Is there Anything "Fundamental" in the Right to Keep and Bear Arms? A Call for Parity in the Incorporation Doctrine

*By Thomas H. Burrell**

With the *District of Columbia v. Heller* decision set to arrive sometime in the summer of 2008,[1] the U.S. Supreme Court will determine whether the District's ban on handguns, in operation since 1976, is a violation of the Second Amendment.[2] Its opinion will likely cut a new facet on the interpretation of Second Amendment—including, inevitably, incorporation.

The District of Columbia is under the supervision of Congress, which has plenary power to enact or repeal provisions of the D.C. Code.[3] In its majority opinion, the D.C. Circuit noted that incorporation of the Second Amendment through the Fourteenth Amendment as a prohibition against the states was not directly at issue in the case.[4] But Judge Henderson's dissenting opinion argued that the Second Amendment only protects citizens of states against national legislation, and that the District is not a "state" within the purview of the Amendment. Judge Henderson also noted that even if the District were a "State," the Second Amendment has not been incorporated.[5] D.C.'s petition for certiorari likewise relies on the fact that the Second Amendment has not been incorporated.[6] Given the arguments touching upon incorporation, the Court's opinion, to a greater or lesser extent, will discuss the issue. Moreover, in light of the stringent gun laws in other major cities, courts post-*Heller* will likely revisit the issue of incorporation of the Second Amendment, perhaps even incorporation of the Bill of Rights generally.

The doctrine of incorporation received its first breath in the nineteenth century, but its full impact did not come about until the mid-twentieth century.[7] In basic terms the doctrine holds that the rights secured by the Federal Bill of Rights are "fundamental" and thus protected by the words "due process" with substance.[8] In other words, courts read the word "liberty" in the Due Process Clause to include anything deemed "fundamental" and thus, incorporate the Bill of Rights.[9] Nowhere in the text will you find that the Amendment includes the ability to enforce the Bill of Rights against the States. The language of Section One 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.[10]

Those terms had a specific historical meaning when adopted. Extending the meaning of the language to include the Bill of Rights for national protection was only advocated by a few members of the 39th Congress.[11] In contrast to modern incorporation, the Supreme Court initially rejected reading the Fourteenth Amendment as a vehicle to incorporate the Bill of Rights.[12] In *Walker v. Sauvinet* the Court recognized the omission of language from the Fifth Amendment in the Fourteenth Amendment and refused to incorporate trial by jury.[13] In *Walker*, the Louisiana statute provided that if a jury could not reach a decision, the issue shall go before the judge to decide on the evidence and pleadings.[14] A defendant ultimately deprived of a jury trial under the act appealed, arguing that the statute violated the common law right to trial by jury covered by the Fourteenth Amendment. The Supreme Court refused to incorporate trial by jury under either the Due Process Clause or the Privileges or Immunities Clause of the Amendment.[15]

In the same term, the Court in *United States v. Cruikshank* addressed the conviction of three defendants accused of interfering with the rights of two African American voters.[16] Of importance to this discussion, the second and tenth counts of the indictment alleged that the defendants banded together and conspired with the intent to prevent the exercise of the right to keep and bear arms for a lawful purpose.[17] The Court appeared sympathetic to the case against the defendants but noted with emphasis that the indictment generally suffered from two types of flaws: (1) the jurisdiction of the United States courts did not provide a remedy for the injuries suffered, and (2) where the injuries were protected by the laws of the United States, the allegations in the indictment were too broad to put a defendant on notice of the crime charged.[18] The *Cruikshank* Court discussed the role of federal and state governments and noted that citizens are citizens of both governments, but the "Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people."[19] In reference to the Second Amendment claim, the Court found:

> This [right to bear arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called . . . internal police [powers].[20]

A decade later, in *Presser v. Illinois*, the Court reaffirmed the *Cruikshank* Second Amendment holding in a case dealing with an appeal from a defendant convicted of a state statute preventing parading or drilling with arms unless one is a member of the militia or has a license from the governor.[21] Herman Presser was indicted on September 24, 1879 in Cook County for unlawfully drilling and parading with arms in violation of the statute.[22] He moved that the law was unconstitutional as a violation of the Second Amendment. Presser also alleged that the act violated the Privileges or Immunities Clause and Due Process Clause of the Fourteenth Amendment.[23] The Court

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noted that it was not sure that the military code of Illinois was infringing the right to bear arms, but stated that, even if it were, the "conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the national government, and not upon that of the state."[24] The Court also suggested that states cannot prohibit the right to bear arms under an express right of Congress to raise a militia under Article I, § 8.

As these cases show, during the generation of its adoption and ratification, the principle that the Fourteenth Amendment did not incorporate the Bill of Rights was considered a given. On several occasions, contemporaries to the 39th Congress's understanding of the Amendment refused to incorporate the Bill of Rights under Section One.[25] As the Court began to erode the limitations of the Amendment through substantive due process and substantive equal protection interpretations in the latter part of the nineteenth century, the concept of judicially incorporating the Bill of Rights found refuge in the new understanding of the Amendment.[26]

Modern incorporation theory usually refers to a few passages from Representative John Bingham or Senator Jacob Howard of the 39th Congress to argue that the Fourteenth Amendment incorporates the Bill of Rights as a tool for the judiciary.[27] Both Howard and Bingham referred to the Amendment as arming Congress with the power to protect the privileges or immunities of citizens, which they generally described by referring to the first eight amendments including the right to bear arms.[28] Bingham was the primary author of Section One and for this reason his commentary on the Amendment is entitled to deference. Howard attracts attention because he opened the initial Senate debate of the Amendment in place of an ill, and more moderate, Senator William Fessenden.[29] In the context of analyzing sentiments of Bingham and Howard, one must consider that Bingham and Howard were among what contemporaries called "radical Republicans." Both Bingham and Howard wanted more under the Amendment than would pass under an amending majority.[30] In terms of defining the understanding of the 39th Congress, the predispositions of Bingham and Howard are worth noting. One does not need to fight with Bingham's shorthand, echoed by Howard, however, to determine that the judiciary's incorporation is not warranted under Section One. There are two major problems with modern incorporation. First, Bingham's desires of the level of federal protection were not shared by the amending majority.[31] Second, even adopting Bingham's view *in toto*, Section One was designed as a tool to expand Congress's power with little interpretive role for the judiciary.

The original design and intent of Bingham's draft was for Congress to have plenary powers to pass laws protecting, for example, the Bill of Rights.[32] Congress was distrustful of the Court following the *Dred Scott* decision.[33] Bingham introduced the Amendment in its early draft by quoting the Supremacy Clause and Congress's role to protect the rights embodied in the Bill of Rights.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.[34]

After noting the Amendment was taking its language from the Due Process Clause of the Fifth Amendment and from the Privileges and Immunities Clause of Article IV, § 2, Bingham stated: "[I]t has been the want of the Republic that there was not 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 of the Constitution."[35] Bingham continued:

> The proposition pending before the House is 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 today. It 'hath that extent-no more.'[36]

Under the Amendment, Congress was to interpret "privileges or immunities" through enforcement legislation. Bingham himself declared in a post-ratification debate that the "Constitution is not self-executing."[37] Bingham clarified:

> [B]y virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is 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, for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.[38]

Reconstruction pitted Congress against the rebelling states. The main purpose of Section One was to constitutionalize the Civil Rights Act of 1866 (CRA of 1866).[39] The CRA of 1866 was originally proposed as legislation under the congressional enforcement section of the Thirteenth Amendment barring slavery. Many felt the Bill was beyond the authority of the Thirteenth Amendment and thus unconstitutional. President Johnson vetoed the Bill. Congress overrode the veto and sought to amend the Constitution to give Congress authority to pass laws such as the CRA of 1866.

In his initial draft of Section One, Bingham urged for a broad array of congressional powers.[40] Bingham even stated that he wanted to alter the design of federal-state relations to change the principle enunciated in Madison's Federalist No. 45.[41] The Amendment's early draft read:

> 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.[42]

Although Bingham intended for Congress to have a plenary grant in securing privileges and immunities, the rest

of Congress did not share Bingham's desire in arming Congress with general regulation of life, liberty and property at the expense of state sovereignty.[43] In the Reconstruction Committee and before Congress, Bingham's initial proposals and his vision of plenary powers for Congress were rejected. Congress discarded those proposals which included latitudinarian language securing "equal protection in their rights of life, liberty and property," "same political rights and privileges," "equal protection in the enjoyment of life, liberty and property," and "equal political rights and privileges."[44] Members of Congress did not want Congress to have the power to establish uniform laws in the states' jurisdiction.[45] The final draft states:

> 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.[46]

In its final form, Congress was to provide remedial protection and the scope of Congress's enforcement power was limited to equal protection of the laws and protection of national privileges and immunities. The language was revised to remove the suggestion that Congress was to attempt to secure "equal protection in the rights of life, liberty and property" or "equal privileges and political rights."[47] Implications in this language would allow some to construe the Amendment to reach political and social rights. But the Amendment and CRA of 1866 covered only citizenship rights. Laws concerning, for example, voting, interracial marriage, segregation and jury service were left for the states to regulate.[48] The 39th Congress wanted only a narrow Amendment just as they wanted a narrow CRA of 1866 to remove open-ended interpretations. In fact, many members of congress understood Section One to be "a copy of the [CRA of 1866]" in more general terms.[49] Section One was merely to provide a constitutional basis for the CRA of 1866 and to prevent the protection of civil rights from being removed by a simple majority.[50]

Congress rejected Bingham's language, and along with that, Bingham's initial desire to have the scope of congressional protection equivalent to the first eight amendments of the Bill of Rights. One must discount Bingham's later discussions about the plenary scope of Section One as rehashing the proposals and desires rejected by the Committee and by the amending majority of the 39th Congress. Bingham loses credibility in his post-ratification suggestion that the final revised language of the Amendment was actually intended to make it "more comprehensive" in the role of Congress against the states.[51] After the language was adopted, Bingham even attempted to argue that the Privileges or Immunities Clause allows Congress to pass laws covering universal suffrage.[52] As a definition of congressional coverage under the Amendment, his post-ratification discussion must be written off as self-serving and unrepresentative of the amending majority.

As noted above, early courts shared the 39th's understanding and did not incorporate the Bill of Rights. A generation after the Amendment was adopted, courts began to undermine the limited Amendment with substantive language. These substantive opinions were initially contained in non-majority opinions such as the dissenting opinions of Justices Field, Bradley, Swayne and Chief Justice Chase in the *Slaughter-Houses Cases*.[53] Justice Stephen Field had a penchant for expanding the original intent of the Fourteenth Amendment with open-ended interpretations.[54] These non-majority opinions captured the majority toward the end of the nineteenth century and reshaped the Amendment, leaving an extraordinary role for the judiciary in judicial reasonableness review of state legislation.[55]

In one of these non-majority opinions, *O'Neil v. Vermont*, [56] Justice Field squarely broke away from previous Court law and suggested that the Privileges or Immunities Clause incorporated the amendments of the Bill of Rights dealing with the rights of citizens. Field went along with the majority in *Cruikshank* and *Presser*, but parted from the majority in *O'Neil*.[57] John O'Neil was convicted of 307 offenses of selling intoxicating liquor in violation of a Vermont statute.[58] O'Neil was sentenced to pay a fine and to serve over fifty-four years if he did not meet the terms of the sentence.[59] O'Neil appealed to the Vermont Supreme Court and then to the U.S. Supreme Court. The majority of the Court, noting that the Eighth Amendment had not been pled as error, reaffirmed in dicta that the Eighth Amendment did not apply to the states and thus would have no bearing on the case.[60] Finding no federal question, the Court dismissed the appeal.[61]

Justice Field, however, dissented and noted, before discussing the Court's jurisdiction, that the sentence was cruel and unusual. Field commented that Neil's sentence was six times as great as a court could have given for manslaughter, forgery or perjury.[62] He reasoned that the Privileges or Immunities Clause should be read broadly to include the Bill of Rights. Field characterized the Bill of Rights as part a guarantee of restrictions against congressional action, part against congressional violation of procedure, and part as guarantees of individual rights. Field used the omission of express language forbidding Congress from acting or making law in the amendments other than the First Amendment as a cleavage point for arguing that Section One meant to incorporate the individual rights contained in the other amendments.[63] Field would have found the Eighth Amendment applicable to the states and the sentence in violation of it.[64]

This germ of incorporation, championed by Justice Harlan, reached a majority in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.[65] In this case, the Court incorporated the "just compensation" provision of the Fifth Amendment's Takings Clause. In 1880, Chicago passed an ordinance resolving to widen a street. The expansion of the street would condemn a portion of a railroad right away and deprive the land of its value. Illinois had a provision similar to the Fifth Amendment and a jury awarded the railroad $1 as compensation for the condemnation. After an unsuccessful appeal to the Illinois Supreme Court, the railroad petitioned the U.S. Supreme Court to review the jury award in terms of Fourteenth Amendment as a denial of "due process." The Court opined:

> Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against

> the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.[66]

The Court concluded that the Due Process Clause of the Fourteenth Amendment requires just compensation for takings.[67] There is little legitimacy in the Court's doing so. Bingham attempted specifically to add the "just compensation" language to the draft of Section One, proposing "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[68] The Reconstruction Committee, keen on pulse of the rest of the 39th Congress, rejected his proposal as they did with his other attempts to increase national power at the expense of the states. The Committee kept "due process" to its basic structure and did not include the rest of the language from the Fifth Amendment. After ratifying the Amendment, several states held constitutional conventions and passed legislation modifying or abolishing provisions such as trial by jury and grand jury indictment without the slightest belief they were violating the Fourteenth Amendment.[69] The Court was without basis to read the rejected language back into its interpretation of the Amendment.

After gaining a foothold in *Chicago, Burlington & Quincy Railroad*, the Court piecemeal incorporated various rights it deemed fundamental to liberty and justice. In *Gitlow v. New York*,[70] the Court found that the freedom of speech and press were fundamental and thus incorporated by the Fourteenth Amendment. The defendant was an Anarchist who published the *Left Wing Manifesto,* which called for the overthrow of the government. The defendant claimed that the statute violated the Constitution's protection of freedom of speech. The question before the Court was whether "liberty" in the Fourteenth Amendment includes freedom of speech and press and whether the statute which does not take into consideration circumstances, "unduly restrains this liberty and is therefore unconstitutional."[71] The Court held:

> For present purposes, we may and do assume 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.[72]

Over the next few decades, the Court expanded upon this rationale. With *Gitlow* and progeny, the test of incorporation is whether the judiciary determines a right or procedure "fundamental." With such an amorphous test, the Court's modern incorporation doctrine gives little or no deference to federalism considerations.[73] The framers of both the Constitution and the Fourteenth Amendment were concerned about centralizing national power. Drafts of reconstruction legislation allowing for expansive national government at the expense of the states were rejected. The Court's interpretation of Section One toward the end of the nineteenth century and thereafter undermined these intended limitations.

In all its judicial footwork under the rubric of the Fourteenth Amendment, the Court has not, however, incorporated the Second Amendment. Given the ease with which the Court incorporated other rights in the Bill of Rights and other rights entirely made up, it is baffling that the Court has yet to incorporate the Second Amendment as being one of the "deeply rooted"[74] "rights of persons,"[75] one of the "fundamental personal rights and liberties,"[76] one of the rights in the Court's "penumbra" or "zone"[77] of individual rights or even a "liberty of the person both in... spatial and... more transcendent dimensions."[78]

Unlike, for example, issues such as the distribution of condoms, abortion, or sodomy, the 39th Congress did in fact discuss the issue of disarmament as part of the efforts addressed by Reconstruction legislation. Many felt that black codes disarming African Americans were equivalent to legislation depriving citizens of citizenship rights. The 39th Congress condemned black codes such as those enacted by Opelousas, Louisiana which did not allow Negroes to carry firearms unless they had special permission from their employer and approval in writing by the mayor or president of the board of police.[79] In Kentucky, a white person could own a gun, but a black person would pay a fine if caught with a firearm.[80] Senator Lyman Trumbull, former Illinois Supreme Court Justice and author of the CRA of 1866, spoke of the prohibition of the civil right to own a firearm in the same sense as he did other slave laws and black codes.[81] For Trumbull, disarming citizens was similar to laws forbidding preaching the Gospel, forbidding travel and allowing African Americans to be sold into slavery if traveling into a state with the purpose of residing there.[82] Trumbull was not alone. Representative Henry J. Raymond indicated that the Bill establishes citizenship for newly freed slaves and provides protection for those citizenship rights. The colored citizen "has the right of free passage from one State to another, any law in any State to the contrary notwithstanding. He has a defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in Federal courts; he has all those rights that tend to elevate him and educate him for still higher reaches in the process of elevation."[83] Protection against disarmament was also included in the Freedmen's Bureau Bill, a companion bill to the CRA of 1866, which contained language protecting "the constitutional right to bear arms."[84] If any right were going to be read into the Fourteenth Amendment beyond the civil rights enumerated in the CRA of 1866, the right to bear arms would be among the first.

With Section One, courts pick fragments from debates and expound volumes, but when it comes to interpreting the Second Amendment, despite the better footing, courts perform a *volte face* and refuse to give it the same consideration. Judge Kozinski aptly described the double standard:

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or... the press" also means the Internet... and that "persons, houses, papers, and effects" also means public telephone booths. When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases-or even the white spaces between lines of constitutional text. But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there....
>
> The able judges of the panel majority are usually very

> sympathetic to individual rights, but they have succumbed to the temptation to pick and choose. Had they brought the same generous approach to the Second Amendment that they routinely bring to the First, Fourth and selected portions of the Fifth, they would have had no trouble finding an individual right to bear arms.[85]

If the framers of the Amendment wanted to incorporate any of the first eight amendments, they would have chosen language better suited for that purpose. Bingham stated that he was taking the language of Section One directly from the Constitution. The Fifth Amendment as a ban against the national government had more guarantees than the words "due process." These other guarantees did not make the language of the Amendment. To appease moderates and conservatives, the Committee revised Bingham's initial language to reduce the scope of the Amendment. Congress rejected open-ended language for its implications of broad national coverage. He attempted to add an additional right protected in the Bill of Rights to the Due Process Clause of Section One, and the Committee rejected his proposal. The Committee opted to keep "due process" to its basic structure, *e.g.,* preventing an unlawful *posse comitatus* from seizing and hanging a suspect.[86] Under the original Fourteenth Amendment, the wisdom of states having jury trials, having protections for free speech in the same fashion as the First Amendment, or having a national concept of "cruel and unusual" punishment had no place in the debate.[87] Just as prior to the Civil War, the states had the liberty to add—and more importantly to modify—these protections as they saw fit, free from a national straightjacket.[88] The Bill of Rights not only protected the spirit of individual rights, but also protected the people and the states from centralization.

From a litigation position, the argument that the Fourteenth Amendment does not incorporate the Bill of Rights has been dormant (if not dead) for quite some time. The question at hand in *Heller* is one of parity. If the "right" in question strikes its fancy, the Court would find little difficulty incorporating that right as "fundamental" and thus protected by its understanding of "due process" under the Fourteenth Amendment. The Court's refusal thus far to see the right to keep and bear arms in the Second Amendment as a "deeply rooted" or "fundamental" right is at odds with its own jurisprudence.

Endnotes

1 *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *sub nom*. District of Columbia v. Heller, *cert. granted*, 76 U.S.L.W. 3273 (U.S. Nov. 20, 2007) (07-290).

2 U.S. Const amend. II; *see Parker*, 478 F.3d at 373.

3 U.S. Const. art 1, § 8, cl. 17; *Parker*, 478 F.3d at 408.

4 *See Parker*, 478 F.3d at 391 n.13.

5 *See Parker*, 478 F.3d at 405-07, 408 n.13 (Henderson, Circuit Judge, dissenting).

6 *Heller* Pet. for Cert. at 18-19 (arguing that the Second Amendment was designed to prevent federal encroachment of local legislation and that the District's ban is local legislation).

7 *See, e.g.*, Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating First Amendment freedom of speech and press); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (making First Amendment applicable to the states through Fourteenth Amendment); Wolf v. Colorado, 338 U. S. 25, 27-28 (1949) (Fourth Amendment applicable to the states); Mapp v. Ohio, 367 U.S. 643, 650, 655 (1961) (Fourth Amendment reasonable searches and seizures and the exclusionary rule); Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (Sixth Amendment right to counsel); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (Fifth Amendment right to be free from compelled self-incrimination); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (Sixth Amendment right to trial by jury).

8 Earlier attempts were made to incorporate the Bill of Rights through the Privileges or Immunities Clause. *See, e.g.*, Walker v. Sauvinet, 92 U.S. 90 (1875); O'Neil v. Vermont, 144 U.S. 323 (1892); Maxwell v. Dow, 176 U.S. 581 (1900). For criticisms of "due process" incorporation, see Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. Rev. 431 (1926).

9 *Duncan*, 391 U.S. at 148 (describing the test of incorporation as whether the right affects "fundamental principles of liberty and justice"); *Gitlow*, 268 U.S. at 666; *Mapp*, 367 U.S. at 649; Griswold v. Connecticut, 381 U. S. 479, 485 (1965).

10 U.S. const. amend. XIV.

11 *See generally* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

12 *See, e.g.*, Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321, 325-26 (1868) (Bill of Rights does not apply to the states); The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870) (Seventh Amendment does not apply to the states); *Walker*, 92 U.S. at 92 (right to trial by jury not incorporated); United States v. Cruikshank, 92 U.S. 542, 552 (1876) (Bill of Rights not incorporated); Hurtado v. California, 110 U.S. 516, 538 (1884) (refusing to incorporate Fifth Amendment grand jury terms into "due process" of Fourteenth Amendment); Presser v. Illinois, 116 U.S. 252, 265 (1886) (refusing incorporation of Second Amendment); Spies v. Illinois, 123 U.S. 131, 166 (1887) (Bill of Rights not incorporated); In re Kemmler, 136 U.S. 436, 449 (1890) (Eighth Amendment not incorporated); *Maxwell*, 176 U.S. at 601 (affirming *Hurtado* and holding further that the Privileges or Immunities Clause does not incorporate the Bill of Rights); Twining v. New Jersey, 211 U.S. 78, 114 (1908) (refusing to incorporate the right to be free from compulsory incrimination: "[i]f the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands"); Weeks v. United States, 232 U.S. 383, 398 (1914) (Fourth Amendment does not apply to state officers); Palko v. Connecticut, 302 U.S. 319, 323 (1937) (Cardozo, J.) (refusing to find the Fifth Amendment's double jeopardy barring second trials applicable to a state seeking a new trial on error but commenting that the Fourteenth Amendment might incorporate principles of the First Amendment); Adamson v. California, 332 U.S. 46, 54 (1947) (Reed, J.) (refusing to incorporate Fifth Amendment ban against self-incrimination).

13 92 U.S. 90 (1875) (Waite, C.J.).

14 *Walker*, 92 U.S. at 92.

15 *See id.* at 92-93 (citations omitted).

16 92 U.S. 542 (1876).

17 *See Cruikshank*, 92 U.S. at 545.

18 *See id.* at 557-58.

19 *Cruikshank*, 92 U.S. at 549-51.

20 *Cruikshank*, 92 U.S. at 553.

21 116 U.S. 252 (1886).

22 *See Presser*, 116 U.S. at 254.

23 *See id.* at 260, 261.

24 *Id.* at 264-65 (quoting from *Cruikshank*).

25 *See* Adamson v. California, 332 U.S. 46, 53 (1947) (Reed, J.) (noting the contemporary view of several justices on the bench at the adoption of the Amendment refusing to incorporate the Bill of Rights).

26 *See* Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth*

Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony, 43 Gonz. L. Rev. 77, 161 (2007).

27 Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 5 n.13, 51 n.98 (1955); Adamson v. California, 332 U.S. 46, 92, *et seq*. (1947); *see generally* Fairman, *supra* note 18. For a reprinting of the debates, see Alfred Avins, The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments (1967).

28 *See* Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (mass of privileges under Section One); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-92 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); Rep. Bingham Cong. Globe, 42d Cong., 1st Sess. app 81-85 (1871).

29 *See* Earl A. Maltz, *The Concept of Equal Protection of the Laws–A Historical Inquiry*, 22 San Diego L. Rev. 499, 524 (1985) (commenting on the presentations of the Amendment to the House and Senate).

30 Bingham persistently attempted to push the language of the Amendment to secure broader federal protection, *infra* notes 49-51. *See* Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2765-67 (1866) (Howard pushed for broader coverage but conceded that the Amendment secured less than he had hoped).

31 *See* Burrell, *supra* note 26, at 100-04, 116-19; *infra* note 50 (limitations of the Amendment).

32 *See* Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-94 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 2542 (arms congress "to protect by national law the privileges and immunities of all the citizens").

33 *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *see* Raoul Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 245-52 (2d ed. 1997).

34 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

35 *Id.*

36 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1088 (1866); *see also id*. at 1090.

37 Rep. Bingham Cong. Globe, 42d Cong., 1st Sess. app. at 81 (1871).

38 *Id.* at 85. Quotation to this passage is for the limited purpose of demonstrating Bingham's intent for Congress to enforce the provisions of Section One. As discussed above, the 39th Congress did not share Bingham's view in the scope of congressional coverage. *See, e.g.*, Rep. Farnsworth Cong. Globe, 42d Cong., 1st Sess. app. at 115 (taking issue with Bingham's post-ratification attempt to bolster the power of Congress under Section Five); Rep. Garfield *id.* app. at 151 (Bingham can "make but he cannot unmake history"); Burrell, *supra* note 26, at 102-03.

39 *See* Rep. Broomall Cong. Globe, 39th Cong., 1st Sess., 2498 (1866); Rep. Latham Cong. Globe, 39th Cong., 1st Sess. 2883 (1866) (Civil Rights Bill "covers exactly the same ground as this amendment"); *infra* note 56 (Sen. Trumbull stating Section One is copy of the Act).

40 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-94 (1866).

41 *See* Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1093 (1866). It's amazing that Bingham could think that he could get an Amendment passed which altered the entire concept of federalism and yet think the Amendment was not a point of controversy. *See* Rep. Hale Cong. Globe, 39th Cong., 1st Sess. 1063 (noting Bingham's characterization of the Amendment as trivial).

42 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); *see also* Bickel, *supra* note 34, at 30-31, 40-45.

43 *See* Rep. Hotchkiss Cong. Globe, 39th Cong., 1st Sess. 1095 (1866); Hale Cong. Globe, 39th Cong., 1st Sess. 1063, 1094 (1866); Bickel, *supra* note 34, at 58.

44 *See* Bickel, *supra* note 34, at 30, 31, 32.

45 *See supra* note 50.

46 U.S. const. amend. XIV.

47 Bickel, *supra* note 34, at 45; Burrell, *supra* note 26, at 116-19.

48 *See* Burrell, *supra* note 26, at 91-100. Representative James Wilson, manager of the CRA of 1866 in the House, noted the distinction between civil rights and political rights: "What do these terms [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be construed." Rep. Wilson Cong. Globe, 39th Cong., 1st Sess. at 1117 (1866).

49 *See* Sen. Trumbull Cong. Globe, 42d Cong., 1st Sess. 575 (1871) (finding the Amendment's first section is a "copy of the civil rights act"); *supra* note 46.

50 *See* Rep. Stevens Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (places CRA of 1866 in the Constitution beyond a simple majority); Rep. Garfield Cong. Globe, 39th Cong., 1st Sess. 2462 (1866) (same).

51 *See* Rep. Bingham Cong.Globe, 42d Cong., 1st Sess. app. 82, 150-53 (1871).

52 *See* Rep. Bingham Cong.Globe, 40th Cong., 2d Sess. 2462-63 (1868) (arguing that political rights are protected under the Fourteenth Amendment despite the clear understanding of the 39th Congress to the contrary). Universal suffrage failed to obtain support in the Fourteenth Amendment. Both Howard and Stevens when introducing the final draft expressed their regret that the Amendment did not cover suffrage rights. *See* Rep. Stevens Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (expressing regret that universal suffrage was not secured with the Amendment); Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (same). If the Fourteenth Amendment allowed Congress to establish universal suffrage, why would we need the Fifteenth Amendment? *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-76 (1875).

53 83 U.S. (16 Wall.) 36, 83, 111, 124 (1873).

54 Burrell, *supra* note 26, at Part IV.

55 *Id*.

56 144 U.S. 323, 337 (1892) (Field, J., dissenting). Justice Harlan filed a separate dissent. *Id.* at 366.

57 Field was also among the majority in a case refusing to incorporate the Eighth Amendment nearly two years earlier. *See* In re Kemmler, 136 U.S. 436, 449 (1890).

58 *O'Neil*, 144 U.S. at 327.

59 The justice of the peace convicted Neil of 457 offenses of mailing liquor into Vermont for which he was to serve a month in jail and pay $140 and the costs of prosecution. If he failed to pay within a month, his sentence was to increase to 79 years in prison. He appealed the judgment to the county court. On appeal, he was convicted of 307 offenses and fined $140 along with the costs of prosecution and ordered to stand committed until the sentence was complied with. If he failed to pay by a specified deadline, he was to serve over 54 years in prison. *O'Neil*, 144 U.S. at 326-30.

60 *See id.* at 331-32.

61 *See id.* at 334-35, 337.

62 *See id.* at 339 (Field J., dissenting).

63 *See id.* at 363-64 (Field J., dissenting).

64 *See id.* at 339, 360-65 (Field J., dissenting).

65 166 U.S. 226, 235-36 (1897) (Harlan, J.) (modifying Field's dissent in *O'Neil*, to which he joined, to hold that "due process" with substance incorporated "just compensation").

66 Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897).

67 *Chicago, Burlington & Quincy Railroad Co.*, 166 U.S. at 241.

68 Bickel, *supra* note 34, at 42.

69 *See* Fairman, *supra* note 18, at 82 *et seq*.

70 268 U.S. 652 (1925).

71 Gitlow v. New York, 268 U.S. 652, 664 (1925).

72 *Gitlow*, 268 U.S. at 666.

73 Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (describing the test of incorporation as whether the right affects "fundamental principles of liberty

and justice"); Burrell, *supra* note 26, at Part III.E.

74 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

75 O'Neil v. Vermont, 144 U.S. 323, 363-64 (1892) (Field J., dissenting).

76 *Gitlow*, 268 U.S. at 666; *Duncan*, 391 U.S. at 148.

77 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Douglas, J.) .

78 Lawrence v. Texas, 539 U.S. 558, 562 (2003).

79 *See* Rep. Eliot Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

80 *See* Rep. Grinnell Cong. Globe, 39th Cong., 1st Sess. 651 (1866).

81 *See* Sen. Trumbull Cong. Globe, 39th Cong., 1st Sess. 474 (1866); *see* Bickel, *supra* note 34, at 56.

82 *Id. See also* Rep. Chandler Cong. Globe, 39th Cong., 1st Sess. 217 (1866) (urging for congressional protection against disarming blacks); Brief for Members of Congress et al. as Amici Curiae Supporting Respondents, District of Columbia v. Heller (07-290) at 14 [hereinafter "Members of Congress Amicus Brief for Resp."] (Stephen P. Halbrook, counsel for amici).

83 Rep. Raymond Cong. Globe, 39th Cong., 1st Sess. 1266 (1866).

84 The Freedmen's Bureau Act of 1866, 14 Stat. 173, 176-77 (1866); Members of Congress Amicus Brief for Resp. at 15, 17-18.

85 Silveira v. Lockyer, 328 F.3d 567, 568-69 (9th Cir. 2003) (Judge Kozinski, dissenting from denial of rehearing en banc) (citations omitted).

86 *See* The Civil Rights Cases, 109 U.S. 3, 23-24 (1883).

87 *Cf.* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176, 178 (1875) (wisdom of suffrage for women has no bearing on interpretation of Constitution and Reconstruction amendments).

88 Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J. dissenting) (Justice John M. Harlan was the grandson of Justice John M. Harlan who initially held for judicial incorporation in Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897)); Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring); Maxwell v. Dow, 176 U.S. 581, 600-01 (1900) (Peckham, J.) (noting that the Amendment did not, among other things, require each ratifying state grant trial by jury irrespective of their own constitution stating otherwise); *see* Fairman, *supra* note 18, at 82 *et seq.*