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Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act

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Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act

*Jay S. Bybee**

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No act of Congress can authorize or make a law respecting an establishment of religion, or prohibiting the free exercise thereof.... Would it be appropriate legislation to enforce [the Fourteenth Amendment] that Congress should pass an act prohibiting a State from doing so or directing it to do so? Congress is simply restrained from doing this itself.

...

[A]n attempt on the part of Congress to exercise powers not granted, and much more, powers prohibited, is a usurpation that cannot be justified by any legislation under the fourteenth amendment....[1]

[The States] shall not substantially burden a person's exercise of religion....[2]

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1. Cong. Globe, 42d Cong., 1st Sess. 572 (1871) (statement of Sen. Stockton).
2. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(a), 107 Stat. 1488 (1993), codified at 42 U.S.C. § 2000bb (Supp. V 1993).

I. INTRODUCTION

In July 1788 the North Carolina legislature was considering ratification of the Constitution, a constitution that did not contain a Bill of Rights. As the delegates reached the Religious Test Clause,[3] Henry Abbot remarked:

> Some are afraid . . . that, should the Constitution be received, they would be deprived of the privilege of worshiping God according to their consciences, which would be taking from them a benefit they enjoy under the present constitution. They wish to know if their religious and civil liberties be secured under this system, or whether the general government may not make laws infringing their religious liberties. . . . Many wish to know what *religion* shall be established.[4]

James Iredell, Federalist, former North Carolina Attorney General, and future Supreme Court justice, responded that he was "astonished" that anyone should conceive that Congress had "authority to interfere in the establishment of any religion whatsoever."[5] He went on, "If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass . . . . Every one would ask, 'Who authorized the government to pass such an act?' It is not warranted by the Constitution, and is barefaced usurpation."[6] Iredell then referred to the Guaranty Clause[7] and asked, rhetorically, "why a *guaranty* of religious freedom was not included." Iredell answered his own question: "Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the [Guaranty Clause] does not interfere, must be left to the operation of its own principles."[8]

In 1993 Congress enacted the Religious Freedom Restoration Act ("RFRA"),[9] which provided that government, including the United States and the states, "shall not substantially burden a person's exer-

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3. U.S. Const., Art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

4. Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 191-92 (Burt Franklin, 2d ed. 1888) ("Elliot's *Debates*").

5. Id. at 194.

6. Id.

7. U.S. Const., Art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

8. 4 Elliot's *Debates* at 195 (cited in note 4).

9. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1448 (1993), codified at 42 U.S.C. § 2000bb (Supp. V 1993).

cise of religion even if the burden results from a rule of general applicability" except where the government can demonstrate that the burden furthers "a compelling governmental interest" and is "the least restrictive means of furthering that . . . interest."[10]

In his Rose Garden ceremony upon the signing of RFRA, President Bill Clinton hailed the Act as "affirm[ing] the historic role that people of faith have played in the history of this country and the constitutional protections that those who profess and express their faith have always demanded and cherished."[11] The President declared that RFRA "reverse[d]" the Supreme Court's decision in *Employment Division v. Smith*[12] and established a standard that he was "convinced [was] far more consistent with the intent of the Founders of this Nation than the Supreme Court decision."[13]

Like the President, we should celebrate the role of people of faith, and we should certainly welcome any light that can be shed upon the cathedral of church-state relations, an arena that has traditionally "generate[d] [more] heat . . . than light."[14] The Court's cases are a muddle of conflicting doctrines, principles, and rules that guarantee only that any church-state dispute will eventually find its way into the courts for, what appears to many as, arbitrary resolution. More and more it appears that the key to understanding the Court's ever changing views is the "Rule of Five."

Unfortunately, whatever consistency RFRA might bring to the substance of church-state relations comes at the expense of clarity in federal-state relations. This is unfortunate because the First Amendment does not address church-state relations; it concerns church-federal relations. Whatever else RFRA is, it is not "consistent with the intent of the Founders," at least with respect to Congress's power over religious freedom in the states. Congress enacted RFRA

10. Id. §§ 2000bb-1(a), (b); 2000bb-2(1).

11. *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993). See also 42 U.S.C. § 2000bb(a)(4).

12. 494 U.S. 872 (1990). In *Smith*, the Court, without expressly overruling any of its prior precedents, held that the Free Exercise Clause was not offended by the "incidental effect[s]" of "generally applicable and otherwise valid" laws. Id. at 878. *Smith* has been soundly criticized. See, for example, James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990). Even defenders of *Smith*'s result do not defend the opinion. See, for example, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991).

13. 29 Weekly Comp. Pres. Doc. at 2377 (cited in note 11).

14. Philip B. Kurland, *Religion and the Law* 15 (Aldine, 1962).

in the teeth of the First Amendment, which begins "Congress shall make no law . . . ."[15]

I demonstrate in Part II that the Constitution expresses relationships between the national government and the people, the national government and the states, the states and the people, and among the three great departments of the national government as a series of forms: powers, immunities, privileges, and disabilities. The Founders'[16] choice of form has consequences and reflects deliberate decisions. The consequences of these choices of form are readily apparent in the Bill of Rights. Seven of the first eight amendments consist of privileges and immunities, which are personal rights that inure to people, persons, owners, and the accused. Only one of the first eight amendments—the First Amendment—is a governmental disability. The First Amendment's disability reflects two distinct concepts: (1) the disability applies to the national government and not the states, and (2) the disability applies to Congress and not the federal judiciary. The former is a familiar principle of federalism; the second, an all but overlooked principle of separation of powers. Although both of these concepts survived early tests of the First Amendment, much of the debate since the founding has been over whether the First Amendment is a disability (or, to use Professor Smith's term, "jurisdictional"[17]) or whether it states purely personal rights. As modern Americans, we recognize immediately that *we* regard First Amendment rights as personal, but this was not true in the first century of the First Amendment, including the period surrounding the drafting and ratification of the Fourteenth Amendment.

While the Founders insisted that Congress had no power over religion, speech, or press, and that the First Amendment assigned responsibilities for church-state matters to the states,[18] the Federalists conveniently abandoned these views in 1798 in order to

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15. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

16. For convenience I intend to refer to those who drafted the Constitution of 1787 and its first ten amendments as the "Founders" and to those who drafted the Fourteenth Amendment as the "Framers."

17. Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 26 (Oxford U., 1995) ("The question is not whether the [religion] clauses imposed substantive restrictions on the national government . . . but instead whether the restrictions were adopted to effect a positive national policy on the subject of religious freedom or, more modestly, were calculated merely to assign jurisdiction over matters of religion to the states").

18. See notes 77-99 and accompanying text.

rationalize the Sedition Act of 1798.[19] Instead of seeing the First Amendment as jurisdictional, the Federalists claimed that Congress had power to regulate speech and press, so long as it did not abridge those rights. Republican opponents of the Sedition Act, led by Thomas Jefferson and James Madison, consistently argued that the First Amendment was, pure and simple, confirmation that Congress possessed no power in this area, and that the substantive content of religious liberty and free expression was defined exclusively by the states.[20] Although the First Amendment figured in very few cases prior to ratification of the Fourteenth Amendment in 1868, the cases reflect the understanding of Jefferson and Madison.

In Part III I discuss the effect of the Fourteenth Amendment on the First Amendment. The debate begun during the Sedition Act was renewed in 1866 during the drafting of the Fourteenth Amendment and arose again in the civil rights enforcement debates of 1871-72, as Radical Republicans, holding idiosyncratic views of the Constitution, argued that the First Amendment was a personal privilege of the same genre as the Fourth or Fifth Amendments.[21] Democrats and more moderate Republicans maintained, as had the Republicans of the earlier generation, that the First Amendment was unique among the Bill of Rights and described the relationship between Congress and the states over the subjects of religious freedom and freedom of speech and press.[22] The Supreme Court straddled these arguments. For a time after ratification the Court continued to maintain that the First Amendment did not apply to the states, but the Court made a series of missteps which ensured that, in the Court's rush to absorb or incorporate the personal guarantees of the Bill of Rights against the states, the First Amendment would follow.

In Part IV I discuss the textual basis for incorporation of the First Amendment and Congress's power to enforce the First Amendment through Section 5 of the Fourteenth Amendment.[23] Modern theories of incorporation fail to account for the difference between the disability in the First Amendment and the remaining privileges and immunities in the Bill of Rights. These theories

19. See notes 125-29 and accompanying text.
20. See notes 130-41 and accompanying text.
21. See notes 244-57 and accompanying text.
22. See notes 258-71 and accompanying text.
23. U.S. Const., Amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

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assume uncritically that the First Amendment states personal rights only and is, therefore, consistent with Congress's powers to enforce the provisions of Section 1 of the Fourteenth Amendment. I conclude that, whatever the merits of incorporation of Amendments Two through Eight, neither the Privileges or Immunities Clause nor the Due Process Clause is a proper vehicle for incorporating the First Amendment. Congress's section 5 power, the so-called *Morgan* power,[24] does not correct this defect.

In Part V I conclude that the Religious Freedom Restoration Act is unconstitutional, violating the very provision it purports to enforce. I propose a limited corrective, a modest change in course, for the distance Congress and the Court have traveled from the First Amendment, and I suggest how the Court might rectify its section 5 views without entirely reversing its questionable tack on incorporation of the First Amendment.

II. THE FIRST AMENDMENT AND THE BILL OF RIGHTS: TEXT AND THE FOUNDING

A. *The Structure of Constitutional Powers: Of Powers, Immunities, and Disabilities*

The Constitution is about power. It consists of a series of powers granted, reserved, or assigned. In its modern conception, a constitution should serve as a structure for protecting individuals from the coercive authority of the government. The Founders, however, did not regard the United States Constitution as the ultimate means of guaranteeing the political and personal autonomy of individuals. Rather, it sought to allocate power between the federal government and the states, assigning to the federal government those matters essential for resolution by a national authority, and reserving to the states those matters which were more appropriately handled by local authorities. Having decided that the national government could more appropriately resolve some matters, the Founders diffused the powers they granted to the federal government, lest any department

24. The name derives from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where the Court held that Congress could "prohibit the enforcement of state law by legislating under § 5 of the Fourteenth Amendment" even if the judiciary would have concluded that the state did not violate the Fourteenth Amendment. Id. at 649.

abuse the powers vested in a single coercive body.[25] They also declared certain matters simply beyond the ken of any governmental action, state or federal.

The mechanism for accomplishing the allocation and reservation of power was the Founders' ability to describe legal relationships between the federal government and the people, between the federal government and state governments, and between different departments of the federal government. The Constitution is an intricately woven document of genius and compromise, of carefully laid lines of authority, and of disparate rights cobbled together.

Helpful to understanding the legal relationships set forth in the Constitution is the important insight of Wesley Newcomb Hohfeld that all legal relationships are binary. According to Hohfeld, every legal relationship must involve at least two parties,[26] and their relationship can be described in terms of one of four pairs of correlative terms: right and duty, privilege and no right, power and liability, and immunity and disability.[27] The existence of a right in X necessarily implies that there exists some Y who has a duty to X; conversely, to state that Y has a duty suggests that there exists some X who can enforce Y's performance. Right and duty are correlative and must be found together.[28] Similarly, immunity and disability are correlative. If X has an immunity, there exists some Y who is legally disabled. It makes no sense to speak of X's immunity without knowing who is thereby disabled; conversely, if we know that Y is legally disabled, we know that an immunity has been created in some X.[29]

The Constitution, written by a generation schooled in the terms of the common law, expresses relationships that fit well within

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25. Federalist 47 (Madison), in Jacob E. Cooke, ed., *The Federalist Papers* 323, 326 (Wesleyan U., 1961).

26. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 28 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710, 712 (1917). For an insightful discussion of Hohfeld, see James E. Herget, *American Jurisprudence, 1870-1970: A History* 101-16 (Rice U., 1990).

27. Hohfeld, 23 Yale L. J. at 30 (cited in note 26); Hohfeld, 26 Yale L. J. at 710 (cited in note 26).

28. Hohfeld, 23 Yale L. J. at 30-32 (cited in note 26).

29. Id. at 55. Additionally, Hohfeld draws a useful distinction between what he calls "multital" and "paucital" rights. Hohfeld, 26 Yale L. J. at 718-20 (cited in note 26). Multital rights (for example, rights *in rem*) are those held by the population at large; paucital rights (or rights *in personam*) are those held by a discrete group or an individual. See *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N.E. 812, 814 (1900) ("All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected").

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Hohfeld's scheme, although not always in precisely these same terms.[30] For example, the Constitution confers or denies powers to federal or state governments in different ways. The Founders' Constitution, following the Articles of Confederation, conferred greater powers on a national government, but it did not confer all the powers inherent in sovereignty. Article I vests Congress only with such "Powers herein granted,"[31] and Congress must affirmatively assert the source of its power. The need to assert a source of power is not a burden the states must bear. Assuming that the states have not acted contrary to any provisions of their own constitutions, they need only demonstrate that they are not disabled, expressly or implicitly, by the United States Constitution.[32] The Constitution is, by and large, not a document about restraining the states in order to ensure the political or personal autonomy of individuals; state restraints are more often a means of ensuring exclusive power to the federal government.

The critical sections for defining Congress's powers are Sections 8, 9, and 10 in Article I. Section 8, of course, contains the affirmative grants of power to Congress.[33] Following Hohfeld, a grant of power to Congress necessarily implies that some person or group of persons is subject to a liability; there must exist someone who is subject to the powers of Congress defined in Section 8. Three possible groups suggest themselves: people, and here we mean individuals, families, business associations, and so on; other levels of government, namely, the states; and other departments of the national

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30. See Mark DeWolfe Howe, *The Garden and the Wilderness* 17 (U. Chicago, 1965) ("[T]he framers set forth what most accurately might be described as either a schedule of immunities or a body of liberties—to borrow the phrase used in seventeenth-century Massachusetts to describe equivalent constitutional prohibitions").

One of the reasons Hohfeld set forth his scheme, acknowledging that lawyers and jurists did not use terms consistently, was to impose some discipline on the "ambiguity and looseness of our legal terminology." Hohfeld, 23 Yale L. J. at 21 (cited in note 26). The Attorney General, in an important Civil War-era opinion on United States citizenship, expressed a similar thought: "the words *rights, privileges, immunities* are abusively used, as if they were synonymous. The word *right* is generic, common, embracing whatever may be lawfully claimed. *Privileges* are specialty rights belonging to the individual or class, and not to the mass. *Immunities* are rights of exemption only, freedom from what otherwise would be a duty, obligation, or burden." 10 Op. Atty. Gen. 382, 407 (1862). See also Cong. Globe at app.47 (cited in note 1) (statement of Rep. Kerr) ("It is most erroneous to suppose that the words 'rights,' 'privileges,' and 'immunities' are synonymous. . . . The word 'rights' is generic, embracing all that may be lawfully claimed, and it is affirmative; but the others are, in the most exact and legal definition, both restrictive and negative").

31. U.S. Const., Art. I, § 1.

32. See, for example, Federalist 32 (Hamilton), in Cooke, ed., *The Federalist Papers* at 200 (cited in note 25).

33. I recognize that § 8 is not the sum total of Congress's powers, and that other powers of the federal government are found in other articles of the Constitution.

government, obviously, the executive and judiciary. Take the Commerce Clause as an example. The fact that the Constitution grants Congress power to regulate commerce with foreign nations, sovereign Indian tribes, and among the states[34] implies a liability both in those people whom such congressional regulation might affect and in the states that have ceded a portion of their sovereignty to Congress.[35] The affirmative grant to Congress also suggests that the principal regulator of interstate commerce is Congress, and not the President or the federal judiciary.[36] The Founders might have accomplished the same purpose by expressing the relationship between Congress and individuals or Congress and states as a liability. For example, the Founders might have provided that "states and persons shall be subject to regulation respecting commerce with foreign nations, with sovereign Indian tribes, and among the states." Though these are equivalent statements of the relationship between the federal government and persons and states, the latter does not effectively allocate power between Congress, the President, and the judiciary. It was more efficient for the Founders to express the relationship as a power rather than as a liability.

Article I, Section 9 contains disabilities, things that the federal government cannot do, and implies that corresponding immunities have been created. But as with Section 8 powers, identifying the parties possessing the immunities is not always as easy as it seems. We would naturally characterize the Habeas Corpus Clause,[37] for example, as creating an immunity in people, whose right to the great writ may not be suspended except when public safety demands it in cases of rebellion or invasion. But the Habeas Clause has a federalism component. The states are also beneficiaries of Congress's disability because Congress may not suspend the states' privilege of granting or denying habeas.[38] The Habeas Clause is a guarantee to federal prisoners and a promise of non-interference to the states; both

34. U.S. Const., Art. I, § 8, cl. 3.

35. "The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states." *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264, 382 (1821).

36. See *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part) (questioning the Court's role in enforcing the Dormant Commerce Clause).

37. U.S. Const., Art. I, § 9, cl. 2.

38. Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862, 865, 871-72 & n.42 (1994). See also William Rawle, *A View of the Constitution* 113-14 (D.H. Nicklin, 2d ed. 1829).

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can lay legitimate claim to the immunity created through the disability in Section 9. Yet the Founders were not so didactic as to spell out all of these relationships; in creating a national government of limited powers, it was sufficient to describe what Congress could and could not do. Similarly, the Bill of Attainder and Ex Post Facto Clauses[39] benefit individuals, but they bear a strong separation of powers component; the clauses serve as a guarantee to the federal judiciary of congressional non-interference with judicial review, which is necessarily retrospective.[40] It is easy to identify individuals as the beneficiaries of these congressional disabilities, but it would be a mistake to identify only individuals without considering—in a scheme where separation of powers and federalism matter—who else may lay claim to the immunity.

Section 10 contains disabilities on the states. As with the congressional disabilities in Section 9, Section 10's Ex Post Facto, Bill of Attainder, and Contracts Clauses[41] may be described as a "shield [for the people of the United States] and their property" and thus a "bill of rights for the people of each state."[42] Yet it would be an oversimplification to see Section 10 as granting immunities only to people. The clause disabling the states from entering into treaties, granting letters of marque and reprisal, and coining money[43] guarantee to Congress or the President that their respective powers over treaties,[44] letters of marque and reprisal,[45] and coining money[46] are exclusive. Even the Contracts Clause, which disables the states alone, suggests that the Founders intended to protect people from state power to impair the obligation of contracts, while permitting the federal government to impair contracts when necessity required.[47]

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39. U.S. Const., Art. I, § 9, cl. 3.

40. Thus, the Bill of Attainder Clause provides that no such "Law shall be passed." Id. Art. I, § 9, cl. 3. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1205 n.330 (1991) (citing John Hart Ely, *Democracy and Distrust* 90 (Harvard U., 1980)). See also *Ex Parte Garland*, 71 U.S. (4 Wallace) 333, 388 (1866) (Miller, J., dissenting).

41. U.S. Const., Art. I, § 10, cl. 1.

42. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

43. U.S. Const., Art. I, § 10, cl. 1.

44. Id. Art. II, § 2, cl. 2.

45. Id. Art. I, § 8, cl. 11.

46. Id. Art. I, § 8, cl. 5.

47. See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 286, 289, 294 (1988). Professor McConnell also suggests that the reason the Takings Clause of the Fifth Amendment originally applied only to the federal government was that the Founders feared that the remoteness of the federal government would make it less sensitive to the rights of property owners. Id. at 286-87, 292.

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The Founders drafted Sections 9 and 10 differently, and the difference is significant. Section 9 is written in passive form: "The Privilege of the Writ of Habeas Corpus shall not be suspended"; "No Tax or Duty shall be laid . . ."; "No Preference shall be given . . . ." By contrast, the three clauses in section 10 are written in active voice; each begins, "No State shall . . . ." Certainly Section 9 could have been written in active voice to parallel Section 10: "Congress shall pass no Bill of Attainder or Ex Post Facto Law." The Founders' stylistic choices, while perhaps dismissible as "elegant variation,"[48] more likely have meaning. They drafted Section 9 as they did because Congress is not the only federal department disabled by Section 9. The disabilities in Section 9, except where the Constitution provides otherwise, apply to all of the departments of the United States, not just to Congress.[49] As Chief Justice John Marshall pointed out, "[S]ome of [Section 9's disabilities] use language applicable only to Congress: others are expressed in general terms."[50] For example, Congress, the executive, and the judiciary shall not suspend the writ of Habeas Corpus, except in defined "Cases."[51] Although there is probably little danger that the judiciary would impose duties on articles for export or vessels moving between states, the Duties Clauses[52] make clear that they disable not just Congress, but also the President. Section 9 specifically disables Congress in two unique instances: the Migration Clause provides that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress";[53] the Bill of Attainder and Ex Post Facto Clause emphasizes that "[n]o [such] Law shall be passed."[54]

The use of passive voice in Section 9 is a simple way of placing in parallel form a series of disabilities, most of which apply to all departments and some of which apply to only one department. Since

48. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1487 n.395 (1990) (discussing the use of different terms in the First Amendment and the possihility of "elegant variation").

49. William Crosskey, however, argued that Section 9 applies to the states as well. William Winslow Crosskey, 1 *Politics and the Constitution* 625 n.* (U. Chicago, 1953) ("[The Haheas Clause] seems to assure the *general* availability of the writ under the Constitution, though that document nowhere provides for it").

50. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Peters) 243, 248 (1833).

51. U.S. Const., Art. I, § 9, cl. 2.

52. Id. Art. I, § 9, cls. 5, 6.

53. Id. Art. I, § 9, cl. 1.

54. Id. Art. I, § 9, cl. 3.

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no such distinction was required to disable the states, the Founders wrote the Section 10 disabilities in parallel form and active voice. The choice of stylistic forms allows the Founders to express complex relationships implicating federalism and separation of powers concepts succinctly and efficiently.

B. The Structure of the Bill of Rights

1. The Second through Eighth Amendments: A Bill of Privileges and Immunities

The Founders made similar structural and stylistic choices in the Bill of Rights. First, we should observe that the Bill of Rights is not a bill of rights in any Hohfeldian sense, in any sense that people have claims enforceable against the government.[55] Amendments Two through Eight are written as privileges and immunities, while the First Amendment is a disability. In contrast to Section 9, which consists of disabilities, Amendments Two through Eight grant privileges or immunities to individuals.[56] The various guarantees protect "people" (Amendments II, IV, IX, and X), "person" (Amendment V), "owner" (Amendment III), and "accused" (Amendment VI).[57]

Take the Fourth Amendment as an example. It provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[58] The right belongs to "the people," who are immune from certain kinds of actions involving their persons, houses, papers, and effects. But against whom is the immunity secured? Who bears the correlative disability? The question is perhaps not as obvious as it might first appear. We suspect from what we know about the purposes for and structure of the original Constitution that the guarantee is good at least against the federal government, but nothing in the plain language of the Fourth Amendment restricts it to

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55. Howe, *The Garden and the Wilderness* at 16-17 (cited in note 30). Professor Howe points to two exceptions: the right of the accused to a speedy and public trial, and the right to a jury trial in common law suits exceeding twenty dollars in value. Id. See U.S. Const., Amends. VI, VII.

56. These are Hohfeld's "paucital" rights, or rights *in personam*. See note 29.

57. Some of these points were previously made, albeit more briefly, in Department of Justice, Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 15-16 (1986) ("*Report to the Attorney General*"). Lowell V. Sturgill and I were the principal authors of that report.

58. U.S. Const., Amend. IV.

the federal government. In the amendment's indistinct format, it might just as easily apply to the states. One of the earliest commentators, William Rawle, contended that most of the Bill of Rights applied to the states.[59] And a modern scholar, William Crosskey, noting the differences in linguistic style within the Bill of Rights, argued that "the only reasonable explanation for the variance in form thus existing between the First Amendment and all the others of the first eight is that the others were *intentionally* drawn in general terms, in order to apply both to the nation and to the states."[60]

The Supreme Court first addressed the issue of applying any of Amendments Two through Eight to the states in *Barron v. Mayor and City Council of Baltimore*.[61] Barron brought suit against the City of Baltimore under the Takings Clause of the Fifth Amendment, claiming the city had diverted streams feeding the Patapsco River in such a way that silt deposits rendered Barron's decedent's wharf unusable. It is testimony to the uniqueness of the passive voice in which Amendments Two through Eight are written that the Court even had to decide against whom the Fifth Amendment was effective. Chief Justice Marshall's opinion for the Court never did confront the linguistic structure of the Fifth Amendment. Rather, the Court looked to the structure of Article I, Sections 9 and 10, to show that the Founders used very specific language when they wished to disable the states. The Court announced that it would not depart from this "safe and judicious course" without powerful evidence of "an intention to

59. Rawle, *A View of the Constitution* at 120-21, 127 (cited in note 38) (noting that the Fourth Amendment is stated in "general terms which prohibit *all* violations of these personal rights, and of course extend to both the state and the United States"). See also William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* at 266-27 (Cornell U., 1977) (discussing early theories that Amendments Two through Eight restrained state and federal governments).

60. Crosskey, 2 *Politics and the Constitution* at 1058 (cited in note 49). If this was not the First Congress's intention, Crosskey claims, "its draftsmanship of these amendments was bungling, in an extreme degree." Id. Charles Fairman's response is found in Charles Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. Chi. L. Rev. 40, 71-72 (1953). See also Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L. J. 74, 77 (1963) ("If [a citizen] reads his Constitution, most of the Bill of Rights is addressed at large, not expressly to the federal government alone"). Both Rawle and Crosskey admitted, however, that the Seventh Amendment guarantee that facts tried by a jury shall not be "re-examined in any Court of the United States" did not apply to the states. Crosskey, 2 *Politics and the Constitution* at 1058 (cited in note 49); Rawle, *A View of the Constitution* at 135 (cited in note 38). Rawle also considered the Sixth Amendment applicable to the federal government alone. Id. at 128.

61. 32 U.S. (7 Peters) 243 (1833).

apply them to the State governments."[62] More persuasively, Chief Justice Marshall recalled that the states adopted the amendments as protection against federal encroachment, and he observed that at the time of ratification the states had their own constitutional guarantees. "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States . . . they would have declared this purpose in plain and intelligible language."[63]

The Court undoubtedly decided *Barron* correctly. But why then the ambiguity in the language? Why didn't the Founders state the immunities in the Bill of Rights as disabilities and write them in active voice? The Founders could just have easily stated "Congress shall not violate the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The answer may well be that the Founders wrote the amendments in passive voice to ensure that they applied to the executive and judicial departments as well. In fact, especially with respect to the Fourth Amendment, citizens had more to fear from collusion between the executive and judicial departments—constable and magistrate—than from Congress. The Founders thus intended that the amendments secure rights of people, persons, owners, etc., against all of the departments of the federal government.[64]

Not only is this theory consistent with the structure of the rights secured in Article I, Section 9, but it is consistent with the way in which James Madison proposed amendments to the First Congress. Madison recommended that his proposed amendments be included in the various articles of the Constitution to which they naturally be-

62. Id. at 249-50. Chief Justice Marshall, as was his custom, did not offer historical references to support his statements. He may have had in mind the arguments between the federalists and anti-federalists over the need for a declaration of rights when Congress was not grantod power to affect such matters.

63. Id. at 250. See *Withers v. Buckley*, 61 U.S. (20 Howard) 84, 90 (1858) ("[S]o full, so emphatic, and conclusive, is the doctrine of this court [in *Barron*] . . . that it would seem to require nothing less than an effort to unsettle the most deliberate and best-considered conclusions of the court, to attempt to shake or disturb that doctrine"); *Fox v. Ohio*, 46 U.S. (5 Howard) 410, 434-35 (1847) ("[I]t is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority,—restrictions which some of the States regard as the *sine qua non* of its adoption by them"). See generally G. Edward White, *The Marshall Court & Cultural Change, 1815-1835* at 589-93 (MacMillan, 1988) (analyzing Justice Marshall's decision in *Barron*); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. Chi. L. Rev. 887, 964-69 (1982) (analyzing *Barron* and comparing it to Justice Marshall's other decisions). As Professor Currie notes, Chief Justice Marshall's conclusion was the accepted, but not universal, wisdom of the day. Currie, 49 U. Chi. L. Rev. at 967-68 & nn. 545-48.

64. See, for example, *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 Howard) 272, 276 (1855) (concluding that the Fifth Amendment's Due Process Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government").

longed; accordingly, most of what became the Bill of Rights would have been added to Section 9, and not left free-standing at the end of the Constitution.[65] Had they done so, the Founders would have made it indisputable that the people held the immunities against the federal government alone. Madison simply placed his proposed amendments in the same form as Section 9 to which they would have properly belonged. As it was, Chief Justice Marshall understood that locating the new amendments at the end of the document, rather than integrating them into the Constitution, did not affect their substance.

2. The First Amendment: A Congressional Disability

The First Amendment is unique, not only among the Bill of Rights, but also among any of the disabilities[66] found in the body of the Constitution. The First Amendment is the plainest federal disability in the Constitution, much closer to the form of Section 10 than to Section 9 or to the other amendments. Amendments Three through Eight address boundaries between the federal government and individuals, made necessary because the quartering of soldiers, searching of homes, holding persons for crimes, and conducting of criminal and civil trials concerned sovereign powers granted to the new government.[67] The Founders did not expect the government to govern without holding at least some ordinary police powers; thus, a declaration of the rights of citizens with respect to the inherent powers of the government was both necessary and inevitable.[68] The new government, pursuant to its war powers, might quarter soldiers in peace, but it could not do so without the consent of the owner.[69] It might conduct searches and seizures, but only if they were reasonable and after the proper issuing of a warrant.[70] In the conduct of criminal trials it must

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65. Edward Dumbauld, *The Bill of Rights And What It Means Today* 33-38 (U. Okla., 1957).

66. Professor Mayton, employing Hohfeld's terminology, calls the First Amendment a "no-power." William T. Mayton, *"Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments*, 3 Wm. & Mary Bill of Rights L. J. 373, 376-77 & n.17, 390 n.71 (1994).

67. See Chase J. Sanders, *Ninth Life: An Interpretative Theory of the Ninth Amendment*, 69 Ind. L. J. 759, 846 (1994) (stating that Amendments Two through Eight "cap governments' legitimate powers").

68. See *United States v. Carmack*, 329 U.S. 230, 241-42 (1946) ("[The Takings Clause] is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power").

69. U.S. Const., Amend. III.

70. Id. Amend. IV.

afford due process, an impartial jury, and the opportunity to confront witnesses and to enjoy the assistance of counsel.[71] These privileges and immunities are a kind of procedural right—they do not restrain the government from acting in a particular area, but restrain the way the government conducts its legitimate functions.

A statement of the relationship between government and people regarding religion, speech, press, and petition, however, is not a declaration of boundaries in the same kind of zero-sum game. The First Amendment is a subject-matter disability, as opposed to a procedural disability.[72] Instead of qualifying the conduct of governmental affairs, it puts a category of laws beyond the competence of Congress. The disability is so complete that Congress is expressly forbidden to enact laws respecting an establishment of religion, or laws abridging the free exercise of religion, freedom of speech and press, and the right to petition the government.[73] The First Amendment is a rule about rules.[74]

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71. Id. Amends. V, VI.

72. The First Amendment "impose[s] upon the federal government a political duty rather than to confer upon the citizen a constitutional right...." Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash. U. L. Q. 371, 373 (footnote omitted). Alexander Hamilton distinguished between reservation of rights and rights not surrendered. The rights expressed in the proposed Bill of Rights were, in his view, of the latter variety: "[reservation of rights] have no application to constitutions professedly founded upon the power of the people... the people surrender nothing, and as they retain every thing, they have no need of particular reservations." Federalist 84 (Hamilton), in Cooke, ed., *The Federalist Papers* at 578 (cited in note 25). See Herbert J. Stering, *The Constitution and the Bill of Rights*, in Robert A. Goldwin and William Schambra, eds., *How Does the Constitution Secure Rights?* 26-27 (Amer. Enterprise Inst., 1985) (observing that the Federalists saw the Constitution as merely *granting* limited powers to government, thus making the *reservation* of rights in the Bill of Rights a redundancy).

73. By contrast, the rights secured in the remaining amendments do not forbid the passage of laws to define the rights conferred. The Third Amendment contemplates that the quartering of soldiers in time of war be done "in a manner to be prescribed by law." U.S. Const., Amend. III. Congress has, in fact, promulgated laws defining rights found in the Fourth and Fifth Amendments. See, for example, 18 U.S.C. § 3105 (1994) (defining who can serve a warrant in federal searches and seizures); id. § 3501 (regulating the admissability of confessions); id. §§ 6002-05 (providing rules for witness immunity). See also Department of Justice, Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, 22 U. Mich. J. L. Ref. 437, 512-21 (1989) (discussing § 3501).

At least some commentators believe that Congress, independent of its Fourteenth Amendment powers, can also make rules for religious liberty. See Crosskey, 2 *Politics and the Constitution* at 1057 (cited in note 49); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1273 (1992). But see Snee, 1954 Wash. U. L. Q. at 388-89 (cited in note 72) (arguing that Congress was powerless to interfere if states prohibited free exercise of religion).

74. The phrase belongs to John Harrison, who has also been known to refer te the First Amendment as a "meta-rule."

First Amendment rights create "multital" rights, or rights *in rem*. See note 29. The practice of empowering or disabling Congress generally creates multital liabilities, privileges, or immunities. However, once Congress is disabled from doing something it is irrelevant who the

If the First Amendment is a disability, who is possessed of the correlative immunity? The Petition Clause does not keep us in suspense, for it refers to the "right of the people." We assume that the people (considered individually or collectively) are the primary beneficiaries of the prohibitions against congressional laws respecting establishment of religion, prohibiting the free exercise of religion, and abridging the freedom of speech and press. But we have learned to expect more from the Constitution. Had the First Amendment been written as a right of the people ("The right of the people to the free exercise of religion, freedom of speech and press, and to assemble to petition the government for a redress of grievances shall not be violated") we would ask who was disabled. And the matter, following *Barron*, would be clear—as with Amendments Two through Eight, the First Amendment would disable the national government.[75] But that is not what the Amendment says. It says "*Congress* shall make no law." If we have been correct in our parsing of the other provisions in the text, it should not surprise us to discover that the First Amendment protected not only people, but states, and, curiously enough, preserved power in the federal judiciary.[76]

a. "Congress" as Congress, and not the states

The federalism component of the First Amendment is, of course, well-documented. "Congress" meant "Congress" and not the "states." By the time of the drafting of the Bill of Rights, every state

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intended beneficiaries of the clause were; the disability is absolute and works to the benefit of everyone. If the clause names both the party disabled and the party immune, then the disability would be a paucital disability because the disabled party is disabled only as against the party bearing the immunity.

This may help explain the Court's difficulty in dealing with First Amendment standing questions, in particular those brought under the Establishment Clause. Compare, for example, *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), where the Court denied standing to respondents who challenged the constitutionality of a statute allowing the conveyance of federal property to a religious group, with *Flast v. Cohen*, 392 U.S. 83 (1968), where the Court gave standing to petitioners who challenged a statute allowing the disbursement of federal funds to religious schools. Since the First Amendment disables Congress, the stakeholders in such cases include, literally, everyone. For a similar reading, see Robert C. Palmer, *Akhil Amar: Elitist Populist and Anti-textual Textualist*, 16 S.I.U. L. J. 397, 398-400 (1992) ("The Establishment Clause was only a prohibition of congressional powers.... [T]here is no explicit right holder in the Establishment Clause").

75. *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 420 (1819) (asserting that, had the founders intended to restrict Congress's use of the Necessary and Proper Clause, it "would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others . . . no laws shall be passed but such as are necessary and proper' ").

76. See note 105 and accompanying text.

had been through the process of drafting and ratifying some kind of declaration of fundamental rights.[77] Every state except Connecticut had adopted some kind of guarantee of religious freedom.[78] Most states had also guaranteed freedom of speech, press, and petition.[79]

The Founders' debates over the religion provisions[80] show careful attention to the question of the form of the amendment. On August 15, 1789, the House Committee of the Whole considered the proposition "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[81] Peter Sylvester spoke first, concerned that the "mode of expression" might "abolish religion altogether."[82] James Madison replied that he understood the proposal to

77. Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* at 41-77 (Northeastern U., 1983).

78. See *Report to the Attorney General* at 88-104 (cited in note 57) (compiling state guarantees of free exercise). The guarantees offered by the states varied widely, however. In Virginia, the minority Baptists had found sympathetic ears in Jefferson and Madison, who spurred the Virginia Declaration of Rights in 1776. Pennsylvania followed, and others followed Pennsylvania. Id. at 5-6. Massachusetts still had an established church, the Congregational Church. See Jacob C. Meyer, *Church and State in Massachusetts, from 1740 to 1833* at 30-31 (Russell & Russell, 1968). South Carolina on the other hand established the "Christian Protestant religion," without expressing a preference for any particular Protestant sect. S.C. Const. of 1778, Art. XXXVIII.

The delegates representing these states were generally agreed that *Congress* should make no law respecting religion, but there was no consensus—and no occasion or attempt to reach consensus—as to what any particular state, or the states generally, should do. Delegates were more than willing to maintain the status quo, permitting each state to choose for itself the best course, so long as the remaining states did not try to enforce a single rule.

79. By 1789, nine states had press clauses guaranteeing freedom of the press. See David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455, 464-66 (1983). See also id. at 538-41 (listing state provisions); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U. L. Rev. 1156, 1173-74 n.80 (1986) (summarizing state constitutional protections).

80. We do not have the benefit of the discussions over the form of the speech, press, and petition provisions. The House draft read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for the redress of grievances, shall not be infringed." 1 The Debates and Proceedings in the Congress of the United States 731 (Gales & Seaton, 1834) ("Annals of Cong.") (Aug. 15, 1789). Because the debates of 1789 are found in two different reports, each with its own pagination, this Article follows the citation of volume one with the exact date. The Senate put the amendment in the form "Congress shall make no law . . . ." 1 Journal of the Senate 104 (1789) (Glazier, 1977) ("Senate Journal"). The form was consistent with the religion clauses, and the two proposed amendments were eventually combined in one. Anderson, 30 U.C.L.A. L. Rev. at 477-82 (cited in note 79).

81. 1 Annals of Cong. at 729 (cited in note 80) (Aug. 15, 1789). For discussion of the debates, see Thomas J. Curry, *The First Freedoms* 193-222 (Oxford U., 1986); Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 3-17 (Amer. Enterprise Inst., 1978); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and A Critique of the* Reynolds *and* Everson *Decisions*, 20 Wake Forest L. Rev. 569, 604-20 (1984). See also *Lee v. Weisman*, 112 S. Ct. 2649, 2668-70, 120 L. Ed. 2d 467 (1992) (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 92-104 (1985) (Rehnquist, J., dissenting).

82. 1 Annals of Cong. at 729 (cited in note 80) (Aug. 15, 1789).

mean "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[83] Benjamin Huntington agreed with Madison's interpretation, but feared that "others might . . . put another construction upon it."[84] Madison then suggested adding the word "national" before the term "religion."[85] Massachusetts delegate Elbridge Gerry objected to the term "national" because it justified the anti-federalists' claim that "this form of Government consolidated the union," creating a national government rather than a federal one.[86] Samuel Livermore recommended that the proposal read, "Congress shall make no laws touching religion, or infringing the rights of conscience"[87]—language very similar to a proposal originally submitted by the New Hampshire ratifying convention.[88]

Two days later the Committee considered inserting a different proposition in Article I, Section 10: "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press . . . ."[89] Thomas Tucker of South Carolina opposed the proposition on the grounds that it would be "much better . . . to leave the State Governments to themselves and not to interfere with them more than we already do."[90] Madison objected that this was "the most valuable amendment on the whole list" and that it was "equally necessary" to secure these rights against the states.[91] The amendment survived in the House, only to have the Senate vote it down.

On August 20, the amendment moved closer to its present form. Without recorded explanation or discussion, the House approved Fisher Ames's motion to change the proposal to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the right of conscience."[92] As in the House, the Senate debates were "a discussion about style, not

83. Id. at 730.
84. Id.
85. Id. at 731.
86. Id. The term "national" was particularly inflammatory and appears nowhere in the original Constitution. See Malbin, *Religion and Politics* at 10 (cited in note 81).
87. 1 Annals of Cong. at 731 (cited in note 80) (Aug. 15, 1789).
88. 1 Elliot's *Debates* at 326 (cited in note 4).
89. 1 Annals of Cong. at 755 (cited in note 80) (Aug. 17, 1789).
90. Id.
91. Id.
92. Id. at 766 (Aug. 20, 1789).

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substance" in which "the Senate manifested its concern for form."[93] While the Senate amended the "rights of conscience" language, it maintained the form "Congress shall make no law."[94]

The House and Senate Conference approved in large measure the Ames proposal, with one significant change. It added the words "respecting an establishment of religion" in place of "establishing religion."[95] This change broadened the scope of the First Amendment to satisfy the concerns of the anti-federalists because the term "respecting an establishment" not only prohibited Congress from making laws which tended to establish religion, but prohibited second-tier laws about the establishment of religion.[96] The latter ensured that Congress could not dis-establish religion any more than it could establish it;[97] it placed the matter of religious establishment beyond Congress's competence. The state ratifying conventions offered little commentary on the new First Amendment.[98] The records we have suggest the First Amendment applied only to Congress, and the general lack of interest confirms that the Founders had successfully deferred the difficult questions of the content of freedom of expression to other fora, the states.[99]

b. "Congress" as Congress, and not the federal judiciary

Less obvious, but equally important, is the proposition that the Founders meant "Congress" and not the President or the federal judiciary. The point has been infrequently noted,[100] and even where

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93. Curry, *The First Freedoms* at 213 (cited in note 81).

94. 1 Senate Journal at 104 (cited in note 80); Malbin, *Religion and Politics* at 12-13 (cited in note 81).

95. Malbin, *Religion and Politics* at 13 (cited in note 81).

96. Id. at 15; Leonard W. Levy, *The Establishment Clause* 95 (MacMillan, 1986).

97. This observation has been made by a number of commentators. See, for example, Crosskey, 2 *Politics and the Constitution* at 1074 (cited in note 49); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 321-22 (1986); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L. J. 65, 85 (1962); Snee, 1954 Wash. U. L. Q. at 385 (cited in note 72).

98. See Chester J. Antien, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment* 145 (Bruce Pub., 1964) (quoting *Journal of the Senate of Virginia for 1789* at 51) (the First Amendment "goes to restrain Congress . . ."). See also id. at 153 (quoting Robert C. Cotner, ed., *Theodore Foster's Minutes of the Convention . . . at South Kingston, Rhode Island, in March, 1790* at app.93-98 (1929)) (echoing Madison's suggestion that if Congress cannot make laws respecting religion, states should not be able to either).

99. Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 224-33 (Harvard U., 1963).

100. The most important work on this point to date is Professor Denbeaux's, *The First Word of the First Amendment*, 80 Nw. U. L. Rev. 1156 (cited in note 79). See also *Report to the*

noted, it is often assumed to be of no consequence.[101] That it was significant is evident from Representative Huntington's response to Madison's proposal, which began "no religion shall be established by law . . . ."[102] Huntington protested that this language might be "extremely hurtful to the cause of religion"[103] because it might forbid federal courts from enforcing contracts between ministers and their congregations. According to Huntington:

> The Ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could

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Attorney General at 17 n.25 (cited in note 57); Leo Pfeffer, *Church, State & Freedom* 115-16 (Beacon Press, 1953); Palmer, 16 S.I.U. L. J. at 400 n.15 (cited in note 74); Leonard W. Levy, *On the Origins of the Press Clause*, 32 U.C.L.A. L. Rev. 177, 206-07 (1984); Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461, 465 (1953).

101. See, for example, Pfeffer, *Church, State & Freedom* at 117 (cited in note 100) (stating that there is "no indication in any of the debates or writings that the purpose of the stylistic change was to leave the executive and judicial branches of government free of the restriction imposed on the Congress"); Levy, *Legacy of Suppression* at 233-34 (cited in note 99) ("[T]he prohibition on power was imposed exclusively upon *Congress*," hut "the Framers did not say what they meant"); Amar, 101 Yale L. J. at 1274 (cited in note 73) ("To be sure, the Amendment speaks only of 'Congress'; but any . . . inference that citizens therefore lack analogous rights against the President or federal judges—or states—flies in the face of the Ninth Amendment"); Anderson, 30 U.C.L.A. L. Rev. at 501 (cited in note 79) ("It is conceivable . . . that addition of the reference to Congress had no significance whatsoever"). See also *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting) ("The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments—Legislative, Executive and Judicial. . . . [C]onstitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment"); *Magill v. Brown*, 16 F. Cases 408, 427 (C.C.E.D. Pa. 1833) (holding that the First Amendment "wholly prohibits the action of the legislative or judicial power of the Union on the subject matter of a religious establishment, or any restraint on the free exercise of religion").

Leonard Levy seems to have backed away from his original conclusion. See Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* lv (Bobbs-Merrill, 1966) (asserting that the First Amendment applies te Congress only); Leonard W. Levy, *The* Legacy *Reexamined*, 37 Stan. L. Rev. 767, 767 (1985) (same); Levy, 32 U.C.L.A. L. Rev. at 206-07 (cited in note 100) (same).

102. 1 Annals of Cong. at 729 (cited in note 80) (Aug. 15, 1789). Virginia originally proposed that the freedom of the press "cannot be cancelled, abridged, restrained, or modified, *by any authority of the United States*." 3 Elliot's *Debates* at 656 (cited in note 4) (emphasis added). From this, Levy concludes that the change to "Congress" was deliberate. See, for example, Levy, 32 U.C.L.A. L. Rev. at 207 (cited in note 100).

103. 1 Annals of Cong. at 730 (Aug. 15, 1789) (cited in note 80).

> not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.[104]

Livermore followed shortly with the proffer of "Congress shall make no law."

The Founders' insertion of the word "Congress" was "an intentional act, specifically designed to assure that the federal courts, unlike Congress, could act without constitutional restriction."[105] While members of the House were concerned with the relationship between Congress and religion, the Senate apparently had broader concerns and imported the disabilities on "Congress" to press and speech.[106] Even this change was not poor drafting, but a conscious attempt to forestall legislative prior restraints of speech, while leaving the judiciary free to issue injunctive prior restraints when equity so required.[107] At the same time, the lack of a disability on the judiciary would have permitted federal courts to enforce state guarantees of freedom of religion and expression in cases properly within their jurisdiction.

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104. Id. See Howe, *The Garden and the Wilderness* at 22-23 (cited in note 30) (arguing that the House intended to disable only Congress so as not to "deprive the federal courts of power to respect state law when it happened to sustain a religious enterprise").

105. Denheaux, 80 Nw. U. L. Rev. at 1169 (cited in note 79). See Levy, *Freedom of the Press* at lvii-lviii (cited in note 101) (maintaining that courts had Article III jurisdiction even though Congress could not enact a law against the press). See also Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Poly. 196, 199, 211-14 (1991). The First Amendment would theoretically free the executive to infringe free exercise, speech, press, and petition rights. But there is almost no threat in the executive because the President's so-called enumerated powers provide no occasion to infringe such rights and his Take Care responsibilities, U.S. Const., Art. II, § 2, cl. 2, derive from the powers of Congress. See Denbeaux, 80 Nw. U. L. Rev. at 1158 n.1 (cited in note 79). See also Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L. J. 51, 98-103 (1994) (discussing the relationship between Congress and the Take Care Clause and the President's enumerated powers).

106. 1 Senate Journal at 70-71 (cited in note 80). See Denbeaux, 80 Nw. U. L. Rev. at 1169-70 (cited in noto 79) (asserting that the Senate extended protection to speech and press as well as religion); Anderson, 30 U.C.L.A. L. Rev. at 481 (citod in note 79) (maintaining that the Senate included speech and press in the domain of protection).

107. Denbeaux, 80 Nw. U. L. Rev. at 1173, 1176, 1192, 1196, 1201 (cited in note 79). As Professor Denbeaux observes, "during the prerevolutionary colonial era and during the preconstitutional period, the main threat to freedom of speech was not from the courts, but from the legislature." Id. at 1173-74. But see 4 Elliot's *Debates* at 541 (cited in note 4) (quoting the Kentucky Resolution of 1798, which was drafted by Thomas Jefferson) ("[L]ibels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals").

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3. Reconciling Text and Theory

It is an irony of the First Amendment that matters such as religious freedom, free speech, and the press—matters which have proven so divisive to us—should have been the object of so little disagreement among the Founders. Despite deep differences between federalists and anti-federalists over the need for a Constitution, they at least agreed that, given a constitution creating a federal government, the new government did not possess "a shadow of right . . . to intermeddle with religion."[108] The disagreement was whether the Constitution should *say* so. James Madison,[109] Alexander Hamilton,[110] and others[111] contended that since Congress had been granted no power to establish a religion or to restrict freedom of religious exercise, speech, and press, no bill of rights was necessary. Hamilton warned that a bill of rights was "not only unnecessary . . . but dangerous. [It] would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted."[112]

Madison recognized the political expediency of acquiescing to the demands for a bill of rights in order to secure ratification of the Constitution.[113] Because he continued to believe the federal government lacked any power to address religion, speech, or press, he had little incentive to be terribly attentive to the language of the new

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108. 3 Elliot's *Debates* at 330 (cited in note 4) (statement of James Madison).

109. Id.

110. Federalist 84 (Hamilton), in Cooke, ed., *The Federalist Papers* at 578-80 (cited in note 25).

111. 4 Elliot's *Debates* at 194 (cited in note 4) (statement of James Iredell); 3 *Elliot's Debates* at 469 (statement of Edmund Randolph) ("No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion"). For a similar argument, see Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* at 617-18 (Yale U., 1937) (statement of Roger Sherman) (opposing a guarantee of "liberty of the Press": "It is unnecessary—The power of Congress does not extend to the Press").

112. Federalist 84 (Hamilton), in Cooke, ed., *The Federalist Papers* at 679 (cited in note 25). He emphasized that a hill of rights might afford

> a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power te prescribe proper regulations concerning it, was intended to be vested in the national government.

Id. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. Chi. L. Rev. 775, 853 (1994).

113. For an interesting related discussion, see Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1248-51 (1990) (discussing Federalist concerns over enumerated rights).

amendment.[114] For Madison, it was more important that the delegates reach some agreement than that they reach a precise result. Moreover, the form of the new amendment eliminated the need for agreement among the delegates as to the substance of religious liberty or freedom of expression; they simply reduced their various views to their least common denominator, that Congress would lack the power to affect the content of religious liberty in the states.[115] This history also explains why Madison considered the proposed amendment forbidding the states from interfering with religious liberties to be the "most valuable" proposal on the list.[116] In Madison's view, our First Amendment only confirmed Congress's lack of an enumerated power over religion and expression. A restraint on the states, however, was the one guarantee that would have actually worked a substantive change in the structure of the Constitution.

The First Amendment was a promise to people and states of non-interference with the content of religious and expressive freedom and establishment in the states. While the Establishment Clause quite clearly prohibited Congress from enacting any laws "respecting" establishment, the Free Exercise, Free Speech, and Free Press Clauses seemed to disallow only such laws as "prohibit[ed]" or "abridg[ed]" those freedoms,[117] a difference which, we will see, was seized upon in the Sedition Act debates.[118] The Amendment also re-

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114. See Leonard W. Levy, *Original Intent and the Framers' Constitution* 179-80 (MacMillan, 1988) (noting that Madison routinely misquoted the First Amendment); Malbin, *Religion and Politics* at 8 (cited in note 81) (observing that Madison sometimes misquoted his own proposed amendments). See also Curry, *The First Freedoms* at 216 (cited in note 81) ("Because it was making explicit the non-existence of a power, . . . Congress approached the subject in a somewhat hasty and absentminded manner. To examine the two clauses of the amendment as a carefully worded analysis of Church-State relations would be to overburden them").

115. Jefferson characterized the First Amendment as securing exclusive power in the states. In the Kentucky Resolutions of 1798 and 1799, which Jefferson authored, he argued that the absence of delegated power to Congress, plus the First and Tenth Amendments, "manifested [the states'] determination to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom." 4 Elliot's *Debates* at 540-41 (cited in note 4). See also Thomas Jefferson, *Second Inaugural Address* (March 4, 1805), in James D. Richardson, ed., 1 *Messages and Papers of the Presidents* 366, 367-68 (Bureau of National Literature, 1912) ("In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies").

116. 1 Annals of Cong. at 755 (cited in note 80) (Aug. 17, 1789). This may also explain why Madison was so imprecise in his subsequent references to the amendment.

117. See McConnell, 103 Harv. L. Rev. at 1485-88 (cited in note 48) (discussing the use of the two different terms); *Report to the Attorney General* at 17-19 (cited in note 57) (same).

118. See notes 125-29 and accompanying text.

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flects a broader sentiment, one not shared by more liberal thinkers such as Jefferson or Madison, that religion, in order to prosper, required the encouragement and support of government.[119] As Joseph Story put it, "it is the especial duty of government to foster and encourage [Christianity] among all the citizens and subjects."[120] The Founders had no intention of broaching the difficult and divisive question of the role of state and local government in the promotion of religion. There were obvious regional and sectarian differences that the Founders simply avoided altogether. The Founders had their substantive views of church and state, of course, but they did not codify their views in the Bill of Rights. Thus, no coherent theory of the religious liberty or freedom of expression can be drawn from the text or the history of the First Amendment; such questions were deliberately deferred to the states. The First Amendment was the least common denominator; it was simply jurisdictional.[121]

From the states' perspective, the First Amendment successfully codified the lack of federal power over state-church relations. For them the principal guarantee was the Establishment Clause. Religious establishment and religious free expression were inextricably connected in the states. Whatever freedom in religious practices the states guaranteed was subject to the state's decision to establish religion, in varying degrees. In other words, the free exercise of religion in the states was subject to whatever orthodoxy in religious practices the state prescribed. If Congress was forbidden to interfere with the establishment or disestablishment of religion, it was effectively prohibited from interfering with state laws granting or

119. See Curry, *The First Freedoms* at 203 (cited in note 81) (discussing Huntington's argument that because religion was necessary for a civil society, the states should promote it, and that doing so was acceptable so long as no one was forced to pay to support a religion other than his own); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* at 427-28 (U. N.C., 1969) (observing that Massachusetts intentionally promotod and encouraged religion for the good of the people); Howe, *The Garden and the Wilderness* at 26-29 (cited in note 30) (noting that religion often received promotion from the government). Mark DeWolfe Howe concludes that "the federalism of the First Amendment may be even more important than its libertarianism." Id. at 29.

120. Joseph Story, 2 *Commentaries on the Constitution* § 1871 at 661 (Little, Brown, 3rd. ed. 1858). See also id. §§ 1867-68 at 724-26; Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 444 (Harper & Row, 1859) (asserting that governmental encouragement of religion was essential); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (commenting that although all men are entitled to the free exercise of religion, the legislature should be able to promote all sects of religion by giving the sects corporate rights).

121. Smith, *Foreordained Failure* at 18-26 (cited in note 17).

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restricting free exercise as well.[122] Since there was no disability analogous to the Establishment Clause for press and speech, it is questionable whether the First Amendment dispossessed Congress of any power to pass laws respecting speech and press. For such guarantees the states would have to rely on the absence of power conferred in Article I, not on the First Amendment.[123]

In sum, the Founders' First Amendment reaffirmed, above all else, exclusive state control of religious freedom. It also guaranteed the freedom of expression against federal suppression. Additionally, it ensured that the federal judiciary was not prevented from enforcing obligations under state law affecting religious organizations, free exercise of religion, and freedom of speech and press.[124] Those objectives could not have been better achieved than through a provision which began "Congress shall make no law . . . ."

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122. Id. at 36-37. The Free Exercise Clause was not, in the main, a guarantee to the states of non-interference with their free exercise laws; that was accomplished through the Establishment Clause. Nonetheless, the Free Exercise Clause served an essential, although unacknowledged function. It guaranteed federal religious freedom with respect to those things over which Congress legitimately exercised exclusive power: the military, the territories, and the District of Columbia. See, for example, *Goldman v. Weinberger*, 475 U.S. 50 (1986) (military); *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (territories); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (District of Columbia). See also Smith, *Foreordained Failure* at 27 (cited in note 17) (discussing the view that Congress's retention of power over religion in the territories and the District of Columbia established a "substantive right or principle of religious freedom applicable to the national government"); McConnell, 103 Harv. L. Rev. at 1477-79 (cited in note 48) (discussing the fear of the free exercise amendment proponents that Congress would exercise "plenary regulatory authority" over religion in the territories, the District of Columbia, and the military). The Court noted in *Cohens*, 19 U.S. (6 Wheaton) at 426, that there were acts beyond Congress's powers when directed against the states that were within Congress's powers when directed to the District of Columbia or the territories. See also *United States v. Dewitt*, 76 U.S. (9 Wallace) 41, 44-45 (1869) (holding that the regulation of internal state trade was outside of congressional power except where Congress's legislative authority is exclusive, as in the District of Columbia).

123. This view is, perhaps, not as naïve as it might seem. Professor Mayton, for instance, suggests that the Treason Clause, U.S. Const., Art. III, § 3, omitted reference to constructive treason, and "thereby bar[red] the federal government from making dissident speech a crime." William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 115 (1984). See also id. at 118 (discussing the Copyright Clause as the sole exception to the prohibition on Congress's power to interfere with freedom of press).

124. See note 105.

C. The First Amendment in the Interregnum: Government Disability or Personal Privilege?

1. The First Amendment in Congress: The Sedition Act Debates

Madison's carefully knit coalition unraveled quickly in debates over the Sedition Act of 1798,[125] as new interpretations crept into discourse on the First Amendment. The Federalists, seeking to shield themselves and President John Adams from criticism, argued that the measure of Congress's power to pass the Act was whether seditious utterings were comprehended in the term "freedom of speech, or of the press." The Federalists found ample power in the Necessary and Proper Clause to punish seditious libel.[126] The First Amendment, the Federalists argued, did not confirm the absence of enumerated power to legislate on the subject of speech and press, but was an independent disability, and one that protected individuals, not states. "This freedom . . . is nothing more than the liberty of writing, publishing, and speaking, one's thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual . . . ."[127] Accordingly, the national government "must [not] be indebted to and dependent on an individual State for its protection . . . ."[128] The Federalists claimed that the Sedition Act was "perfectly harmless" as a federal analog of state statutes: it "contain[ed] no provision which is not practised upon under the laws of the several States . . . from which [the Founders] had drawn most of their ideas of jurisprudence."[129]

The outnnmbered Republicans vociferously opposed the measure, but resisted arguing the matter on the Federalist's terms. The real issue for the Republicans was not what comprised the freedoms of speech and press, but whether Congress had any power at all in these areas. Any law might incidentally affect speech and press, but

125. Sedition Act of 1798, ch. 74, 1 Stat. 596. The Sedition Act made criminal the "writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . ." Id. at 596-97.

126. 2 Annals of Cong., 5th Cong., 2d Sess 2167 (1798) (statement of Rep. Harper) ("[C]an the powers of a Government be carried into execution, if sedition for opposing its laws, and libels against its officers, itself, and its proceedings, are to pass unpunished?").

127. Id. at 2148 (statement of Rep. Otis).

128. Id. at 2146.

129. Id. at 2145. See id. at 2147-48 (citing examples of state regulation of political speech).

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the Sedition Act was, after all, a law about speech and press, and *that* Congress had no power to enact. "[W]hen the Constitution had not an express provision on the subject of the liberty of the press, the understanding of the members of the convention was complete on the subject . . . ," but to make matters clear Congress and the states added "the most express terms" in the form of the First Amendment.[130] Republicans admitted that states did have similar libel laws, but far from showing that the national government possessed the same power, as the Federalists had argued, it demonstrated that the national government was dependent on the states for protection.[131] Finally, the Republicans pointed out that the Sedition Act conflicted with the separation of functions; that whatever power *federal courts* might have to enforce the common law of libel, *Congress* was forbidden to legislate here.[132] Despite Republican arguments, the Sedition Act passed along party lines.[133]

The Sedition Act spawned vigorous objection from Virginia and Kentucky, which urged its repeal. In the Virginia debates, John Marshall took up the Federalists' arguments, although he found himself in the minority. According to Marshall, the amendment itself was proof of the existence of Congress's power, since "[i]t would have

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130. Id. at 2142, 2151-53, 2159-60 (statements of Rep. Nicholas, Rep. Macon, Rep. Livingston, and Rep. Gallatin). See also 3 Annals of Cong., 6th Cong., 1st Sess. 3014 (1799) (statement of Rep. Nicholas). Members argued that if Congress possessed the power to enact the Sedition Act, it might as well establish a national religion. 2 Annals of Cong. at 2151, 2153 (cited in note 126) (statements of Rep. Macon and Rep. Livingston).

Rep. Gallatin addressed specifically the claim that Congress found its power in the Necessary and Proper Clause:

> [The Necessary and Proper Clause] was strict and precise; it gave not a vague power, arbitrarily, to create offenses against Government, or to take cognizance of cases which fall under the exclusive jurisdiction of the State courts. In order to claim any authority under this clause, the supporters of this bill must show the specific power given to Congress or to the President, by some other part of the Constitution . . . .
>
> [T]he bill now under discussion justified the suspicions of those who, at the time of the adoption of the Constitntion, had apprehended that the sense of that generally expressed clause might be distorted for that purpose. It was in order to remove these fears, that the [First] amendment . . . was proposed and adopted.

Id. at 2159. See also 3 Annals of Cong. at 2994, 3003-05 (statement of Rep. Gallatin); 1 Annals of Cong. at 730 (cited in note 80) (statement of James Madison) (Aug. 15, 1789); 4 Elliot's *Debates* at 568, 573 (cited in note 4) (Madison's *Report on Virginia's Resolution*); Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers, *and the Big Argument for Union,* 16 Harv. J. L. & Pub. Pol. 111, 115 (1993) (stating that the First Amendment "intentionally inverted the language of the Necessary and Proper Clause").

131. 2 Annals of Cong. at 2151-54 (cited in note 126) (statements of Rep. Macon and Rep. Livingston).

132. "The question was not whether the Courts of the United States had, without this law, the power to punish libels, but whether, supposing they had not the power, Congress had that of giving them this jurisdiction—whether Congress were vested by the Constitution with the authority of passing this bill." Id at 2157-58 (statement of Rep. Gallatin).

133. Id. at 2171.

been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press, if the power itself does not exist."[134] He then urged that the authors of the First Amendment, having "well weighted" the different terms, "manifest a difference of intention":

> Congress is prohibited from making any law RESPECTING a religious establishment, but not from making any law RESPECTING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropt, and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression to religion and the press, manifests a difference of intention with respect to the power of the national legislature over those subjects, both in the person who drew, and in those who adopted this amendment.[135]

Madison, the author of the Virginia Resolution, replied to Marshall that Virginia ratified the original Constitution on the express understanding that "the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."[136] "Words," Madison said, "could not well express, in a fuller or more forcible manner . . . that the liberty of conscience and freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."[137] Jefferson, the author of the Kentucky Resolution, stated:

> [N]o power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people.[138]

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134. John Marshall, *Report of the Minority on the Virginia Resolutions*, reprinted in Philip B. Kurland and Ralph Lerner, eds., 5 *The Founders' Constitution* 136, 137 (U. Chicago, 1987). See also *Case of Fries*, 9 F. Cases 826, 839 (C.C.D. Pa. 1799) (James Iredell's charge to the Grand Jury) ("[C]ongress may make a law respecting the press, provided the law be such as not to abridge its freedom"), reprinted in Kurland and Lerner, 5 *The Founders' Constitution* at 140.

135. Marshall, *Report of the Minority* at 138 (cited in note 134).

136. 4 Elliot's *Debates* at 576 (cited in note 4) (quoting the Virginia Resolution). See also id. at 572-73 (debating the constitutional effect of expressly excluding authority over the press from the government).

137. Id. at 576. See Levy, *Freedom of the Press* at lvi-lvii (cited in note 101) (stating that the amendment was intended to ensure that Congress would not use its delegated powers to infringe upon the freedom of speech and of the press); McConnell, 103 Harv. L. Rev. at 1487-88 (cited in note 48) (discussing the restrictive scope of the word "abridging" in the portions of the First Amendment relating to freedom of speech and of the press).

138. 4 Elliot's *Debates* at 540 (cited in note 4). In a letter to Abigail Adams in 1804, Jefferson referred te the Sedition Act and offered: "While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their

The House of Representatives referred the Kentucky and Virginia Resolutions to a select committee, whose report echoed prior arguments, and added that of John Marshall:

> [In the First Amendment] is manifest that the Constitution intended to prohibit Congress from legislating at all on the subject of religious establishments, and the prohibition is made in the most express terms. Had the same intention prevailed respecting the press, the same expressions would have been used, and Congress would have been "prohibited from passing any law respecting the press." [Congress is] not, however, "prohibited" from legislating at all on the subject, but merely from abridging the liberty of the press. It is evident they may legislate respecting the press [and] may pass laws for its regulation . . . provided those laws do not abridge its liberty.[139]

The Republican minority assailed the notion of a "boundary between what is prohibited and what is permitted. The Constitution has fixed no such boundary; therefore, they can pretend to no power over the press, without claiming the right of defining what is freedom."[140] Voting along party lines, Congress adopted a resolution finding it "inexpedient" to repeal the Sedition Act.[141]

The legacy of the Sedition Act is a modest, but perceptible, shift from viewing the First Amendment as confirming the total absence of congressional power over religion, speech, and press, to assuming that, like the remaining guarantees in the Bill of Rights, the First Amendment conferred a personal privilege whose substantive content could be defined.[142] As Mark DeWolfe Howe pointed out, "a

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exclusive right, to do so." Quoted in *Dennis v. United States*, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring).

139. 3 Annals of Cong. at 2990 (cited in note 130).

140. Id. at 3011 (statement of Rep. Nicholas). Rep. Nicholas argued that to distinguish "abridging" from "respecting" as the Federalists had done "implie[d] that freedom of the press was before limited," and, more significantly, that Congress possessed the same power to define the right of petition to Congress itself. Id.

141. Id. at 2992-93 (outlining the resolution), 3016-17 (providing results of the vote).

142. As Professor Anderson noted, the Sedition Act was consistent with the separation of powers component in the First Amendment in the sense that a criminal law was not a prior constraint. But the Act was plainly inconsistent with the idea that "Congress had no legitimate power to pass *any* law respecting the press." Anderson, 30 U.C.L.A. L. Rev. at 522-23 (cited in note 79). See L.A. Scot Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 48 (U. Cal., 1991) (noting that in the Sedition Act debates, "the Supreme Court, historians and lawyers would ask of the First Amendment a question it was not intended to answer: what did the First Amendment say about the scope of freedom of the press? The First Amendment was not intended to answer that question, because the question was left entirely to the states"); Mayton, 84 Colum. L. Rev. at 124-25 (cited in note 123) (discussing the effect of the Sedition Act debates on the subsequent construction of the First Amendment; Federalist arguments "stood [the First Amendment] on its head"). See also Leonard W. Levy, *"Bill of Rights,"* in Jack P. Greene, ed., 1 *Encyclopedia of Amerieon Political History* 104, 123 (Scribner's, 1984) ("The framers meant Congress to he totally without power to enact legislation respecting the press, although the First Amendment does not say so").

crisis which seems to us to have been concerned with freedom seemed to the statesmen of 1798 to be a crisis in federalism,"[143] and, I would add, in separation of powers. It emphasized the inevitability of defining the boundaries between Congress and the states and Congress and the federal judiciary with respect to freedom of religion, speech, and press. It was the beginning of a shift from seeing the First Amendment as a governmental disability to a personal immunity, from affirming an exclusive power in the states to stating a personal privilege.

2. The First Amendment in the Supreme Court

Between ratification of the Bill of Rights in 1791 and ratification of the Fourteenth Amendment in 1868, there were few decisions in the United States Supreme Court even mentioning the guarantees of the First Amendment. The first Supreme Court decision to analyze substantively any First Amendment guarantee was not until 1879 in *Reynolds v. United States*.[144]

Twelve years after the Supreme Court ruled in *Barron* that the Fifth Amendment bound only the federal government,[145] the Court heard its first claim to federal guarantees of religious freedom.[146] In

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143. Mark DeWolfe Howe, Book Review, 66 Harv. L. Rev. 189, 190 (1952) (reviewing John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Little, Brown, 1951)). See Walter Berns, *Frcedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 S. Ct. Rev. 109, 121-22 (asserting that Republicans in Congress "were not contending for free speech and press; they were contending for states' rights, for the right of the states to punish seditious libel").

144. 98 U.S. 145 (1879). See text accompanying notes 299-302.

145. *Barron* was followed by *Withers v. Buckley*, 61 U.S. (20 Howard) 84, 90 (1858) (concerning the Fifth Amendment); *Lessee of Livingston v. Moore*, 32 U.S. (7 Peters) 469, 551-52 (1833) (concerning the Ninth Amendment).

146. The Court had previously decided two cases affecting religious establishment, but not involving the First Amendment. In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), the Episcopal Church in Virginia, through Taylor, claimed title to real property that it had been granted in 1776, but which had been the subject of incorporation in 1784. The law incorporating the Episcopal Church was repealed in 1798 as "inconsistent with the principles of the constitution and of religious freedom," id. at 48, and in 1801 Virginia claimed the property of all Episcopal churches. Terrett, representing Fairfax County, asserted a claim under the 1801 statute and sought te sell the lands for the benefit of the poor. The Court held for Taylor on the grounds that the property properly belonged to the church in 1798, finding that by 1801 the church's property no longer lay within Virginia, but belonged to the County of Alexandria in the new District of Columbia. Id. at 52-55.

The Court also rejected the claim that the acts returning title to the church violated Virginia's bill of rights. "Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives .... But the free exercise of religion cannot he justly deemed to be restrained by aiding

Permoli v. First Municipality,[147] a Roman Catholic Priest, Bernard Permoli, was convicted of violating a New Orleans municipal statute forbidding the exposure of any corpse in any Catholic church except an obituary chapel.[148] Permoli argued that the Northwest Ordinances of 1787,[149] guaranteed to the "people and states in said territory" that "[n]o person . . . shall ever be molested on account of his mode of worship or religious sentiments."[150] From this he argued that "[t]he United States have guarantied, to their inhabitants, religious liberty; as absolutely as they have republican government to us all."[151] Permoli further relied on the organic act admitting Louisiana to the union,[152] which provided that Louisiana's constitution must "contain the fundamental principles of civil and religious liberty."[153]

The one argument Permoli had not made was that the statute violated the First Amendment. Counsel for New Orleans nevertheless answered that the city ordinance was not "repuguan[t] to the [federal]

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with equal attention the votaries of every sect . . . ." Id. at 49. See Currie, 49 U. Chi. L. Rev. at 901-05 (cited in note 63) (analyzing the Court's rationale in *Terret*).

In *Vidal v. Girard's Executors*, 43 U.S. (2 Howard) 127 (1844), Girard left a substantial devise for the establishment of a school for orphans in Philadelphia, but provided that "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college." Id. at 133. Girard's heirs at law challenged the devise on the grounds that it violated Pennsylvania public policy. The Court upheld the devise, finding narrowly that it did not prohibit the teaching of Christianity entirely, only teaching by clerics. Id. at 199. In the process the Court acknowledged that "the Christian religion is a part of the common law of Pennsylvania." Id. at 198.

147. 44 U.S. (3 Howard) 589 (1845).

148. Id. at 590. The city alleged that the measure helped prevent the spread of yellow fever. The ordinance affected only Municipality No. 1, a sector of New Orleans which was predominantly Catholic. Counsel for the city suggested that Catholic congregations traditionally held an open casket service at the church, while the Protestants usually held their services at the cemetery. Id. at 600-01.

149. Act to Provide for the Government of the Territery Northwest of the river Ohio, 1 Stat. 50 (1789).

150. 44 U.S. (3 Howard) at 594 (quoting the Northwest Ordinance of 1787, 1 Stat. at 51-52 n.(a)).

151. 44 U.S. (3 Howard) at 595. The analogy between the religion clause of the Northwest Ordinance and the Guaranty Clause of the Constitution, U.S. Const., Art. IV, § 4, was an ironic choice. During the ratification debates in North Carolina, James Iredell addressed the question of "what is the meaning of that part, where it is said that the United States shall *guaranty* to every state in the Union a republican form of government, and why a *guaranty* of religious freedom was not included." 4 Elliot's *Debates* at 195 (cited in note 4). He explained that the Guaranty Clause was "inserted to prevent any state from establishing any government but a republican one. . . . Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence te interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles." Id.

152. Act to Enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the other states, and for other purposes, 1 Stat. 641 (1811).

153. Id. at 642, quoted in *Permoli*, 44 U.S. (3 Howard) at 595.

constitution, because no provision thereof forbids the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the states."[154] Counsel then argued that, whatever restrictions Congress might have imposed on territories, once admitted to the union, Louisiana stood on equal terms with other states.[155]

The Court dismissed the suit for want of jurisdiction for failure to state a claim under the Constitution or laws of the United States.[156] The matter, the Court found, did not arise under the Constitution: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[157] The Court turned to whether the Northwest Ordinances or statutes under which the union admitted Louisiana were a *federal* guarantee of religious liberty. The Court agreed with the city that once Louisiana was admitted to the union, religious liberties, as "political rights," were secured, if at all, by the state constitution.[158] The question presented was "exclusively of state cognisance."[159] Missing from the Court's discussion was any reference to *Barron*.[160]

In June 1865, at the close of the Civil War, the state of Missouri amended its constitution to require an oath averring that the person swearing the oath had never been in "armed hostility to the United States," "manifested his adherence to cause of such enemies," or "knowingly and willingly barbored, aided, or countenanced any person so engaged."[161] Any person unable to take the oath should

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154. *Permoli*, 44 U.S. (3 Howard) at 606.

155. Id. at 606-07.

156. Id. at 610. See Judiciary Act of 1789, § 25, 1 Stat. 73, 85-87 (granting the Supreme Court appellate jurisdiction over state supreme court cases in which the exercise of authority by a state is thought to be repugnant to the Constitution or laws of the United States).

157. *Permoli*, 44 U.S. (3 Howard) at 609.

158. Id. at 610.

159. Id.

160. *Permoli* was hardly a reaffirmation of *Barron*. In contrast to the current view, see Amar, 101 Yale L. J. at 1202-03 & n.43 (cited in note 73) (citing *Permoli* as one of many cases following *Barron*), *Permoli* really had nothing to do with *Barron*, and the Court treated the cases that way. It seems unlikely that *Barron* was decided in anticipation of *Permoli*, or some other First Amendment concern. But see Michael Kent Curtis, *No State Shall Abridge* 23 (Duke U., 1986) ("*Barron* avoided troubling questions.... It left southern states free to suppress speech and press on the question of slavery").

161. Mo. Const. of 1865, Art. II, §§ 3, 7, reprinted in Benjamin Perley Poore, ed., 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1136, 1139-40 (Burt Franklin, 2d ed. 1876). See *Cummings v. Missouri*, 71 U.S. (4

not hold "any office of honor, trust or profit," including "acting as a professor or teacher in any education institution" or "holding any real estate or other property in trust for the use of any church, religious society, or congregation."[162] In September, 1865, a Missouri jury convicted Reverend Cummings, a Roman Catholic priest, of failing to take the oath while teaching "as a priest and minister of that religious denomination."[163]

In *Cummings v. Missouri*,[164] Reverend Cummings secured representation before the Court from two of the most distinguished practitioners of the day: David Dudley Field of New York[165] and Senator Reverdy Johnson of Maryland,[166] who was, at the time of oral argument in March 1866, involved in the drafting of the Civil Rights Act[167] and the Fourteenth Amendment. Field argued first for Cummings and pressed that the Missouri law violated the Ex Post Facto and Bill of Attainder provisions.[168] He referred frequently to Reverend Cummings and his religious practices, but did not mention the First Amendment.

The attorneys for Missouri, however, believed that Cumming's attorney had made sufficient mention of "rights of conscience" to merit formal response. These references were "well calculated to excite interest.... [T]he American people are exceedingly sensitive on the subject of religious freedom; and whenever the people are told... that the indefeasible right to worship God according to the dictates of conscience is about to be invaded, the public mind at once arouses itself to repel the invasion."[169] Citing the First Amendment and Story's *Commentaries*, counsel argued that "Congress cannot

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Wallace) 277, 279 (1867) (quoting in full the third section of Article II of the 1865 Missouri Constitution).

162. *Cummings*, 71 U.S. (4 Wallace) at 280.

163. Id. at 282.

164. 71 U.S. (4 Wallace) 277 (1867). The case was argued March 15-20, 1866, and decided January 14, 1867. See 18 L. Ed. 356 (1867) (discussing *Cummings* in an annotation). The companion case, *Ex Parte Garland*, 71 U.S. (4 Wallace) 333 (1867), was argued March 14 and December 15, 1866, and decided the same day as *Cummings*. 18 L. Ed. at 366.

165. David Field was the author of the "Field Code" of New York, the precursor of the Federal Rules of Civil Procedure, and perhaps "the most commanding figure at the American bar." Henry M. Field, *The Life of David Dudley Field* vii (Scribner's, 1898). He was also brother to Justice Stephen J. Field, who authored the opinion for the *Cummings* majority.

166. According to Horace Flack, Johnson was "probably the best constitutional lawyer in the 39th Congress." Horace Flack, *The Adoption of the Fourteenth Amendment* 23 (Johns Hopkins U., 1908). See *Memoranda*, 92 U.S. v, v-xvi (1876) (containing tributes to Reverdy Johnson). Johnson also argued *Garland*, 71 U.S. (4 Wallace) at 333, the companion case to *Cummings*.

167. Act of April 9, 1866, ch. 31, 14 Stat. 27. See note 186 and accompanying text.

168. *Cummings*, 71 U.S. (4 Wallace) at 284-89. See U.S. Const., Art. I, § 10, cl. 1.

169. *Cummings*, 71 U.S. (4 Wallace) at 303-04 (argument of J.B. Henderson).

establish a national faith.... But within the limits of the State constitution... the legislature has entire control of the subject."[170]

Reverdy Johnson, in reply, refused to let the point pass entirely, but quickly retreated from an argument under the First Amendment to one that sounded in substantive due process:

> The Constitution of the United States, to be sure, so far as the article which proclaims that there shall be no interference with religion is concerned, is not obligatory upon the State of Missouri; but it announces a great principle of American liberty... that as between a man and his conscience, as relates to his obligations to God, it is not only tyrannical but unchristian to interfere.... The issue is whether the Church shall be free or not to exercise her natural and inherent right of calling into, or rejecting from, her ministry whom she pleases....[171]

The Court reversed the convictions as based on laws which violated both the Ex Post Facto and Bill of Attainder Clauses.[172] The majority took no note of the applicability of either the First Amendment or general principles of religious freedom. In dissent, however, Justice Miller, joined by Chief Justice Chase and Justices Swayne and Davis, addressed the "allusions... made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country."[173]

> [N]o attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to

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170. Id. at 304-05. Co-counsel had also argued:

> Even the freedom of religious opinion, and the rights of conscience which we so highly prize, are secured to us by the Stato constitutions, and find no protection in the Constitution of the United States.
>
> If any State were so unwise as to establish a *State religion*, and require every priest and preacher to be licensed before he attempted to preach or teach, there is no clause in the Federal Constitution that would authorize this court to pronounce the act unconstitutional or void.

Id. at 294 (footnote omittted) (argument of G.P. Strong).

171. Id. at 313 (argument of Reverdy Johnson).

172. Id. at 327-28. The same day the Court struck down a federal loyalty oath on similar grounds. *Garland*, 71 U.S. (4 Wallace) at 333. See David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. Chi. L. Rev. 131, 139-44 (1984) (providing a history and analysis of the Court's decisions in *Garland* and *Cummings*). See also Charles Fairman, *Reconstruction and Reunion, 1864-88*, in Paul A. Freund, ed., 6 *The History of the Supreme Court of the United States* 151-160 (MacMillan, 1971) (discussing the political and judicial debate surrounding the loyalty oath imposed by the 1865 Missouri Constitution).

173. The dissent was attached to the companion case, *Garland*, 71 U.S. (4 Wallace) at 382 (Miller, J., dissenting).

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> make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.
>
> No restraint is placed by that instrument on the action of the States; but on the contrary, in the language of Story, "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."[174]

The dissent then asserted that "[i]f there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli."[175] Recounting the facts in *Permoli* and calling the case "hard," the dissent contrasted *Permoli* with the case at bar to demonstrate the much greater intrusion *Cummings* represented into state affairs. *Permoli*, the dissenters said, involved "an ordinance of a mere local corporation," which "forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend." By contrast, in this case "the fundamental law of the people of [Missouri] . . . declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government."[176] That the Court would not interfere with the exercise of a religious rite in *Permoli*, but would interfere with a mere oath of allegiance spoke for itself.[177]

The dissent's last point was largely rhetorical, of course, because the Court decided in favor of Cummings and against Permoli on the basis of two different constitutional provisions. What is significant is that in January of 1867, at a time when the Fourteenth Amendment was pending before the states,[178] at least four members of the Court believed *Permoli* to be good law and continued to view the First Amendment as applicable to Congress alone. And, as in *Permoli*, no one in *Cummings* thought to cite *Barron* in support of the proposition. The First Amendment stood on its own terms, apart from the remainder of the Bill of Rights.

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174. Id. at 397-98 (quoting Story, *Commentaries* at § 1878 (cited in note 120)).
175. Id. at 398.
176. Id.
177. Id.
178. Fairman, *Reconstruction and Reunion*, in Freund, ed., 6 *The History of the Supreme Court* at 242-43 n.195 (cited in note 172).

III. THE FIRST AND FOURTEENTH AMENDMENTS: TEXT AND THE RECONSTRUCTION

On its face the Fourteenth Amendment does not say anything about the First Amendment. In its principal section it speaks instead of "privileges or immunities," "equal protection," and "due process." The Court has held for seventy years that the Fourteenth Amendment incorporates the First Amendment.[179]

In this Section I examine the historical and textual bases for claiming that the Fourteenth Amendment incorporates the First Amendment and that Congress may enforce state compliance with the First Amendment through Section 5. I propose to reexamine the text of the Fourteenth Amendment, together with its legislative history and the various theories of incorporation and enforcement in light of my central thesis: that the First Amendment is fundamentally different from the other amendments in the Bill of Rights and, accordingly, we must treat it differently. Section 1 of the Fourteenth Amendment provides:

> 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.[180]

Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." These provisions, read together, are "limitations of the power of the States and enlargements of the power of Congress."[181]

The debates over the Fourteenth Amendment are extremely frustrating because either the Framers of that amendment were not careful in their drafting, or they were deliberately vague. In any event, the debates will support nearly any particular view of the Fourteenth Amendment. For my purposes I do not have to resolve here the great questions of the Fourteenth Amendment. What I

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179. *Everson v. Board of Education*, 330 U.S. 1 (1946) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (Right of Petition Clause); *Near v. Minnesota*, 283 U.S. 697 (1931) (Free Press Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (Free Speech Clause).

180. U.S. Const., Amend. XIV, § 1.

181. *Ex Parte Virginia*, 100 U.S. 339, 345 (1879).

intend to do is to demonstrate the consequences of various Fourteenth Amendment theories on the First Amendment. All of this is important, because the choice of theory—even the choice among theories of incorporation—has important consequences for the relationship between the First and Fourteenth Amendments.

A. The First Amendment and the Thirty-Ninth Congress

It is familiar history that the question of slavery dominated constitutional, economic, and political institutions in the period between the Revolutionary War and the Civil War. Whether we examine the industrial revolution, changes in transportation, or trade practices, some question regarding slavery lurks near. The question so dominated political and economic discourse that it soon dominated other kinds of discourse as well. The Southern states, feeling threatened and fearing insurrection, censored abolitionist speech, books, newspapers, and pamphlets.[182] Congress, not immune to the persistence and vociferousness of abolitionists, suppressed First Amendment rights by suspending its rules regarding the receipt of petitions.[183]

The suspension of rights of free speech and press, and to a lesser degree, suspension of religious liberty in the South,[184] were among the bill of particulars levied in Congress against the insurgent states. According to Representative James Wilson, slavery

> persecuted religionists [and] denied the privileges of free discussion; . . . [the] agitations [of slavery] dominated over everything . . . overshadowed the material interests of the country, directed its legislation, overawed its executive

182. Russel B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860* at 155-58, 171 (Mich. State U., 1963); Curtis, *No State Shall Abridge* at 52 (cited in note 160).

183. Nye, *Fettered Freedom* at 45-46 (cited in note 182); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for a Redress of Grievances*, 96 Yale L. J. 142, 158-65 (1986).

184. See II Report of the Committees of the House of Representatives, 39th Cong., 1st Sess. 39, 45-46, 53 (1866); Cong Rec., 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson); Curtis, *No State Shall Abridge* at 138-39 (cited in note 160); Clement Eaton, *The Freedom-of-Thought in the Old South* 300-34 (Harper & Rew, rev. ed. 1964); Wiecek, *Sources of Antislavery Constitutionalism* at 177, 181-83 (cited in note 59); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Incorporation of the Nonestablishment Principle*, 27 Ariz. St. L. Rev. (forthcoming, Winter 1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1131-36 (1994). See also *The Slaughter-House Cases*, 83 U.S. (16 Wallace) 36, 123 (1873) (Bradley, J., dissenting) ("The mischief to be remedied was not merely slavery and its incidents . . . but . . . intolerance of free speech and free discussion which often rendered life and property insecure . . ."); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* at 88-97 (Harper & Roe, 1988).

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> agents, controlled its courts, corrupted its religion, debased its morals, vitiated its literature, beclouded and benumbed everything upon which a people must rely for greatness, prosperity, happiness, and the promotion of the general welfare.[185]

In January 1866 the Senate began consideration of what would become the Civil Rights Act of 1866.[186] Before the House even began its own consideration of the bill, it constituted a Joint Committee on Reconstruction to begin work on an amendment to the Constitution.[187] Within two weeks of the passage of the Civil Rights Act in April 1866, Congress had drafted what would become the Fourteenth Amendment. The amendment cleared Congress by June 1866 and was ratified in July 1868.[188]

References to the Bill of Rights lace the debates over the Civil Rights Bill and the proposed amendment to the Constitution. While it is not necessary for my purposes to recount all references to the Bill of Rights, I wish to review those having a bearing on the First Amendment.

1. The First Amendment and the Debate Over John Bingham's Proposed Amendment, February 1866

In late February 1866, John Bingham, Republican representative from Ohio and a member of the Joint Committee, offered an amendment to the Constitution:

> ARTICLE__. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[189]

Representative Bingham observed that he had drawn the language of the proposed amendment from the Privileges and Immunities Clause

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185. Cong. Globe, 38th Cong., 1st Sess. 1201, 1202 (1864). See also id. at 138 (statement of Rep. Ashley) (stating that slavery has "silenced every free pulpit within its control" and suppresssed speech and press).

186. Act of April 9, 1866, ch. 31, 14 Stat. 27 ("An Act to protect all Persons in the United States in their Civil Rights and furnish The Means of their Vindication").

187. Chronologies may be found in Curtis, *No State Shall Abridge* at 57-91 (cited in note 160); Flack, *Adoption of the Fourteenth Amendment* at 55-139 (cited in note 166); Joseph B. James, *The Framing of the Fourteenth Amendment* (Illinois U., 1956); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 8, 19-68 (1949).

188. 15 Stat. 708, 708-11 (1868).

189. Cong. Globe, 39th Cong, 1st Sess. 1034 (1866).

(or Comity Clause)[190] and the Fifth Amendment.[191] According to Bingham, there was a "want" for "an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements."[192] The proposed amendment would "not impose upon any State . . . or any citizen . . . any obligation which is not now enjoined upon them by the very letter of the Constitution." The amendment merely secured the power to enforce "this immortal bill of rights," which had to that point "rested for its execution and enforcement . . . upon the fidelity of the States."[193]

Representative Bingham evidently believed the Bill of Rights was already binding upon the states, probably through the Comity Clause.[194] What the Constitution lacked, however, was a means to enforce the Comity Clause against the states.[195] Bingham and others conceded that their view of the application of the Bill of Rights to the states was in conflict with what the courts had actually held. The

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190. U.S. Const., Art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

191. Id. Amend. V ("No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . .").

192. Cong. Globe at 1034 (cited in note 189). As Rep. Regers, a member of the Joint Committee and critic of Bingham's proposal, explained, the Necessary and Proper Clause only gave Congress power to facilitate the *powers* of the government:

> The courts have decided that guarantees, privileges, and immunities are not powers, and when the Constitution authorized Congress to make all laws necessary and proper to carry into execution the powers vested in the Government, it meant powers strictly. . . . That powers do not mean guarantees and privileges we all agree; and because of that this amendment in part is deemed necessary.

Id. at app.135.

193. Id. at 1034. Fairman suggests that when Rep. Bingham referred to "this immortal bill of rights" he meant the Constitution generally, rather than the Bill of Rights. Fairman, *Reconstruction and Reunion*, in Freund, ed., 6 *The History of the Supreme Court* at 26 (cited in note 172). Jacobus ten Broek states that Bingham was not referring to the Bill of Rights, but probably to the Comity Clause, the Due Process Clause, and some kind of equal protection notion. Jacobus ten Broek, *Equal Under Law* 214 (Collier, 1965).

194. Curtis, *No State Shall Abridge* at 59-62 (cited in note 160). See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L. J. 57, 79 (1993). See also Cong. Globe at 1202 (cited in note 185) (statement of Rep. Wilson) ("Freedom of religious opinion, freedom of speech and press . . . belong to every American citizen. . . . With these rights no state may interfere").

195. Cong. Globe at 1054 (cited in note 194) (statement of Rep. Higby) (asserting that the proposed amendment "will only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored . . . . When we read this proposed amendment we will think it already embraced in the Constitution, but so scattered through different portions of it that it has no life or energy"). See also id. at 1063 (statement of Rep. Kelley) ("[A]ll the power this amendment will give is already in the Constitution"); id. at 1088 (statement of Rep. Woodbridge) (stating that the amendment would "enable Congress . . . to give a citizen of the United States . . . those privileges and immunities which are guarantied to him under the Constitution of the United States").

problem was, of course, *Barron*, which Bingham and others cited by name.[196] After *Barron*, "the people [we]re without remedy."[197]

Throughout the discussion, Representative Bingham and others treated the First Amendment as an expression of personal rights and referred to it as an undifferentiated part of the broader Bill of Rights. Nevada Senator James Nye, for example, referred to " 'life,' 'liberty,' 'property,' 'freedom of speech,' 'freedom of the press,' 'freedom in the exercise of religion,' [and] 'security of person,' " as "natural and personal rights of the citizen," established through "fundamental law" which no state "ha[d] the power to subvert or impair."[198] And Republican Representative Roswell Hart argued that a republican government is "a government whose 'citizens shall be entitled to all privileges and immunities of other citizens'; [and] where 'no law shall be made prohibiting the free exercise of religion.' " Where the states do not afford those privileges, "it is the duty of the United States to guaranty that they have it speedily."[199]

Opponents of Bingham's proposal, like the Republicans in the Sedition Act debates, recognized that the First Amendment has both a federalism and a separation of powers component, and they questioned Congress's power to affect the scope of the First Amendment through the Bingham proposal. Indiana Democrat Michael Kerr stated that the "privileges and immunities referred to as attainable in the States are required to be attained, if at all, *according to the laws or constitutions of the States,* and never in *defiance* of them."[200] Representative Kerr assailed the idea that "the first eleven amendments to the Constitution are grants of power to Congress; that they contain guarantees which it is the right and duty of Congress to

196. See, for example, id. at 1089-90 (statement of Rep. Bingham) (Bingham also quoted from *Lessee of Livingston v. Moore*, 32 U.S. (7 Peters) 469, 551 (1833)); id. at app.135 (statement of Rep. Regers); id. at 1270 (statement of Rep. Kerr).

197. Id. at 1090 (statement of Rep. Bingham). See also id. at 1292 ("[T]he bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of States").

198. Id. at 1072. See also id. at 1075 (arguing that the Constitution forbids states from interfering with "natural or personal rights enumerated or implied in the Constitution"). These rights, Sen. Nye recognized, "Congress has no power to invade," but he thought Congress did have "power te make all laws 'necessary and proper' to give them effective operation and to restrain the respective States from infracting them." Id. at 1072.

199. Id. at 1629. Rep. Hart also quoted portions of the Second, Fourth, and Fifth Amendments.

200. Id. at 1270.

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secure and enforce in the States."[201] Referring to the Bill of Rights and quoting from *Barron*, Kerr added:

> Hitherto those amendments have been supposed . . . to contain only *limitations* on the power of Congress. . . . They were not intended to be, and they are not, limitations on the powers of the States. They are bulwarks of freedom, erected by the people between the States and the Federal Government . . . .
>
> I am telling this House, that they have no right to find a grant of power in what was intended as a limitation upon power. . . . [T]hese are limitations upon the power of Congress and not upon the powers of the States. They are not guarantees at all, except to protect the States against the usurpations of Congress and the Goneral Government. They simply say that Congress shall not invade the rights of the States of this Union to do things that are forbidden to be done by the first eleven amendments of the Constitution.[202]

Representative Kerr's view, unlike the idiosyncratic views of Representative Bingham, was consonant with the views of the Founders and, more importantly, the Supreme Court. Moreover, his central point, that it was a non sequitur for Congress to attempt to enforce limitations on its own powers, was a point that many would repeat in the debates over enforcement of the Fourteenth Amendment.

Republican Robert Hale of New York made a similar point regarding the power of Congress and noted the amendment shifted responsibility for enforcement from federal courts to Congress:

> Now, what are these amendments to the Constitution, numbered from one to ten[?] . . . They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation. They are not matters upon which legislation can be based. They begin with the proposition that 'Congress shall make *no law*,' . . . and . . . [t]hroughout they provide safeguards to be enforced by the courts, and not to be exercised by the Legislature.[203]

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201. Id.

202. Id. Five years later, during debates over enforcement of the Fourteenth Amendment, Rep. Kerr repeated that "the first eleven amendments . . . are limitations on tbe powers of Congress as against the States." He also added that they were "fundamental guarantees to the people." Cong. Globe at app.46 (cited in note 1). There is no inconsistency here. Personal guarantees to people can be secured both by limiting the powers of a government we expect might be tempted to encroach on them, or by committing the protection of such guarantees to a government that we expect would be benevolent.

203. Cong. Globe at 1064 (cited in note 1). Rep. Hale's misstatement, that the Bill of Rights limited "Federal and State legislation," was seized by Rep. Bingham, who cited *Barron* as evidence that the courts were not an adequate restraint to state legislation. Cong. Globe at 1089-90 (cited in note 189).

Representative Hale even went so far as to suggest, perhaps facetiously, that the First Amendment phrase "Congress shall make no law" might itself be "a sufficient prohibition" against further legislation.[204]

Representative Hale's reference to "Congress shall make no law" was curious because it refers to the text of the First Amendment but is not an accurate paraphrase of the remaining amendments. He was, of course, correct that the First Amendment prohibits Congress from enacting certain kinds of laws. However, Amendments Two through Eight do not, either by text or by virtue of *Barron*, prohibit Congress from passing legislation respecting their subject matter, and in fact, the Third Amendment expressly anticipates that Congress would do so.[205] Hale's point about congressional enforcement was well taken with respect to the First Amendment, but not to the others.

For Democrat A.J. Rogers of New Jersey, a member of the Joint Committee and vocal opponent of the amendment, the proposal was "the embodiment of centralization and the disfranchisement of the States."[206] Citing *Corfield v. Coryell*,[207] he complained that the term "privileges and immunities" had been construed so broadly that "it is easy to perceive why our fathers refused to authorize Congress to legislate on this subject by granting no power to it" and why "[the Due Process Clause] as well as the other guarantees of the Constitution, have been repeatedly decided by the Supreme Court . . . to apply only to cases affecting the Federal Government."[208] "[A]ny power to override a State and settle . . . the rights, privileges, and immunities of citizens in the several States . . . was left entirely for the courts."[209] Even Representative Bingham could not take issue with the latter point. Although Bingham had claimed that giving Congress "the power to enforce the bill of rights" took "from the States

204. Id. at 1064.

205. U.S. Const., Amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law"). See note 73.

206. Cong. Globe at app.133 (cited in note 189).

207. 6 F. Cases 546 (C.C.E.D. Pa. 1823) (No. 3230).

208. Cong. Globe at app.135 (cited in note 189).

209. Id. at app.133. Rep. Rogers did not deny Rep. Bingham's analysis that the Privileges or Immunities Clause included the Bill of Rights, or that all that was missing from the Constitution was an enforcement provision. Alfred Avins has argued that many members of Congress understood that the Privileges or Immunities Clause would permit congressional enforcement of the Comity Clause, but because of *Barron* many would have assumed that the Comity Clause did *not* include the Bill of Rights. Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 Harv. J. Leg. 1, 13-15 (1968).

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no rights that belong to the States,"[210] he later admitted that "[a] grant of power, according to all construction, is a very different thing from a bill of rights."[211]

Ultimately, several concerns over the scope of the powers granted Congress led the House to postpone consideration of the proposal while it turned to the Civil Rights Act.[212] First, it was unclear to a number of members of Congress whether the proposed amendment granted Congress plenary power over state laws, or only power over those state laws that did not apply equally to blacks and whites.[213] Second, there was still the question of enforcement. Some members became convinced that Congress must have the power to enforce whatever substantive guarantees the amendment contained, while others were persuaded that enforcement should be left to the judiciary. Shortly before the House postponed the resolution, Representative Hotchkiss stated that "[c]onstitutions should have their provisions so plain that it will be unnecessary for courts to give construction to them; they should be so plain that the common mind can understand them."[214] He suggested that in order to avoid "the caprice of Congress" the amendment should simply provide that "no State shall discriminate against any class of its citizens,"[215] thus making clear that an amendment should require equal enforcement of existing state guarantees, and that the federal judiciary should be responsible for its enforcement.[216]

2. The First Amendment and the Debates Over the Proposed Fourteenth Amendment, May-June 1866

By early April 1866 Congress had enacted the Civil Rights Act over the veto of President Andrew Johnson. But with nagging questions about Congress's authority to pass the Act, the Joint Committee

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210. Cong. Globe at 1088, 2090 (cited in note 189). See also id. at 1292 ("I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the [Civil Rights Act]").

211. Id. at 1093. See also id. ("[I]s there any one prepared to say that the bill of rights confers express legislative power on Congress[?]").

212. See Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 Const. Comm. 123, 125-47 (1986) (discussing the 1866 debates).

213. See, for example, Cong. Globe at 1066-67, 1094-95 (cited in note 189).

214. Id. at 1095.

215. Id.

216. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 145 (Harvard U., 1988). See also Bernard Schwartz, *From Confederation to Nation: The American Constitution, 1835-1877* at 196 (Johns Hopkins U., 1973) (discussing enforcement of the Bingham proposal).

again set to drafting an amendment to submit to the states.[217] In early May, Thaddeus Stevens introduced the redrafted proposal in the House, in a form very similar to the amendment ultimately ratified. Admitting that the "proposition is not all that the committee desired," Stevens explained that the first section contained privileges or immunities, due process, and equal protection clauses, "all asserted, in some form or other, in our DECLARATION or organic law."[218] The problem, he noted, was that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect."[219] Had he stopped there, the members might have heard the echoes of Representative Bingham's February speeches. But Stevens then added that the proposed amendment only "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all."[220] As Stevens stated it, the proposed amendment incorporated familiar restrictions, though he did not make reference to the substantive restrictions of the Bill of Rights, or for that matter, to any substantive body of law. Rather, he suggested that the real import of the new provision was that it required that the states enact and administer their laws equally.[221]

Two weeks after Representative Stevens introduced the revised proposal in the House, Jacob Howard of Michigan introduced the same proposal in the Senate. His reflections on the Privileges or Immunities Clause are some of the most frequently cited evidence for incorporation and stand in contrast to Stevens's remarks in the House. Senator Howard thought the Privileges or Immunities Clause

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217. See, for example, Cong. Globe at 2465 (cited in note 189) (statement of Rep. Thayer) (arguing that the amendment would constitutionalize the Civil Rights Act); id. at 2467 (statement of Rep. Boyer) (noting that the amendment "embodies the principles" of the Civil Rights Act).

218. Id. at 2459.

219. Id.

220. Id.

221. As Rep. Stevens explained:

> Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection te the black man. Whatever means of redress is afforded to one sball be afforded te all. Whatever law allows the white man to testify in courts shall allow the man of color to do the same. These are great advantages over their present codes.

Id. See also id. at 2511 (statement of Rep. Eliot) (supporting the proposed amendment and arguing that if Congress did not have the power to prohibit discriminatory state legislation, such power should be conferred). But see id. at 2530 (statement of Rep. Randall) (arguing that the power to create the equality of citizens should be left to the states).

in proposed Section 1 "a general prohibition upon all the States" and "very important."[222] Referring to the Comity Clause in Article IV, he thought "[i]t would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States."[223] He was "certain the clause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there."[224] After quoting from Justice Washington's opinion in *Corfield*, he stated:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.[225]

Senator Howard then observed that these privileges "do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress."[226] Thus, "the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year."[227] Howard explained that the new amendment would "restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[228] The guarantees originally, as written, were only self-executing because "they are not powers granted to Congress," but

222. Id. at 2765.
223. Id.
224. Id.
225. Id.
226. Id. This statement was an obvious reference to *Barron*. See notes 61-63 and accompanying text.
227. Id. at 2766.
228. Id.

Section 5, as an "affirmative delegation of power to Congress to carry out all the principles of all these guarantees,"[229] would remedy that.

Senator Howard's statement is the clearest explanation in the Thirty-ninth Congress as to how the Amendment might incorporate the Bill of Rights and empower Congress to enforce it. Regrettably, it elicited no response; neither comments nor debate. Either Howard had spoken so forcefully that there was no further discussion on this point, or the point simply did not sink in. The evidence in the legislative history supports the latter.[230] A week after Howard's speech, Democratic Senator Thomas Hendricks of Indiana "ask[ed] what it means when we speak of 'abridging' the rights and immunities of citizenship. It is a little difficult to say, and I have not heard any Senator accurately define, what are the rights and immunities of citizenship; and I do not know that any statesman has very accurately defined them."[231] The same day Reverdy Johnson, the only Democratic Senator on the Joint Committee, spoke in favor of the Due Process and Equal Protection Clauses in the proposed amendment, but thought it "quite objectionable" to include the Privileges or Immunities Clause "simply because I do not understand what will be the effect of that."[232] He moved that the clause be stricken. The Senate rejected the motion but the point was well made. Johnson, one of the leading practitioners before the Supreme Court, had only two months before argued *Cummings v. Missouri* and

229. Id. See also id. ("I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States").

230. But see Aynes, 103 Yale L. J. at 103 (cited in note 194) (suggesting that Sen. Howard's proposition was well accepted and that the caucus of Union Republican Senators had agreed to limit debate).

Sen. Howard's statement is not without its problems. Aside from his uncertainty as to what the "privileges and immunities" in Article IV referred to, what is striking about Howard's laundry list of rights is that he omits any reference to the religion clauses, although he mentions the remaining rights in the First Amendment. It would be tempting to infer that this was deliberate on Howard's part, but the inference would probably demand too much; Howard's speech simply does not reach that level of precision. Moreover, besides the religion clauses, he failed to mention the Grand Jury, Double Jeopardy, Due Process, and Takings Clauses of the Fifth Amendment and the Jury provision of the Seventh Amendment. We might well make more of the clauses Howard omitted when we recall that application of the Grand Jury Clause, U.S. Const., Amend. V, to the states would have been a sensitive matter, requiring substantial reworking of state criminal procedures. See Fairman, 2 Stan. L. Rev. at 82-83 (cited in note 187). But there would be no reason for Howard to have omitted the Double Jeopardy Clause and certainly not the Takings Clause, especially after having just taken pains to refer to *Barron*.

231. Cong. Globe at 3039 (cited in note 189).

232. Id. at 3041.

had made a substantive due process argument based on the free exercise of religion, an argument met with citation of the First Amendment and *Permoli*.[233] If Reverdy Johnson and Thomas Hendricks did not understand the effect of the Clause, and Jacob Howard was unsure of what it included, it was likely that many others also did not understand the Clause.

There was no other substantive reference to the First Amendment or its enforcement in the debates. The House passed the amendment on May 10,[234] as did the Senate on June 8.[235] The House gave final approval to the Senate's changes on June 13, 1866.[236] The states ratified it July 9, 1868.

What emerges from the debates is not a coalescing of views and intentions, but an uncertain confederation of votes. While many members of Congress cited various provisions of the Constitution, cases, Elliot's *Debates*, and commentators such as Story and Kent, the members were not clear as to what the Constitution meant, and they agreed on little. The views of the Framers of the Fourteenth Amendment are astonishingly imprecise.[237] As legal draftsmen, the Framers of the Fourteenth Amendment were much less accomplished than the Founders; they were surprisingly nonplussed by the mechanics of the amendment they were drafting.[238] At least some members of Congress believed Section 1 incorporated the Bill of Rights, but few were concerned with their draftsmanship, even when other members complained that the language did not convey the purpose of the amendment as they understood it.[239] For a Congress that parted with the Supreme Court over the construction of the Constitution in cases such as *Barron* and *Dred Scott*, the Framers were remarkably sanguine about the prospects that the Court would get it right, a

233. See notes 166-77 and accompanying text.

234. Cong. Globe at 2545 (cited in note 189).

235. Id. at 3042.

236. Id. at 3149.

237. Nelson, *The Fourteenth Amendment* at 143-45 (cited in note 216); Fairman, 2 Stan. L. Rev. at 9 (cited in note 187); Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 Nw. U. L. Rev. 142, 174-76 (1984).

238. Judith Baer argues that the Radical Republicans "were just not legalistic thinkers" and that they assumed any interpretive difficulties could be corrected legislatively. Judith A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* 101-02 (Cornell U., 1983). See also Nelson, *The Fourteenth Amendment* at 143 (cited in note 216).

239. See Cong. Globe at 1082 (cited in note 189) (statement of Sen. Stewart) ("It seems to me that the grammatical, legal, and necessary construction of this proposed amendment can hardly have been intended by its framers"); id. at 1095 (statement of Rep. Hotchkiss) (asserting that constitutions "should be so plain that the common mind can understand them" and recommending that Rep. Bingham's proposal be tabled until Congress can "agree upon an amendment that shall secure beyond question what the gentleman desires to secure").

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problem borne out almost immediately in the Court's implausible reading of the Privileges or Immunities Clause in *The Slaughter-House Cases*.[240]

While the opponents of the proposed amendment, or at least more cautious reformers, held views of the First Amendment much closer to the Founders and to the Supreme Court, Representative Bingham and his supporters failed to differentiate the First Amendment from the remaining guarantees in the Bill of Rights. Rather than recognizing the First Amendment as a disability on the power of Congress, they treated it as did the Federalists in 1798, as a personal right. Furthermore, the Fourteenth Amendment's supporters held such idiosyncratic views of the Constitution[241] that it is difficult to take their mechanics for incorporation too seriously; they failed to address either the Constitution or the Court's decisions on their own terms. Their views were such a striking contrast to the views of the Court they so criticized,[242] it is no wonder the Court and Congress failed to understand each other.

B. The First and Fourteenth Amendments in the Wake of Ratification

1. The First and Fourteenth Amendments in Congress: The Enforcement Debates

Whatever meaning members of the Thirty-Ninth Congress thought the Fourteenth Amendment possessed in 1866 was quickly lost in the post-ratification debates over the Fifteenth Amendment and civil rights enforcement laws. The members of the Forty-second Congress, many of whom had been members of the Thirty-ninth, could not agree in 1871 any more than they could in 1866.[243] In contrast to the earlier debates, which manifested more concern for the substance of the disabilities visited on the states in Section 1, the later debates

240. 83 U.S. (16 Wallace) 36 (1873). See notes 284-86 and accompanying text. For a more complete discussion of the background and circumstances surrounding these three decisions, see Gerald Gunther, *Constitutional Law* 396-411 (Foundation, 12th ed. 1991) (The Bill of Rights and the Post-Civil War Amendments: Fundamental Procedural Rights and the "Incorporation" Dispute).

241. Curtis, *No State Shall Abridge* at 91 (cited in note 160); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L. Rev. 45, 55-56, 88-92 (1980).

242. But see Aynes, 103 Yale L. J. at 83-94 (cited in note 194) (arguing that Rep. Bingham's views were not outside the mainstream of the period's legal thought).

243. Nelson, *The Fourteenth Amendment* at 148 (cited in note 216).

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naturally showed greater attention to the scope of Congress's power under Section 5. The 1871 debates again featured John Bingham who, together with Samuel Shellabarger, advocated broad interpretation of Sections 1 and 5. They were well opposed.

Once again many members referred to the First Amendment. But both sides in 1871 focused more on the Constitution's text and structure, and their arguments reflect far greater sophistication than the ratification debates. Those who favored broad interpretation of the Fourteenth Amendment again treated the First Amendment as a personal privilege or immunity, and thus of the same genre as Amendments Two through Eight. Opponents of the civil rights enforcement acts contended that the acts were beyond Congress's powers and used the First Amendment as proof of the limitations. The opposition relied on both the federalism and the separation of powers aspects of the First Amendment.

a. The First Amendment as a congressionally enforceable personal privilege

Perhaps the most cited post-ratification discussion of the Bill of Rights is John Bingham's speech in March 1871. Bingham reminded the House that he "had the honor to frame the [Fourteenth A]mendment," both the amendment "as reported in February 1866, and the first section, as it now stands."[244] He stated that he changed the form of the February 1866 proposal after re-reading *Barron* and *Lessee of Livingston v. Moore*.[245] Confessing that *Barron* was "properly decided," Bingham then quoted from Justice Marshall's opinion: "Had the framers of [the Bill of Rights] intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention."[246] According to Bingham, "[a]cting upon [*Barron's*] suggestion," he "imitate[d] the framers of the original Constitution." Just as they provided in Article I, Section 10 that "no State shall . . ." he began Section 1 of the amendment with the same language.[247]

Representative Bingham then turned to the Privileges or Immunities Clause. He stated flatly, "the privileges and immunities of citizens of the United States, as contradistinguished from citizens

244. Cong. Globe at app.83 (cited in note 1).
245. 32 U.S. (7 Peters) 469 (1833).
246. Cong. Globe at app.84 (cited in note 1) (quoting *Barron*, 32 U.S. (7 Peters) at 250).
247. Id.

of a State, are chiefly defined in the first eight amendments to the Constitution of the United States."[248] He then proceeded to quote verbatim the first eight amendments.[249] Noting that states had abridged freedom of press, speech, and rights of conscience, Bingham concluded that because of Section 5 Congress was "competent . . . to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances."[250] Bingham's argument is simple enough. The states were prohibited from denying the first eight amendments to their citizens, and Congress had the power to enforce the prohibitions.

Samuel Shellabarger carried Bingham's argument even further on the question of enforcement. He asserted that "the United States always has assumed to enforce, as against the States . . . every one of the provisions of the Constitution."[251] He then distinguished between federal enforcement of the Article I, Section 10 disabilities, which "do not relate directly to the rights of persons," and which only the courts enforced, and the "rights or the liabilities of persons . . . as between such persons and the States" found in Article IV, Section 2.[252] As to these latter "rights or liabilities," Shellabarger claimed that "Congress has by legislation affirmatively interfered to protect or to subject such persons."[253] He then equated the Fugitive Slave Clause[254]—a provision

248. Id. See also id. at app.310 (statement of Rep. Maynard).

249. Id. at app.84.

250. Id. at app.85. Rep. Bingham offered no explanation for omitting reference to the religion clauses.

Three years later Sen. Norwood of Georgia made a similar, vigorous defense of incorporation. Norwood, unlike Bingham before him, had the benefit of the Court's intervening decision in *The Slaughter-House Cases*, 83 U.S. (16 Wallace) at 36. Norwood, quoting from *Permoli*, observed that prior to the Fourteenth Amendment "any State might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms . . . and so on." Cong. Rec., 43d Cong., 1st Sess. app.242 (1874). In his view, upon ratification, "every State was that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution." Id. See id. at app.244 (claiming that the Fourteenth Amendment "prevent[s] the states themselves from depriving their citizens of [the guarantees of the Bill of Rights]"). See also id. at 384-85 (statement of Rep. Mills); id. at 420 (statement of Rep. Herndon); id. at 342-43 (statement of Rep. Beck). Although Sen. Norwood's methodology was coherent, his elaborate discussion is suspect, because Norwood's real concern was not to defend incorporation, but to concede incorporation and deny any other effect to Section 1, thereby confirming its incursion on states' rights. Id. at app.242-44. See also Curtis, *No State Shall Abridge* at 167-68 (cited in note 160).

251. Cong. Globe at app.69 (cited in note 1). He had just quoted *Jones v. Van Zandt*, 46 U.S. (5 Howard) 215, 230 (1847).

252. Cong. Globe at app.69 (cited in note 1).

253. Id. at 69-70.

"in restraint of the power of the States"—with the Privileges or Immunities Clause of the Fourteenth Amendment.[255] In the Fugitive Slave Clause, "[n]o express power is given to Congress to return or make laws for the return of the fugitive. There is no express grant of power whatever found in the clause; merely a negation upon the power of the States," yet it had been well "affirmed that upon that mere negation upon the power of the States it was the right of Congress to enforce its provisions by affirmative law."[256] Shellabarger must have had in mind *Prigg v. Pennsylvania*,[257] in which the Court held that the Fugitive Slave Clause implied a power in Congress to settle the details of the return of slaves.

Shellabarger had crafted his point well on the Fugitive Slave Clause, but he pushed his argument too far. Bingham had boasted that in Section 1 he had imitated the form of the disabilities of Section 10 ("no state shall"), but that was the section which Shellabarger noted was subject to judicial enforcement only. If Shellaburger was correct about the difference between Article I, Section 10 and Article IV, by Bingham's admission, Section 1 of the Fourteenth Amendment was enforceable only by the judiciary.

b. The First Amendment as a court-enforced disability

Other members of Congress, including many who had been present in 1866 and supported the Amendment, criticized Bingham's and Shellabarger's claim that Section 1 guaranteed new rights.[258]

254. U.S. Const., Art. IV, § 2, cl. 3 ("No persons held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or regulation therein be discharged from such Service or Labour, but shall be delivered up on claim of the party to whom such service or labor may be due").

255. Cong. Globe at app.70 (cited in noto 1).

256. Id. See also Cong. Glohe, 40th Cong., 3d Sess. 727 (1869) (statements of Rep. Bingham and Rep. Jenckes) (discussing the difference between enforcing negative and affirmative provisions).

257. 41 U.S. (16 Peters) 539 (1842).

258. For example, fellow Ohio Rep. James Garfield took issue with Bingham over whether Section 1 created new rights, or simply guaranteed to all citizens equal rights. He argued that Thaddeus Stevens's May 1866 speech emphasizing the need for equality in the application of the laws was "[t]he interpretation . . . followed by almost every Republican who spoke on this measure," and he agreed with New York Rep. Hotchkiss's assessment that Bingham's original proposal was too "radical a change in the Constitution" and would never have passed. Cong. Globe at app.151 (cited in note 1). John Farnsworth had a similar exchange with Bingham, in which Farnsworth quoted extensively from the 1866 debates, and disputed that Bingham's February 1866 proposal had survived in the Fourteenth Amendment. Like Garfield, Farnsworth quoted Rep. Stevens's May 1866 speech to show that the intent of the Fourteenth Amendment was to correct "the partial, discriminating, and unjust legislation" of states. Id. at app.115-16.

More importantly, the members repeatedly challenged Bingham's and Shellabarger's expansive views of Congress's section 5 powers. First, they argued that Section 5 was nothing more than a necessary and proper clause for the Fourteenth Amendment, and its real purpose was to secure Sections 2 and 3 of the Amendment, which contemplated congressional action. According to Illinois Republican John Farnsworth, "[Section 1] of the amendment requires no legislation; . . . the courts can execute it."[259] By contrast, the "other provisions in that amendment . . . require legislation by Congress."[260] The point was technically correct, although perhaps a little simplistic. Section 2 provides that a state's representation in Congress would be reduced in proportion the state's abridgement of the right to vote; Section 3 disqualifies certain persons from holding certain public offices, but provides that Congress could remove the disability.[261] These provisions in and of themselves are probably sufficient to imply the power in Congress to enforce them. Accordingly, Section 5 would have been superfluous.

Second, they objected that even if Section 5 were a broader grant of power than the Necessary and Proper Clause, no power in Congress could be derived from a mere prohibition on the states. As Representative Golladay stated,

> by a negative provision States are prohibited from making and enforcing laws which shall abridge the privileges and immunities of citizens of the United States. It is . . . well understood, that negative provisions confer no power to

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Sen. Blair of Missouri quoted the same Stevens speech to show that Bingham's statements in 1866 were not authoritative. Id. at app.231. Rep. Willard and Sen. Bayard emphasized that the Fourteenth Amendment, in Bayard's words, "enlarged the class, but . . . did not enlarge the rights of those included in it." Id. at app.242 (statement of Sen. Bayard). See id. at app.189 (statement of Rep. Willard) (claiming that the Fourteenth Amendment "does not abrogate, nor modify, nor in any way change the previous Constitution. It only authorizes Congress to extend its previous power of legislation . . . to secure to this new class of citizens the same protection").

259. Cong. Globe at app.117 (cited in note 1). See id. at 578 (statement of Sen. Trumbull) ("[I]n regard to all the rights secured by the fourteenth amendment . . . the courts are established to vindicate them, and they can be vindicated in no other way").

260. Id. at app.117. See id. at app.231 (statement of Sen. Blair) ("[T]he enforcement section does not apply to the first section"); id. at app.314 (statement of Sen. Burchard) (arguing that Section 5 is no broader than the Necessary and Proper Clause); id. at app.259 (statement of Rep. Holman) (claiming that Section 5 has "reference only to the second and third sections . . . both of which clearly require the action of Congress; but the first confers on Congress no powers of legislation"). See also id. at app.87 (statement of Rep. Storm) (arguing that Section 5 "enacted nothing new"; "the power to enforce by appropriate legislation all the provisions of the Constitution" was already found in the Necessary and Proper Clause).

261. U.S. Const., Amend. XIV, §§ 2, 3.

> enact positive laws. There is simply a denial of power to States, and not a conferring of power on Congress to pass laws.[262]

Senator Stockton ridiculed the notion that "because no State can, Congress may; or, in other words, the denial of power to a State confers it on Congress."[263] While this argument would answer Bingham's claim that he had imitated Article I, Section 10, it would not answer completely Samuel Shellabarger's point that Congress had assumed the power to enforce restrictions on state power in Article IV even though no such power was expressly conferred.

Third, other members of Congress argued that Bingham and Shellabarger had confused personal privileges and immunities with governmental disabilities; that Congress might enforce personal rights, but not governmental disabilities. Representative Burchard's discerning analysis began with the premise that the Necessary and Proper Clause was at least as broad as Section 5. He then pointed out that the Comity Clause in Article IV provided that "citizens are entitled" to all privileges and immunities, whereas the Privileges or Immunities Clause of the Fourteenth Amendment provided that "a 'State is prohibited.' "[264] This was an intriguing argument. Burchard characterized the Comity Clause as protecting personal rights and the Privileges or Immunities Clause as a governmental disability, and he found the difference important. The difference, he suggested, was that "the power and extent of congressional enforcement as to individuals [was] less questionable where the Constitution expressly invests a citizen with privileges and immunities than when it simply prohibits a State from abridging them."[265] Where the Constitution confers privileges and immunities to citizens, Congress may define or enforce those rights through the Necessary and Proper Clause, but

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262. Cong. Globe at app.160 (cited in note 1).

263. Id. at 572 (statement of Sen. Stockton). See id. at app.242 (statement of Sen. Bayard) (finding no "affirmative grant of power" in Section 1); id. at app.259 (statement of Rep. Holman) (arguing that Section 1 is "a positive limitation and nothing more" and not "a grant of any power to Congress"; "[w]here power is conferred on Congress . . . it is done in express terms, or as a necessary incident to a power of legislation expressly conferred; but here there is no power conferred, but simply a denial of power"). See also id. at app.221 (statement of Sen. Thurman) (arguing that Section 1 is similar to disabilities in Article I, Section 10, which are judicially and not legislatively enforced); id. at app.260 (statement of Rep. Holman) (claiming that Article I, Section 10 does not confer "legislative power on Congress").

264. Id. at app.314.

265. Id. See id. at app.160 (statement of Rep. Golladay) (quoted in the text accompanying note 262); id. at app.259 (statement of Rep. Holman) (arguing that Section 1 is "a denial of power" to the states, and does not confer power to Congress; Section 5 empowers Congress with respect to Sections 2 and 3 only, both of which contemplate some action by Congress).

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where the Constitution merely prohibits government from doing something, the provision is only enforceable by the judiciary.

On this point Burchard had answered Shellabarger. Shellabarger had argued that the Privileges or Immunities Clause was analagous to the Fugitive Slave Clause and observed that the Court in *Prigg* had implied congressional power to enforce the return of fugitive slaves. Burchard replied, in effect, that the Privileges or Immunities Clause was, in form, more analogous to the Comity Clauses, and that clause—even though it might be said to secure individual rights—is not enforceable by Congress.[266]

Burchard's point, that because, under the original Constitution, Congress lacked power to enforce the Comity Clause, *a fortiori*, it lacked power to enforce the Privileges or Immunities Clause, was well made when we recall that Bingham himself stated that he had based Section 1 on the Comity and Due Process Clauses.[267] Representative Burchard concluded that Bingham's argument regarding incorporation of the first eight amendments in Section 1 was, if correct, at best a prohibition against the states that the courts could enforce, and not a license to Congress.[268]

Finally, several members of Congress suggested that the general power in Section 5 could not trump specific disabilities on Congress, the First Amendment being the principal example. Senator Bayard of Delaware argued that "an implied power to Congress" could not overcome the Bill of Rights, which was "a distinct and affirmative inhibition of power to Congress."[269] Senator Stockton denied that Section 5 was a basis for enforcing the First Amendment:

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266. The Court has invalidated congressional legislation attempting to enforce the Comity Clause. See *United States v. Wheeler*, 254 U.S. 281, 293-94 (1920); *United States v. Harris*, 106 U.S. 629, 643-44 (1882). See also Federalist 80 (Hamilton), in Cooke, ed., *The Federalist Papers* at 537 (cited in note 25) (stating that enforcement of the Comity Clause is committed to the judiciary).

The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, provides a good contrast to the Comity Clause. It provides that "Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State." By itself, the clause is fully enforceable by the judiciary. See *Adam v. Saenger*, 303 U.S. 59, 63 (1938). But the clause expressly provides that Congress "may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." Congress has exercised this authority. 28 U.S.C. § 1738 (1988).

267. See notes 191-99 and accompanying text.

268. Cong Globe at app.314 (cited in note 1). See also id. at app.315 (recognizing that courts have the power to set aside unconstitutional state laws).

269. Id. at app.242. Bayard quoted at length from *Withers v. Buckley*, 61 U.S. (20 Howard) 84 (1857), and quoted verbatim the First, Second, Third, Fourth, Fifth, Ninth, and Tenth Amendments. He did not explain why he omitted the Sixth, Seventh, and Eighth Amendments.

> No act of Congress can authorize or make a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. Would it be appropriate legislation to enforce this amendment that Congress should pass an act prohibiting a State from doing so or directing it to do so? Congress is simply restrained from doing this itself.[270]

Referring to the Ninth and Tenth Amendments, Senator Stockton stated that "an attempt on the part of Congress to exercise powers not granted, and much more, powers prohibited, is a usurpation that cannot be justified by any legislation under the fourteenth amendment, which only restricts States in matters wherein the Congress was already restricted."[271] Even if Bingham were correct, that the Privileges or Immunities Clause incorporated the Bill of Rights, *Congress* was still disabled from enforcing the First Amendment against the states.

c. *Epilogue: The strange case of the Blaine Amendment*

Only four years later Congress was again embroiled in debates over the application of the First and Fourteenth Amendments. But the debate over the Blaine Amendment in 1876 could not have been a greater contrast to the enforcement debates of 1871-72.[272] Maine Senator James Blaine had advocated an amendment to the Constitution making the Religion Clauses applicable to the states and prohibiting public funds and lands from coming under the control of religious sects.[273] The amendment passed the House easily,[274] but failed to get the necessary two-thirds vote in the Senate.[275]

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270. Cong. Globe at 572 (cited in note 1). See Cong. Globe, 42d Cong., 2d Sess. 759 (1872) (statement of Sen. Carpenter) (questioning an amendment to the proposed enforcement act which would have prohibited exclusion on the basis of race by "trustees and officers of church organizations": "it is in violation of the spirit of the Constitution in that it disregards the opinions and the motives of those who framed the Constitution .... [I]t cannot be doubted that they who framed the Constitution of the United States intended to, and thought they had, carefully excluded the whole subject of religion from Federal control or interference"). See also id. at 823-27 (colloquy between Sen. Carpenter and Sen. Sumner). The members may have had in mind a case argued before the Court in early 1871, requesting that the Court resolve a schism in the Presbyterian Church in Kentucky. See *Watson v. Jones*, 80 U.S. (13 Wallace) 679 (1872).

271. Cong. Globe at 572 (cited in note 1).

272. One explanation for the transformation is "the electoral tidal wave" in 1874 that turned the Republicans' overwhelming control of the House to the Democrats. See Foner, *Reconstruction* at 523 (cited in note 184); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 949, 1080 (1995).

273. The amendment under consideration in the House of Representatives read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denomi-

The Blaine Amendment debates are notable for what was *not* argued. Missing from any of the rhetorical speeches and obviously vigorous debate was any mention of the Fourteenth Amendment as a vehicle for already having made the Religion Clauses applicable to the states.[276] Instead, the proposed amendment—"for the first time"[277]—"impos[ed] on the States what the Constitution already imposes on the United States."[278] If any members of Congress thought the Fourteenth Amendment had already imposed the First Amendment on the states, no one spoke up.

In fact, many members denied that the First Amendment restrictions could appropriately apply to the states. For some members, applying the Religion Clauses to the states was contrary to the original scheme, under which "freedom of conscience and the right to worship God according to the dictates of each one's individual conviction . . . was left to the States, and was not placed in the hands or under the control of the Federal Government,"[279] while for others the amendment was harmless, if unnecessary, because there was "[no] danger that [the states] would begin now to establish a State religion, or begin to prohibit its exercise, or make religious belief a test or qualification for holding office."[280]

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nations. This article shall not vest, enlarge, or diminish legislative power in the Congress.

4 Cong. Rec. 5190 (Aug. 4, 1876). The Senate considered a more complicated version. Id. at 5580. Background on the amendment may be found in Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951). See also William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191, 1208-10 (1990).

274. 4 Cong. Rec. at 5191-92 (cited in note 273).

275. Id. at 5595. The vote in the Senate apparently followed party lines. Meyer, 64 Harv. L. Rev. at 944 & n.27 (cited in note 273).

276. One member compared the proposed amendment with the Fourteenth and Fifteenth Amendments: "This [amendment] is just as clearly right as either of those . . . amendments." 4 Cong. Rec. at 5594 (cited in note 273) (statement of Sen. Morton).

277. Id. at 5561 (statement of Sen. Frelinghuysen).

278. Id. at 5245 (statement of Sen. Christiancy).

279. Id. at 5591 (statement of Sen. Bogy).

280. Id. at 5581 (statement of Sen. Kernan). See id. at 5591 (statement of Sen. Morton) (stating that the states should not be free to establish a religion). The reference to the Religious Test Clause, U.S. Const., Art. VI, cl. 3, was ironic. The prior year one commentator had suggested that the Clause applied to the states by virtue of the Privileges or Immunities Clause of the Fourteenth Amendment. Joseph P. Thompson, *Church and State in the United States* 15-17 (James R. Osgood, 1873).

During the 1869 debates on the Fifteenth Amendment, John Bingham expressed concern that a proposed amendment implied that states could establish voting qualifications, including religious tests. Cong. Globe, 40th Cong., 3d Sess. 726-27 (1869). Bingham's concern was not inconsistent with his views on the Privileges or Immunities Clause and the First Amendment

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In the end, few disagreed that the Religion Clauses might profitably apply to the states. What was more controversial was whether Congress should have power to enforce the restriction. The House proposal clearly stated that Congress would not acquire such power through the amendment, and more vocal senators agreed that Congress should not be dictating religious freedom to the states.[281] Whatever power to judge the First Amendment resided in the courts alone, "a provision like this in the first article of amendments . . . [was] to be enforced solely and [was] enforced sufficiently by the power of the Supreme Court."[282]

2. The First and Fourteenth Amendments in the Supreme Court

With Congress unable to agree as to what it had passed, it is not surprising that the federal courts puzzled over the Fourteenth Amendment as well. The Court's opinions in the early Fourteenth Amendment cases reflect many of the same arguments made in Congress.[283]

The post-ratification period saw subtle, but important, changes in the Court's view of the First Amendment. In 1873 the Court interpreted the Fourteenth Amendment for the first time. In *The Slaughter-House Cases*,[284] the Louisiana legislature had given a monopoly to a New Orleans slaughterhouse. Local butchers alleged, among other things, that the monopoly violated their privileges and immunities as Louisiana citizens to pursue their chosen profession.

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for the same reason a Fifteenth Amendment was required. Voting rights were political rights and were not comprehended within the civil privileges and immunities of citizens.

281. 4 Cong. Rec. at 5589 (cited in note 273) (statement of Sen. Stevenson); id. at 5591 (statement of Sen. Bogy); id. at 5592 (statement of Sen. Eaton). This history is inconsistent with the claim that Congress considered the Blaine Amendment a corrective to the Supreme Court's construction of the Petition Clause in *United States v. Cruikshank*, 92 U.S. 542 (1876). Compare Curtis, *No State Shall Abridge* at 169-70 (cited in note 160). There is no mention of *Cruikshank* and only scant reference to amendments "impaired by construction." 4 Cong. Rec. at 5585 (cited in note 273) (statement of Sen. Morton). It is unthinkable that a Congress unhappy with the Court's interpretation of the First and Fourteenth Amendments would propose an amendment binding the states but *without* the standard provision that Congress could enforce the provision. See Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1115, 1137-39 & n.125 (1988).

282. 4 Cong. Rec. at 5190 (cited in note 273) (statement of Rep. Hoar) ("[W]here the Constitution asserted certain rights of citizens or prohibited to the States or Congress certain legislative powers, the right to enforce those provisions of the Constitution was left to the courts"). Members of Congress periodically proposed amendments similar to the Blaine Amendment for the next fifty years. See F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 Washburn L. J. 183, 210 (1965).

283. Nelson, *The Fourteenth Amendment* at 149 (cited in note 216).

284. 83 U.S. (16 Wallace) 36 (1873).

The Court rejected the claim, holding that the Privilieges and Immunities Clause only forbids the states from interfering with citizens' *federal* rights.[285] As Justice Field pointed out in dissent, the states could not have interfered with federal privileges and immunities before the passage of the Fourteenth Amendment. The majority's reading of the Clause rendered it "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.[286]

Following the Court's decision in *The Slaughter-House Cases*, the Privileges or Immunities Clause was a dead letter. The Court had struck out in a direction neither side in Congress had proposed. The Privileges or Immunities Clause was neither a restriction on state abridgements of state constitutional rights (as Michael Kerr had suggested)[287] nor did it impose upon the states the Bill of Rights (as John Bingham had suggested).[288] In *Slaughter-House* the Court had held that the Privileges or Immunities Clause only forbids states to abridge federal privileges or immunities, and the only First Amendment right the Court thought sufficiently important to mention was the Petition Clause.[289] Ironically, the Petition Clause figured in the first post-ratification case invoking the First Amendment.

In *United States v. Cruikshank*,[290] the United States charged Cruikshank and others with conspiracy to deprive two "citizens of the United States, of African descent"[291] from the "free exercise and enjoyment of any right or privilege granted or secured . . . by the Constitution or laws of the United States."[292] One count alleged that Cruikshank had interfered with the right of African-American citizens to peaceably assemble, which the United States contended violated the Right of Petition.[293] Citing *Barron*, the Court commented that the First Amendment,

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285. Id. at 74-79.
286. Id. at 96 (Field, J., dissenting).
287. See notes 200-02 and accompanying text.
288. See notes 248-50 and accompanying text.
289. 83 U.S. (16 Wallace) at 79. Justice Bradley, in dissent, referred to "free exercise of religious worship, the right of free speech and a free press, [and] the right peaceably to assemble for the discussion of public measures . . . as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of argument, the rights of all persons, whether citizens or not." Id. at 118-19 (Bradley, J., dissenting).
290. 92 U.S. 542 (1876).
291. Id. at 548.
292. Id.
293. U.S. Const., Amend. I.

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> like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State Governments in respect to their own citizens, but to operate upon the National government alone.... [The amendments of the Bill of Rights] left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.[294]

The right to assemble was a right protected by the states. Since there was no evidence that Cruikshank sought to prevent citizens from petitioning the United States government, but only from assembling, the Court dismissed the indictments on this count.[295]

Cruikshank seemed to have all the trappings of prior Court decisions regarding the application of the Bill of Rights to the states. But *Cruikshank*'s dicta inaugurated a perceptible change in the Court's thinking. For the first time the Supreme Court had linked *Barron* with the First Amendment, a position the Court made clear in *Spies v. Illinois*:[296] "the first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government.... [T]hat decision has been steadily adhered to since [*inter alia*, *Barron*]."[297] It was true enough that the First Amendment did not bind the states, and it was also true that in *Barron* and succeeding cases the Court had held that various provisions of the Bill of Rights did not apply to the states. But the amendments did not apply to the states for very different reasons, as the Court had recognized since *Permoli*.[298] By citing *Barron*, the Court implied that First Amendment rights were purely personal rights, like those of the remaining amendments in the

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294. *Cruikshank*, 92 U.S. at 552. The Court added:

> The particular Amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the Amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

Id. See Aynes, 103 Yale L. J. at 99-100 (cited in note 194) (discussing the Court's repudiation of the original intent of the Framers of the Fourteenth Amendment).

295. *Cruikshank*, 92 U.S. at 559.

296. 123 U.S. 131 (1887).

297. Id. at 166 (citations omitted). Significantly, the Court expressly rejected an argument that "the first ten Amendments ... in so far as they secure and recognize fundamental rights—common law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment.... [T]he Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power." Id. See also id. at 148-53 (argument of J. Randoph Tucker) (arguing that the Privileges or Immunities Clause made the Bill of Rights applicable to states).

298. See text accompanying notes 156-60. See also text accompanying notes 173-78.

Bill of Rights. Though the difference between the First Amendment and the remaining amendments was subtle, lost in the margin were the last vestiges of state immunity from congressional interference and the preferred position of the federal judiciary.

The movement strengthened when, two years after *Cruikshank*, the Court decided a First Amendment case on substantive rather than "jurisdictional" grounds. In *Reynolds v. United States*,[299] the United States brought criminal bigamy charges against Mormon polygamist George Reynolds. "Congress," the Court observed, "cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned."[300] The "precise point of the inquiry is, what is the religious freedom which has been guaranteed."[301] Prior First Amendment cases had been decided purely on federalism grounds. Here, the Court had to give substantive content to the scope of protection given individuals subject to the plenary police powers of the federal government. Relying principally on Jefferson's writings, the Court wrote that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[302] The Court upheld the conviction.

In 1897 the Court began the process of absorbing certain of the Bill of Rights into the Fourteenth Amendment. The Court first recognized that the Due Process Clause required states to pay just compensation—quite ironic in light of *Barron*—in *Chicago, Burlington and Quincy Railroad Co. v. Chicago*.[303] Other rights followed, and it was only a matter of time before the Court discovered that the Due Process Clause of the Fourteenth Amendment had absorbed First Amendment rights as well.[304] Finally, without fanfare, the Court in

299. 98 U.S. 145 (1878).

300. Id. at 162.

301. Id.

302. Id. at 164.

303. 166 U.S. 226 (1897). See also *Cohen v. Hurley*, 366 U.S. 117, 154-59 (1961) (Brennan, J., dissenting) (recounting the post-ratification use of *Barron* and the development of the doctrine of incorporation).

304. The first Justice Harlan had argued that the Privileges or Immunities Clause made the first ten amendments, including the First, applicable to the states. *Patterson v. Colorado*, 205 U.S. 454, 464-65 (1907) (Harlan, J., dissenting); *O'Neil v. Vermont*, 144 U.S. 323, 361-63 (1892) (Harlan, J., dissenting).

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Gitlow v. New York[305] "assume[d]" for "present purposes . . . that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[306] In these cases, as in *Cruikshank*, the Court drew no distinctions between the personal liberties or immunities guaranteed through the Fifth or Sixth Amendments and those guaranteed under the First Amendment's disability. "[F]reedom of speech and of the press are rights of the same fundamental character" as the "fundamental right of the accused to the aid of counsel in a criminal prosecution."[307]

In these early absorption cases, the Court specifically denied that the Fourteenth Amendment made the First Amendment itself applicable to the states. It rejected a "rule" that "[w]hatever would be a violation of the original bill of rights . . . if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state."[308] For the time being the Court made clear that the First Amendment applied only against the federal government, while the states were required by the Due Process Clause to respect amorphous, non-textual rights of freedom of religion, speech, press, and petition.

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305. 268 U.S. 652 (1925). In *Prudential Insurance Co. of America v. Cheek*, 259 U.S. 530 (1922), the Court held that a Missouri statute requiring corporations to furnish dismissed employees with statements of their employment histories and reasons for their termination did not interfere with the freedom to contract. Id. at 542. In the course of its decision the Court remarked that "as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence.'" Id. at 543. The Court in *Gitlow* dismissed this statement as "incidental." 268 U.S. at 666. But see *Cohen*, 366 U.S. at 156 (Brennan, J., dissenting) (implying that *Gitlow* was inconsistent with *Cheek*).

306. *Gitlow*, 268 U.S. at 666. *Gitlow* was followed by *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Whitney v. California*, 274 U.S. 357, 371 (1927). See also *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring); *Fiske v. Kansas*, 274 U.S. 380, 386 (1927); *Hamilton v. Regents of the University of California*, 293 U.S. 245, 261-62 (1934); *Herndon v. Lowry*, 301 U.S. 242, 256-57 (1937). An early history of incorporation of the First Amendment may be found in John Raeburn Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. Pa. L. Rev. 608 (1949).

307. *Grosjean*, 297 U.S. at 244.

308. *Palko v. Connccticut*, 302 U.S. 319, 323 (1937). See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 Georgetown L. J. 253, 290-92 (1982) (describing the movement from "absorption" te "selective incorporation"); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746, 747-48 (1965) (distinguishing "absorption" from "incorporation"). But see *Cohen*, 366 U.S. at 157 (Brennan, J., dissenting) (criticizing the idea of "absorption": "surely it hlinks reality to pretend that the specific [right] selected for application is not really being applied").

For several years, the Court reaffirmed the abstract nature of the rights of religion and expression applicable to the states through the Due Process Clause,[309] although it was undoubtedly reaching the same results it would have under the First Amendment. When the Court eventually concluded that personal rights of religion and expression against state governments and the federal government were coextensive,[310] it was an easy step to declare that the text of the First Amendment bound the states as well.[311] This move anchored the right in some text. Instead of speaking of vague, unwritten rights of religious liberty and freedom of expression, the Court could state that the First Amendment itself applied to the states. Just as important, this shift provided a legislative history to which the Court could refer.[312] By 1947 the transformation of the personal privilege held

309. As examples of cases where the Court has stated that the Fourteenth Amendment protects the right of free expression from state interference, see *Poulos v. New Hampshire*, 345 U.S. 395, 396-97 (1953); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-71 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

310. For a time several justices expressed the view that the Constitution did not exact the same standard from the states as it did from the federal government. See, for example, *Memoirs v. Massachusetts*, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting); *Smith v. California*, 361 U.S. 147, 169-70 (1959) (Harlan, J., concurring and dissenting); *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring and dissenting); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 706 (1968) (Harlan, J., concurring and dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288-91 (1952) (Jackson, J., dissenting); *Gitlow*, 268 U.S. at 672 (1925) (Holmes, J., dissenting).

For Justices Harlan and Jackson, the dual standard approach was consonant with the way in which the First Amendment had come to apply to the states. According to Justice Harlan it was "plainly consistent with the language of the First and Fourteenth Amendments and . . . more responsive to the proper functioning of a federal system." *Memoirs*, 383 U.S. at 456 (Harlan, J., dissenting). Dissenting in *Beauharnais*, Justice Jackson made the argument that at the time of the Fourteenth Amendment state constitutions recognized criminal libel laws:

> Certainly this tolerance of state libel laws by the very authors and partisans of the Fourteenth Amendment shows either that they were not intending to incorporate the First Amendment or that they believed it would not prevent federal libel laws. Adoption of the incorporation theory today would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments.

343 U.S. at 294 (Jackson, J., dissenting).

311. See, for example, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard"); *Bridges v. California*, 314 U.S. 252, 263 (1941) ("[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must he taken as a command of the broadest scope that explicit language . . . will allow" (footnote omitted)).

against the states from an abstract, non-textual right to a First Amendment right was made complete with the incorporation of the Establishment Clause. "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' "[313] Today, the Court has unhesitatingly applied the text of the First Amendment to the states,[314] with virtually no acknowledgment of the federalism,[315] much less the separation of powers,[316] concerns that brought about its form.

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312. See, for example, *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983) (finding that history demonstrates that the Founders intended to allow prayer at the opening of legislative sessions); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (finding that the history of the colonial period informed the understanding of the origins of religious liberty). See also *Lee v. Weisman*, 112 S. Ct. 2649, 2668-70, 120 L. Ed. 2d 467 (1992) (Souter, J., concurring) (finding that history shows that the Founders intended the Establishment Clause to prohibit non-preferential aid to religion); *Wallace v. Jaffree*, 472 U.S. 38, 98-99 (1985) (Rehnquist, J., dissenting) (finding that the history of the Establishment Clause shows that the Founders did not intend to create a rigid separation between church and state); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (reviewing history to conclude that the "Framers meant the Establishment Clause to prohibit more than the creation of an established federal church"); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 215 (1948) (Frankfurter, J., dissenting) (observing that, prior to adoption of the Fourteenth Amendment, American citizens had supported prohibition on state supported religious instruction).

313. *Everson*, 330 U.S. at 8 (footnote omitted). See David P. Currie, *The Constitution in the Supreme Court, The Second Century, 1888-1986* at 338-40 (U. Chicago, 1990) ("The text [of the Establishment Clause] did not lend itself to incorporation.... It was not obvious that an establishment of religion as such would deprive anyone of 'life, liberty, or property' " (footnote omitted)).

314. See, for example, *Weisman*, 112 S. Ct. at 2661 (1992); *Jaffree*, 472 U.S. at 48-49 (1985); *Zorach v. Clauson*, 343 U.S. 306, 309-10 (1952). Indeed, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court resorted to the history of Congress's use of chaplains in order to uphold Nebraska's similar practice. In the process, the Court fended off the claim that the Fourteenth Amendment "impos[ed] more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." Id. at 790-91.

315. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 276-77 (1964) (stating that there was "no force in [the] argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States"); *Schempp*, 374 U.S. at 254-55 (1963) (Brennan, J., concurring) (arguing that the original motivation for the Establishment Clause was "historical anachrouism by 1868, [and] cannot be thought to have deterred the absorption of the Establishment Clause"); *Cohen*, 366 U.S. at 157-58 (Brennan, J., dissenting) (admitting that there were "considerations of federalism," but these should not "overbear the weighty arguments in favor of their application to the States"). But see Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv. L. Rev. 1700, 1709 (1992) ("[N]ot only is it impossible for the Establishment Clause to be incorporated while accurately reflecting its original federalist purpose, but it also cannot be incorporated without eviscerating its raison d'etre" (footnote omitted)).

316. The Supreme Court finally dispossessed itself of whatever power to issue prior restraints it had and extended the First Amendment to the judiciary. See *Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President of Princess Anne County*, 393 U.S. 175 (1968). See also *Near*, 283 U.S. at 712-20, 722-23 (holding that freedom of the press was infringed by a state statute that allowed the enjoining of literature found to be a nuisance).

Justices have occasionally referred to specific departments of governments when discussing the applicability of the First Amendment. See *Cantwell*, 310 U.S. at 303 (1940) ("The

IV. THE FIRST AND FOURTEENTH AMENDMENTS: FORGOTTEN TEXT AND MODERN THEORIES

A. The Textual Basis for Incorporation

As we did with the First Amendment, it is not enough that we ask, "what did the Framers of the Fourteenth Amendment intend?" Members of the Thirty-ninth and succeeding Congresses had such very different views as to what they had done that it will be difficult to find a consensus, even among those who favored the amendment. Even if we can reach an opinion in our own minds as to their *intentions*, we must ask whether they were successful.[317] To understand the effect of the Fourteenth Amendment on the First Amendment, we must have a theory of the Fourteenth Amendment, because if we conclude that some kind of incorporation was intended and achieved, then the theory of incorporation we adopt may have consequences for Congress's powers under Section 5. Of the three clauses of Section 1, I am only aware of two, the Privileges or Immunities Clause and the Due Process Clause, that have been cited as the mechanism by which the Fourteenth Amendment incorporated the Bill of Rights.

1. The Privileges or Immunities Clause

Let us start with the Privileges or Immunities Clause and the question of whether that guarantee is an equality-based provision, as Thaddeus Stevens and others argued, or a substantive provision, as Jacob Howard and John Bingham claimed. Although *The Slaughter-House Cases* seem to have eviscerated the Privileges or Immunities

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Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws"). However, there is no indication that any justice thought the First Amendment binding on the legislature alone. See *Beauharnais*, 343 U.S. at 286 (1952) (Douglas, J., dissenting) ("Freedom of speech . . . is a negation of power on the part of each and every department of government").

317. "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheaton) 1, 188 (1824). See also id. at 232 (Johnson, J., concurring) ("One half the doubts in life arise from the defects of language").

Clause, there is renewed interest in the Clause;[318] for those favoring incorporation, there is substantial evidence that if the Framers intended some kind of incorporation, they intended to accomplish it through the Privileges or Immunities Clause.[319]

a. The Privileges or Immunities Clause as a mandate for substantive rights

The predominant view of the Fourteenth Amendment is that the Privileges or Immunities Clause is a substantive clause, guaranteeing against the states a body of rights.[320] These rights may be variously determined and may include some or all of the first eight amendments, other constitutional guarantees, and natural rights.[321] Of those theories that conclude the Privileges or Immunities Clause works some kind of incorporation, most of the arguments rest on incorporation as historical fact; that is, that the Framers thought they were incorporating some or all of the first eight amendments through the Clause.[322]

Few have attempted to explain precisely how the Privileges or Immunities Clause accomplishes incorporation. The one notable exception is Akhil Amar, who has offered a carefully plotted analysis of the Clause's text to demonstrate that the Framers both intended and accomplished incorporation through the Privileges or Immunities Clause.[323] According to Professor Amar, the Privileges or Immunities Clause guaranteed against the states all personal privileges or immunities in the Bill of Rights. The catch is that not everything in

318. See, for example, Curtis, *No State Shall Abridge* (cited in note 160); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385 (1992); Amar, 101 Yale L. J. at 1193 (cited in note 73); Bishop, 79 Nw. U. L. Rev. at 142 (cited in note 237).

319. Curtis, *No State Shall Abridge* at 215-19 (cited in note 160); Amar, 101 Yale L. J. at 1218-26 (cited in note 73).

320. See, for example, the comments of Sen. Matthew Carpenter: "The fourteenth amendment assumes that there are certain privileges and immunities belonging to the citizens of the United States, and it declares that no State shall abridge those privileges and immunities.... [T]o abridge the rights of any citizen it must follow that the privileges and immunities of all citizens must be the same." Cong. Globe at 762 (cited in note 270).

321. See Harrison, 101 Yale L. J. at 1393-96 (cited in note 318) (surveying a number of theories about the scope of the clause).

322. The best known proponent of this view is Justice Black, who concluded that his "study of the historical events that culminated in the Fourteenth Amendment" persuaded him that "the provisions of the Amendment's first section, separately, and as a whole, were intended ... to make the Bill of Rights, applicable to the states." *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (footnote omitted).

323. Amar, 101 Yale L. J. at 1218-26 (cited in note 73).

the Bill of Rights is a personal privilege or immunity.[324] What is not a personal privilege or immunity? Professor Amar acknowledges that certain amendments, notably the First, Second, and Seventh, have a strong federalism component and pose severe problems for the total incorporation theorists, and he begins with the Establishment Clause.[325]

Professor Amar recognizes the dilemma posed by the First Amendment. His approach is worthy of extended consideration because his analysis of this issue is the most important work to date marrying historical and textual rigor.

> The First Amendment explicitly speaks of "right[s]" and "freedom[s]" (entitlements also known as "privileges" and "immunities"), and the Amendment's words that these rights "shall" not be "abridg[ed]" by "law" perfectly harmonize with their echoes in the key sentence of Section One. . . .
>
> Of course, federalism played an important role in the original First Amendment, but not in a way that impedes incorporation of its explicit rights and freedoms. . . . [N]othing about incorporation takes away state legislatures' freedom of speech; incorporation simply limits their freedom to use state law to silence ordinary citizens, and *that* freedom is not in any way protected by the First Amendment. For example, the Amendment nowhere forbids Congress to "make any law *protecting* freedom of speech" and so on against repressive state action. On the contrary, a strong argument can be made that Congress was empowered and perhaps required to pass precisely these sorts of laws to vindicate the Article IV guarantee that each state would have a republican government.[326]

Professor Amar concludes that the term "Congress" presents no "stumbling block to incorporation," although he admits that "the federalism aspect of First Amendment absolutism does not sensibly incorporate against states."[327] To this he suggests a solution short of failing to incorporate the First Amendment: "[T]he First Amendment might constrain Congress more strictly than the Fourteenth constrains states," a solution he suggests if "taken seriously" might

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324. Id. at 1232, 1264-66. Amar would also include personal privileges or immunities found in the original Constitution, such as the right to Habeas Corpus. Id. at 1220-21.

325. Id. at 1260-62, 1266. See also Amar, 100 Yale L. J. at 1157-60 (cited in note 40) (discussing federalism and the religion clauses).

326. Amar, 101 Yale L. J. at 1273 (cited in note 73) (footnotes omitted). See Cong. Globe at 1629 (cited in note 189) (statement of Rep. Hart) (arguing that the Guaranty Clause requires that the states recognize First Amendment rights). See also Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 39-42 (L.S.U., 1969). The argument regarding the Guaranty Clause as applied to religion was made, unsuccessfully, by counsel in *Permoli*, and it was rejected during the ratification debates in 1789. See note 151 and accompanying text.

327. Amar, 101 Yale L. J. at 1274 (cited in note 73) (footnote omitted).

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"permit differential treatment of state and federal governments."[328] He also recognizes that "jot for jot" incorporation of the First Amendment—which at least John Bingham proposed—creates a serious problem when we get to deciding just what the substantive guarantee of the First Amendment is. If the First Amendment really confirmed that Congress lacked enumerated power over religion, speech, and press, "we must not assume that state governments also necessarily lack power—for perhaps Congress is denied a particular power precisely because the Constitution meant to leave it to the states."[329]

Let us begin with the question Professor Amar poses as core to his argument: Does the First Amendment plausibly include personal privileges and immunities belonging to citizens? The answer is "Of course it does." The disability imposed on Congress necessarily implies the existence of a privilege or immunity in someone else. Citizens of the United States are undoubtedly possessors of a privilege or immunity against Congress. Professor Amar gave the right answer to the question he asked, but he has asked the wrong question, or at least an incomplete question. Because the First Amendment is a disability, we must ask who possesses the corresponding privilege or immunity. And when we answer that people possess a privilege or immunity, we must inquire whether there is any one else who possesses a privilege or immunity. The answer again is "Of course: the states."[330] Asking whether religious freedom is a personal privilege or immunity is simply to ask what *persons* would be burdened if the law were otherwise. If we only ask if persons may claim the privilege[331] then we miss entirely those promises made to the states.[332]

Once we admit that the states have equal claim to a privilege or immunity against Congress, it makes the entire First Amendment

328. Id.

329. Id. at 1275.

330. Even the Establishment Clause can be characterized as protecting a personal privilege or immunity. See *Weisman*, 112 S. Ct. at 2649-50 (holding that a high school graduation prayer violates the establishment clause rights of students); *Jaffree*, 472 U.S. at 48-61 (holding that a statute prescribing a moment of silence violates the establishment clause rights of students). See also *Schempp*, 374 U.S. at 230-304 (Brennan, J., concurring). In some states an established religion meant a difference in the tax bill. It is hard to imagine a more personal liability.

331. "[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (footnote omitted). See *Schneider v. State*, 308 U.S. 147, 161 (1939) (characterizing the freedom of speech and that of the press as fundamental personal rights and liberties).

332. Professor Mayton has concluded that the form of the First Amendment—a disability or "no-power"—"primarily establish[es] speech as a common good rather than a personal right." Mayton, 3 Wm. & Mary Bill of Rights L. J. at 405 (cited in note 66).

a poor candidate for any textually rigorous theory of incorporation under the Privileges or Immunities Clause. And that is a problem that is unique to the First Amendment.[333] The remainder of Amendments Two through Eight are properly described as "privileges or immunities of citizens of the United States."[334] *Barron* was necessary precisely because the Founders stated the Fifth Amendment as a personal privilege or immunity, and the Court had to determine against whom the privilege or immunity was effective. The Court had no such difficulty with the First Amendment in *Permoli*.[335] If Professor Amar is correct that the Privileges or Immunities Clause is a substantive guarantee, that Clause, though far from ideal, is an adequate means of incorporating the personal privileges or immunities contained in Amendments Two through Eight, but it is an inadequate mechanism for incorporating the First Amendment.

The argument I have made here, as a matter of text and history, is more easily made for the Religion Clauses than it is for the Speech, Press, and Petition Clauses.[336] The Founders were successful in confirming the absolute lack of power in Congress to make laws respecting establishment, and, consequently, from saying anything about free exercise in the states.[337] If they intended a similar subject-matter disqualification with respect to speech, press, and petition, they were, as we have seen from the debates over the Sedition Act, not as successful. In response to Professor Amar's view that the states had no first amendment freedom to silence ordinary citizens—to take the worst scenario—Jefferson would have answered that Congress had no power to stop the states from doing so, and, if that were not sufficient, the First Amendment prevented Congress from meddling. Madison and Jefferson based their opposition to the Sedition laws on the lack of power in Congress, not on Congress's folly

333. As Professor Harrison aptly put it, "Incorporation under the Privileges or Immunities Clause turns on whether the definition of a right of distinctively national citizenship includes its label. If we read it with the label on, the First Amendment creates a right to be free from congressional abridgments of the freedom of speech. If we read it without the label, the First Amendment protects the freedom of speech." Harrison, 101 Yale L. J. at 1466 (cited in note 318).

334. I leave to others the problem of the Second Amendment. See Amar, 101 Yale L. J. at 1261-62, 1264-66 (cited in note 73) (discussing incorporation and the Second Amendment); Amar, 100 Yale L. J. at 1162-73 (cited in note 40) (addressing federalism and the meaning of the Second Amendment).

335. See text accompanying notes 146-60.

336. See Amar, 100 Yale L. J. at 1157-58 (cited in note 40) (observing the difference between incorporating the Speech Clause and the Establishment Clause).

337. See text accompanying notes 73, 80-99.

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in wishing to suppress political speech.[338] Undoubtedly Jefferson would have opposed any similar attempt by the Virginia legislature, but he would have argued on substantive rather than on jurisdictional grounds.[339] For want of an Establishment Clause analog for speech and press, Amar's argument stands on somewhat stronger grounds with respect to the Speech and Press Clauses, but his theory must still get around the fact that the First Amendment disability is unique to Congress.[340]

b. *The Privileges or Immunities Clause as a mandate for equal privileges or immunities*

The equality reading of the Privileges or Immunities Clause postulates that "the actual content of the privileges and immunities of citizens of the United States is given by positive law, state and national, rather than by the Fourteenth Amendment."[341] According to this view, the Privileges or Immunities Clause does not have independent content; it does not refer to a fixed body of rights, which the states may not abridge. Rather, it holds that whatever positive rights

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338. See note 130; text accompanying notes 130-41. The First Amendment might not expressly forbid Congress from making laws regarding the free exercise of religion, but Congress must still find an enumerated power to do so. Indeed, recall that Hamilton and others argued that since there was no source for such a power in Article I, the First Amendment was superfluous at best, and, at worst, might imply the existence of such a power. Section 5 of the Fourteenth Amendment might cure this defect. But it grants power to Congress only if freedom of speech and press, and the right of petition are exclusively personal privileges or immunities. Otherwise, the Court in *Slaughter-House* would be correct, at least with respect to the First Amendment, that the Privileges or Immunities Clause forbids the states from interfering with federal rights. See *The Slaughter-House Cases*, 83 U.S. (16 Wallace) at 77.

339. See Joel F. Hansen, Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645, 672-74 (concluding that Jefferson argued for vigorous separation with respect to the national government, but was more flexible with respect to state governments).

340. Professor Amar's claim that First Amendment incorporation only restricts the states from silencing citizens, and that the Amendment does not forbid Congress from making laws protecting speech, conflates two separate issues. See Amar, 101 Yale L. Rev. at 1273 (cited in note 73). The first is whether the First Amendment protects the states' power to silence citizens. That appears to have been its intent, although I have questioned whether the Founders were successful in this.

Second, whatever the answer to the foregoing question, it is distinct from asking whether Congress may make laws protecting speech in the states. Compare Levy, 32 U.C.L.A. L. Rev. at 207 n.156 (cited in note 100) (stating that Congress cannot "abridg[e] the power of the states to abridge the freedom of speech, or of the press" (emphasis omitted)) with Anderson, 30 U.C.L.A. L. Rev. at 507-08 (cited in note 79) (stating that Congress can "abridg[e] the power of the states to abridge the freedom of speech, or of the press" (emphasis omitted)).

341. Harrison, 101 Yale L. J. at 1393 (cited in note 318). See Nelson, *The Fourteenth Amendment* at 118 (cited in note 216) ("Understanding section one as an instrument for the equal, rather than absolute, protection of rights resolves the contradictions in the evidence that has so puzzled historians").

are found, for example, in state tort, contract, or property law are privileges or immunities of citizens of the United States, which states cannot abridge. A state abridges the privileges or immunities of United States citizens, not when it alters its substantive law, but when it enacts laws that "take rights away from a class of individuals."[342] This view, according to its proponents, has the advantage of demonstrating how the Fourteenth Amendment wrote the Civil Rights Act of 1866 into the Constitution,[343] while answering the critics' claim that the amendment would result in uniform national laws.[344] The Privileges or Immunities Clause protects classes of people rather than classes of rights.

The equality-based view of the Privileges or Immunities Clause casts a pall on the claim of jot-for-jot incorporation because it incorporates by reference *state* law. The theory, however, is not as unpalatable or inconsistent with the Framers' concerns over the Southern states' infringement of first amendment freedoms as it might seem. The First Amendment of the United States Constitution had no authoritative substantive content in 1866. Other than *Permoli*, in which the Court merely confirmed that the First Amendment did not apply to state laws,[345] there was no Supreme Court decision interpreting the First Amendment, and there would not be such a decision until ten years after ratification of the Fourteenth Amendment. Since the last state, Massachusetts, disincorporated its church in 1833, there was no reason to believe that state guarantees of free exercise of religion or rights of conscience, or whatever phrase the states had employed in their individual constitutions, were substantively different from the federal Establishment and Free Exercise Clauses.[346] The same thing would be true of the Speech and Press Clauses.[347] What would have concerned Congress was that

342. Harrison, 101 Yale L. J. at 1421 (cited in note 318).

343. See Cong. Globe at 2498 (cited in note 189) (statement of Rep. Broomall) (stating that the Amendment puts the Civil Rights Act into the Constitution); id. at 2502 (statement of Rep. Raymond) (stating that the amendment gives Congress the power to enact a civil rights bill); id. at 2511 (statement of Rep. Eliot) (stating that Section 1 will give Congress "the power to prohibit State legislation discriminating against classes of citizens").

344. Nelson, *The Fourteenth Amendment* at 119 (cited in note 216).

345. To *Permoli* we might add that the Supreme Court had given effect to state establishment, *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), and acknowledged the role Christianity played in state common law, *Vidal*, 43 U.S. (2 Howard) at 127. See note 146.

346. See McConnell, 103 Harv. L. Rev. at 1503-11 (cited in note 48) (discussing the interpretations found in various Free Exercise cases).

347. See, for example, Justice Jackson's reliance on state criminal libel laws at the passage of the Reconstruction amendments. *Beauharnais*, 343 U.S. at 292-94 (Jackson, J., dissenting).

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state religion, speech, press, and petition clauses were not enforced, or were enforced unequally.

An equality-based interpretation of the Fourteenth Amendment would suggest that what Congress had the power to enforce was the prohibition of unequal state enforcement of the states' own so-called First Amendment guarantees, whether the inequality was based on race or some other fact.[348] In that sense the Privileges or Immunities Clause could bring federal enforcement of *state* First Amendment provisions to the extent that the states did not guarantee those provisions equally to all citizens. However, it would not justify the claim that the federal courts or Congress could dictate the content of First Amendment rights or require uniform results, any more than the courts or Congress could dictate uniform property laws. This view appears to be consistent with Thomas Cooley's contemporaneous reading of Section 1: "[I]t may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State Constitutions; but . . . a principle of State constitutional law has now been made a part of the Constitution of the United States."[349] It is also consistent with Thaddeus Stevens's construction of the Fourteenth Amendment,[350] as well as the construction supplied by others, including some who went to great lengths to try to understand John Bingham's views.[351]

2. The Due Process Clause

As we saw in the post-ratification history of the Supreme Court's construction of the First Amendment, two fairly distinct theories of the First Amendment emerged under the Due Process Clause: "absorption" and "incorporation."

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348. See Harrison, 101 Yale L. J. at 1465 (cited in note 318) ("The privileges and immunities of state citizenship include state constitutional protections, many of which are similar in subject matter to those contained in the first eight amendments to the federal Constitution. States may not, therefore, discriminate with respect to those rights").

349. Thomas Cooley, *Constitutional Limitations* *294 (Little, Brown, 2d ed. 1871), quoted in Aynes, 103 Yale L. J. at 92 (cited in note 194). See also Thomas Cooley, *Constitutional Limitations* 25 (Little, Brown, 4th ed. 1878) (arguing that the Sixth and Seventh Amendments do not apply to States). Professor Aynes suggests that Cooley simply did not see any conflict between federal constitutional principles and state constitutional principles. Aynes, 103 Yale L. J. at 92 n.228. He may be correct. See Cooley, *Constitutional Limitations* at 584 (discussing religious liberty and "[t]hose things which are not lawful under any of the American constitutions"), and this would support an equality-based reading.

350. See text accompanying notes 218-21.

351. See, for example, sources listed in note 258.

a. *The Due Process Clause and "absorption" of the First Amendment*

The absorption theory, which counts among its theorists opponents of incorporation such as Felix Frankfurter and Charles Fairman,[352] eschews the textual rigor of the privileges or immunities clause theorists. It will frustrate anyone who believes that the text, rather than unspecified principles, defines the rules. The absorption theory is not dependent on the views of the Framers of the Fourteenth Amendment, nor does it depend on the structure of the text of the first eight amendments, or in fact on the text of any amendment or law. Instead, it has its origins in *Lochner*.[353] This theory contends that the Due Process Clause incorporates certain fundamental rights against the states, some of which were also enumerated in the Bill of Rights and applied against the federal government.

In some respects, the absorption theory of the Due Process Clause is consistent with the equality theory of the Privileges or Immunities Clause. The Framers of the Fourteenth Amendment could not have agreed on the content of the First Amendment any more than the Founders could have. There was no body of law on which they could rely (at least no *federal* body of law). Perhaps a theory of the Due Process Clause as a guarantee of certain fundamental rights, rather than as a guarantee of the Bill of Rights, suggests that the states must provide and enforce some kind of First-Amendment-type rights. So long as the states provide those rights, they have not denied any person due process, and there is no occasion for federal interference. Such a theory would allow for some flexibility in the standard, permitting modest variations in the state applications. As the Supreme Court relinquished "absorption" and moved towards more formal "incorporation,"[354] Section 1 incorporated a substantive *federal* right and therefore prescribed national *uniformity*, a result not necessary to due process.

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352. Exemplary discussions of these views can be found in *Adamson v. California*, 332 U.S. 46, 67 (1946) (Frankfurter, J., concurring), and Fairman, 21 U. Chi. L. Rev. at 138-39 (cited in note 60).

353. Currie, *The Constitution in the Supreme Court, The Second Century* at 155 (cited in note 313). See also *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1937) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face te be within a specific prohibition of the Constitution, such as those of the first ten amendments which are deemed equally specific when held to be embraced within the Fourteenth").

354. See notes 303-16 and accompanying text.

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The challenges to substantive due process theories generally are well documented. For our purposes, the defects are plain. The due process theory of absorption succeeds only if all first amendment rights are exclusively personal rights because the theory must deny that there are any residual state rights or federalism concerns in the First Amendment. In sum, the theory posits that the Fourteenth Amendment amended the First Amendment without so much as fair warning that that was its function. Absorption does not rely on the text or history of the First Amendment, and it finds virtually no support in the text and history of the Fourteenth Amendment.

b. The Due Process Clause and "incorporation" of the First Amendment

The current theory of "incorporation" of the First Amendment claims the Due Process Clause makes selected clauses of the first eight amendments (including the entire First Amendment) applicable to the states.[355] Like the absorption theory, incorporation does not claim its provenance from the history of the Fourteenth Amendment. Unlike that theory, however, the incorporation theory posits the jot-for-jot adoption of the text of the First Amendment.[356] Once the Court incorporated the text of the First Amendment into the Fourteenth, it made the history of the First Amendment its own as well.[357] As a result, the incorporation theory is a strange amalgam of history and fiction: It is historical with respect to the First Amendment, but ahistorical with respect to the Fourteenth; it recognizes the legitimacy of the tools of original intent where the First Amendment is concerned, but scorns it with respect to the Fourteenth.

The incorporation theory is perhaps the least acceptable of the theories applying the First Amendment (or first-amendment-type rights) to the states because it is unable to account for the history of the Fourteenth Amendment.[358] And, having accepted the text and history of the First Amendment, it is unwilling to recognize the First Amendment for what it was. As with the absorption theory, the incorporation theory must ignore the federalism and separation of

355. The theory counts among its more prominent defenders Justice Brennan. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, speech given at Georgetown University (Oct. 12, 1985), reprinted in 27 S. Tex. L. J. 433, 441 (1986); William J. Brennan Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 769-78 (1961).

356. See notes 313-16 and accompanying text.

357. See notes 310-12 and accompanying text.

358. Henkin, 73 Yale L. J. at 77, 88 (cited in note 60).

powers concerns that motivated adoption of the First Amendment, and it ignores them with a vengeance.

3. Reconstructing the First Amendment: The Consequences of Text and Theory

Obviously much is at stake in our choice of theories on Section 1. The more textually and historically rigorous the theory of incorporation, the stronger becomes the case for incorporation, but the more closely we must examine the history of the First Amendment's form and substance. The more willing we are to find broad constitutional emanations in Section 1 that do not incorporate "jot for jot" the guarantees in the Bill of Rights, the less we can complain when Congress decides to prescribe uniform laws.

A substantive theory of the Privileges or Immunities Clause and the orthodox reading of the Due Process Clause as the source of incorporation lead to substantive First Amendment rights, and these theories raise interesting questions regarding whether Congress may not only enforce but dictate the substance of First Amendment rights. By contrast, an equality-based theory would not lead to substantive rights. Although an equality-based theory would not deprive Congress of any role in enforcing the guarantees of religious liberty and freedom of expression, it would certainly alter current notions of Congress's power under the Fourteenth Amendment. Under an equality-based provision, Congress lacks power to prescribe substantive First Amendment standards, but it retains the power to make and enforce laws against states that failed to respect the state's own guarantees of religious liberty and freedom of speech, press, and petition. Accordingly, a state violates Section 1 when it either restricts the rights of some of its citizens through positive law, or fails to protect some citizens in the exercise of those rights.[359]

Any theory incorporating the First Amendment into the Fourteenth Amendment must deal with the federalism and separa-

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359. Additionally, Congress would retain the power to enforce federal rights where the states directly interfered with federal rights; for example, if a state punished a petition to the federal government. See *Cruikshank*, 92 U.S. at 552-53 (finding that the right to petition Congress is an "attribute of national citizenship" and thus lies "within the scope of the sovereignty of the United States"). See also *The Slaughter-House Cases*, 83 U.S. (16 Wallace) at 79 (discussing the right of petition); Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book,* The Impending Crisis*: Free Speech, Slavery, and Some Light on The Meaning of the First Section of the Fourteenth Amendment*, 68 Chi. Kent L. Rev. 1113, 1135 n.103 (1993) (discussing constitutional protection of the right to petition Congress).

tion of powers concerns inherent in the First. For example, Jefferson's metaphor of the "wall of separation" makes sense when coupled with his strict views of the enumerated powers of Congress, but it is not useful as a standard for judging state laws under the Establishment Clause. The same is true, but to a lesser degree, for the Free Exercise, Free Speech, Free Press, and Right of Petition Clauses. Those clauses come much closer to having some substantive content, but from the beginning they lacked the kind of definition or development that state constitutions in 1789, or even in 1868, contained.[360] It is thus not at all clear what incorporation of the First Amendment brings upon the states, except the oversight of the Supreme Court, and perhaps Congress, both of which have no guidance other than a rule which provides that Congress shall make no rules.

B. Section 5 and the Enforcement of the Fourteenth Amendment

Even if we were convinced that Section 1 made the First Amendment applicable to the states, there is still the question of what enforcement powers Congress acquired in Section 5. As we saw in Part III, the Framers of the Fourteenth Amendment agreed on little beyond the fact of passage of the Amendment itself, and the debates over Section 5 occasioned no more agreement than the debates over Section 1. Several different theories emerge from those debates and from the Section 5 cases that have followed. I briefly consider the implications of three of these theories.

1. Judicial Enforcement of Section 1

A number of the Framers of the Fourteenth Amendment regarded Section 1 as self-executing like the First Amendment. The disabilities in Section 1 forbid the states from enacting certain kinds of laws, and if the states enact such laws the judiciary stood to declare the laws unconstitutional. These proponents believed Section 1 was complete without further response by Congress.[361] Indeed, since Section 1 confers no power on Congress, not only was there no occasion for Congress to act to enforce Section 1, but also the

360. See, for example, discussions of early state religion clauses in McConnell, 103 Harv. L. Rev. at 1455-66 (cited in note 48); *Report to the Attorney General* at 4-10 (cited in note 57).

361. Cong. Globe at app.117 (cited in note 1) (statement of Rep. Farnsworth) ("The first Section of the amendment requires no legislation; 'it is a law unto itself;' and the Courts can execute it").

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Constitution prohibits Congress from doing so. Representative Holman argued that Section 1 was a "positive limitation and nothing more," and upon its violation, no one should "doubt the completeness of the remedy . . . . The Supreme Court will declare the law void."[362]

This theory confines the scope of Section 5, but does not nullify it. According to the theory's proponents, Section 1's limitations on state action—similar to those found in Section 10 of Article I—do not confer power upon Congress. Instead, Section 5 facilitated Sections 2 and 3, which authorized Congress to apportion representatives and to relieve those disabled from holding public office for having "engaged in insurrection or rebellion."[363]

The problem with this crabbed reading of Section 5 is not that it is too technical, but that it is not technical enough and did not survive *Ex Parte Virginia*. It nevertheless merits further examination. In *Ex Parte Virginia*,[364] a state judge was charged with excluding black citizens from grand and petit juries, in violation of federal law. The Court upheld the judge's conviction and the power of Congress under Section 5 to make such conduct criminal.[365]

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[366]

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362. Id. at app.259. See id. at app.314-15 (statement of Rep. Burchard). See also *Ex Parte Virginia*, 100 U.S. 339, 361 (1880) (Field, J., dissenting) ("The provision authorizing Congress to enforce [the 13th and 14th Amendments] does not enlarge their scope, nor confer any authority which would not have existed independently of it").

363. U.S. Const., Amend. XIV, § 3. See Cong. Globe at app.117 (cited in note 1) (statement of Rep. Farnsworth) ("There are other provisions in that amendment which require legislation by Congress. Apportioning Representatives and relieving from disabilities by Congress are required by the amendment").

364. 100 U.S. 399 (1879).

365. Id. at 348-49.

366. Id. at 345-46. See also *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (Fifteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (Thirteenth Amendment).

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The Court agreed with some members of Congress that Section 5 was "equivalent"[367] to the Necessary and Proper Clause, and authorized Congress to enact legislation where the Constitution permitted it.

The analogy between the Necessary and Proper Clause was inevitable because of the striking similarities in their wording. The Necessary and Proper Clause grants Congress "power" as "necessary and proper" to "make laws" for the "carrying into execution" of the "powers" of the federal government.[368] Section 5 grants Congress "power" as "appropriate" to enact "legislation" to "enforce" the "provisions" of the amendment.[369]

There are two key differences between the Necessary and Proper Clause and Section 5. First, the Necessary and Proper Clause is the power to "execute," seemingly a broader term than "enforce." The term "enforce" suggests that a violation of Section 1 is a condition precedent to the use of the Section 5 powers, but it does not limit enforcement to the judiciary.[370] Second, the Necessary and Proper Clause only gives Congress the power to facilitate "powers" of the government, while in Section 5 it may enforce the "provisions" of the Fourteenth Amendment, irrespective of whether those provisions consist of "powers" or something else. As the first Justice Harlan pointed out in dissent in *The Civil Rights Cases*, Section 5 is "to enforce 'the *provisions* of *this article*' of amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment."[371] In this regard, Section 5 is broader than the Necessary and Proper Clause.

A necessary and proper clause does not operate in a vacuum; it is not a free-standing power, but must operate on something else. The Necessary and Proper Clause, in and of itself, would not permit enforcement of the First Amendment, because the First Amendment is not a grant of power to the federal government. For similar reasons, the Necessary and Proper Clause would not authorize

367. Cong. Globe at app.87 (cited in note 1) (statement of Rep. Storm).

368. U.S. Const., Art. I, § 8, cl. 18.

369. Id. Amend. XIV, § 5.

370. See generally Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?: An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029 (1993). See also Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995).

371. *The Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting). See also Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 311 n.189 (1993) (comparing the enforcement provisions of the Reconstruction Amendments and the Necessary and Proper Clause).

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enforcement of Section 1. It would thus leave enforcement of Section 1's provisions to the judiciary.[372] The same cannot be said of Section 5.

2. Remedial Congressional Enforcement of Section 1

A second view of Section 5 suggests that there is some role for Congress to enforce Section 1, but that the primary role belongs to the judiciary. Congress might act, but only once the judiciary has determined that a state had violated Section 1. As Senator Norwood stated, "[U]ntil a State shall attempt to abridge [a citizen's] rights, Congress has no power to act."[373] And Representative Garfield, speaking of complaints of "systematic maladministration" of the laws, stated that "[w]henever such a state of facts is clearly made out, . . . the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection."[374]

This is substantially the second Justice Harlan's position in *Katzenbach v. Morgan*.[375] In *Morgan* the Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965.[376] That section prevented the states from denying any person's right to vote simply because that person could not read or write English. The law had the effect of nullifying state English literacy requirements, requirements which seven years earlier the Court held did *not* violate the Fourteenth or Fifteenth Amendments.[377] The *Morgan* Court held that its prior decision was "inapposite" and that the question before the Court was, "[w]ithout regard to whether the *judiciary*" would find

372. See *Harris*, 106 U.S. at 639 (stating that Section 1 of "the amendment imposes no duty and confers no power upon Congress").

373. 2 Cong. Rec. app.244 (April 30 and May 4, 1874). See *The Civil Rights Cases*, 109 U.S. at 11 (finding that Section 5 vests Congress with authority "[t]o adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null").

374. Cong. Globe at app.143 (cited in note 1). Garfield also thought that if Congress provided for appeal from state courts to federal courts, that would "cover[ ] nearly all the ground that needs to be covered in time of peace." Id.

375. 384 U.S. 641, 659-71 (1966) (Harlan, J., dissenting). See *EEOC v. Wyoming*, 460 U.S. 226, 260 (1983) (Burger, C.J., dissenting) (arguing that Congress's section 5 enforcement was appropriate only "where a violation lurks"). See also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (O'Connor, J., writing for the Court).

376. 42 U.S.C. § 1973b(e) (1988).

377. *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 53-54 (1959) (holding that a North Carolina statute requiring that all prospective voters be able to read and write English did not on its face violate the Fourteenth and Fifteenth Amendments).

an English literacy requirement violated the Fourteenth Amendment, "could *Congress* prohibit the enforcement of the state law" through Section 5.[378] The Court answered that Congress could.

Justice Harlan dissented. "When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by [Section] 5 to take appropriate remedial measures," but it is a "judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution," and thus, "the necessary prerequisite to bringing the [section] 5 power into play at all."[379] As Justice Harlan explained, without the threshold judicial finding, "Congress would be able to qualify this Court's constitutional decisions" by resorting to Section 5 and even the Necessary and Proper Clause.[380]

Justice Harlan's view grants to Section 5 a broader reading of the term "provisions," a failing in the prior theory, but it also takes a strict view of the term "enforce." The view finds support in the tradition of enforcement being reactive and remedial, rather than prescriptive. It also claims support from an unlikely source: John Bingham. Recall that Representative Bingham boasted that upon a second reading of *Barron*, he decided to imitate the Founders and began the Fourteenth Amendment with the same language as Article I, Section 10: "No State shall."[381] That section, of course, is subject to judicial enforcement only, and admits of no role for Congress, except as specifically provided. Justice Harlan's reading of Section 5 is faithful to its text and the structure of the Constitution, and has some support in the legislative history.

3. Independent Congressional Enforcement of Section 1

A third view, one which claims some support from Justice Brennan's majority opinion in *Morgan*, suggests that Section 5 empowers Congress to enforce Section 1, not only in the absence of a judicial finding of violation, but even in the face of a judicial finding of

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378. *Morgan*, 384 U.S. at 649 (emphasis added).

379. Id. at 666 (Harlan, J. dissenting).

380. Id. at 667-68.

381. See text accompanying notes 245-47. Professor Burt argues that Bingham, at least in 1866, recognized "the propriety of . . . final appeal of all questions of law arising under [the Civil Rights Act] to the Supreme Court of the United States." Robert A. Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 S. Ct. Rev. 81, 89 (quoting Cong. Globe at 1291 (cited in note 189) (statement of Rep. Bingham)). Burt concludes that "[i]t is unlikely that Bingham would interpret the very same language in § 5 of the Fourteenth Amendment as conferring a broad, even unreviewable, discretion in Congress to determine the substance of § 1." Id. at 89.

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no violation of Section 1.[382] It thus grants Congress the power to determine state constitutional violations in the absence of judicial findings, and perhaps even when Congress's determinations conflict with the opinion of the federal judiciary.[383] This view claims support in statements of Jacob Howard, and it might profitably look to John Bingham as well. In his post-ratification explanation of Section 5, John Bingham pointed to the Thirteenth, Fourteenth, and Fifteenth Amendments as "limitations . . . upon the powers of the States which never were imposed on them before" and as "granting to the Congress of the United States express powers which never were in Congress before."[384] He opined that it was "competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances."[385]

Senator Howard's views are far less conclusive. As he introduced the resolution that would become the Fourteenth Amendment, Howard acknowledged that Section 1 was simply a "restrain[t] [on] the power of the States . . . [and] not powers granted to Congress."[386] He declared that Section 5 plainly conferred something new; it was an "affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[387] In his view, Section 5 "casts upon Congress the responsibility of seeing . . . that all the sections of the amendment are carried out. . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."[388] Howard's role for

382. *Morgan*, 384 U.S. at 649-52 & n.10. See Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 103 (1966) (stating that *Morgan* left no doubt that Section 5 gives Congress the power to deal with conduct outside the scope of Section 1). But see Conkle, 56 Mont. L. Rev. at 53-55 (cited in note 370) (questioning whether Congress has the power to interfere with Court-detormined "constitutional coherence"); Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 462 (1994) (arguing that Congress cannot "command the Court to yield to congressional judgments about . . . the Constitution's liberty-bearing provisions").

383. Cox, 80 Harv. L. Rev. at 106-07 (cited in note 382) (asserting that after *Morgan*, Congress has "concurrent power to invalidate state legislation").

384. Cong. Globe at app.85 (cited in note 1).

385. Id. But see Burt, 1969 S. Ct. Rev. at 88-90 (cited in note 381) (citing instances where Bingham indicated that the Supreme Court would be the final arbiter of the amendment).

386. Cong. Globe at 2766 (cited in note 189).

387. Id.

388. Id. at 2768.

Section 5 is consistent with either the majority's or Justice Harlan's opinion in *Morgan*.

There are few other contemporaneous sources to support the Court's broad view of Section 5. The Court in *Morgan* cited Howard (but not Bingham) and various secondary sources[389] for the proposition that Section 5 granted "the same broad powers expressed in the Necessary and Proper Clause."[390] Virtually all who spoke during the debates to the question of Section 5's scope acknowledged that Section 5 was similar to the Necessary and Proper Clause, but as I have shown, for many members of the Thirty-ninth and Forty-second Congresses, that fact did not answer whether there had to be a separate grant of authority to Congress in Section 1 on which the Necessary and Proper Clause, or something very similar to a necessary and proper clause, could operate. The *Morgan* Court stepped right over this question and assumed the broadest powers in Congress.

The Framers of the Fourteenth Amendment were focused primarily on redefining federalism and were less intent on redefining separation of powers. Section 5 was important to the Framers because of what it said about the relationship between Congress and the states, not between Congress and the federal judiciary.[391] While members of the Thirty-ninth Congress displayed their displeasure with the Court—mainly over its resolution of *Dred Scott*—the members were acutely aware of the Court's role in constitutional interpretation and repeatedly cited Court decisions to strengthen their own arguments.[392] If Congress was deeply distrustful of the Court, the debates over Section 5 do not reflect it. Congress showed no inclination to dispossess the Court of its jurisdiction, and the members fully understood that the Fourteenth Amendment would be committed to the Court's interpretation and enforcement.[393]

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389. *Morgan*, 384 U.S. at 648-49 nn.7-8.

390. Id. at 650. See William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 619 (1975) ("[I]f anything remains of the rationale of *Katzenbach v. Morgan*, Congress should have the power to create a newsmen's privilege binding against the states").

391. Burt, 1969 S. Ct. Rev. at 94 (cited in note 381). See also id. at 95-96 (suggesting that even if the 39th Congress was suspicious of the Court in the past, it had reason to trust the Court in the future). Professor Frantz's observation that the Framers distrusted the federal judiciary and attempted to enlarge the powers of Congress is generally true. See Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L. J. 1353, 1356 (1964). But it found its fullest expression in John Bingham's failed proposal. See text accompanying note 189.

392. See, for example, text accompanying notes 196, 202, 207-09.

393. See, for example, text following note 265.

There are other good reasons for concluding that Congress assumed it would have a lesser interpretive role than the Court. During the debates over Bingham's first proposal, Representative Davis criticized Bingham's proposed amendment as a "grant for original legislation by Congress. [Congress] . . . is itself the judge of the measure of [equal] protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it make it equal."[394] Davis was not alone in his concerns that Bingham's proposal would result in uniform substantive laws. Five years later Representative Garfield pointed to the textual differences between Bingham's proposal and the Fourteenth Amendment as the clearest evidence of congressional intent regarding the latter:

> The [Fourteenth Amendment] exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State over these subjects. The [Bingham proposal] gave Congress plenary power to cover the whole subject with its jurisdiction, . . . to the exclusion of the State authorities.[395]

According to Garfield,

> [I]t became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution . . . it became perfectly evident, both to the members of the Senate and of the House, . . . that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn.[396]

Nevertheless, the Court in *Morgan* effectively adopted Bingham's failed amendment.[397]

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394. Cong. Globe at 1087 (cited in note 189).

395. Cong. Globe at app.151 (cited in note 1).

396. Id. See *Oregon v. Mitchell*, 400 U.S. 112, 160 & n.11 (1970) (Harlan, J., writing for the Court) (recognizing that postponement of Rep. Bingham's original amendment meant that it was dropped).

397. See Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U. L. J. 331, 381 (1967) ("The result of [*United States v. Guest*, 383 U.S. 745 (1966)] is to resurrect the rejected first draft of the Bingham amendment . . . and enshrine it in all of its glory into the fourteenth amendment" (footnote omitted)). See also Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* at 92 (U. Kansas, 1990) (arguing that any construction of Section 1 must not be "suhject te the objections that caused the rejection of Bingham's original amendment"); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 60 (1955)

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In *Morgan*, the Court noted one important limitation on the section 5 power. "Congress'[s] power under [Section] 5 is limited to adopting measures to enforce the guarantees of the Amendment; [Section] 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[398] Those guarantees are of two kinds: federal disabilities and personal rights. If we take the Court at its word, that Congress acquired no power in Section 5 to "dilute" the guarantees of the First Amendment, then Congress cannot abrogate or dilute the guarantees made to the states. The *Morgan* power may work so far as the personal priviliges or immunities of Amendments Two through Eight are concerned, but Congress's enforcement of the *Morgan* power cannot improve upon constitutional promises of federal abstention to the states. It is a contradiction that Congress could claim the general power to enforce through legislation a provision that specifically begins "Congress shall make no law."

V. SECTION 5 AND THE FIRST AMENDMENT: THE CONSTITUTIONALITY OF THE RELIGIOUS FREEDOM RESTORATION ACT

A. Section 5 and the Reconstruction of the First Amendment

In the Religious Freedom Restoration Act of 1993 ("RFRA"), Congress has provided that a state "shall not substantially burden a person's exercise of religion" unless the state demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[399] The requirement applies "even if the burden results from a rule of general applicability." Congress stated expressly that its authority to bind the states is found in Section 5.[400]

("Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by 'necessary and proper' power").

398. *Morgan*, 384 U.S. at 651 n.10.

399. 42 U.S.C. §§ 2000bb-1(a), (b). The Act applies to "government," which is defined to include "a State, or a subdivision of a State." Id. at § 2000bb-2(1).

400. See, for example, Religious Freedom Restoration Act of 1993, S. Rep. No. 103-11, 103d Cong., 1st Sess. 13-14 (1993) (discussing congressional power to enact RFRA under Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause of Article I); Religious Freedom Restoration Act of 1993, H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993) (same). For commentators supporting Congress's use of Section 5, see The Religious Freedom Restoration Act, Hearings before the Senate Committee on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess. 92-97, 129 (1992) ("Senate RFRA Hearings") (statement of Professor Douglas Laycock); Religious Freedom Restoration Act of 1991, Hearings on H.R. 2797

Before addressing whether Congress has authority to enact RFRA under Section 5, I wish to begin with a slightly different question. In the absence of the Fourteenth Amendment, could Congress enact RFRA? The answer must be no. First, Congress lacks any affirmative source of power by which it can enact a law requiring the states to observe the compelling state interest test. The best evidence for this is that the 103rd Congress offered no other source for its authority, and no one testifying before Congress offered any other source from among Congress's enumerated powers as an alternative to Section 5.[401] Second, Congress certainly could not claim power

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before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess. 353-59 (1992) ("House RFRA Hearings") (statement of Professor Douglas Laycock); Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 before the Subcommittoe on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. 51, 54 (1990) (statement of Rev. John H. Buchanan, Jr.); Hearings on H.R. 5377 at 72-79 (letter from Professor Douglas Laycock to Rep. Don Edwards (Oct. 3, 1990)); David M. Ackerman, *CRS Report for Congress—The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* 30-31 (1992) (on file with the Author); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 62-68 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 249-252.

For commentators questioning Congress's use of Section 5, see Senate RFRA Hearings at 116, 121-25 (statement of Bruce Fein); House RFRA Hearings at 372-74, 385-91 (statement of Professor Ira C. Lupu); Conkle, 56 Mont. L. Rev. at 60-79 (cited in note 370); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 Va. L. Rev. 1, 58-59 (1993).

401. Professor Lupu suggested Congress might ground RFRA in the Spending or Commerce Clauses, but he concluded that "these two power grants, alone or taken together, will not support the full sweep of the Act." House RFRA Hearings at 385-86 (cited in note 400). See Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 361-64 (1994) (discussing the limits of congressional power under the Constitution); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171, 212-16 (1995) (questioning congressional power to enforce RFRA); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90-91 n.79 (discussing possible congressional sources of constitutional authority for the enforcement of RFRA); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 286-87 (1994) (discussing the constitutionality of RFRA).

Whether Congress can constitutionally apply RFRA to the states raises a very different question from whether Congress can apply RFRA to the federal government. The Senate Report noted that RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under [the First Amendment]. Instead, it creates a new statutory prohibition on governmental action." S. Rep. No. 103-11 at 14 n.43 (cited in note 400). See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 251-52 & n.10 (1995) (discussing congressional power to regulate states under RFRA). Congress has a much stronger claim under the Necessary and Proper Clause to restrict "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, cl. 18. While Professor Hamilton has demonstrated that Congress is not without its problems on this score, Hamilton, 16 Cardozo L. Rev. at 366, 373-74, to the extent that Congress created a form of religious exemption for activities legitimately regulated under its enumerated powers, Congress may be on more secure ground. See, for example, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)

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under the First Amendment. We need not even speculate on whether Congress would have power if the amendment were stated as a personal privilege, as with Amendments Two through Eight. A disability specific to Congress, located in the Bill of Rights, cannot confer power to Congress. Third, not only is the First Amendment not a source of power to Congress, it forbids Congress from enacting a whole class of laws. Even if Congress thought it had an independent, enumerated power to enact RFRA—through, for example, the Spending or Commerce Clauses—it would run afoul of the First Amendment. So far as the states are concerned, the First Amendment takes back whatever power over First Amendment subjects Congress can claim derivatively in its enumerated powers.[402]

Having concluded that Congress would not have power to enact RFRA in the absence of the Fourteenth Amendment, we must ask whether Congress acquired the power to enact RFRA in the Fourteenth Amendment. Here we confront the broader question of whether Congress enjoys the same power to enforce incorporated rights as it has to enforce the express provisions of Sections 1, 2, and 3. In *Hutto v. Finney*[403] the Court held that the Eleventh Amendment did not bar attorney's fees awards[404] following violations of Section 1983.[405] Importantly, the underlying claims in *Hutto* were based on violations of the Eighth Amendment. While the majority did not expressly address whether Congress's section 5 powers extended to incorporated rights, its approval was assumed in the decision. Justice Rehnquist, joined by Justice White, dissented, in part on the grounds that "it is not at all clear . . . that it follows that Congress has the same enforcement power under [Section] 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters."[406] Justice Rehnquist has not found further supporters for his concerns.

(holding that § 702 of the Civil Rights Act of 1964 did not violate the Establishment Clause by exempting religious organizations from Title VII's prohibition against discrimination based on religion); *Ex Parte Curtis*, 106 U.S. 371 (1882) (holding that an act prohibiting certain U.S. officers from giving to, or receiving from any other officer, money or property for political purposes was constitutional).

402. See Note, 105 Harv. L. Rev. at 1714 n.97 (cited in note 315).

403. 437 U.S. 678 (1978).

404. The award was based on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988).

405. *Hutto*, 437 U.S. at 689; 42 U.S.C. § 1983.

406. Id. at 717-18 (Rehnquist, J., dissenting).

If incorporation of the Eighth Amendment is a correct doctrine, then *Hutto* probably follows.[407] There would be no reason for us to distinguish between state violations of personal rights incorporated through the Privileges or Immunities Clause or even the Due Process Clause and state violations of, for example, "pure" procedural due process rights.[408] But there is still the problem of the First Amendment, and *Hutto* does not make it go away. The Fourteenth Amendment might have made the personal privileges and immunities of United States citizens applicable to the states, but that would not necessarily affect the First Amendment. So far as I can determine, until the passage of RFRA, no court has ever considered the impact of Section 5 on a matter involving First Amendment rights.[409]

Instead, we might conclude that the Fourteenth Amendment repeals the First Amendment insofar as it is a guarantee to the states. That is implicit in the Court's current theory of incorporation. The problem with this theory is that there is no hard evidence to support it. Because implied repeals are not favored, we should insist that if Section 5 meant to trump the First Amendment, then Section 5 should state so in very specific terms. The text does not so provide, and that is consistent with John Bingham's assurances that his proposed amendment would not deprive the states of anything that belonged to them.

We might also conclude that the First Amendment codifies only personal rights. That might bring First Amendment rights within the Privileges and Immunities Clause. But that is revisionist history; it gives effect to Madison's original proposal rather than the Amendment that Congress passed and the states ratified. Unfortunately, this version of revisionist history is the prevailing view of the First Amendment, that the impediment to application of

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407. See Senate RFRA Hearings at 92 (cited in note 400) (statement of Professor Douglas Laycock); Pawa, 141 U. Pa. L. Rev. at 1096 (cited in note 370).

408. *Hutto* may be read narrowly as recognizing Congress's power to prescribe a remedy, rather than the power to prescribe substantive standards. Hamilton, 16 Cardozo L. Rev. at 391 n.127 (cited in note 401).

409. See Idleman, 73 Tex. L. Rev. at 318 (cited in note 401) ("[T]he Court has never really explained the relationship between Section Five and incorporated rights, and, until it does, it would be unwise to assume that a strong reading of *Morgan* . . . will be extended to give Congress broad power in interpreting these rights"). The district courts that have recently ruled on RFRA's constitutionality have divided. Compare *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995) (holding RFRA unconstitutional) with *Sasnett v. Wisconsin Dept. of Corrections*, 891 F. Supp. 1305 (W.D. Wisc. 1995) (holding RFRA constitutional) and *Belgard v. Hawaii*, 883 F. Supp. 570 (D. Haw. 1995) (holding RFRA constitutional). See also *Canedy v. Boardman*, 16 F.3d 183, 186 n.2 (7th Cir. 1994) (noting, but no resolving, the issue).

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the Bill of Rights is *Barron simpliciter*, and not the structure of the amendment itself. As I have demonstrated, the personal rights argument has some basis as applied to the Second through the Eighth Amendments, but it does not work with respect to the First.

B. Reconciling Section 5, the First Amendment, and RFRA

RFRA depends on two separate assumptions about the Fourteenth Amendment. First, that Section 1 incorporates the Bill of Rights, making it applicable to the states. Second, that Congress has the power to enforce state observance of those rights. If either of these assumptions falls, RFRA must also fall.

I will not here challenge RFRA any further insofar as it rests on incorporation of the First Amendment. Incorporation of that amendment is a questionable doctrine, questionable as a matter of text, history, and theory. We must, however, acknowledge with Professor Kurland that at this point incorporation is "*fait accompli*."[410] Deciphering how the Fourteenth Amendment incorporates the Bill of Rights is still relevant because it makes a difference if the Bill of Rights is incorporated as a text (the "jot for jot" incorporation) or as a collection of broad, substantive principles found in the common law of due process. The question of incorporation's legitimacy will likely remain open in the academy, but at this point we probably must concede that, correct or not, incorporation is with us.

Even conceding incorporation, we must still reconcile whether Congress may enforce the First Amendment pursuant to Section 5. This is a different question than asking whether the First Amendment applies to the states at all. Reconciling the First Amendment (an express disability in Congress creating an implied immunity in the states) with the Fourteenth Amendment (an express disability in the states and an express power in Congress) requires recollection of a relationship completely lost in modern discussions of the First Amendment: the relationship between Congress and the federal judiciary.

If we think of the First Amendment as the Founders intended, an unexpected solution emerges from our dilemma. The First Amendment is not a general restriction on the powers of the federal government; rather it is a restriction on the powers of *Congress*. And, as I have discussed, Congress's section 5 power does not trump its

410. Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 10-11 (1978-79).

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first amendment disability. Closer attention to the First Amendment, however, shows that it does not similarly disable the federal courts. The federal judiciary remains, by design, empowered to hear cases and controversies, including those touching on the subject matter of the First Amendment.

We can give fuller effect to both Section 1 of the Fourteenth Amendment, as interpreted, and the First Amendment, as written, by recognizing the power of the judiciary alone to enforce the modern First Amendment. This view respects the structure of the First Amendment, and preserves the intentions of the Founders embedded in that structure. To the Founders, the federal courts represented far less of a threat to the cause of religious liberty than Congress. Whereas Congress might establish a national religion or interfere with state protection of religious freedom, the federal judiciary could only enforce state laws. James Madison, of course, did not share the view of a majority of the Founders that religious freedom should remain the exclusive province of the states, and he strongly urged a constitutional guarantee of religious liberty in the states. But "right or wrong, the framers of the Constitution and Bill of Rights believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government,"[411] or, at least, than Congress. Certainly state legislatures, no less than Congress, might encourage religious factionalism, but the states were subject to pressures that Congress was not. As Professor McConnell pointed out, "Religious dissenters were free to travel to more tolerant states, and did; moreover, the example of the more tolerant states generated pressure on the more restrictive states to modify their policies."[412]

The Founders' judgment over the role of the states was revisited in 1868. Although the intent of the Framers of the Fourteenth Amendment was not entirely clear, they obviously intended some kind of federal oversight of state protection of fundamental rights. If they intended complete federal control over the substance of freedom of religion and expression, they were, as we have seen, unsuccessful in their mechanism. The Court's subsequent missteps into incorporation have, nevertheless, assured some federal control of the protection of First Amendment rights in the states. But

411. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1506 (1987).

412. Id.

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federal control does not necessarily mean congressional control. Leaving enforcement of the First Amendment with the judiciary resolves two important separation of powers problems. First, it satisfies the objections of a number of the Framers of the Fourteenth Amendment who, concerned about the substantive reach of Section 1 and the effect of Section 5, thought the courts a better forum in which to enforce Fourteenth Amendment rights against the states.[413] More importantly, the federal judiciary is not subject to the First Amendment's "jurisdictional" disability. Simply stated, the judiciary is not "Congress."

I do not suggest that the judiciary is more capable of answering the substantive issues of the First Amendment than Congress. Recent experience offers little hope that any solid consensus on the First Amendment will emerge from the Court. In fact, I have suggested that my proffered solution is only a partial corrective to problems created in large measure by the Supreme Court. The judiciary is, however, better situated to deal with the First Amendment by force of the Constitution itself. And there is much to be said for finding some refuge in a stable *source* of interpretation, even in an oracle as fallible as the Court.

My approach would not deny Congress power to enforce nonsubstantive equal protection and due process claims, even if the claims in some way involve religious freedom. The First Amendment is a constraint on the *Morgan* power, but the Fourteenth Amendment gives Congress an independent power to enforce states' failure to afford equal protection and due process to all persons in the exercise of their first amendment rights. This interpretation would be consistent with Representatives Stevens and Garfield and others who expressed concern over equality within states, rather than uniformity between states.[414] Thus, for example, Congress might retain some power under the Fourteenth Amendment where a state failed to enforce its laws neutrally with respect to religion.[415] But Congress

413. Moreover, there is nothing special about incorporation under the Due Process Clause that would prevent the Court from limiting enforcement of the First Amendment to the courts. Nor is there anything in Professor Amar's more textually rigorous "refined incorporation" under the Privileges or Immunities Clause that would prevent it; indeed, Professor Amar has almost invited such a result. See Amar, 101 Yale L. J. at 1274 (cited in note 73) (stating that a federalism-based First Amendment might "permit differential treatment of state and federal governments").

414. See Nelson, *The Fourteenth Amendment* at 119 (cited in note 216).

415. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (finding that a local statute prohibiting animal sacrifice discriminated against the Santeria), might be such an example. See *Larson v. Valente*, 456 U.S. 228 (1982) (finding that a

cannot prescribe the substantive content of first amendment rights in the states.

Finally, leaving enforcement of incorporated first amendment rights to the Court may further the federalism aspect of the First Amendment. RFRA was prompted by the Court's decision in *Employment Division v. Smith*.[416] In *Smith*, the Court held that "religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[417] Concurring in the judgment, Justice O'Connor accused the majority of "depart[ing] from settled First Amendment jurisprudence," which had struck "sensible balances between religious liberty and compelling state interests."[418] In a perverse way, *Smith* unintentionally accommodates both the Founders and the Framers of the Fourteenth Amendment. Through incorporation the Supreme Court has determined to supply a constitutional baseline for religious freedom. In *Smith* it dramatically lowered the standard, refusing to exempt religiously motivated conduct that conflicts with generally applicable criminal laws. The result fairly invites the states to revise *Smith* and readopt as state constitutional standards the compelling state interest or some other test.[419] As the states fashion their own rules for religious liberty, free exercise questions in the future may admit more than one solution, so long as the states respect the broad contours of *Smith*. Effectively in *Smith*, the Court has declared it will not prescribe, within limits, the unique content of free exercise rights.

From the states' perspective, the much maligned *Smith* decision interferes far less with state control of religious freedom than the prior compelling interest standard.[420] Leaving religion clause principles in the hands of the Court thus assures less interference with state laws, providing more opportunity for states to protect religious liberty under their own laws and constitutions. This result is consonant with the equality-based reading of the Privileges or Immunities Clause. The net effect may be that many states will

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statute exempting certain religious organizations from reporting requirements discriminated against the Unification Church).

416. 494 U.S. 872 (1991)

417. Id. at 886 n.3.

418. Id. at 901, 902 (O'Connor, J., concurring).

419. See Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 Notre Dame L. Rev. 747, 772 (1993).

420. For examples of the application of the compelling interest standard, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

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provide greater protection of free exercise principles than the Constitution presently requires. And that result is certainly within the spirit of *Morgan*.

VI. CONCLUSION

The Constitution exhibits the close attention the Founders paid to the form of relationships among the departments of the federal government, the states, and the people. Our inattention to the form and structure of the Bill of Rights, and in particular, our failure to regard it as an integral part of the larger document—for which form and structure are vital—is regrettable.[421] It is a near accident of history, and certainly unfortunate, that the Bill of Rights was located outside of Article I, Section 9, where it rightfully belonged. Had the Founders located it there, as Madison intended,[422] it would have better served as a reminder of the limitations of the federal constitution and the place of state constitutions.

The twin themes of federalism and separation of powers have woven themselves throughout the text and history of the First Amendment, just as they did in the text and history of the Constitution of 1789. Those themes, which we are accustomed to seeing in other provisions of the Constitution, may strike us as out of place in our current debates over religious liberty. But if we still harbor any sense that form and structure in our Constitution matter, then the Religious Freedom Restoration Act is not only an appropriate occasion to consider the First Amendment, but it compels us to reexamine the basis for Congress to prescribe the substance of matters placed beyond its ken.

The First Amendment committed the substance of religious liberty and free expression to the people of the several states, and it left the federal judiciary competent to interpret those laws. At critical junctures Congress and the Court have had to choose between careful construction of the First Amendment, construction that would recognize the federalism and separation of powers aspects of the First Amendment, and more political goals. As we have seen, the

421. See Amar, 100 Yale L. J. at 1132 (cited in note 40).

422. See text accompanying note 65. The reasons had more to do with appearances than legal interpretation. While Madison favored locating the Amendments in Article I, Section 9, Roger Sherman and others thought that to do so would concede imperfection in the original document and be an affront to George Washington. Dumbauld, *The Bill of Rights and What It Means Today* at 39, 44 (cited in note 65).

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Federalists of 1798 and the Radical Republicans of 1866 had remarkably similar views of the First Amendment. Both viewed it as protecting purely personal liberties, and neither saw in the First Amendment any impediment to Congress defining the standards for political and religious expression. We vilify the Federalists and honor the Radical Republicans because we disagree with the former and agree with the latter in the uses to which they would put the First Amendment. But we cannot honor the views of both without confessing that they had questionable views of what it means to say "Congress shall make no law."

We are once again poised to define Congress's power under the First Amendment. In RFRA Congress has simply willed itself power it cannot possess. This time Congress may well have the best of the Court in its understanding of religious liberty, but whether the Court agrees or disagrees with Congress over the substance of religious liberty and freedom of expression, it can no longer abandon its duty to police Congress for the states' and its own account.

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