Refined Incorporation and the Fourteenth Amendment

Richard L. Aynes
REFINED INCORPORATION AND THE FOURTEENTH AMENDMENT

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In Professor Akhil Reed Amar’s The Bill of Rights: Creation and Reconstruction,¹ the voices of Founders, Federalists, Anti-Federalists, promoters of the Bill of Rights, contrarians of Barron v. Mayor of Baltimore,² abolitionists, antislavery advocates, Fourteenth Amendment Republican Framers, ratifiers, and twentieth-century U.S. Supreme Court justices, all have their role. If they do not sing the same tune, at least their voices, under Amar’s skillful direction, whether melody or harmony, alto or soprano, all harmonize to produce a clear song.

Though there are important and critical verses surrounding the Founding Era, it is the transformative era of Reconstruction in which Professor Amar seeks to write a new stanza. The centerpiece of this new work is his doctrine of “refined incorporation,” which holds that personal rights contained in the Bill of Rights are privileges and immunities within the meaning of Section 1 of the Fourteenth Amendment.³ The purpose of this essay is to examine the refined incorporation doctrine and test it against the historic roots of the Fourteenth Amendment.

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2. 32 U.S. (7 Pet.) 243 (1833).
I. PAST GRIEVANCES AND FUTURE HOPES

One of the many methods of interpreting an action—be it a statute or a constitutional amendment—is to look at the grievances that gave rise to that action. In general, the grievances that underlie the Fourteenth Amendment began with the concepts of the “Slave Power” and the “Slave Power Conspiracy.” The feeling was that the national government had been captured by an elite group of oligarchs, the slaveholders.

The feeling was that the national government had been captured by an elite group of oligarchs, the slaveholders. The slaveholders used the government itself to perpetuate not only slavery, but their own power as well.

Statistics show that slaveholders were disproportionately represented in the national government. For example, southern slaveholders held the presidency for forty-nine of the seventy-two years between the ratification of the Constitution and 1861. Twenty-three of the thirty-six speakers of the House of Representatives and twenty-four of the thirty-six President Pro Tems of the Senate were Southerners. Of the thirty-five men who served on the U.S. Supreme Court, twenty were from the South.

Had these results been produced through what were perceived as open, fair, and democratic elections, the antislavery forces might have viewed themselves as a permanent minority. They, however, saw these results as a product of unfair and antidemocratic practices, some of which they perceived as stemming from the Constitution itself. The requirement that the U.S. Senate have two senators from each state gave southern slave states disproportional representation in the Senate.

6. See Gara, supra note 4, at 5-6.
8. See id.
9. See id.
10. See U.S. Const. art. I, § 3, cl. 1. Even though the 1860 population of the 20 northern states was more than twice that of the free population of the 14 slave states, the slave states held 28 of the 68 Senate seats. See The Civil War 78-79
The fact that, under the Three-Fifths Clause, people held in slavery counted towards a state's representation in the House of Representatives meant that slave states had disproportional representation in the House as well. Likewise, it meant that voters in slaveholding states had more influence than voters in nonslaveholding states. The Electoral College, based on these same "defects," produced a similar distortion that tilted the playing field in favor of proslavery advocates.

Nevertheless, the abolitionists and antislavery forces had an optimism in the power of free speech and persuasion that led them to believe that Slave Power could be defeated at the ballot box in an otherwise fair fight. In an evangelical age, they believed that God's truth—that all people were made of one blood—would ultimately prevail if given a fair chance.

When one looks at the history of the actions taken to protect slavery, however, one quickly sees that such a fair chance did not exist. To paint in broad strokes, we know that freedom of speech on the question of slavery was denied in the slaveholding states. The right to petition was denied by the "gag" rule in the Congress. Freedom of press was denied in slaveholding states and in some northern states as well.

Even the right to speak one's mind on the floor of the U.S. Senate was shown to be illusory when Charles Sumner was brutally attacked by Representative Preston Brooks and caned

(Richard M. Ketchum ed., 1968). This was roughly eight more seats than the South would have had under a strict representative population basis.

11. See U.S. Const. art. I, § 2, cl. 3.
12. See id. art. II, § 1, cl. 2. For example, without the benefit of counting slaves as three-fifths of a person for purposes of apportioning the House of Representatives and through it, the Electoral College, John Adams would have been reelected in 1800 over Thomas Jefferson. See Paul Finkelman, The Centrality of the Peculiar Institution in American Development, 68 Chi.-Kent L. Rev. 1009, 1031 (1993).
in the well of the Senate.\textsuperscript{17} That incident was only the most
dramatic of a series in which Southerners with guns, knives,
and intimidating words attempted to silence the speech of
northern representatives.\textsuperscript{18} Antislavery meetings were broken
up, denying the right of free assembly.\textsuperscript{19}

Antislavery grievances, however, went well beyond denial of
First Amendment rights. We know that under the postwar
black codes, state militia made up of former Confederate sol-
diers took away the arms that the U.S. Army had given to
black Union veterans for their faithful
service.\textsuperscript{20} The effort of
people, whom the North viewed as traitors, to disarm loyalists
sparked concerns about the Second Amendment right to bear arms.\textsuperscript{21}

Fourth Amendment concerns were evident as well. The con-
troversy during President Jackson’s administration over the
Postmaster General’s refusal to ship pamphlets making anti-
slavery arguments through the mail raised significant Fourth
Amendment issues across the nation.\textsuperscript{22} The slaveholders al-
leged “right” to enter the cabins of people held in slavery pro-

\begin{itemize}
\item \textsuperscript{17} See \textsc{Kenneth M. Stampp}, \textit{America in 1857: A Nation on the Brink} 11 (1990).
\item \textsuperscript{18} One interesting change in the dynamic of Congress took place when “western”
men entered the Congress. All talk of challenging Ohio Senator Ben Wade disap-
ppeared when Wade, upon entering the Senate the day after a threatened challenge,
displayed two large pistols which he took from underneath his coat and placed in his
Senate desks. See \textsc{Linus P. Brockett}, \textit{Men of Our Day} 245-46 n.* (1868).
\item Similarly, because of Ohio Congressman Lewis Campbell’s role in the attempted
expulsion of Preston Brooks from the House after Brooks’s attack upon Charles
Sumner, Southerners were determined to challenge Campbell to a duel. When Camp-
bell heard of the impending challenge, he went to a public shooting gallery and
snuffed out a candle by shooting at the flame with a rifle three times in a row. All
talk of challenging Campbell ceased. See \textsc{James E. Campbell}, \textit{Sumner-Brooks-
Burlingame, or, The Last of the Great Challenges}, 34 \textsc{O. Archaeological & Hist. Q.}
435, 455 (1925).
\item Representative Brooks did challenge Massachusetts Representative Anson
Burlingame to a duel. Burlingame was described as “a bitter foe of slavery, a fine
rifle shot and . . . a northern man who would fight.” \textit{Id.} at 455-56. Burlingame
accepted the challenge and set Canada as the place for the duel. Brooks rather lame-
ly claimed he could not safely reach Canada and no duel was fought. \textit{See id.} at 460-
63.
\item \textsuperscript{19} See \textit{generally} sources cited supra note 16.
\item \textsuperscript{20} \textit{See AMAR, supra} note 1, at 50-59.
\item \textsuperscript{21} \textit{See id.} at 264-65.
\item \textsuperscript{22} \textit{See W. Sherman Savage, The Controversy over the Distribution of Abo-
lition Literature 1830-1860} (1968).
\end{itemize}
duced an indignity in the North where people clung to Lord Chatham's vision of a home as a private sanctum, which even the government could not enter.  

The Fifth Amendment right to due process of law loomed large in all of the antislavery arguments. Significant arguments, though outside of the mainstream discourse, suggested that the Fifth Amendment Due Process Clause prohibited the holding of slaves in any federal territory or in the District of Columbia. Moreover, mainstream antislavery constitutional arguments suggested that the Fugitive Slave Act of 1850 was unconstitutional because it violated the Fifth Amendment Due Process Clause. Equally implicated were the Sixth and Seventh Amendment Jury Clauses because the Fugitive Slave Act denied alleged fugitives a trial by jury. Slave owners and slave states often inflicted what were seen as inhuman and intolerable punishments upon slaves, invoking images of the Eighth Amendment Cruel and Unusual Punishment Clause.

Thus, the very context of the times in which the onset of the Civil War came brought about disputes over the original Bill of Rights. People claimed that those rights applied to the states based upon a variety of theories. Some claimed they were natural rights, which the Bill of Rights had properly protected as well. Some claimed protection for those rights under state constitutions. Some claimed protection for those rights through the theory of what Professor Amar has called the Barron contrarians: the view that Barron v. Mayor of Baltimore was wrongly decided and that the Bill of Rights applied directly to the states. Others claimed that the rights under

23. "[T]he poorest man may, in his cottage, bid defiance to all the forces of the crown." United States v. Three Tons of Coal, 28 F. Cas. 149, 151 (D.C.E.D. Wisc. 1875) (No. 16,515).
26. See id.
27. See U.S. Const. amend. VIII.
28. Under this theory, the Bill of Rights were declaratory of natural rights. See Amar, supra note 1, at 148-56.
29. See e.g., Virginia Bill of Rights in Sources of Our Liberties 311-12 (Richard L. Perry ed., 1978); Ohio Const. of 1851, art. I (Ohio Bill of Rights).
31. See Amar, supra note 1, at 145-62.
the Bill of Rights were included in the privileges and immunities protections provided for federal citizens through Article IV, Section 2 of the U.S. Constitution.  

Whatever the legal theory, it seems clear that significant groups of people, including key government officials, thought that the same rights protected by the Bill of Rights ought to be, and perhaps were, protected by the federal government against the states. Undoubtedly, people did not think clearly and carefully about the intricacies of the general principle. Which theory was the "correct" theory? Would every single provision or clause of the Bill of Rights apply? Would enforcement take place by the legislature or by the judiciary? To deny, however, that widespread groups of people had fully worked out all of the details is not to deny that they had accepted the general principle.

Coupled with these references, we have numerous and uncontested statements in the Congress indicating that one of the results of the Fourteenth Amendment was that all citizens could claim the protections of the first eight amendments against the states. Professor Amar's excellent synthesis of the


33. At this point, I want to make a distinction about the language we use. The word "incorporation" (meaning to incorporate the Bill of Rights through the Fourteenth Amendment) is not the word choice of the nineteenth-century participants in the drafting and ratification of the Amendment. Professor Amar does not quote from any speech in which a participant in the process used that word and I do not recall any time in which that word was used in the 1866-1868 debates. The word does not appear in what is generally the very helpful index to the key debates prepared by Alfred Avins. See THE RECONSTRUCTION AMENDMENTS' DEBATES 745-53 (Alfred Avins ed., 1967). Though I have not attempted to trace its genealogy, an early use of the term appears in Justice Felix Frankfurter's concurring opinion in Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring).

Justice Frankfurter was hostile not only to incorporation but to the Fourteenth Amendment itself. In 1924, he argued for the repeal of the Due Process Clause and was critical of the Equal Protection Clause. See Richard L. Aynes, Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment, 70 CHI.-KENT L. REV. 1197, 1217-18 (1995). In 1928, he referred to the Reconstruction amendments as "drastic" limitations on the states. See id. By 1954, Frankfurter "wished" that the Fourteenth Amendment had never been adopted. See id. This should give one pause in utilizing the terminology of one who was not himself friendly to the end result.

Whether more nuanced or more ambiguous, Justice Hugo Black chose significantly different language to characterize his theory. In his own words, the legislative history "conclusively demonstrates that the language of the first section of the Four-
debates adds to Justice Hugo Black's pathbreaking dissent in *Adamson v. California*, W.W. Crosskey's empathetic reading of the Congressional debates, the work of Alfred Avins, Michael Curtis's numerous articles and important book, and the writings of countless others. Without recounting those efforts line by line, it is fair to say that on the floor of Congress there were specific references by important Republican proponents of the Amendment suggesting that, no matter what the theory, after the adoption of the Amendment, it would enforce against the state the following constitutional provisions:

First Amendment: free speech, freedom of press, right
to petition,\textsuperscript{41} right to assembly and petition,\textsuperscript{42} Free Exercise Clause\textsuperscript{43} and Establishment Clause;\textsuperscript{44}

Second Amendment: right to bear arms;\textsuperscript{45}

Third Amendment: no quartering of troops;\textsuperscript{46}

Fourth Amendment: right against unreasonable search and seizures;\textsuperscript{47}

Fifth Amendment: Due Process Clause,\textsuperscript{48} and Just Compensation Clause;\textsuperscript{49}

Sixth Amendment: notice\textsuperscript{50} and trial by jury;\textsuperscript{51}

Seventh Amendment: civil jury trial;\textsuperscript{52} and

Eighth Amendment: proportionality in cruel and unusual punishment\textsuperscript{53} and no excessive bail.\textsuperscript{54}

\begin{footnotes}
\item See Paschal, supra note 39, at xli.
\item See Howard, supra note 39.
\item See AMAR, supra note 1, at 184 n.\textsuperscript{*} (statement of Rep. John Bingham); id. at 192 (statement of Rep. Hart); Bingham, Speech at Belpre, Ohio, supra note 39, at 1; see also Paschal, supra note 39, at xli.
\item See Paschal, supra note 39, at xli.
\item See AMAR, supra note 1, at 192 (statement of Rep. Hart); id. at 192-93 (statement of Rep. Clarke); Howard, supra note 39; Bingham, Speech at Belpre, Ohio, supra note 39.
\item See Howard, supra note 39.
\item See AMAR, supra note 1, at 192 (statement of Rep. Hart); Howard, supra note 39; Paschal, supra note 39, at xli.
\item See CONG. GLOBE, 39th Cong., 1st Sess. 67 (1866) (statement of Rep. Garfield); CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (statement of Rep. Bingham); see also AMAR, supra note 1, at 182, 184 n.\textsuperscript{*} (statement of Rep. Bingham); id. at 192 (statement of Rep. Hart); id. (statement of Rep. Moulton); Paschal, supra note 39, at xli.
\item See CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866) (would overrule Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); see also AMAR, supra note 1, at 182, 184 n.\textsuperscript{*}.
\item See Howard, supra note 39.
\item See Howard, supra note 39; Bingham, Speech at Belpre, Ohio, supra note 39, at 1; Paschal, supra note 39, at xli.
\item See Howard, supra note 39; Bingham, Speech at Belpre, Ohio, supra note 39, at 1; see also AMAR, supra note 1, at 182.
\item See CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866); Howard, supra note 39; see also AMAR, supra note 1, at 183-84 n.\textsuperscript{*}.
\item See Howard, supra note 39.
\end{footnotes}
In addition to these references to most of the provisions of the first eight amendments, Congressman Bingham’s 1871 speech recounting the history of the drafting of the Fourteenth Amendment and its purpose indicated that the privileges and immunities were “chiefly defined” by the first eight amendments.55 Without any suggestion that some portions of the amendments would be enforceable against the states and other portions would not, Bingham proceeded to quote, verbatim, each and every provision of the first eight amendments.56

Thus, we can couple the noncongressional concerns about a variety of provisions from the Bill of Rights with the congressionally expressed concerns to build a strong linkage between the results hoped for by the Amendment and the rights protected by the Bill of Rights.57

When we look to legislative history in Congress, we frequently look to the key advocates of the provision. Ohio Congressman John A. Bingham and Michigan Senator Jacob Howard were the key advocates for the Fourteenth Amendment. Bingham was a lawyer, county prosecutor, member of the Judge Advocate General’s staff, Solicitor of the U.S. Court of Claims, frequent Chair of the House Judiciary Committee, and member of the important Joint Committee on Reconstruction.58 Additionally, Bingham authored all of Section 1,59 except the Citizenship Clause, and led the fight for adoption of the Amendment in the Joint Committee and in the House.

Howard also was a lawyer and served as the Attorney General of Michigan.60 He, too, was on the Joint Committee and was

55. CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871).
56. Id.
57. I set to one side the question of whether the theory used by the Framers to achieve their intended result is important. There appear to be some who suggest that if the Framers articulated a clear result based upon what is thought to be a false theory, then both the result and the theory fail. See, e.g., Trish Olson, The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment, 48 Ark. L. Rev. 347, 350 (1995). That is an important issue that is beyond the scope of this article. I submit, however, perhaps somewhat tentatively, that if the intent to accomplish a goal is clear, we cannot defeat that intent because we think the reasoning that led them to form the intent was faulty.
59. See AMAR, supra note 1, at 171.
60. See THE RECONSTRUCTION AMENDMENTS’ DEBATES 759 (Alfred Avins ed., 2d
chosen by the Chairman to be the spokesman for the Commit-

tee in the U.S. Senate.61

Bingham, of course, frequently spoke of enforcing the Bill of Rights against the states without defining what he meant by the Bill of Rights.62 Other key leaders of Congress, such as House Judiciary Committee Chairman James Wilson and Senate Judiciary Committee Chairman Lyman Trumbull, believed that Congress already had the power to enforce the Bill of Rights against the states.63 As set forth above, Bingham frequently made references to most of the first eight amendments, which is entirely consistent with his 1871 exposition indicating that he meant to include only the first eight amendments as the Bill of Rights.

These views were not hidden from the public. They were reported in the Congressional Globe at a time when it was nationally read by those interested in Congress and frequently reprinted in local newspapers. Further, the New York Times's summary of Bingham's February 28, 1866 speech told the reading public that this was "a proposition to arm the Congress . . . with power to enforce the Bill of Rights as it stood."64 Similarly, Howard's speech introducing the Amendment to the Senate and referring to it as enforcing the first eight amendments to the U.S. Constitution also was published in the New York

61. See AMAR, supra note 1, at 187.

62. See CONG. GLOBE, 39th Cong., 1st Sess. 1088-90 (1866). Bingham stated that the Fourteenth Amendment would "arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today." Id. at 1088. Bingham also suggested that the Fourteenth Amendment would overcome the effects of Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (involving a question of whether the Fifth Amendment is binding upon the states), and Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833) (involving a question of whether the Seventh Amendment extends to the states), which both generally state that the Bill of Rights was not enforceable against the states. See CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). The pamphlet version of this speech was, as Professor Amar emphasizes, "subtitled [a speech] 'in support of the proposed amendment to enforce the bill of rights.'" AMAR, supra note 1, at 187 (footnote omitted); see Aynes, supra note 32, at 72; see also CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (stating that the inability to "enforce the bill of rights is the want of the Republic" and that Bingham wanted the Bill of Rights enforced "everywhere").

63. See CONG. GLOBE, 39th Cong., 1st Sess. 603-05 (1866); see also CURTIS, supra note 37, at 80-84; Crosskey, supra note 35, at 16-17.

64. AMAR, supra note 1, at 187.
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*Times* and the New York *Herald*. Further, the only three treatise authors writing during the ratification period, from 1866 to 1868, who spoke directly to the meaning of the Amendment, indicated that it would result in enforcing the Bill of Rights against the states.

These threads of history, the evil that prompted the Amendment, the plain meaning of the words of the constitutional Amendment, the legislative history of the Amendment, and the interpretation of the Amendment by constitutional law treatise authors, all converge to support the general conclusion that after the adoption of the Fourteenth Amendment a citizen should be able to enforce the Bill of Rights against the states.

This conclusion was, of course, the position advocated by Justice Hugo Black in his dissent in *Adamson v. California*. With three other justices joining his position, this view was just one vote shy of being recognized as the law of the land. Nevertheless, in later days the Court embarked upon the process of using the doctrine of “selective incorporation” to allow the enforcement against the states of some, but not all, of the first

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65. See CURTIS, supra note 37, at 123 (citing N.Y. TIMES, May 24, 1866, at 1, col. 6).

66. See AMAR, supra note 1, at 187.

67. Those writers were of different political backgrounds and, like the members of Congress, reached their conclusions from different routes. Yet they all reached the same conclusion. Judge Timothy Farrar, a radical abolitionist and one-time law partner of Daniel Webster, published *Manual of the Constitution of the United States* in 1867. See Aynes, supra note 32, at 83-85 (citing TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES (1867)). Former Arkansas Supreme Court Justice George W. Paschal was a proslavery Unionist from Texas and later became a member of the law faculty of Georgetown University. See id. at 88. His treatise was *The Constitution of the United States Defined and Carefully Annotated*. See id. at 85 (citing GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES (1868)). Unlike Bingham, Paschal spoke of enforcing the thirteen amendments to the Constitution, necessarily including the Ninth and Tenth Amendments. See id. at 86. The last treatise was written by John Norton Pomeroy, Dean of the Law School and Griswold Professor of Political Science at the University of New York. See id. at 89. His treatise was entitled *An Introduction to the Constitutional Law of the United States*. See id. (citing JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1868)). Pomeroy wrote of enforcing the first eight amendments. See generally id. The text of what these writers said and information about their prominence is set forth in Aynes, supra note 32, at 83-94.

68. See AMAR, supra note 1, at 7.

eight amendments. Yet, with the onward march of the "selective" enforcement of the Bill of Rights, the Court came to apply all elements of the First Amendment, the Fourth Amendment, the Fifth Amendment, with the exception of the grand jury provisions, all aspects of the Sixth Amendment, and aspects of the Eighth Amendment, against the states.70 Though not strictly accurate, one can certainly understand Elizabeth Black's point of view that, upon the application of the Confrontation Clause to the states in Pointer v. Texas,71 her husband's dissent in Adamson had "the virtue of becoming the law."72

II. THE BILL OF RIGHTS, ENFORCEMENT AND REFINED INCORPORATION

Like Gaul, incorporation was historically divided into three parts: Justice Black's total incorporation, Justice Frankfurter's no incorporation, but sometimes reaching the same result through "fundamental fairness and ordered liberty," and Justice William Brennan's "selective incorporation."73 In a skillful synthesis, Professor Amar posits that "there is something to be said for each of three positions, but each is also fatally flawed."74 In his own words: "An alloy of the three seemingly incompatible elements—an alloy that I shall call 'refined incorporation'—will prove far more attractive and durable than each unalloyed component."75

71. 380 U.S. 400 (1965).
73. See AMAR, supra note 1, at 139. Justice Murphy and Justice Rutledge argued that the protections of the Fourteenth Amendment were not limited to those contained in the Bill of Rights. See Adamson, 332 U.S. at 123 (Murphy and Rutledge, J.J., dissenting). This view is often referred to as "incorporation plus." The characterization of Justice Brennan's views are filled with tension. On the one hand, Brennan is said to have "never met a right in the Bill [he] didn't like or deem fundamental enough to warrant incorporation," implying that given the opportunity Brennan would have incorporated the entire Bill of Rights. AMAR, supra note 1, at 220. Yet on the next page, reference is made to "Brennan's intuition that perhaps not every provision of the first eight amendments sensibly incorporates." Id. at 221.
74. AMAR, supra note 1, at 140.
75. Id.
Amar’s argument for refined incorporation has as its cornerstone the proposition that the Fourteenth Amendment Privileges and Immunities Clause includes ("incorporates") as one of its privileges or immunities, the privilege of the writ of habeas corpus. He notes the reference to this right in Article I, Section 9 of the Constitution and assumes that this Clause is the source of the right. Because there is much in the literature indicating that the Fourteenth Amendment Framers valued habeas corpus, Professor Amar concludes that the Fourteenth Amendment Framers “incorporated” the writ of habeas corpus from Article I, Section 9.

Having laid this foundation, Professor Amar builds upon it by asking this question: “Why does the Fourteenth Amendment incorporate [the Habeas Clause of Article I Section 9], but not . . . its section 9 companion [the Capitation] clause . . .?” His answer is that the distinction is between the rights of citizens and the rights of states and the difference between clauses that give individual rights to people and clauses that help structure a federal government. Thus, refined incorporation is “far more subtle” than Justice Black’s incorporation because it calls for the examination of each clause of the amendments and, perhaps the original Constitution, to test whether the clause is more like a federalism clause, no incorporation, or an individual right, incorporation. This is work, in Professor Amar’s words, for “a scalpel, not a meat cleaver.” Under this “new synthesis” one must “ask whether it is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large.”

76. See id. at 175.
77. See id. at 179-80.
78. Id. The Capitation Clause reads: "No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4.
79. See AMAR, supra note 1, at 180. This theme is built upon in Chapter 10, Refining Incorporation, beginning at page 219 and especially at page 221. The distinction between the Habeas Suspension Clause and the Capitation Clause is the constant example advanced to prove the point of refined incorporation. See generally id. at 215-30.
80. See id. at 175-80.
81. Id. at 180.
82. Id. at 221.
At one level, Professor Amar’s suggestion that the privileges and immunities of U.S. citizenship include matters outside the first eight amendments is firmly grounded in legislative history. Senator Jacob Howard’s contemporary construction was explicit on that point. After exploring the nature of the Privileges and Immunities Clause of Article IV, Section 2 and quoting extensively from Justice Bushrod Washington’s opinion in Corfield v. Coryell,\(^8\) Howard continued,

> [s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. 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 [sic] and secured by the first eight amendments of the Constitution . . . . \(^6\)

John Bingham’s 1871 speech on the drafting of the Amendment indicated that the privileges and immunities were “chiefly” contained in the Bill of Rights, clearly indicating that some of the privileges and immunities were not contained in the first eight amendments.\(^8\)

Thus, we know that the author of the Amendment in the House and the floor manager in the Senate both indicated that privileges and immunities would go beyond the first eight amendments. From Senator Howard, we also see an explicit statement that the Fourteenth Amendment Privileges and Immunities Clause would consist of the combination of all the privileges and immunities under Article IV, Section 2 and the first eight amendments.\(^6\) This view is consistent with the majority of Congress that passed the Civil Rights Act of 1866 based upon the belief that Congress already had the power to enforce Article IV, Section 2 against the states.\(^8\) This view is

\(^8\) See Aynes, supra note 32, at 72-73.
also consistent with John Bingham's minority view that what was lacking was the power to enforce Article IV, Section 2 against the states and that the Fourteenth Amendment was necessary to provide that power.88

If we agree that the privileges and immunities reach beyond the Fourteenth Amendment, however, what then of Professor Amar's suggestion of the differences between the Habeas Suspension Clause and the Capitation Clause? The linchpin of Professor Amar's argument is the assumption that the source of the right to the use of the writ of habeas corpus is Article I, Section 9, Clause 2. But it is not self-evident that this is so. Justice Bushrod Washington, for example, indicated that the writ of habeas corpus was a "fundamental right" that belonged to citizens of "all free governments" and identified it as one of the privileges and immunities of federal citizens protected by Article IV, Section 2.89 Using the interpretive method Professor Amar has termed intratextualism,90 one notes that a significant difference exists between the text of the first eight amendments and Article I, Section 9, Clause 2 of the Constitution.

We know that the Framers of the Constitution thought that the many provisions of the Bill of Rights were declaratory and that, as suggested in the Ninth Amendment, the people retained many rights not mentioned in the Bill of Rights. There are provisions in the first eight amendments suggesting their declaratory nature. These include references to not "abridging" certain First Amendment rights,91 to not "infringing" upon "the right of the people to keep and bear arms" in the Second Amendment,92 to not violating the "right of the people" to be free from unreasonable searches and seizures,93 and to "preserving" the right to civil juries.94 At the same time, many of the provisions of the amendments read very much like the normal commands of new law:

88. See id. at 71-72.
91. See U.S. CONST. amend. I.
92. See id. amend. II.
93. See id. amend. IV.
94. See id. amend. VII.
"Congress shall make no law respecting an establishment of religion . . . ." 95

"No soldier shall, in time of peace be quartered in any house . . . ." 96

"No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . ." 97

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." 98

"Excessive bail shall not be required . . . ." 99

The provision of Article I, Section 9, Clause 2 stands in marked contrast to both the declaratory form and the positive law formulation. It provides: "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." 100

If this Clause was intended to be declaratory of what Professor Amar terms a "personal right," it would read something like: The Privilege of the Writ of Habeas Corpus shall not be abridged. If the Clause was intended to create or establish a new right to habeas corpus it would use language approximating the following: "All citizens (or people) shall enjoy the privilege of the Writ of Habeas Corpus." Article I, Section 9, Clause 2 does neither. 101

Instead, this provision tells the reader that there is such a thing as the "Privilege of the Writ of Habeas Corpus." The text,

95. Id. amend. I.
96. Id. amend. III.
97. Id. amend. V.
98. Id. amend. VI.
99. Id. amend. VIII.
100. Id. art. I, § 9, cl. 2.
101. Indeed, the only Amendment that seems analogous to Article I, Section 9, Clause 2, is the Fourth Amendment. But that Amendment contains a less ambiguous and more direct statement of a right: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Id. amend. IV. The qualifying words, "unreasonable searches and seizures," define the right itself. In contrast, Article I, Section 9, Clause 2 seems to have as its primary textual purpose a procedural goal: to spell out when the right may be suspended.
however, does not purport to create that right, shield it from abridgement, or even declare its existence. Much like the *Griswold v. Connecticut*\(^\text{102}\) view that marriage predates the Constitution and exists independent of the Constitution,\(^\text{103}\) one has the feeling that somehow the *right or privilege* to exercise the writ of habeas corpus does not stem from Article I, Section 9, but rather exists independent of that Article.

Ironically, one might turn the guns of refined incorporation upon itself and ask: Is this a Clause *creating or protecting* an individual right or is this a Clause relating to a procedural matter, providing that the government could suspend this right in certain instances?\(^\text{104}\) A close reading of the Clause suggests it may be more of a structural or procedural aspect of government than an individual right.\(^\text{105}\)

If this is true, then the Fourteenth Amendment Privileges and Immunities Clause can hardly be said to "incorporate" Article I, Section 9 in the way refined incorporation presupposes. To do so would incorporate not the right to habeas corpus, but rather, only the procedure by which the writ of habeas corpus could be suspended. This would be akin to attempting to incorporate the Capitation Clause\(^\text{106}\) or the federalism portion of the Tenth Amendment.\(^\text{107}\)

It does not necessarily follow that the *privilege* of the writ of habeas corpus is not included in the Fourteenth Amendment Privileges and Immunities Clause. It does suggest, however, that the source of that "privilege" is not Article I, Section 9, but some other source. Though the exact nature of that source is beyond the scope of this paper, Senator Howard's Fourteenth Amendment speech opens the possibility that the source of the

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102. 381 U.S. 479 (1965).
103. See id. at 482, 486.
104. Indeed, the refined incorporation distinction may not be as easy to apply as one might think. Consider Professor Amar's recurring example of a structural command, the Capitation Clause. That Clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. 1, § 9, cl. 4. This may be a simple directive to the government about the way in which it can assess a tax. But might it not also be a right of a citizen to be taxed "proportionally" to other taxpayers?
105. See U.S. CONST. art. I, § 9, cl. 2.
106. Id. art. I, § 9, cl. 4.
107. Id. amend. X.
right to habeas corpus is in Article IV, Section 2.\textsuperscript{108} The point here, however, is one that undermines the foundation of refined incorporation: The Fourteenth Amendment Founders do not seem to have intended to "incorporate" the Suspension Clause of Article I, Section 9.

It might be suggested that even if the comparison between the Suspension Clause and the Capitation Clause did not inevitably lead to refined incorporation, the road to that conclusion might lead through the Ninth and Tenth Amendments.\textsuperscript{109} The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."\textsuperscript{110} The Tenth Amendment provides: "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."\textsuperscript{911}

While it is clear that reserving rights "to the people" could be used to place limitations upon state action, how are we to treat the Tenth Amendment's provision to "reserve power to the States" if it is applied to the states?\textsuperscript{112} Or, for that matter, how do we link the first clause of the Ninth Amendment, "[t]he enumeration in the Constitution, of certain rights,"\textsuperscript{113} with the clause reserving other rights to the people? Is the measuring

\textsuperscript{108} In a forthcoming article, C. Michael Walsh and I explore the constitutional basis for the writ of habeas corpus. Like Professor Amar, we conclude that it was intended by the Fourteenth Amendment Framers as one of the privileges and immunities of U.S. citizens. We note, however, that the writ of habeas corpus was thought to be one of the requirements of a republican form of government. Further, we note that even conservative Democrats like Delaware's Willard Saulsbury thought that writs of habeas corpus could be utilized to vindicate the liberty interests of people held in bondage contrary to the commands of the Thirteenth Amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 113 (1866); TEN BROEK, supra note 24, at 182 (1965). Chief Justice Chase, on the Circuit, did precisely that in \textit{In re Turner}, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). The writ of habeas corpus was, of course, part of the "rights of Englishmen" under the English Habeas Corpus Act, 1679, 31 Car. 2, ch. 2 (Eng.), and the unwritten English constitution.

\textsuperscript{109} See AMAR, supra note 1, at 226.

\textsuperscript{110} U.S. CONST. amend. IX.

\textsuperscript{111} Id. amend. X.

\textsuperscript{112} One option is that it protects the rights of local governments against state governments, in the same way the Tenth Amendment protects state governments against the federal government. There is a certain logical symmetry to that analysis, but it seems to strain the text.

\textsuperscript{113} U.S. CONST. amend. IX.
stick of rights those reserved in the federal constitution or an
unmentioned state constitution, or both? This could be protec-
tion for "natural rights," but again, the reference to "the Consti-
tution" makes this interpretation awkward as a matter of a tex-
tual construction.

Professor Amar suggests the term "Bill of Rights" as a short
hand for the first eight or ten amendments did not come into
common use until the 1860s.\footnote{114. See AMAR, supra note 1, at 284-88.} In none of the Bingham or
Howard speeches is there any reference to the Ninth or the
Tenth Amendment being enforced against the states. Indeed, in
his 1871 retrospective on the drafting of the Amendment,
Bingham explained that "the privileges and immunities of citi-
zens of the United States, as contradistinguished from citizens
of a State, are chiefly defined in the first eight amendments to
the Constitution of the United States."\footnote{115. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (emphasis added).}
Earlier that same
year, Bingham authored a majority report rejecting the claim
that the voting was among the Fourteenth Amendment privileg-
es and immunities. In that report, he wrote that prior judicial
decisions had determined that "the first eight articles of amend-
ment of the Constitution were not limitations on the power of
the States" and that such a determination made it necessary to
give Congress explicit power to enforce privileges and immuni-
ties of citizens in the Fourteenth Amendment.\footnote{116. H.R. REP. NO. 22 (1871), reprinted in THE RECONSTRUCTION AMENDMENTS'
DEBATES, supra note 33, at 466-67.}

The statements by Bingham and Howard are confirmed by
some contemporary sources. For example, two of the three trea-
tise writers, Judge Farrar and Dean Pomeroy, referred the
Fourteenth Amendment as enforcing the first eight amendments
to the Constitution against the states.\footnote{117. See supra note 67. The third, Justice Paschal, suggested that it would enforce all of the prior thirteen amendments. He did not explain how this would apply to the Ninth or Tenth Amendments.} Similarly, in United States v. Hall,\footnote{118. 26 F. Cas. 79 (S.D. Ala. 1871) (No. 15,282). For an account of Justice Joseph Bradley's correspondence giving Judge Woods advice on how to proceed on the legal issues, see John P. Roche, Civil Liberty in the Age of Enterprise, 31 U. CHI. L. REV. 103, 108-09 (1963). See also Aynes, supra note 32, at 98 n.261 (discussing the dispute as to whether a second case was decided on these same grounds by the same court).} Judge Woods made it clear that the Four-
teenth Amendment was designed to enforce "the first eight articles of amendment."\textsuperscript{119}

If the Ninth and Tenth Amendments were considered part of the Bill of Rights and thought to be enforceable against the States, they would provide powerful support for refined incorporation. The reservation of undesignated rights "to the people" might be incorporated against the states and the nonpersonal rights and structural provisions could be excluded from incorporation. One could argue that the Framers were prescient in utilizing refined incorporation themselves.\textsuperscript{120} After all, they omitted the Ninth, Tenth, Eleventh, and Twelfth Amendments from their definition of the Bill of Rights and, as a consequence, from their partial definition of the Fourteenth Amendment's Privileges and Immunities Clause.

Like the Suspension Clause, however, the Ninth and Tenth Amendments provide their own arguments against refined incorporation. After all, many theories of antislavery advocates and abolitionists were based upon natural rights and natural law theories that could be viewed as being recognized through the Reservation of Rights Clauses of the Ninth and Tenth Amendments.\textsuperscript{121} Similarly, many Fourteenth Amendment Framers relied on theories highly congenial with use of the Ninth and Tenth Amendments.\textsuperscript{122} This being the case, if the Fourteenth Amendment's Framers had intended to apply the concept now referred to as refined incorporation, they could have done so by including the reservation of rights provisions of the Ninth and Tenth Amendments. Their failure to do so suggests some other factor than refined incorporation was at work.\textsuperscript{123}

\textsuperscript{119} Hall, 26 F. Cas. at 82.
\textsuperscript{120} See AMAR, supra note 1, at 226.
\textsuperscript{121} See TEN BROEK, supra note 24.
\textsuperscript{122} See Olsen, supra note 57.
\textsuperscript{123} Arguably, the vicinage provision of the Sixth Amendment could support refined incorporation. See AMAR, supra note 1, at 275. That portion of the Amendment provides that in all criminal prosecutions "the accused shall have the right" to be tried "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously been ascertained by law." U.S. CONST. amend. VI (emphasis added).

At the most general level, this provision simply implements the universal American rule that a criminal proceeding must be brought in the state that has jurisdiction to prosecute the crime and in a venue based, not on the will of a local prose-
Understanding the source of the right of habeas corpus as coming from somewhere other than Article I, Section 9, Clause 2, removes the linchpin from theory of refined incorporation. That loss is confirmed by the knowledge that the Reconstructors did not intend to incorporate the Ninth and Tenth Amendments and by a recognition that the vicinage provision simply restates the jurisdictional and procedural due process requirements of the existing state law. Thus, it would appear that as promising as the refined incorporation theory may be, one can properly invoke the Scottish verdict of "not proven."

III. THE EFFECT OF REFINED INCORPORATION

But what if one did find support for "refined" incorporation? In what way would our jurisprudence change? It would not exclude any right already recognized under selective incorporation. Adding to the growing literature about the meaning of the Second Amendment, Professor Amar links and contrasts the views of the Framers on the right to bear arms, writing of the Concord Militiaman and the Carolina freedman. He shows eloquently how the meaning of the Amendment may have been transformed in the Fourteenth Amendment adoption process.
He would go beyond current selective incorporation jurisprudence and incorporate the Second Amendment. If the current literature is credited, however, then one would reach the same result under either selective or total incorporation. On the other hand, if the Supreme Court views the Second Amendment as a matter of federalism, protecting the right of the state to maintain a militia, then refined incorporation works no change.

While suggesting that the Reconstructors did not have the same Third Amendment concerns as the revolutionary Framers, Amar concludes that the "privatizing" of the Third Amendment links it to a privacy right that should be enforced against the states. This too could be accomplished under selective or total incorporation.

While reflecting upon the Founders emphasis upon citizen's rights to "participate" in juries and the Reconstructors' emphasis upon the right to be "tried" by juries, Amar's refined incorporation guarantees the right to jury trial in criminal cases under the Sixth Amendment. Again, this is a result that would be reached under selective or total incorporation.

The first real break with total incorporation comes with the Seventh Amendment. Even though there is clear evidence from the debates that Bingham thought the Seventh Amendment was to be enforced against the states, Professor Amar's use of "refined" incorporation suggests a possible justification for non-incorporation. Under Amar's skillful hand, however, refined incorporation determines that the remaining provisions of the Fifth through Eighth Amendments "are rather easy candidates for incorporation." He specially enumerates "double jeopardy

127. See AMAR, supra note 1, at 267.
128. Professor Amar rejects the vicinage provision as unworkable in certain situations: "mechanical incorporation of this federalism clause against [the] states would make little sense." Id. at 275. But see analysis supra note 123. Professor Amar also believes that even in applying the clause to federal cases "this rule [does] not quite mean what it said." AMAR, supra note 1, at 275. If that be true in the federal context, then why is it not also true when enforced against the state? Could one not apply total incorporation and simply take into account all of the hypothetical circumstances Amar posits?
129. See id. at 276.
130. Id. at 278.
and compelled self-incrimination, as well as the rights of confrontation, compulsory process, counsel, bail, and the like.\textsuperscript{131}

In the end, the results of refined incorporation are largely congruent with the results of Justice Brennan's selective incorporation. Justification is found for not incorporating the Seventh Amendment.

A different result is posited for the Second Amendment, but only because Professor Amar views it as an "individual" rather than a "collective right."\textsuperscript{132} It is only in the area of Fifth Amendment grand jury rights that refined incorporation produces any significantly different result from selective incorporation.\textsuperscript{133} This is so because Professor Amar concludes that, "in general, courts today have ended up in pretty much the right place, even if they have not always offered the best textual and historical reasons. . . . Selective incorporation is largely right in result and instinct . . . ."\textsuperscript{134}

IV. CONCLUSION

Professor Amar thinks in large concepts and embraces the "big idea" of the Constitution. He writes elegantly of the intentions of the original Framers of the Bill of Rights. He makes both intriguing and important connections and contrasts between their thinking and that of the Fourteenth Amendment Framers. He does so by a synthesis that draws upon the insights of previously competing theories, using Frankfurter as well as Black, Crosskey as well as Fairman. He correctly challenges us to think about new ways to look at what has been called the "incorporation" debate and raises new questions that bear further investigation.

Notwithstanding my reservations about the application of refined incorporation, I have no reservations in praising the quality of his work or its pioneering status. For the last fifteen years, no thorough and careful scholar could write upon the incorporation controversy without first consulting Michael Kent

\textsuperscript{131} Id.
\textsuperscript{132} See id. at 259.
\textsuperscript{133} See id. at 307.
\textsuperscript{134} Id.
Curtis's *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* and Raoul Berger's *Government by Judiciary.* To that list, one must now add Akhil Reed Amar's *The Bill of Rights: Creation and Reconstruction.*

Professor Amar ends his narrative with "more work always remains to be done, if all are to be free and equal." In doing that work, contemporary and future scholars will build upon the foundation laid by Professor Amar in *The Bill of Rights.*

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135. Curtis, supra note 37.
137. Amar, supra note 1, at 294.