bingham asking for a provision in the Amendment to prohibit taxing loyal citizens to pay Confederate veterans’ pensions).

151. HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 272 n.59 (1982).

A further issue was whether the southern states would use taxpayer's money in a discriminatory fashion. Georgia had appropriated \$200,000 for assistance to widows and children of Confederate veterans but made no provision for its Union veterans.<sup>152</sup> When North Carolina, which had contributed six regiments of Union troops to the war effort, passed legislation to provide artificial limbs to its citizens, the law made it clear that they would be supplied only to its Confederate and not to its Union veterans.<sup>153</sup> Again, any reluctance to following common law grand and petit jury procedures seem to pale in insignificance when contrasted with the seeming importance of protecting the payment of the Union debt and repudiating the debts that supported the rebellion.

*F. Denying Compensation for Former Slaves*

One provision of Section 4 of the Fourteenth Amendment that receives little attention provides that: "[N]either the United States nor any State shall assume or pay . . . any claim for the loss or emancipation of any slave."<sup>154</sup> The slaveholders claimed slaves as property, and they were counted in census records, tax appraisals and similar purposes. In 1868, George W. Paschal, a Unionist and former slaveholder, estimated that the value of emancipated slaves was more than \$2 billion.<sup>155</sup> A committee of the Forty-Second Congress placed the loss at \$1.6 billion.<sup>156</sup> To place this amount in context, one needs to note that the South's entire property, including slaves, was assessed in 1860 at \$4.4 billion and in 1870 at \$2.1 billion.<sup>157</sup>

There were many claims for reimbursement of former slaveholders from the "taking" of their "property" by the federal government, whether through the Thirteenth Amendment or some other action during the war. These claims had a legal and political basis under the Fifth Amendment, which provides that no person shall "be deprived of . . . property without due process of law" and that "private property" shall not be "taken for public use without just compensation."<sup>158</sup> Support for such a claim can be found in the unreversed decision of *Dred Scott* in which the Supreme Court recognized slaves as property and used the Fifth Amendment due

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152. ERIC FONER, RECONSTRUCTION 207 (1988).

153. McNeill Smith, *Of the Search for Original Intent*, 13 LAW AND SOC'Y REVIEW 583, 601 n.36 (1988) (book review of Michael Kent Curtis, *No State Shall Abridge*).

154. U.S. CONST. amend. XIV, § 4.

155. PASCHAL, *supra* note 145, at 292.

156. DUBOIS, *supra* note 35, at 605.

157. *See id.*

158. U.S. CONST. amend. V.

process clause to protect those who held people in slavery.<sup>159</sup> Further, throughout the war President Lincoln had tried to coax the border states into emancipating slaves *with compensation*.<sup>160</sup> These attempts, even through rejected, may have further conditioned slaveowners to think that if the slaves were emancipated, they were entitled to government compensation.

Examples of these views were seen in state governmental proceedings immediately after the war. For example, the Georgia Convention, elected in October 1865 to frame a new constitution, abolished slavery but added:

[T]his acquiescence in the action of the Government of the United States, is not intended to operate as a relinquishment, waiver or estoppel of such claim for compensation or loss sustained by reason of the emancipation of his slaves, as any citizen of Georgia may hereafter make upon the justice and magnanimity of that government.<sup>161</sup>

Even with Salmon P. Chase, a leading antislavery lawyer and the national architect of the antislavery movement's legal strategy, as its Chief Justice, the memory of *Dred Scott* was too vivid in the mind of the public to erase the possibility that a suit by even a single former slaveholder might result in a judgment against the United States for taking property without just compensation. Moreover, the perpetual fear of an alliance between former slaveholders and their former allies, northern Democrats, provided a strong incentive to lay this question to rest by a constitutional amendment. The prospects of risking between \$1.5 and \$2 billion in debt, when weighed against complying with common law jury provisions, would make the latter seem petty. Faced with such a choice, even a ratifier who disdained common law jury provisions would see ratification as a "greater good."

The Fourteenth Amendment framers and ratifiers may not have seen the alleged conflict between the Amendment and the Bill of Rights. But even if they did, Bryan Wildenthal is surely correct when he writes:

Given the political imperatives for Republicans supporting ratification of the Fourteenth Amendment, it is doubtful whether anyone considered or cared much about the relatively minor particulars in which some states were not already in conformity with the Bill of Rights. That could have been worked out by litigation or

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159. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

160. JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 303 (1995).

161. DUBOIS, *supra* note 35, at 496.

legislation.<sup>162</sup>

When viewed from this standpoint, it is possible to conclude that the framers knew, or at least feared, that one or more of the separate sections of the Fourteenth Amendment would not command the necessary support from state legislatures. This knowledge led them to link the provisions together to gain a result that some legislatures themselves may not have wanted, but accepted in order to obtain the more important objectives of the Amendment.

This unique approach had another significant consequence. As David Kyvig has written, “[t]o combine a number of proposals into a single measure subtly but perceptibly shifted critical decision-making from the ratifiers to the initial adopters of an amendment resolution. Unlike the 1790s experience, states would confront a take-it-or-leave it, all-or-nothing choice.”<sup>163</sup> Thus, unlike other constitutional amendments, in which the concerns of the ratifiers may be paramount, in the Fourteenth Amendment our primary focus is upon the framers. This insight may help unravel why states would vote to ratify the Fourteenth Amendment and then not conform their state constitution to comply with its provisions.<sup>164</sup> To be sure, they may simply have focused upon the bigger issues like disenfranchisement and public debt and ignored less pressing matters like enforcement of the Bill of Rights. But an equally plausible explanation is that in some cases states did not want to ratify the whole package but did so as the lesser of two evils. The greater evil was not ratifying at all. This hypothesis may well help explain some of the convoluted post-amendment actions by courts and by state legislators upon which Fairman and Justice Frankfurter relied so heavily. But, if so, it may also mean that the *framers* of the Amendment intended to produce some consequences which the *ratifiers* did not intend, or at least desire.

This analysis may provide insight into the academic and judicial controversies over incorporations of the late 1940s and 1950. The arguments which Justice Hugo Black and Chicago’s William W. Crosskey made in favor of incorporation were based largely upon the intent of the framers. The rejection of those arguments by Justice Felix

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162. Wildenthal, *supra* note 133, at 1478.

163. KYVIG, *supra* note 125, at 166-67.

164. See generally FAIRMAN, *supra* note 2, at n.20. But see Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2, at 95-96. See also LEONARD W. LEVY, CHARLES FAIRMAN & STANLEY MORRISON, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY* xv (1970) (indicating that Fairman’s proof was largely “negative”).



Frankfurter and Charles Fairman were based largely upon inferences about the intent of the ratifiers of the amendment.<sup>165</sup> While the full picture should include the view of both the framers and the ratifiers, David Kyvig's insight suggests in this instance it is the work of the framers that should trump any contrary views held by individual ratifiers.

## VII. CONCLUSION

This examination of the unintended consequences of the Fourteenth Amendment suggests that the framers of that Amendment were as human as current legislators. In some cases, such as the adoption of the Citizenship Clause, they simply did not anticipate the use to which their work could be put. The clause they hoped would strengthen the Amendment was actually improperly used to weaken it.

In other cases, such as their intention that the Due Process Clause be a supplementary clause and not a major new protection of the Amendment, they could not foresee the ways in which the judiciary would mis-interpret first the Privileges and Immunities Clause and then the Due Process Clause. In other instances, such as their linking of the parts of the Amendment together in one omnibus amendment, they had paramount political motives in mind. They may have intended to force the legislatures to adopt a broader package of protections than would have been possible if each had been submitted separately.

We know that people in the legislative process engage in politics. We know that those creating legislation, whether of a statutory or fundamental nature, cannot predict all the results, and we know that we can only dimly see the future. While these considerations may enlighten our understanding of the Fourteenth Amendment and help to correct errors in past court decisions, they should not dim our appreciation for the efforts of the Thirty-Ninth Congress.

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165. See Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 2 at 1255 n. 385.