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Kurt T. Lash
University of Richmond, klash@richmond.edu

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Beyond Incorporation

KURT T. LASH*

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Incorporation as a theory of constitutional interpretation is dying. Incorporationist scholars are killing it. In this paper, I argue that they are right to do so, whether they mean to or not. The current incorporation debate bears so little resemblance to the theory of incorporation as it originally emerged at the time of the New Deal that I argue it is time to abandon the metaphor of incorporation altogether and admit that what we are after has nothing to do with incorporated texts from 1787. Our search is for the public understanding of texts added to the Constitution

* James P. Bradley Professor of Constitutional Law, Loyola Law School, Los Angeles. My thanks to Steven D. Smith, Lawrence Solum and Michael Curtis for their comments and suggestions.

in *1868*. Because members of the Reconstruction Congress often linked the meaning of the Fourteenth Amendment to the Bill of Rights, at first glance my proposal may seem to offer a distinction without a difference. In fact, I believe a complete break from incorporation-talk is an important step towards a more historically-contextual investigation of the original meaning of the Fourteenth Amendment. Not only does it allow for a more historically accurate account of Fourteenth Amendment-period rights, it also opens the door to a more nuanced historical account that gives due weight to federalism concerns which informed the original understanding of the Amendment.

Incorporation began as a theory of judicial restraint, not a theory of judicial interpretation. The idea of incorporated rights first appeared in the decisions of the New Deal Court as part of its effort to explain its role as a guardian of individual liberty, even as it abandoned its earlier enforcement of liberty of contract. Prior to the New Deal, the Supreme Court considered itself to have as free a hand in defining constitutional liberty as it did in defining common law rights and obligations. Freedom of speech and liberty of contract were protected not because they had particular roots in the constitutional text, but because the Court considered these to be fundamental rights as long recognized under common law. At no time did the Pre-New Deal Court describe its efforts as "incorporating" the texts of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. Indeed, for some time, textual inclusion in the Bill was one reason *not* to identify the right as a due process liberty under the Fourteenth. Instead of "incorporation" of a text, when the Pre-New Deal Court protected freedom of speech, or liberty of contract, the Court described its effort as one of identifying and enforcing rights deemed fundamental under the common law.

When the New Deal Court expanded its construction of federal commercial regulatory power, this necessitated a new approach to constitutional liberty. In cases like *Carolene Products* and *West Va. v. Barnette*, the Court explained that the *Lochner* Court erred in its enforcement of non-textual economic liberties like liberty of contract. Henceforth, the Court would limit its heightened scrutiny of laws to those cases involving a particular text that had been absorbed or incorporated into the Fourteenth Amendment. This limitation to incorporated rights ensured that the Court would not repeat the errors of *Lochner* and engage in subjective identification and enforcement of what amounted to the personal preferences of the justices.

This newly constructed doctrine of incorporation was deeply criticized by dissenting members of the Supreme Court at the time, and it faced years of withering scholarly criticism as a doctrine that lacked both historical and textual support. In the last few decades, however, the doctrine has gained a high degree of scholarly respect as attention has turned away from the Due Process Clause and towards the Privileges or Immunities Clause as having the more legitimate claim as a fount of incorporated rights. My own early work supported this new focus on the original meaning of the Privileges or Immunities Clause.[1]

Ironically, the efforts of pro-incorporation scholars seem to have undermined incorporation doctrine, at least as that theory was first proposed and understood by the New Deal Court. The shift in focus away from Due Process liberties to Privileges or Immunities has placed the judicial enforcement of certain rights against state action on firmer textual and historical ground. But the effort has also had the effect of highlighting how public understanding of liberty evolved between the Founding and Reconstruction. By now it should be clear that we are not *incorporating* anything at all when we talk about rights under the original understanding of Section One of the Fourteenth Amendment. We are talking about the public understanding of United States citizens' privileges or immunities circa 1868. Even when the texts of the original Bill of Rights became part of the debate, work by scholars like Michael Kent Curtis show that public understanding of these rights had significantly changed in the decades between the Founding and Reconstruction.

This shift in the public understanding of individual liberty suggests that what we are after is not the incorporation of 1787 texts, but the public understanding of 1868 texts—in particular the meaning of Privileges or Immunities and the scope of congressional power to enforce these newly constitutionalized rights. This may seem like a small and currently well-accepted point. In fact, judicial doctrine and a great deal of contemporary scholarship has yet to embrace the implications of shifting ones' gaze away from 1787 and towards 1868. For example, where incorporation scholarship often focuses on a single "incorporated" right, the search for the meaning of privileges or immunities is a much broader inquiry with implications that stretch far beyond a particular asserted

1. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

right. The generation that adopted the Privileges or Immunities Clause was well aware of these broader implications, and the potential scope of the Clause became part of the debate which led to its framing and adoption. Just as historical scholarship regarding the Founding has become more sensitive to the interplay between Federalist and Anti-Federalist arguments in shaping the likely public understanding of the original Constitution, so Fourteenth Amendment historical scholarship must take into account the interplay between nationalist and localist principles in the debates which led to the drafting and adoption of the Fourteenth Amendment. The historical record that we have suggests that federalism played a role in the original understanding of Section One and in the assumed scope of congressional power under Section Five.

We are only at the beginning of a fully contextual investigation of the original understanding of the Fourteenth Amendment. Abandoning the incorporation doctrine as a theory and a methodology will help accelerate and facilitate the turn towards what is central question for originalists: the original understanding of the Privileges or Immunities of citizens of the United States.

I. THE BIRTH OF INCORPORATION DOCTRINE

Prior to the New Deal, the Supreme Court's Fourteenth Amendment jurisprudence was based on a common law methodology by which the Court identified and enforced certain liberties deemed fundamental enough to qualify for heightened protection. The most prominent (and infamous) of these rights were the common law economic rights protected by the Supreme Court in cases like *Allgeyer v. Louisiana*[2] and *Lochner v. New York*.[3] Although the Supreme Court during the same period also found freedom of speech,[4] the right to compensation for a taking of property,[5] and the right to counsel in capital cases[6] to fall within the protections of the Fourteenth Amendment, these protections had nothing to do with the freedoms being listed in the original Bill of Rights. Indeed, during the so-called *Lochner* era, being listed in the original Bill was considered a good reason to not be included as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Since these rights were clearly not aspects of due process under the original Bill of Rights, it seemed textually unlikely they were considered aspects of the Due Process Clause of the Fourteenth Amendment. Thus,

2. 165 U.S. 578 (1897).
3. 198 U.S. 45 (1905).
4. *See* Gitlow v. New York, 268 U.S. 652 (1925).
5. *See* Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).
6. *See* Powell v. Alabama, 287 U.S. 45 (1932).

in early substantive due process cases, a claimed right against the states which was also listed in the original Bill had to overcome a textual presumption that it was *not* an aspect of substantive due process.[7]

The rights most aggressively protected by the *Lochner* Court were rights derived not from text, but from the common law. In addition to liberty of contract, the Court enforced the parental right to control the educational upbringing of children in and *Meyer v. Nebraska*[8] and *Pierce v. Society of Sisters*.[9] It is important to note that the Court in *Meyer* and *Pierce* said nothing about the Free Exercise Clause or even the equal protection of religious and ethnic minorities. The Court in both cases applied a purely *Lochnerian* common law analysis which placed parental rights alongside the common law right to liberty of contract.[10] In *Meyer*, for example, the Court explained its approach as invoking "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," and supported its decision with citations to the *Slaughterhouse Cases*, *Allgeyer*, and *Lochner*.[11]

Even those cases which did invoke textual rights like freedom of speech, the Supreme Court said nothing about "incorporation" or "absorption" of rights listed in the original Bill. Instead, the Court merely expressed its conclusion that these rights were fundamental liberties at common law—a status that called for their heightened protection whether listed in the original Bill or not. Indeed, the Court supported its "assumption" that the Fourteenth Amendment's Due Process Clause protected freedom of speech with a citation to, among other cases, *Meyer v. Nebraska*.[12] As the Supreme Court put it in *Twining v. New Jersey*, if a right listed in the original Bill is to be protected against state action, "it is not because those rights are enumerated in the first eight Amendments, but because

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7. For an example of the implied presumption against textual incorporation, *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (noting that "explicit mention" in the Bill of rights does not necessarily "argue exclusion elsewhere"). *De Jonge* was decided just prior to the New Deal Revolution. *See generally*, Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 483 n.110 (2001).

8. 262 U.S. 390 (1923).

9. 268 U.S. 510 (1925).

10. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court stated the right included liberty "to worship God according to the dictates of his own conscience" at 399.

11. *Id.*

12. Gitlow v. New York, 268 U.S. 652, 666 n.9 (1925).

they are of such a nature that they are included in the conception of due process of law."[13]

II. TEXTUALISM AND THE NEW DEAL REVOLUTION

When the New Deal Court abandoned liberty of contract and the Lochnerian approach to constitutional power, it justified its revisionist jurisprudence as a return to text-based interpretation of the Constitution.[14] The first hint came in December of 1937 in *Palko v. Connecticut*,[15] where the Court rejected a claim that liberty under the Fourteenth Amendment included all rights listed in the first eight amendments, including the Fifth Amendment protection against double jeopardy.[16] Writing for the Court, Justice Cardozo distinguished Lochnerian liberty of contract from other aspects of liberty protected by the Due Process Clause such as freedom of speech, the press and the free exercise of religion. He wrote, "[i]n these and other situations immunities that are valid as against the federal government by force of the *specific pledges of particular amendments* have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[17] Cardozo's link between Fourteenth Amendment liberty and the "specific pledges of particular amendments" necessarily excluded Lochnerian liberty of contract. It also excluded non-textual liberties like the parental rights protected in *Pierce*. Rather than place *Pierce* in the same dustbin as *Lochner*, however, Justice Cardozo characterized *Pierce* as a free exercise case.[18] This despite the fact that the Court in *Pierce* never mentioned religious freedom and based its decision instead on a parent's right to educate their child—a theory broad enough to protect the rights of a military school.[19]

The textualist link between Fourteenth Amendment liberty and the Bill of Rights came up again only a few months later, this time appearing in a footnote. In *United States v. Carolene Products Company*,[20] the Court declared that henceforth "regulatory legislation affecting ordinary commercial transactions" is to be presumed constitutional.[21] Justice Stone then included a footnote which explained "[t]here may be narrower

13. Twining v. New Jersey, 211 U.S. 78, 99 (1908).
14. This section is based on a more extensive investigation of the New Deal. *See* Lash, *The Constitutional Convention of 1937*, *supra* note 7.
15. 302 U.S. 319 (1937).
16. *Id.* at 323.
17. *Id.* at 324–25 (emphasis added).
18. *Palko*, 302 U.S. at 324.
19. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).
20. 304 U.S. 144 (1938).
21. *Id.* at 152.

scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[22] Stone thus echoed *Palko*'s focus on the "specific pledges of particular amendments."[23]

By tying heightened protection of Fourteenth Amendment liberties to rights expressly mentioned in the text of the Constitution, the Court distinguished Lochnerian speech, press and religious liberties from Lochnerian liberty of contract and parental rights. As had Cardozo in *Palko*, Stone linked the parental rights cases of *Meyer* and *Pierce* to "specific prohibition[s]" in the Constitution by characterizing them as involving the rights of religious (*Pierce*) and ethnic (*Meyer*) minorities.[24]

The Court's non-textualist approach to substantive due process triggered vigorous dissents by Justice Oliver Wendell Holmes. According to Justice Holmes, the Court was wrong to enforce rights like liberty of contract which were "not specifically mentioned in the text of the Constitution."[25] The New Deal Court now made Holmes's textualist criticism the intellectual lodestone for the New Deal rejection of *Lochner*. As Justice William O. Douglas wrote for a unanimous Court in *Olsen v. Nebraska*:[26]

> In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.[27]

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22. *Id.* at 152 n.4.
23. *Palko*, 302 U.S. at 324–25.
24. According to Justice Stone in footnote 4:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, or national, Meyer v. Nebraska, Bartels v. Iowa, Farrington v. Tokushige, or racial minorities, Nixon v. Herndon, Nixon v. Condon; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (internal citations omitted).

Carolene Products, 304 U.S. at 153 n.4.

25. Adkins v. Children's Hospital, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).
26. 313 U.S. 236 (1941) (internal citations omitted).
27. *Id.* at 246–47.

The common law methodology which produced liberty of contract, the story now went, allowed the *Lochner* Court to write its personal predilections into the law.[28] According to Felix Frankfurter, the words "due process of law" and "equal protection of the laws,"

> are so unrestrained, either by their intrinsic meaning, or by their history, or by tradition, that they leave the individual Justice free, if, indeed, they do not actually compel him, to fill in the vacuum with his own controlling conceptions, which are bound to be determined by his experience, environment, imagination, his hopes and fears—his "idealized political picture of the existing social order."[29]

The problem with determining the "vague contours" of the Due Process Clause would play a central role in the debate between Frankfurter and Jackson regarding the New Deal charter of judicial review. Although he would part ways with Frankfurter on the Doctrine of Incorporation, Justice Jackson also believed that textual expression marked the boundary between judicial deference to the political branches and judicial enforcement of fundamental liberties. As he later wrote, "[m]uch of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard."[30]

Linking heightened judicial protection to textual expression in the Bill of Rights is a theme that appears throughout individual rights cases during this period.[31] Unlike cases prior to 1937, where textual expression in the Bill of Rights was irrelevant to the common law approach to defining "liberty," text now distinguished legitimate from illegitimate interference with the political process. For the next several decades, the issue became *which* texts were to be incorporated into the Due Process Clause of the Fourteenth Amendment. Failing to achieve majority support for any particular approach to incorporation, the result by default has been a "selective" approach whereby texts, one by one, are considered as candidates for incorporation which most ultimately achieving the honor. This case-by-case approach itself was an important aspect of the New Deal Court's overriding principle of judicial restraint: the same principle which led the Court to defer to the political process in both its regulation of economic rights and commerce in general. It also prevented any kind of wholesale incorporation of the entire Bill of Rights against

28. *See* Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 633 (1936) (Stone, J., dissenting).

29. FELIX FRANKFURTER, MR. JUSTICE HOLMES'S CONSTITUTIONAL OPINIONS, IN FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 117 (Philip B. Kurland ed., 1970).

30. West Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943).

31. See sources cited in Lash, The Constitutional Convention of 1937, *supra* note 7, at 486 n.125.

the states—a move that, in 1937, would have almost certainly resulted in efforts to curtail the powers of the Supreme Court.[32]

III. MODERN DUE PROCESS AND THE TWO TRACK MODEL OF FOURTEENTH AMENDMENT RIGHTS

The modern Supreme Court, of course, has long since abandoned the New Deal Court's textualist interpretation of substantive due process. In cases like *Griswold v. Connecticut*, the Supreme Court reconfigured *Pierce* and *Meyer* once again, this time restoring their original Lochnerian non-textual reading of Due Process and using this original non-textual meaning as precedent in support of the non-textual right to privacy.[33] The restoration of non-textual substantive due process did not, however, have any effect on the general incorporation debate. Instead, what developed was a kind of two-track analysis: judicial enforcement of incorporated (or claimed incorporated) rights focused heavily on the meaning of the texts when first added to the constitution in 1791, while judicial enforcement of non-textual substantive due process rights broke away from any historical analysis whatsoever beyond an occasional nod to developments at common law up to the modern era. Almost completely missing from both tracks of analysis is a focus on the meaning of rights, either textual or common law, at the time of the adoption of the Fourteenth Amendment.

There are a number of problems with this two track analysis. First, and most obviously, it creates a dual analysis for a single constitutional text. Secondly, the incorporation track overemphasizes Founding-era conceptions of rights and underestimates (or ignores) how the rights represented by these texts were understood in 1868. A similar error occurs on the second non-textual substantive incorporation track: although generally sensitive to developments at common law since the time of Reconstruction, little if any effort is made to identify legal principles at play in 1868 which informed, and constrained, the understanding of privileges or immunities of citizens of the United States.

32. For a discussion of political efforts to reduce the independent powers of the Supreme Court during this period, see BRUCE A. ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 312–44 (1998).

33. *See* Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965). *See also* Lash, *The Constitutional Convention of 1937*, *supra* note 7 at 496, n.178.

IV. DISTINGUISHING 1791 RIGHTS FROM 1868 PRIVILEGES OR IMMUNITIES: *WATSON V. JONES*

The work of Michael Kent Curtis has extensively documented how freedom of speech developed in the period between the Founding and Reconstruction.[34] Of particular importance is how Professor Curtis's work illustrates the growing perception of how politically inflammatory speech deserved protection in face of southern demands that abolitionist speech be suppressed. The debates regarding political and religiously motivated speech are clearly relevant in determining the nature of freedom of speech as a privilege or immunity of United States citizens under the Fourteenth Amendment. An incorporationist focus on free speech circa 1787 will miss this critical development in expressive rights. Similarly, public understanding of the nature of religious freedom also developed in important ways in the years prior to the adoption of the Fourteenth Amendment.

A. Watson v. Jones

Immediately following the Civil War, the General Assembly of the Presbyterian Church of the United States ("PCUS") adopted a resolution that required new members who had previously advocated the divine nature of slavery to "repent and forsake these sins" before being allowed to join the church.[35] Enforcing this resolution tore apart the Walnut Street Presbyterian Church of Louisville, Kentucky.[36] Claiming that the requirement violated the Presbyterian Constitution, a majority of the local church trustees and a minority of the congregation seized control of the Walnut Street Church and attempted to sever the Church's ties with PCUS. The General Assembly promptly declared the local pro-Union members to be the "true" Walnut Street Church and proceeded to appoint new trustees. Both factions claimed control of the Church property and the dispute landed in state court.[37] The Kentucky Supreme Court rejected the idea that the dispute involved a "question purely ecclesiastical,

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34. In addition to his contribution to this symposium, Professor Curtis has published a number of important works illustrating this development in the public understanding of free speech. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); MICHAEL CURTIS, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

35. For a discussion of the background to the Watson case, see Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religious Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 184–86 (1987).

36. Watson v. Avery, 65 Ky. (2 Bush) 332 (1867).

37. *Id.* at 343–44.

to be settled by the synod itself and the general assembly,"[38] and held that the General Assembly had departed from its own laws when it installed the new trustees. The losing pro-Union faction then sought relief in federal court, and the case eventually made its way to the U.S. Supreme Court.

In *Watson v. Jones*,[39] the Supreme Court declared that in the United States "the right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith . . . is unquestioned." [40] This right would be "totally subverted" if secular courts were given the power to reverse the decisions of ecclesiastical tribunals.[41] Therefore, "it is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[42] This principle of national religious liberty could not be reconciled with the "departure from doctrine" approach which informed English common law:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.[43]

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38. *Id.* at 348. According to the court:

> Such a construction of the powers of church tribunals would, in our opinion, subject all individual and property rights, confided or dedicated to the use of religious organizations, to the arbitrary will of those who may constitute their judicatories and representative bodies, without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was intended that said individual and property rights should be protected.

Id. This decision appears to conflict with prior cases decided by the Kentucky Supreme Court. *See id.* at 376–78 (Williams, J., dissenting) (citing both Shannon v. Frost, 42 Ky. (3 B. Mon.) 253 (1842), in which the court refused to apply the departure from doctrine theory in a congregational church dispute, and Gibson v. Armstrong, 46 Ky. (7 B. Mon.) 481 (1847), in which the court indicated that, when in doubt, it should defer to the church tribunals.).

39. 80 U.S. (13 Wall.) 679 (1872).

40. *Id.* at 728–29.

41. *Id.* at 729.

42. *Id.*

43. *Id.* at 728.

Although *Watson* was decided on grounds of federal common law, the rationale had broader implications. The Court in *Watson* refused to give effect to the state court's determination that the elders who prevailed in the Supreme Court were not elders at all. Justice Miller attempted to gloss over this conflict with the Kentucky courts by holding that the elders who prevailed in state court had since removed themselves from the governance of the PCUS. Whether they had a *right* to remove themselves along with the church property, of course, was the essence of the dispute. In essence, the Supreme Court reversed a decision in the same case by the state's highest court, and did so in order to vindicate the people's "right to *establish* tribunals for the decision of religious questions."

Watson is important for a number of reasons. To begin with, it contains an extensive discussion of how the principle of non-establishment had evolved in the period between the Founding and the Civil War. Although departure from doctrine theory was generally acceptable at the time of the Founding (a fact that by itself calls into questions a great many separationist accounts of church-state relations in 1787), by Reconstruction the same doctrine had been broadly rejected as a vestige of English establishment jurisprudence. When the Court in *Watson* declared that the "law knows no heresy," the "law" referred to was the common law in most states. The Court treated this non-establishment principle as an aspect of the right to free exercise of religion—a right also broadly embraced at common law. By itself, the Court's discussion in *Watson* was not dispositive of the issue; it required an historical investigation to determine whether the Court had accurately captured the general status of the law.[44] But if the Court's analysis of the common law in *Watson* was correct, then this is evidence that a non-establishment "privilege or immunity" had emerged by 1868 which was *not* considered a right under either state or federal law in 1787. An incorporationist account which simply applied the original understanding of the Free Exercise and Establishment clauses against the states would miss this development in public understanding of non-establishment liberty.

Just to underline this point, consider what the Court in *Watson* did *not* discuss: The Free Exercise and Establishment Clauses of the First Amendment. The Court said nothing about the textual referents to religious freedom in the Bill of Rights. Instead, the Court discussed principles which had emerged over time at common law. As I have

44. My own investigations suggest that states had, by and large, rejected departure from doctrine theory by Reconstruction—and for the non-establishment reasons asserted by the Watson Court. *See* Lash, *The Second Adoption of the Establishment Clause*, *supra* note 1.

discussed elsewhere, these emergent common law principles were often associated with the religious freedom texts of the First Amendment.[45] Nevertheless, the principles themselves would not be discoverable through an investigation of this text and its original meaning; they existed as an aspect of what was publicly understood to be the people's privileges or immunities at the time of Reconstruction. Nothing was incorporated into Section One of the Fourteenth Amendment, in other words, other than the public meaning of that particular text at the time of its ratification. This is not to say that the framers of the Fourteenth Amendment viewed the texts of the Bill of Rights as unimportant (indeed, to men like John Bingham, these texts were extremely important). Those texts, however, were read in light of 1868 principles of individual liberty and the post-civil war understanding of the privileges and immunities of citizens of the United States.

V. THE IMPLICATIONS OF HISTORICAL CONTEXT

Breaking away from the artificially narrow search for evidence of an incorporated text allows for a more historically robust analysis of the history surrounding the adoption of the privileges or immunities clause— a search that may well have rather surprising results. For example, the Supreme Court's decision in The *Slaughterhouse Cases* has been broadly criticized for its emphasis on a federalist reading of the Constitution and the presumption that texts should be read in a manner preserving state autonomy in the absence of language expressly requiring otherwise.[46] It turns out, however, that some of the most influential figures in the shaping of the Fourteenth Amendment assumed that the *amended* Constitution would continue to embrace the presumptions of federalism and the need to broadly preserve state autonomy.[47]

For example, incorporation advocates often invoke a speech by the author of most of Section One of the Fourteenth Amendment, John Bingham, in which Bingham describes an early version of Section One

45. See sources cited *supra* note 1.

46. *See also* Paul v. Virginia, 75 U.S. 168 (1869) (Court narrowly construing commerce power to avoid a dormant commerce clause claim against the state).

47. This is a point persuasively supported by the work of Bryan H. Wildenthal in his article *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1114 (2000).

as making the Bill of Rights enforceable against the states. In his speech, however, Bingham stressed a limited reading of the Privileges or Immunities Clause in order to avoid unduly intruding upon matters which ought to remain under the control of the people in the states:

> [Bingham] repelled the suggestion, made in the heat of debate, that the committee, or any of its members, sought, in any form, to mar the Constitution, or to take from any State rights that belonged to it under the Constitution. This was simply a proposition to arm the Congress of the United States, by the consent of the people with power to enforce the Bill of Rights, as it stood today in the Constitution. It had that extent. No more.[48]

Although in prior work I had echoed the common assumption that Bingham read the Privileges or Immunities Clause to have nationalized more rights that those listed in the first eight amendments, I am no longer convinced this is the case. Certainly, statements like the above suggest that key players in the drama which produced the Fourteenth Amendment viewed the effort as preserving critical aspects of state autonomy even as it established new national rights.[49]

Even the most radical of Republicans conceded that the principles underlying the Tenth Amendment continued to operate in the aftermath of the Thirteenth and Fourteenth Amendments. For example, Ohio Republican and close associate of John Bingham, Samuel Shellabarger rejected claims that the proposed Fifteenth Amendment would in any way alter the powers reserved to the states under the Tenth Amendment. According to Shellabarger:

> The Constitution itself in express terms provides that:
>
>> 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.
>>
>> Hence it follows that the power of regulating elections not being prohibited to the States by the Constitution as it stands, resides now either with the states or with the people. If this is so, if the power to regulate elections of registrations resides with the States under the Constitution in its present form, then my proposition will not take it away. It simply provides that the right to vote shall be exercised by all male citizens of a certain age. Every

48. THE PHILADELPHIA INQUIRER; March 1, 1866, at 1.

49. *See* Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment, 1866-67,* 68 Ohio St. L.J. 1509, 1617 (2007) ((demonstrating Bingham's agreement with Justice Black that the Bill of Rights was both "a ceiling and a floor" in terms of the original meaning of the Privileges or Immunities Clause.). In a forthcoming series of papers, I will explore the original understanding of the Privileges or Immunities Clause and its likely limitation to rights listed in the text of the original Constitution. *See* Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part I & II (forthcoming).

> power now residing with the States, under the Constitution, except so far as this amendment takes away their power, will remain with them still."[50]

Notice that Shellabarger not only insisted that the Tenth and its original principles remained in operation, he also continued to read "or to the people" as referring to the people in the several states. His comments regarding the Tenth are not unusual; references to the restrictive principles of the Tenth Amendment can be found throughout the Reconstruction debates. Following a practice since the time of the Founding, members of the Reconstruction Congress cited both the Ninth and Tenth Amendments as dual guarantors of state sovereignty—and did so in a manner indicating that these principles remained in operation despite the adoption of new and significant constraints upon the states.[51] As Bingham's comments illustrate, the principles of federalism represented by the Ninth and Tenth Amendments also informed a (limited) construction of Section One. In fact, there is good reason to believe these same principles informed a limited reading of congressional power under Section Five of the Fourteenth Amendment.

VI. STATE SOVEREIGN IMMUNITY AND RECONSTRUCTION

One of the earliest and clearest examples of how federalism called for a limited construction of federal power occurred in the pre- and post ratification debates regarding Article III and state suability. Critics of the proposed Article III claimed that the clause would be interpreted to the fullest extent possible thus allowing individuals to sue non-consenting

50. Remarks of Representative Samuel Shellabarger Jan. 29, 1869, CONG. GLOBE, 40th Cong., 3d sess. 727 (1869). John Harrison describes Shellabarger as "a leading Republican legal theorist in the House." *See* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 366 (2007). For a description of Shellabarger as a "principal radical theoretician," *see* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 164 (1972). Shellabarger, of course, rejected the idea that the Reconstruction Amendments should be strictly construed. See Letter from Shellabarger to J. Comly (Apr. 10, 1871), Comly MSS, Ohio Historical Society. The relevant portions of this letter are quoted in HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 471 (1982).

51. *See* Remarks of William T. Hamilton May 18, 1870 (D. MD), CONG. GLOBE, 41st Cong., 2d Sess. S.P. App. 354 (quoting Ninth and Tenth Amendments in support of narrow reading of the federal power to enforce voting rights).

states in federal court.[52] Federalist defenders of the Constitution responded by insisting that states were presumptively immune from such suits and would continue to so under the proposed Constitution.[53] Because the text of Article III did not *require* such a broad reading of federal judicial power, it was construed in a manner that excluded private suits against the states, thus preserving the retained sovereignty of the states. It was the failure of Federalist judges to apply this rule in the first years of the Constitution that led to the adoption of the Eleventh Amendment—an amendment which merely codified what had been understood as the proper construction of Article III.

The issue of suing states and state officials emerged once again in the debates surrounding the adoption of the Reconstruction Amendments and the attempts of Congress to enact legislation holding state officials accountable for violating the rights of newly freed Blacks in the South.[54] Judicial opinions and legal commentary in the years leading up to the Civil War continued to follow the rule of presumed state sovereign immunity. According to Joseph Story in his *Commentaries on the Constitution*, "It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private person, without its own consent. This exemption is an attribute of sovereignty, belonging to every state in the Union."[55] Case law right up to the civil war followed the same rule.[56] As the Supreme Court of Georgia succinctly stated, "The State cannot be sued."[57]

In the Reconstruction Congress, the debates reflected a widespread assumption that state governments could not be sued without their consent. This was true both during the debates over the Thirteenth, Fourteenth and Fifteenth Amendments, and after those amendments had been ratified. No member of the various Congresses which produced the Reconstruction Amendments suggested that by doing so, Congress now had authority to authorize suits by individuals against the states. Instead,

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52. *See generally*, Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577 (2009).

53. *Id.* at 1599-1604 (quoting James Madison, Alexander Hamilton, Rufus King, John Marshall, and others).

54. For a general discussion of the issues and evidence cited in this section, *see* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353 (2006).

55. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 538, Section 1669 (1833) (footnotes omitted).

56. *See, e.g.*, O'Connor v. Pittsburgh, 18 Pa. 187, 189 (1851) ("it is the prerogative of the sovereign to be exempt from coercion by action").

57. Walker v. Spullock, 23 Ga. 436, 438 (1857).

the various debates indicate a widespread belief that although individual state officials might be held accountable, states as such could not be sued without their consent. Republican Senator John Pool of North Carolina, for example, explained (without contradiction) that Congress's powers under Section Two of the Fifteenth Amendment allowed for legislation holding individual state officials accountable, but not states themselves; states could not be punished for a crime.[58] Other Republicans refused to go even *that* far, arguing that criminal liability for state officials would destroy local self-government.[59] Senator Oliver Morton of Indiana supported the 1871 Ku Klux Klan act which authorized suits against state and private individuals in part because states themselves could not be indicted or punished as states.[60] According to Morton, "[t]here can be no legislation to enforce [Section One of the Fourteenth Amendment] as against a state."[61] John Bingham, the author of Section One, agreed: "the United States punishes men, not states, for a violation of its law."[62]

Interestingly, these debates did not involve suits by out of state residents—a subject expressly covered by the Eleventh Amendment—but rather suits by state residents aggrieved by their own state officials. By assuming states themselves could not be sued, the *Republican* members of the Reconstruction Congresses implicitly assumed the need to construe federal judicial power in a manner preserving the sovereign status of the states. They assumed, in other words, a pre-existing and on-going principle of strict construction of Article III.[63] This does not mean that the Reconstruction Amendments did not accomplish a dramatic realignment of federal-state authority (perhaps more than the courts recognized at the time). It does mean, however, that whatever the understood scope of these Amendments, there is no evidence that their

58. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

59. Cong. Globe, 41st Cong., 2d Sess. App. 421–22 (Remarks of Senator Joseph Fowler, Republican, Tenn.) (1870).

60. Cong. Globe, 42d Cong., 1st Sess. App. 251 (1871) (remarks of Senator Morton) ("There can be no legislation to enforce [Section One of the Fourteenth Amendment] as against a state. A criminal law cannot be made against a state. A State cannot be indicted or punished as such. The legislation which Congress is authorized to enact must operate, if at all, on individuals.").

61. *Id.*

62. *Id.* at App. 86.

63. For a general discussion of the original strict construction of Article III and its relationship to the principles of narrow construction announced by the Ninth and Tenth Amendments, *see* Lash, *Leaving the Chisholm Trail*, *supra* note 52, at 1609.

framers or ratifiers understood them as having erased the status of the states as independent sovereignties nor the need to take this status into account when construing delegated power and rights.[64]

In sum, it appears that the Reconstruction Congress assumed the continued, if trimmed, operation of the Tenth Amendment and the continued existence of the state as independent sovereign entities. If the Republican members of the Reconstruction Congress shared this view of the retained sovereignty of the states, then we can be sure the Democratic members did as well. The same would be true of those who ratified the Reconstruction Amendments, for they did so against a backdrop of judicial opinions and legal commentary that assumed the continued remnant sovereignty of the states. Not even the most radical of the congressional Republicans claimed that the new Amendments would alter this fundamental aspect of the federal Constitution.

VII. THE RECONSTRUCTION SUPREME COURT AND FEDERALIST CONSTRUCTION OF DELEGATED FEDERAL POWER

The same year the Fourteenth Amendment became part of the United States Constitution, the United States Supreme Court reaffirmed the federalist based rule of strict construction. In *Lane County v. Oregon*,[65] Lincoln-appointee, Republican Salmon P. Chase, led a unanimous Court in upholding Oregon's right to require the payment of debts in gold or silver coin instead of federal notes (as required by federal law). Chase supported his ruling by recounting the "separate and independent existence" of the states in the federal system.[66] "To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.'"[67] As Chief Justice Chase would write later that same term, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[68]

64. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court ruled that Congress could authorize individual suits against the states by way of its enforcement powers under section Five of the Fourteenth Amendment. The Fitzpatrick Court did not engage in any historical analysis, nor have later cases which continue to follow Fitzpatrick. *See* Harrison, *supra* note 50, at 354.

65. 74 U.S. 71 (1868).

66. *Id.* at 76.

67. Texas v. White, 74 U.S. 700, 725 (1868).

68. *Id.*

As a Lincoln Republican, Chase rejected the power of the states to secede from the Union.[69] But rejecting this claim of sovereignty did not lead the Reconstruction Supreme Court to reject the idea of remnant sovereignty and the continued independent existence of the states. In its earliest decisions following the adoption of the Thirteenth and Fourteenth Amendments, the Supreme Court continued to follow Madison's rule of "expressly delegated power" and its attendant requirement that federal power be narrowly construed. For example, in the 1870 case *Collector v. Day*, the Supreme Court narrowly construed Congress's delegated powers of taxation and struck down an attempt to tax the salary of state officials.[70] According to Justice Samuel Nelson, the adoption of the Tenth Amendment established a rule of interpretation whereby, "[t]he government of the United States [] can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."[71] This is, of course, precisely what James Madison, John Page, St. George Tucker, and others in the Founding generation, identified as the federal rule of strict construction under which all federal power would be narrowly construed to preserve the retained sovereignty of the states.[72] As the Court in *Day* concluded, the appointment of officers to administer their laws was, "one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State [wa]s as independent of the general government as that government [wa]s independent of the States"—an independence which included independence from federal taxation.[73] Although Justice Bradley dissented, Nelson's opinion was joined by the rest of the Court, including Chief Justice Chase. Nelson's opinion in *Collector v. Day* would remain the rule until the time of the New Deal.[74]

Obviously, much more work needs to be done regarding the originally understood scope of congressional power under Section Five of the Fourteenth Amendment. The point here is merely to illustrate that

69. *Id.*
70. 78 U.S. 113 (1870) (Nelson, J.)
71. Collector v. Day, 78 U.S. 113, 124 (1870) (Nelson, J.).
72. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008).
73. 78 U.S. at 126.
74. See Helvering v. Gerhardt 304 U.S. 405 (1938); Graves v. O'Keefe 306 U.S. 466 (1939) (overruling Day).

the principles of federalism appear to have survived the adoption of the Reconstruction Amendments and that these cross currents of assumed state autonomy (and immunity) must be taken into account in determining the original understanding of the Fourteenth Amendment. None of this is captured in a discussion dominated by "incorporation of the Bill of Rights."

VIII. CONCLUSION

Incorporation doctrine emerged as part of an effort to explain the New Deal Court's roll back of substantive due process rights. The fact that the Supreme Court no longer follows the New Deal Court's distinction between textual and non-textual substantive due process rights is only more reason to make a clean break from a doctrine that misleadingly implies that we are taking provisions from the Bill of Rights and incorporating them into the Fourteenth. The generation that added the Fourteenth Amendment to the Constitution had their own understanding of national liberty, one that diverged in important ways from the conception of liberty which held sway at the Founding. Although this understanding in some ways will be more libertarian than the Founding-era conception (see the Court's embrace of non-establishment principles in *Watson*), in other ways federalism appears to have continued to inform and constrain the interpretation of Fourteenth Amendment rights and powers. Both aspects—transformed rights and the cross currents of federalism—are missed by the model and methodology of incorporation doctrine.

It is the work of incorporationists themselves which points to a future beyond incorporation. The efforts to support substantively libertarian readings of Section One shifted attention away from the Due Process Clause (an odd choice to begin with) and towards the Privileges or Immunities Clause. This move held the promise of an incorporation doctrine grounded in both text and the original understanding of the Fourteenth Amendment—neither of which seemed possible under the older Due Process incorporation approach. But the same historical effort which seemed to support incorporation doctrine carried with it the seeds of that doctrine's destruction. We have not discovered a generation who applied the ideals of Madison and Jefferson against the states. Instead, the record reveals a generation with its own ideas of liberty and local autonomy, and if the inquiry is to discover the original understanding of the Fourteenth Amendment, then it is their understanding that controls. This suggests that future historical investigation of the Fourteenth Amendment will be something of a double-edged sword. As was true at the time of the Founding, when the people adopted the Fourteenth

Amendment, federal authority grew while state authority receded. But as was also true at the Founding, newly delegated federal authority remained constrained by the continuing principle of federalism, a principle which called for a limited construction of nationalized rights and powers.