

**PANEL VI:
THE ORIGINAL MEANING OF THE
FOURTEENTH AMENDMENT**

**DID THE FOURTEENTH AMENDMENT
INCORPORATE THE BILL OF RIGHTS
AGAINST STATES?**

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Under the Fourteenth Amendment, can a State abridge the freedom of speech,¹ or freedom of the press,² or the right to keep and bear arms,³ or the right of jury trial,⁴ or the privilege of habeas corpus,⁵ or any other important fundamental right recognized in either the Bill of Rights or elsewhere in our Constitution? This set of questions falls under the banner of the incorporation debate. I contend that the Fourteenth Amendment bars a State from abridging these rights, and I will try to defend this view on originalist grounds.

Let's start with the text. Section 1 of the Fourteenth Amendment begins by identifying "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof" as "citizens of the United States."⁶ The next sentence reads, "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."⁷

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1. Cf. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

2. Cf. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . .").

3. Cf. U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed.").

4. Cf. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

5. Cf. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

6. U.S. CONST. amend. XIV, § 1.

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Now, let us begin by isolating the first clause, addressing privileges and immunities. Start with the ordinary language understanding. What do you think was in mind with the words, "privileges or immunities of citizens of the United States?" What are the privileges and immunities of citizens of the United States?

I have run this test on many people—especially nonlawyers—and they often say "freedom of the press," "the right to keep and bear arms,"⁸ "jury trial," and "habeas corpus." Every once in a while, someone throws in "freedom of contract," or "property." But they almost always invoke rights that are explicitly declared in the Bill of Rights, among other places. So as a matter of ordinary language, "rights," "freedoms," "privileges," and "immunities" are synonymous. The Bill of Rights sets out privileges and immunities of "citizens of the United States." These are rights of Americans as Americans. They are not the rights of Frenchmen *qua* Frenchmen or Chinese *qua* Chinese; they basically are the things America stands for. That is just an ordinary language reading of the text.

In 1866 one could look at words "privileges" and "immunities" in law dictionaries and these words meant rights and freedoms, which is true even today.⁹ What would a lawyer looking at this clause more carefully say? "*No State shall . . .*" Well, we have seen that one before, in Article I, Section 10, and in that case, it identified precisely what States could not do.¹⁰ In *Barron v. Baltimore*,¹¹ Chief Justice Marshall correctly said, "Gee, if the Framers of the original Bill of Rights had intended to apply the Bill of Rights against the States, they would have used a phrase like '*No State shall.*'"

Now, let us move on to the next clause: ". . . *make or enforce any law which shall abridge . . .*" *Make, law, shall, abridge*. This is not the first time we have seen these words. The same phraseology, the same rhythms are used in the First Amendment of the Constitution: "Congress shall make no law . . . abridging . . ."¹² Here we see a second cross-reference. First Amendment freedoms are

8. They do not say this at elite law schools, but they do say this out there in the country.

9. The Oxford English Dictionary definition of "privilege" includes the word "right," and of "immunity," "freedom." See 12 OXFORD ENGLISH DICTIONARY 522, 691 (2d ed. 1989).

10. See U.S. CONST. art. I, § 10 (listing actions forbidden to the States).

11. 32 U.S. (7 Pet.) 243 (1833).

12. U.S. CONST. amend. I.

paradigmatically the kinds of privileges and immunities that seem to be contemplated.

And indeed that is the next phrase we come across: “*privileges or immunities of citizens.*” Now, we have seen these words elsewhere in the Constitution as well, in Article IV of the Constitution.¹³ And there was a quite robust theory that was in place in the 1860s, that Article IV “privileges” and “immunities” of “citizens” referred to (among other things) the rights that appeared in the Bill of Rights. This is not our theory today, but it was a theory that one sees across the board in the 1850s and 1860s, from the proslavery Roger Taney in *Dred Scott v. Sandford*¹⁴ to the antislavery John Bingham of Ohio. The clause “*citizens of the United States*” is a paraphrase of the Preamble’s “We the People of the United States.”¹⁵ Indeed, in the *Dred Scott* case, the Supreme Court held that constitutional rights—such as those in the Bill of Rights—are rights of *citizens* of the United States as such.¹⁶ Indeed, *Dred Scott* seems to claim aliens do not have rights under the Bill of Rights. And when *Dred Scott* talks about privileges and immunities of citizens of the United States, it refers to the freedom of speech and freedom of the press and the right to keep and bear arms.¹⁷

Then of course we come to the Due Process Clause, written in very similar language to the Due Process Clause in the Fifth Amendment.¹⁸ So, if you are a lawyer looking at this document, you see in this one compact sentence five textual cross-references to other parts of the Constitution. And if you were asked where you should start looking to find these privileges and immunities of Americans, you might begin elsewhere in the Constitution because the Fourteenth Amendment seems to be so insistently cross-referential, basically telling you to look at the other parts of this document. It is part of a coherent Constitutional system.

Now, you might say that if the Fourteenth Amendment framers meant only the Bill of Rights, and nothing more and nothing less, there would have been an easier way to say it than in this somewhat elliptical sentence. And you would be right. If they

13. See 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.”).

14. 60 U.S. (19 How.) 393 (1857).

15. U.S. CONST. pmbbl.

16. See *Dred Scott*, 60 U.S. at 403-04, 410-11, 416-17, 449-50.

17. See *id.* at 416-17, 449-50.

18. Compare U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”) with U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

meant only this, no more, no less, it would have been easier to simply say, "the first ten Articles of Amendment." But they meant more than the Bill of Rights. They meant all sorts of other important freedoms—for example, the privilege of the writ of habeas corpus, which is in Article I, Section 9 and is explicitly described there as a "privilege."¹⁹ That does not appear in the Bill of Rights. There are other parts of the Constitution that declare rights and freedoms. There may be things that are not declared in the Bill of Rights itself that were not meant to be excluded. So they may have meant more than amendments one through eight or amendments one through ten.

But I think they also meant less. Not every provision of the Bill of Rights is a pure individual rights clause, a right or freedom of individuals, a privilege or immunity of citizens. There are important federalism aspects of the original Bill of Rights.²⁰ We heard earlier this morning about how the original First Amendment sounded in part in federalism. Congress could not establish a national church, but neither could it disestablish state churches. It simply lacked all power over the subject—in either direction; the matter was left to the States. There was a Tenth Amendment-like dynamic, an enumerated powers federalism aspect, of the original First Amendment. There is a federalism aspect to the Second Amendment to the extent that it talks about state militias. Granted, this may not be the full extent of the Second Amendment, but what is important to observe is that there is a federalism dynamic to this Amendment as well. And obviously, the Tenth Amendment sounds in federalism.²¹

So not every single provision in the Bill of Rights applies jot for jot against the States under this reading. We have to go through the Bill of Rights and try to figure out the extent to which it affirms or declares the existence of rights, freedoms, privileges, and immunities of individuals. And to *that* extent, those are the things that henceforth no State shall abridge.

19. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

20. See generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

21. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Under a pretty straightforward textual analysis, why would the Fourteenth Amendment's framers pick these words? They would pick these words if they meant pretty much the rights in the Bill of Rights and elsewhere—not only the Bill of Rights, nor everything in the Bill of Rights, not a global word processing change that just deletes the word “federal” and inserts in its place “state or federal.” That would not quite work. It would not work with the Tenth Amendment or the Establishment Clause²² or the Second Amendment or elsewhere.

Stepping back from the text, we must realize that every text has an historical context. Let us look at the history. John Bingham, who authored Section 1 of the Fourteenth Amendment, said over and over and over again that this amendment would overrule *Barron v. Baltimore*. Bingham indeed said this thirteen times on a single day; he made it clear that the Amendment would apply the Bill of Rights against the States.²³

Bingham was not the only one with this view. All the leading figures in House and Senate—Jacob Howard, James Wilson, and Thaddeus Stevens, for example—shared similar concerns. By my count there were about thirty speeches in the House and Senate sharing Bingham's concern.²⁴ Nor was this issue some sort of secret—the speeches were covered in full by the *New York Herald* and the *New York Times*.²⁵ In addition, all this perfectly comports with a plain meaning analysis of the words.

But that is just the narrow legislative history. What is the broader historical context? The broader historical context is that southern States in the antebellum era, to prop up slavery, had violated just about every provision in the Bill of Rights. Slavery bred repression. The first chapter oppressed the slaves. Then the Slave Power had to repress free blacks in the South because they might agitate. And then the Slaveocracy had to repress white southern sympathizers with abolitionism. Then it had to repress northerners who might try to come down and preach against slavery. Then it had to repress northerners, in the North, who tried to circulate newspapers that might foment discontent.

22. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

23. See CONG. GLOBE, 39th Cong., 1st Sess. 1088-94 (1866).

24. See MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 112 (1986).

25. See JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 135-36 (1956).

So the South basically became an increasingly closed society. It tried to shut down the press; it made it a crime to criticize slavery, to teach blacks to read and write. The Slave Power tried to prevent even free blacks from keeping and bearing arms; free blacks were considered very dangerous, as they might even have caused insurrection. Slave States implemented dragnet search policies, and denied alleged fugitive slaves jury trials and many other procedural rights. How many violations of the Bill of Rights can you find in this system? We are not just talking about one or two paltry violations. One violation leads to another, and yet another—in an ever widening spiral of unfreedom.

The whole idea of the Fourteenth Amendment was to break the Slave Power, and to do that, the framers of the Amendment repeatedly invoked one handy catalog of rights and freedoms, privileges and immunities: the Bill of Rights. That is the historical context, the broader historical context.

Finally, let me say a couple of words about why many framers of the Fourteenth Amendment sincerely (but erroneously) believed that States already were bound by the Bill of Rights. They thought that the provisions of the Bill of Rights *declared* fundamental rights and freedoms but did not *create* them. Freedom of speech existed even before the amendment that prohibited Congress from abridging it. And if there was such a thing called *the* freedom of speech, then States should not be free to abridge it any more than the federal government could. This, in short, was the declaratory theory of the Bill of Rights that many Fourteenth Amendment framers held dear.

Here is one other way to see that. Put yourself in Virginia at the time of the founding, in the 1780s. You are a white person in Virginia. You have been part of a self-governing society that has been in existence for 150 years. The Virginia House of Burgess has been up and running for 150 years. You have just thrown off an imperial yoke in London and thus you are very suspicious of central authority. You identify liberty with localism. So when this new central government Leviathan is proposed by the federalists, you are uneasy, and you want to limit it. You support a Bill of Rights that limits only the federal government, which is far off in New York. Do not forget that you have poor communications technology. You can trust your good old State, but you are not sure you can trust the new central government.

Now fast-forward yourself in time sixty years. Now you are in Ohio in the 1860s. You are John Bingham. If you are John Bingham, you know that Ohio was a territory, a federal territory, even before it became a State. As a territory it was bound by the Bill of Rights. And it seems odd to you that the day Ohio became a State, your territorial legislature, by becoming a state legislature, should suddenly be freed of all the restraints that previously held it in check. For you the federal government chronologically came first, *before* your State. The last sixty years have shown that the federal government is not more systematically threatening to liberty than state governments have been. State governments, after all, are propping up slavery. You have improvements of communication technology—the railroad and telegraph—so that Washington does not seem that much more far off than your state capital. So you basically have a rather different structural understanding of the two governments. It seems odd to you that your rights should vary so dramatically as against the state government and the federal government.

So whether we look at the text at a popular level, or the text as lawyers would understand it, or the narrow legislative history, or the broader legislative history and structure of America from 1780 to 1860, I think we see a compelling argument for incorporation (with some refinements) of the Bill of Rights against States.

