
Hamlet Without the Prince

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A Review of:

The Second Founding: An Introduction to the Fourteenth Amendment, by Ilan Wurman
<https://www.cambridge.org/core/books/second-founding/616A124DD13B6A172681A18CA2A3F9AF>

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Note from the Editor:

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Other Views:

- Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100105.
- Randy Barnett & Evan Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 NOTRE DAME L. REV. 679 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534299.
- Mike Rappaport, *The Unbearable Wrongness of Slaughterhouse*, LAW & LIBERTY (April 1, 2019), <https://lawliberty.org/the-unbearable-wrongness-of-slaughterhouse/>.

For Ilan Wurman's response to this review, see *Reading the Wrong Play*, FEDSOC BLOG (Jan. 13, 2021), available at <https://fedsoc.org/commentary/fedsoc-blog/reading-the-wrong-play>.

Scholars seeking to master commentary on the original meaning of Section One of the Fourteenth Amendment confront a bewildering array of theories and schools of thought. Like the college freshman walking about the quad on "Club Day," the budding Fourteenth Amendment historian is wooed by the competing voices of the "Libertarian Club," the "Substantive Due Process Club," the "Equal Protection Club," and the "Incorporation Club"—all trying to out-shout one another in their attempt to win the affection of the young academic.

The newest voice in this cacophony of Fourteenth Amendment choristers is that of Arizona State Law Professor Ilan Wurman. In his new book, *The Second Founding: An Introduction to the Fourteenth Amendment*, Wurman wanders about the quad visiting the various organizations and, finding none of them completely satisfactory, decides to start his own. It is a short and breezy book (144 pages) that serves as a kind of introduction to Fourteenth Amendment scholarship and the various approaches to this endlessly fascinating and complicated amendment. Although historians will find nothing new here, students of Fourteenth Amendment theory will come away with a deeper appreciation of how utterly fractured this corner of constitutional scholarship has become.

Unfortunately, they will learn relatively little about the history of the Fourteenth Amendment. Instead of introducing the reader to the dramatic story of the framing and ratification of the Fourteenth Amendment, Wurman focuses his efforts on describing the legislation of the Thirty-Ninth Congress that drafted the amendment. The result is a book that says a great deal about the men and ideas behind the Freedmen's Bureau Bill and the Civil Rights Act, but almost nothing about the events that drove the framing of the Fourteenth Amendment or the men who explained the meaning of its text to the ratifying public. Wurman is an excellent writer; his book constructs much of the proper historical background, and he fills his stage with many of the key supporting players. The stars of the Fourteenth Amendment, however, are left standing in the wings.

Wurman divides his book into three parts. Part One discusses antebellum theories of three phrases that eventually find their way into Section One of the Fourteenth Amendment: "due process," "equal protection," and "privileges and immunities." In Part Two, Wurman focuses on the 1866 Civil Rights Act and explains how the legislative efforts of the Thirty-Ninth Congress hold the key to understanding the language of Section One of the Fourteenth Amendment, in particular the Privileges or Immunities Clause. Finally, in Part Three, Wurman applies his understanding of Section One to a few high-profile constitutional cases like *Brown v. Board of Education* and *Obergefell v. Hodges* to see if those decisions would be decided differently under his interpretation of the constitutional text (probably not, at least as to *Brown* and *Obergefell*).

Wurman’s approach to the Due Process and Equal Protection Clauses echoes the work of other scholars. For example, he joins most contemporary scholars in rejecting the doctrine of “substantive due process” and adopts the procedural due process theories of Professors Nathan Chapman and Michael McConnell. Wurman also joins a growing number of scholars who read the Equal Protection Clause as a mandate for government *protection* of certain fundamental rights (credit here goes to the groundbreaking work of Chris Green).¹

Wurman’s more controversial position involves his reading of the Privileges or Immunities Clause. Unlike most contemporary constitutional scholars, Wurman rejects the idea that the Privileges or Immunities Clause “incorporates” the Bill of Rights against the states. Instead, Wurman reads this enigmatic text as a kind of equality provision where state citizens are guaranteed equal access to state-defined “privileges and immunities.” Whether a state’s citizens enjoy freedom of speech thus depends on state law, and not the federal Constitution.

Wurman arrives at his “equal state rights” reading of the Privileges or Immunities Clause by tying the meaning of the Clause to the legislative efforts of the Thirty-Ninth Congress, especially the Freedmen’s Bureau Bill and the 1866 Civil Rights Act. The words “privileges” and “immunities” retained an antebellum equal rights connotation due to use in the “privileges and immunities” clause of Article IV. The “Privileges or Immunities Clause” of the Fourteenth Amendment simply transforms what had been the equal “privileges” of out-of-state citizens into to the equal “privileges” of in-state citizens.

Wurman is certainly right to claim that the Thirty-Ninth Congress was concerned about equal rights and the need to respond to the invidious southern “Black Codes.” The issue, however, is whether in 1866 this was Congress’s *only* concern. Determining the answer to that question requires expanding the scope of investigation beyond the legislative output of Lyman Trumbull’s Senate Judiciary Committee, which produced the Freedmen’s Bureau Bill and Civil Rights Act. It turns out that other members, and other committees, had much more on their minds than just the eradication of discriminatory codes.

Moments after the clerk gavelled the Thirty-Ninth Congress into session in early December 1865, Congress appointed a Joint Committee on Reconstruction.² The committee’s job was to consider when, and under what conditions, representatives of the former rebel states would be allowed to return to the seats they had vacated four years earlier. This Joint Committee—whose key members included Pennsylvania Representative Thaddeus Stevens, Ohio Representative John Bingham, and Michigan Senator Jacob Howard—immediately went to work drafting and proposing

amendments to the Constitution that had to be in place before Congress could safely readmit the southern states.

According to Thaddeus Stevens, the committee’s most important task was to draft an amendment that would prevent the southern states from enjoying the windfall of increased representation due to the passage of the Thirteenth Amendment.³ Slavery having been abolished, each freedman now counted as a full five-fifths of a person (instead of three-fifths as under the original Constitution). Unless Congress acted, southern Democrats would return with more political power than they enjoyed prior to the Civil War and potentially derail the entire project of congressional Reconstruction.

To prevent this, the Joint Committee proposed an amendment preventing the freedmen in a particular state from being counted for purposes of representation unless the state granted freedmen the vote. The committee also proposed an amendment authored by John Bingham empowering Congress to enforce the rights of national citizenship and the equal due process rights of all persons. According to Bingham, his amendment was “simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day.”⁴

Both proposals fell in a withering crossfire of criticism from conservative Republicans who believed the proposals went too far and radical Republicans who believed they did not go far enough.⁵ The Joint Committee was forced to go back to the drawing board and rethink its constitutional strategy.

Meanwhile, an entirely different committee, the Senate Judiciary Committee chaired by Lyman Trumbull, proposed the 1866 Freedmen’s Bureau Bill and Civil Rights Act.⁶ Trumbull insisted that these anti-discrimination statutes were authorized by Section Two of the Thirteenth Amendment. When challenged on that point by more moderate Republicans, supporters responded that the acts also could be viewed as enforcing rights covered by the Due Process Clause of the Fifth Amendment. This latter claim prompted an immediate objection by Joint Committee member John Bingham, who insisted that Congress currently lacked the authority to enforce the Bill of Rights. Enforcing the provisions of the 1791 amendments would have to wait until the passage of his proposed constitutional amendment.⁷

Trumbull pushed through his bills anyway. After Congress failed to override President Andrew Johnson’s veto of the Freedmen’s Bureau Bill, the Senate voted to retroactively exclude New Jersey Senator John Stockton.⁸ This allowed Congress to override Johnson’s veto of the Civil Rights Act by a single vote. When it did so, some members thought the act was enforcing the Thirteenth Amendment, others the Due Process Clause, others the Republican Guarantee Clause, and still others neither knew

1 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2009).

2 Much of the account that follows is taken from the documents and introductory notes in KURT T. LASH, *THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS* (U. Chicago Press, forthcoming 2021), available at <https://amzn.to/3aDvdFi>. See Volume 2, 1A: Drafting the Fourteenth Amendment, *id.* at 5, 20 (collecting and introducing original historical documents relating to the drafting and ratification of the Fourteenth and Fifteenth Amendments).

3 *Id.* at 160.

4 *Id.* at 43, 109.

5 See *id.* at 108 (Bingham’s bill), 133 (apportionment bill).

6 *Id.* at 35.

7 *Id.* at 135 (opposition by John Bingham)

8 *Id.* at 146.

nor cared but were content to leave the issue of constitutionality to the Supreme Court.

Meanwhile, the Joint Committee remained focused on its central goal of framing and submitting constitutional amendments. At the suggestion of Thaddeus Stevens, the committee ultimately decided to bundle together a variety of its previous proposals and submit them as a single five-sectioned amendment.⁹ Section One of this proposed amendment contained Bingham's revised version of his original individual rights amendment, while Section Two addressed the problem of the political power of returning southern states by reducing the representation of any state that continued to deny the franchise to qualified black males.

The bundling strategy worked. In his speech introducing the amendment to the Senate, Joint Committee member Jacob Howard explained that Section One's Due Process and Equal Protection Clauses would prevent the enactment of racially discriminatory "codes," while the Privileges or Immunities Clause would protect constitutionally enumerated rights such as those listed in the first eight amendments.¹⁰ Howard thus expressly echoed what John Bingham had previously (and repeatedly) announced: Section One would enforce the Bill of Rights against the states.

Surprisingly, none of this history about the framing of the Fourteenth Amendment is in Wurman's "Introduction to the Fourteenth Amendment." His chapter specifically titled "The Fourteenth Amendment" focuses instead on the 1866 Civil Rights Act and the legislative efforts of the Thirty-Ninth Congress. It contains nothing at all about the Joint Committee's early versions of the Fourteenth Amendment's various sections, the accompanying legislative debates, the committee's decision to combine the various provisions into a single amendment, or the most influential speeches regarding the meaning of the proposed amendment by John Bingham and Jacob Howard.

Perhaps conscious of his omission, early in his book Wurman assures his readers that there is little reason to explore the amendment's legislative history. After all, a "casual perusal of the debates of 1866" reveals nothing more than "a Babel of opinion" and "political chaos."¹¹ Nor should readers put too much stock in a "single statement" from Jacob Howard or "a few stray and ambiguous statements by Representative Bingham."¹²

I am not quite sure how one "casually peruses" over six thousand pages of speeches and debates in the Congressional Globe (not including the appendixes). As for Wurman's dismissal of Jacob Howard's "single statement," that single speech was reprinted in newspapers across the United States and was so influential that some commentators actually nicknamed the proposed Fourteenth Amendment the "Howard Amendment." As a self-identified originalist, Wurman should view Howard's influential public description of the Fourteenth Amendment

as exactly the kind of evidence that public meaning originalists hope to find.

Most problematic, however, is Wurman's dismissal of Joint Committee member John Bingham. There is no single individual more important to the history of the Fourteenth Amendment. The Ohio Representative authored the Privileges or Immunities Clause along with the Due Process and Equal Protection Clauses. Bingham also secured the amendment's ratification by leading Congress to pass the Reconstruction Acts, which ensured that southern freedmen would be allowed to vote on the proposed amendment. No one did more for, or spoke more about, the Fourteenth Amendment during its framing and ratification, and Bingham's words were reproduced and distributed in newspapers across the country throughout the debates of the Thirty-Ninth Congress.

For theorists like Wurman who reject the incorporation of the Bill of Rights, Bingham's speeches in the Thirty-Ninth Congress (and afterward) present a major stumbling block. From the opening weeks of the Thirty-Ninth Congress and throughout the rest of the session, Bingham repeatedly declared his efforts were directed at passing an amendment that would enforce the Bill of Rights against the states. In a single speech in February 1866, Bingham expressly refers to the Bill of Rights more than a dozen times.

Towards the end of his book, Wurman briefly notes Bingham's references to the Bill of Rights, but he dismisses their relevance since "Bingham may not have been referring to the Bill of Rights as we understand it today."¹³ According to Wurman, "recent scholarship show[s] that the term 'bill of rights' was not used as a term of art for the first eight Amendments to the U.S. Constitution until well after the Civil War."

This canard about nineteenth century references to the Bill of Rights has been floating around in various corners of Fourteenth Amendment scholarship for a few years now. It was first suggested in a speech by Pauline Maier, then amplified by Gerard Magliocca, and recently treated as established fact by libertarian theorists like Randy Barnett and Evan Bernick. These revisionists claim that the term "bill of rights" was not commonly used as a reference to the 1791 amendments until the twentieth century.¹⁴ Prior to that time, references to the nation's "bill of

9 *Id.* at 152.

10 *Id.* at 185.

11 ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 5 (2020).

12 *Id.*

13 Wurman, *supra* note 11, at 111.

14 *Id.* ("[T]he term 'bill of rights' was not used as a term of art for the first eight Amendments to the U.S. Constitution until well after the Civil War."); GERARD N. MAGLIOCCA, *THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS* 6 (2018) ("The belief that the first ten amendments are the bill of rights did not become dominant until the twentieth century."); Randy Barnett & Evan Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 NOTRE DAME L. REV. 679, 697 (2019) ("[N]o one [at the time of Reconstruction] necessarily meant what we mean today when speaking of 'the Bill of Rights.'"); Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 593, 609–11 (2017) (claiming that the term "Bill of Rights" was not defined as the first ten amendments prior to the late 1920s and early 1930s); Pauline Maier, *The Strange History of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 497, 506–11 (2017) (arguing that "Bill of Rights" did not take on its current meaning as a reference to the 1791 amendments until the 1930s).

rights” were more likely to be references to the Declaration of Independence than to the first ten amendments.

The revisionists are wrong. As a forthcoming article exhaustively details, there is a mountain of evidence establishing that Americans commonly referred to the 1791 amendments as “the Bill of Rights” from the very first decade of their existence.¹⁵ The evidence includes public declarations by Thomas Jefferson, James Madison, Joseph Story (in his hugely influential *Commentaries on the Constitution*), lawyers arguing before the Supreme Court, antebellum children’s schoolbooks, and much more. Although antebellum Americans occasionally referred to the Declaration of Independence as a bill of rights, those occasional references are vastly outnumbered by references to the 1791 amendments as the Bill of Rights, in proportions that remain constant in every decade from the Founding to Reconstruction (and beyond).

In other words, when John Bingham repeatedly declared to his colleagues and the country that his constitutional amendatory efforts were directed at enforcing the “Bill of Rights,” everyone listening understood him as proposing an amendment that would “incorporate” (to use a modern term) the Bill of Rights against the states. This understanding would have been cemented in the public’s minds when Jacob Howard later stood up and explained to the Senate that the proposed “Privileges or Immunities Clause” required the states to enforce the personal rights enumerated in the first eight amendments to the Constitution.

Whether or not one believes that the declarations of Bingham and Howard represent the original meaning of Section One of the Fourteenth Amendment, it is an exceedingly odd “Introduction to the Fourteenth Amendment” that omits their efforts, along with the entire history of the Joint Committee on Reconstruction. To be fair, Wurman probably intended this brief “Introduction” to set the stage for further scholarly exploration.

I look forward to that production. For now, readers get Hamlet without the Prince.

¹⁵ See Kurt T. Lash, *The 1791 Amendments as The Bill of Rights: Founding Through Reconstruction* (forthcoming 2021).

