



FREE SPEECH AND INCORPORATION: A REASSESSMENT

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Many of the Supreme Court's most controversial free speech decisions involve state laws. In *Gitlow v. New York*, the Court assumed that the First Amendment's guarantee of freedom of speech applied directly against the states via the Fourteenth Amendment, a doctrine today referred to as incorporation. Yet there is reason to doubt incorporation is correct as a matter of the original meaning of the Fourteenth Amendment. Indeed, much of the historical evidence involves debates over the freedom of speech, but none of the historical actors seemed to think the First Amendment applied against the states. This short essay evaluates the historical evidence relating to the freedom of speech and incorporation of the Bill of Rights and considers what a more historically grounded analysis in free speech cases might look like.

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I. THE INCORPORATION DEBATE

In a previous book, the author sought to establish that the likely original meaning of the Fourteenth Amendment's Privileges or Immunities Clause was that it guaranteed equality in fundamental rights under state law.¹ The central provisions of the first section of the Amendment—due process of law, protection of the laws, and the privileges and immunities of citizenship²—had long-established antebellum legal meanings.³ Due process of law primarily meant there had to be established law before one could be deprived of life, liberty, or property, and any violation of that established law had to be adjudicated according to known and established procedures.⁴ The protection of the laws was the other side of the coin: It was the legal protection the government had to extend against private invasions of private rights, principally judicial remedies and physical protection from violence.⁵ The protection of the laws was the heart of the social compact: Men exit the state of nature and give up some of their executive power and agree to obey the sovereign—they agree to give allegiance—in exchange for the sovereign's protection against private violence and private invasions of rights.⁶

The antebellum legal background is crucially important for understanding the original meaning of the Amendment's privileges or immunities provision because it is that provision that therefore must accommodate the central goal of the Amendment's drafters of constitutionalizing the Civil Rights Act of 1866. That act guaranteed equality in civil rights under state law.⁷ Although many Republicans believed

¹ ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020).

² U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”).

³ WURMAN, *supra* note 1, at 15–67.

⁴ *Id.* at 15–35.

⁵ *Id.* at 36–47.

⁶ *Id.* at 44–45.

⁷ *Id.* at 94–101. The Civil Rights Act declared persons born in the United States to be citizens of the United States, and provided that “such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be

the act was justified under the Thirteenth Amendment's enforcement clause, many, including John Bingham, the principal author of the Fourteenth Amendment's first section, believed the Act to be unconstitutional.⁸ Moreover, it was necessary to enshrine the civil rights principle in the Constitution itself, lest the Democrats take over and repeal that legislation; Congress needed, in the words of Representative and future President James Garfield, "to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution."⁹

Yet, if the due process and protection of the laws clauses in the Amendment had their historical legal meanings, they would not accomplish that central objective. Due process does not guarantee equal rights, only that whatever rights one has will not be taken away without established law and known procedures. Nor does equal protection of the law guarantee equal rights, but rather guarantees only that whatever rights one possesses will be equally protected against, say, Ku Klux Klan violence. That leaves only the privileges or immunities provision, whose language does the necessary work. The Reconstruction generation understood that civil rights defined and regulated under state law, including contract and property rights, were fundamental rights that all free governments had to secure.¹⁰ They were, in other words, the "privileges and immunities of citizens of the United States," shared by all citizens, though states may have regulated the rights differently. A state would "abridge" those rights by giving a lesser set of rights to a disfavored class.¹¹

parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

⁸ WURMAN, *supra* note 1, at 97; CONG. GLOBE, 39th Cong., 1st Sess. 1088–89 (1866) (Rep. John Bingham).

⁹ WURMAN, *supra* note 1, at 97; CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (Rep. James A. Garfield).

¹⁰ See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230).

¹¹ WURMAN, *supra* note 1, at 109–10. As explained in the next paragraph, an abridgment could also mean to reduce for everybody from a baseline. There is, however, little evidence that anyone held that view. See *infra* note 17 and accompanying text.

To be sure, the language can also support the conventional, incorporation reading of the clause. The “privileges” and “immunities” of “citizens of the United States” at a minimum include those rights so fundamental that they were constitutionally enumerated, which a state can “abridge” just as Congress can “abridg[e]” the freedom of speech or of the press.¹² Although the book did not tackle the affirmative evidence for incorporation of the Bill of Rights against the states, two other works did so.

One paper, *Reversing Incorporation*,¹³ sought to demonstrate that the antislavery and Republican concern, both before and after the adoption of the Fourteenth Amendment, was equality in civil rights however defined and regulated under state law. Although fundamental rights were routinely mentioned, abolitionists and Republicans relied on state constitutions,¹⁴ on the rights that freedom would bring under state law,¹⁵ and on Congress’s powers to insist on republican governments during readmission.¹⁶ There is very little evidence from the period that anyone understood the Fourteenth Amendment to guarantee a fundamental floor of rights.¹⁷

¹² U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”).

¹³ Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265 (2023). As noted in that piece, that had been the gospel among American “originalists” at least since the publication of Michael Kent Curtis’s book on the Fourteenth Amendment in 1986 and Akhil Amar’s book over a decade later. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

¹⁴ Wurman, *supra* note 13, at 285–87.

¹⁵ *Id.* at 287–95.

¹⁶ *Id.* at 298–302.

¹⁷ In this regard, consider for example Representative Shellabarger’s statement with respect to the Civil Rights Act, which the Fourteenth Amendment was understood to enshrine into the fundamental law. The Act “neither confers nor defines nor regulates any right whatever,” but rather “require[s] that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.” CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). Senator Trumbull stated similarly, using the word “abridge”: “Each state, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.” *Id.* at 1760.

A still more recent work, *The Antislavery Reading of Article IV*,¹⁸ addressed the claim that antislavery constitutionalists had an unorthodox reading of Article IV's Privileges and Immunities Clause,¹⁹ by which that clause effectively nationalized the rights of citizens.²⁰ The clause was conventionally understood to require a state to treat citizens of other states on equal terms with its own citizens.²¹ This prior work demonstrated that some antislavery theorists did hold unorthodox views of Article IV. The best understanding of the unorthodox view, however, was that it would have merely extended the antidiscrimination work of the clause to discrimination among a state's own citizens.²²

Representative Lawrence of Ohio made this equality reading of Article IV explicit in connection with the civil rights bill. Lawrence asked whether the nation was powerless to intervene when a state denies rights to "whole classes of native or naturalized citizens." He argued that Article IV, Section 2 authorized Congress to enforce "the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State."²³

The aim of this essay, prepared for the symposium marking the 100th anniversary of *Gitlow v. New York*,²⁴ the case famously presuming the freedom of speech to be applicable to the states via the Fourteenth Amendment, is to demonstrate that many of the relevant historical debates involved the freedom of speech. Yet these debates do not suggest that the historical actors thought the First Amendment right was "incorporated" against the states. Quite the opposite. The actors presumed that the freedom of speech was a fundamental right guaranteed in many different ways—by state constitutions, by Article IV, by the Republican Guarantee Clause, and, yes, by the First Amendment at least with respect to the federal government.

¹⁸ Ilan Wurman, *The Antislavery Reading of Article IV*, 40 CONST. COMMENT. (forthcoming 2026) (reviewing RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021)).

¹⁹ U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

²⁰ This view was most recently and prominently advanced by BARNETT & BERNICK, *supra* note 18.

²¹ See Wurman, *supra* note 18.

²² *Id.*

²³ CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866) (Rep. William Lawrence).

²⁴ 268 U.S. 652 (1925).

After the adoption of the Fourteenth Amendment, that right was, also, guaranteed in some way by the new Privileges or Immunities Clause. The question is in what sense. One possibility, as the above suggests, is that the clause requires non-discrimination among a state's own citizens with respect to that right. Consider how one treatise writer in 1871 explained that Article IV guaranteed the freedom of speech in a similar manner by prohibiting discrimination in the provision of this right against out-of-state citizens:

[The clause's] intention is to secure the like privileges and immunities to all those American citizens What like privileges and immunities? Those specified and enumerated in the federal constitution; the enjoyment of life, liberty, property, and the pursuit to happiness, no matter where located or domiciled. . . . The states without [this clause], by their local legislation, might, and perhaps would, impose different restrictions on the residents of each other in their necessary trade and intercourse, or upon American citizens migrating from one state to another, with the view of becoming residents, militating against those unalienable rights²⁵

It is possible, of course, that the author believed Article IV incorporated the Bill of Rights against the states, contrary to *Barron v. Baltimore*.²⁶ Yet it seems evident enough that the author supposed those rights would be protected in the same way that ordinary rights to life, liberty, and property would be. He does not appear to have been suggesting that such rights were identically defined and secured in all the states. His reading appears to have been conventional: however the state defines and secures its citizens' fundamental rights—to contract, property, bear arms, freedom of speech, and so on—it must guarantee those same rights to out-of-state citizens.

Part II of this essay, relying on the prior work identified above, canvasses the relevant evidence relating to the freedom of speech. It demonstrates that the historical players generally assumed that the freedom of speech was protected in a variety of ways, but none compels the conclusion that any of them thought the freedom of speech as defined in the First Amendment was “incorporated” against the states. They suggest an equality reading: whatever speech regulations existed must extend equally to all citizens without arbitrary discrimination. At most, they suggest that the framers of the Fourteenth Amendment expected the Privileges or Immunities

²⁵ JOHN KING, A COMMENTARY ON THE LAW AND TRUE CONSTRUCTION OF THE FEDERAL CONSTITUTION 274–75 (Robert Clarke & Co. 1871).

²⁶ 32 U.S. (7 Pet.) 243 (1833).

Clause to secure only those rights that all free governments had to. Whether, on either reading, a state would be prohibited from banning the sale of violent video games to minors,²⁷ from regulating student speech,²⁸ or from punishing flag burning,²⁹ viewing of animal crush videos,³⁰ protesting at a dead soldier's funeral,³¹ or stealing valor,³² may well be doubted.

II. THE FREEDOM OF SPEECH

Throughout the antebellum and Reconstruction-era debates over the suppression of civil liberties and slavery, discussions about the suppression of the freedom of speech were frequent. The relevant actors invoked numerous sources for the protection of that freedom: state constitutions, Article IV, the Thirteenth Amendment, and the Republican Guarantee Clause. The Fourteenth Amendment's Privileges or Immunities Clause would also protect that right. How it would do so is taken up in Part III.

A. *Postal Suppression*

The most important antebellum debate over speech and press centered on the suppression of abolitionist literature.³³ In the late 1820s and early 1830s, manumission societies and independent publishers engaged in "the great postal campaign" to circulate abolitionist literature throughout the United States, including in the South.³⁴ The constitutional dispute flared in 1835 when the Charleston postmaster requested an opinion from Postmaster General Amos Kendall about whether he had to distribute abolitionist literature. Kendall sought the views of President Andrew Jackson, who recommended that Congress prohibit the distribution of abolitionist literature in the South.³⁵

²⁷ *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2010).

²⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

²⁹ *Texas v. Johnson*, 491 U.S. 397 (1989).

³⁰ *United States v. Stevens*, 559 U.S. 460 (2010).

³¹ *Snyder v. Phelps*, 562 U.S. 443 (2011).

³² *United States v. Alvarez*, 567 U.S. 709 (2012).

³³ This section is taken almost verbatim from Wurman, *supra* note 13, at 285–87, some of which itself was adapted from WURMAN, *supra* note 1, at 83–85.

³⁴ WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 172–73 (1977).

³⁵ *Id.* at 175.

This proposal was defeated by a combination of Southerners led by John C. Calhoun and Northerners on the ground that it was an abridgement of the freedom of speech and that it violated the states' police powers. The Southerners worried that if the federal government could prohibit abolitionist literature on the ground that it was incitement to insurrection then it could also decide that this same literature was not incitement, a risk the southern governments were unwilling to take.³⁶ South Carolina, Georgia, Virginia, and Alabama, however, demanded that the *northern* states censor antislavery publications, associations, and meetings.³⁷ So did Calhoun in an important committee report.³⁸ The report argued that although Congress lacked the power to interfere with abolitionist literature, it was incumbent on the northern states to do so.³⁹

In response to this report, Senator William Plumer, writing as Cincinnatus, published a pamphlet excoriating the report's reasoning.⁴⁰ The pamphlet has been taken as evidence of *Barron*-contrarianism, as though Plumer believed the First Amendment equally bound the state governments.⁴¹ Far from espousing a contrarian view, however, the pamphlet argues that Calhoun's proposal would violate *state* constitutions:

As to the practicability of the plan recommended in the Report, it may be duly appreciated, if we inquire whether any laws passed by the non-slave-holding states, "abridging the freedom of the press," would be in agreement with the Constitutions of *those States*. If I am not mistaken, there is in every State Constitution at the North an express article as strictly prohibiting the passage of such a law by the State legislature as the first article of amendments in the U.S. Constitution prohibits the passage of a like law by Congress.⁴²

Plumer then examines the various constitutional provisions from Massachusetts, New Hampshire, and Ohio, before concluding that "[t]he Constitutions of

³⁶ *Id.* at 175–77.

³⁷ *Id.* at 179–80.

³⁸ S. Doc. No. 24-118, at 1 (1836).

³⁹ *Id.* at 7, 10–11.

⁴⁰ CINCINNATUS, FREEDOM'S DEFENCE: OR A CANDID EXAMINATION OF MR. CALHOUN'S REPORT ON THE FREEDOM OF THE PRESS (Dorr, Howland & Co. 1836).

⁴¹ Wurman, *supra* note 13, at 286; CURTIS, *supra* note 13, at 30; AMAR, *supra* note 13, at 358 n.98.

⁴² CINCINNATUS, *supra* note 40, at 10 (emphasis added).

the other States contain similar provisions” and noting that even South Carolina had a provision that would prohibit the suppression of antislavery publications were it honored.⁴³ “Other slave-holding States have like provisions,” too.⁴⁴ “So, as we have shown that the Constitutions of the several States forbid the abridgment of the freedom of the press by the State Legislatures,” Plumer writes later in the pamphlet, “this invaluable right is ‘placed beyond the possible encroachment’ of any STATE government or of the General Government.”⁴⁵

Plumer goes on. “The freedom of speech and of the press is not a right reserved from Congress and vested in a State Legislature,” he adds, “but is reserved both from Congress and all State Legislatures, by the United States Constitution and by the Constitutions of the States, to the PEOPLE; for it is a right which eternally belongs to the people.”⁴⁶ “An article in the United States Constitution, which prevents CONGRESS from enacting a certain law, prevents equally, when found in the Constitution of a State, the State Government from enacting a like law,” Plumer concludes.⁴⁷ “The landmarks of our liberties are well defined in the National and State Constitutions, and the people have only to acquaint themselves with these and *to require that their rulers abide by them*, in order to preserve to themselves and for their posterity the blessings of freedom.”⁴⁸ The problem was not the absence of protections for speech and press, but rather the failure to honor them in service of the slave system.

B. *Privileges and Immunities (Article IV)*

Many antebellum disputes over the freedom of speech involved Article IV of the Constitution and the right to advocate for abolition in other states, or the right of free black persons from one state to enjoy the freedom of speech in other states.

*Dred Scott v. Sandford*⁴⁹ included important dictum about the freedom of speech under Article IV. In that opinion, Chief Justice Taney adopted the view of

⁴³ *Id.*

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 18.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.*

⁴⁸ *Id.* at 24 (emphasis added).

⁴⁹ 60 U.S. (19 How.) 393 (1857).

the southern governments that free black persons were not and could never be citizens “of the United States”—that is, “citizens” within the meaning of the Constitution—entitled to the benefit of Article IV or any of the other constitutional rights of citizens. In explaining his reasoning, Taney illustrated the “absurd” results under the clause that would follow if they were citizens. “[I]f they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws” applicable only to them; and would give such citizens of any state

the right to enter every other State whenever they pleased . . . unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.⁵⁰

Taney hardly can be said to have believed that the First Amendment applied against the states contra the *Barron* decision. The implication of his dictum was that whatever speech rights white citizens enjoyed—subject to reasonable regulation—black citizens from other states would be able to enjoy, too, if they were included within the meaning of Article IV. Nor could he possibly be understood to have thought every state had the same speech regulations. The way in which Article IV guaranteed the freedom of speech was that it promised citizens of other states the same freedom of speech rights that in-state citizens enjoyed, whatever those were.

In 1859, Congress debated a proposed constitution that would have prohibited free black persons from emigrating to Oregon.⁵¹ There was little question that, if free black persons were entitled to comity rights, the proposed Oregon constitution would violate Article IV. But John Bingham, rising to oppose the proposed law, seems to have gone further. He stated that Article IV guaranteed the privileges and immunities “of citizens of the United States in the several States.”⁵² Bingham then stated that he could not

⁵⁰ *Id.* at 417.

⁵¹ This section summarizes Wurman, *supra* note 13, at 295–97; and Wurman, *supra* note 18.

⁵² CONG. GLOBE, 35th Cong., 2d Sess. 984–85 (1859).

consent that the majority of any republican state may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which . . . all good governments are instituted; and the failure to maintain which inviolate furnishes, at all times, a sufficient cause for the abrogation of such governments.⁵³

Here, Bingham does not deny that it was for the states to define and regulate civil rights. His demand was equality. “The *equality* of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which [the] Constitution rests,” he exhorted.⁵⁴ He objected only to “the interpolation into [the Constitution] of any word of caste, such as white, or black, male or female.”⁵⁵ Once again, the freedom of speech, the right to “argue and to utter,” would be secured by extending that right on equal terms to citizens of other states as well as black citizens within the state.

In a famous speech by James F. Wilson on “the incompatibility of slavery with a free Government,”⁵⁶ Wilson claimed slavery required the violation of Article IV.⁵⁷ He explained:

Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together. How have these rights essential to liberty been respected in those sections of the Union where slavery held the reins of local authority and directed the thoughts, prejudices, and passions of the people?⁵⁸

Wilson appears to have been using that amendment as an illustration of the rights that all free governments must secure. The freedom of speech was covered by Article IV; but all that meant was a state could not discriminate with respect to this freedom. The remainder of Wilson’s speech focused on discrimination, both within a state and against out-of-state citizens: “Slavery could hold its assemblages, discuss, resolve, petition, threaten, disregard its constitutional obligations, trample

⁵³ *Id.* at 985.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ CONG. GLOBE, 38th Cong., 1st Sess. 1199–1204 (1864).

⁵⁷ *Id.* at 1202.

⁵⁸ *Id.*

upon the rights of labor, do anything its despotic disposition might direct; but freedom and freemen must be deaf, dumb, and blind.”⁵⁹ He continued: “Slaveholders and their supporters alone were free to think and print, to do and say what seemed to them best on both sides of [the Mason-Dixon] line. They could think, read, talk, discuss with perfect freedom in each and every State.”⁶⁰ The people of the free states should therefore ensure ample protection so that a northern citizen “shall be as free to assert his opinions and enjoy all of his constitutional rights in the sunny South as he whose roof-tree is the magnolia shall to the same ends be free amid the mountains of New England and the sparkling lakes of the North and the West.”⁶¹

On the eve of Reconstruction, John Bingham articulated why a new constitutional amendment was necessary. He began discussion of the issue by stating that Congress might “act upon the suggestion of the President, that hereafter the true intent of the Constitution, which is to secure equal and exact justice to all men, may be carried into effect.”⁶² Bingham then noted how everyone recalled the recent times in which “it was entirely unsafe for a citizen of Massachusetts or Ohio” who advocated against slavery “to be found anywhere in the streets of Charleston or in the streets of Richmond,”⁶³ because “in defiance of the Constitution its very guarantees were disregarded.”⁶⁴

These speeches were all consistent with the conventional antebellum understanding that all free governments must secure natural rights, but that the states regulated these rights differently. To the extent the southern states failed to secure these rights it was because they discriminated against citizens of other states or against certain of their own citizens.⁶⁵ As one member of Congress observed in connection to Article IV, the southern states frequently denied “liberty of speech and the press” to “citizens of other States.”⁶⁶

⁵⁹ *Id.* at 1202.

⁶⁰ *Id.* at 1202–03.

⁶¹ *Id.* at 1203.

⁶² CONG. GLOBE, 39 Cong., 1st Sess. 157 (1866).

⁶³ *Id.*

⁶⁴ *Id.* at 158.

⁶⁵ On the intrastate equality reading, see again, for example, Representative Lawrence’s statement, above in note 23 and accompanying text. More generally, see Wurman, *supra* note 18.

⁶⁶ CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) (Sen. Daniel Clark).

C. Thirteenth Amendment

Another set of discussions occurred over the proposed Thirteenth Amendment.⁶⁷ Many members of Congress, for example, believed that the Thirteenth Amendment would restore the freedom of speech. The Thirteenth Amendment did not in itself create a fundamental rights guarantee; the Republicans in Congress simply believed that once a formerly enslaved person became free, he became a citizen. And citizens have the same fundamental rights to freedom of speech as other citizens in the respective states, subject to like regulations applicable to all.

Senator Isaac Arnold's 1864 speech is a good example of the belief that with abolition the freedom of speech would be restored. "The vengeance of the slaveholder against the man who spoke or published in behalf of liberty was sharp, speedy, and unrelenting. . . . In the slave States of this Union a freeman had no rights which a slaveholder felt bound to respect," he said.⁶⁸ "The degeneracy and barbarism produced by slavery are strikingly illustrated by Virginia," he continued:

[W]hen we look upon her today, and see to what slavery has reduced the proud old Commonwealth, it is indeed the saddest spectacle of the war. She is being purged as with fire; she will pass through this agony, and come out of it restored, emancipated, disenthralled, and regenerated. Once more shall she be hailed as the mother of States—free States—and statesmen. Mount Vernon and Monticello will again become the Meccas of the American patriot. Through the dark clouds which now envelop her the bow of promise shall reappear; that bow shall rest upon liberty.⁶⁹

In 1866, Representative Plant of Ohio reflected on the causes of the war and observed that "until the Government settles into one or the other of these forms"—despotic or republican—"there will be no permanent peace."⁷⁰ The slave system "would not be secure if men in the slave States were permitted to discuss the matter in any form, and hence the freedom of speech and the press must be suppressed as the highest of crimes."⁷¹ "[C]an any one fail to see," he asserted, "that this conflict had progressed until the contending forces were brought face to face, and that only one of two things remained possible—either the utter destruction of slavery or the

⁶⁷ Much of this section is taken, sometimes verbatim, from Wurman, *supra* note 13, at 289–91.

⁶⁸ CONG. GLOBE, 38th Cong., 1st Sess. 115 (1864).

⁶⁹ *Id.*

⁷⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1011 (1866).

⁷¹ *Id.* at 1013.

total extinguishment of freedom.”⁷² “[I]f free speech and a free press and popular education are permitted, the very existence of slavery will be endangered, and they must therefore be suppressed.”⁷³ Hence “the contest could not stop until either slavery or freedom found its eternal tomb! And, thank God, it was slavery that died, and in its death has made the progress of freedom possible, and the glory of our country and the redemption of a race a certainty in the future.”⁷⁴

Representative Ebon Ingersoll believed that the Thirteenth Amendment would restore the freedom of speech because once slavery was abolished, there would no longer be a need to abridge free speech and press in the former slave states:

The freedom of speech that I am in favor of is the freedom which guaranties to the citizen of Illinois, in common with the citizen of Massachusetts, the right to proclaim the eternal principles of liberty, truth, and justice in Mobile, Savannah, or Charleston with the same freedom and security as though he were standing at the foot of Bunker Hill monument; and if this proposed amendment [the Thirteenth Amendment] to the Constitution is adopted and ratified, the day is not far distant when this glorious privilege will be accorded to every citizen of the Republic.⁷⁵

Senator Clark similarly argued, “[Slavery] has denied often-times in those States to citizens of other States their rights under the Constitution. She has shut up to them the liberty of speech and the press.”⁷⁶ He believed that the Thirteenth Amendment would “plant new institutions of freedom, and a new or regenerated people shall rise up.”⁷⁷ In introducing the proposed Thirteenth Amendment, Senator Trumbull noted, “If the freedom of speech and of the press, so dear to freemen everywhere . . . has been denied us all our lives in one half the States of the Union, it was by reason of slavery.”⁷⁸ With the abolition of slavery, the implication was, such freedoms would be restored.⁷⁹

⁷² *Id.*

⁷³ *Id.* at 1014.

⁷⁴ *Id.*

⁷⁵ CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

⁷⁶ *Id.* at 1369.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1313.

⁷⁹ See also *id.* at 1439–40 (statement of Sen. Harlan) (“[A]nother incident of this institution [slavery] is the suppression of the freedom of speech and of the press” because “[s]lavery cannot exist where its merits can be freely discussed”; if “none of these necessary incidents of slavery are

In sum, no one appears to have thought that the Thirteenth Amendment would incorporate the Bill of Rights against the states, and it does not seem to have been widely believed that the rights therein already applied against the states. Rather, the problem was that the states were denying the freedom of speech and of the press to their own citizens by virtue of the institution of slavery. Once that institution is destroyed, the freedom of speech would be restored.

D. *Republican Guarantee Clause*

The freedom of speech was also mentioned in the context of readmission. Two examples will suffice. Representative Hamilton Ward objected to the readmission of the southern states, in part because “[t]hey do not disguise their hate for Union men; who are excluded from all [political] honors and privileges because of their loyalty,” and because “[f]reedom of speech, as of old, is a mockery.” “In the name of God,” he asked, “is such a people entitled to representation on this floor?”⁸⁰

In a similar speech objecting to readmission, Representative Moulton declared, “The constant and barbarous outrages committed by rebels in the South against the Union men and freedmen would fill volumes, and outrage the feelings of savages.”⁸¹ “There is neither freedom of speech, of the press, or protection to life, liberty, or property; and this is the class of people and kind of States that the Democratic party say should be admitted into the Union.”⁸² The only objection was to admitting these states before they had restored rights, including the freedom of speech, to the freed people and loyalists in the South.

III. IMPLICATIONS

Parts I and II sought to make the case, through general evidence and evidence specific to the freedom of speech, that antislavery thinkers did not suggest the freedom of speech should apply against the states as a matter of federal constitutional law. Nor is there much evidence that the framers of the Fourteenth Amendment thought it would make the freedom of speech applicable against the states. Rather,

desirable, how can an American Senator cast a vote to justify its continuance for a single hour, or withhold a vote necessary for its prohibition?”) (emphasis added); *id.* at 2615 (statement of Rep. Morris) (slavery “waged war against free speech”; “I say destroy this monster at once, root out this noxious plant, leave not a fiber to again sprout and choke the tree of liberty planted by our fathers.”).

⁸⁰ CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866).

⁸¹ *Id.* at 1617.

⁸² *Id.*

it was presumed that the states would continue to guarantee freedom of speech to their own citizens, as all free governments had to. It did not follow that each state would regulate that right in precisely the same way.

How, then, does the Privileges or Immunities Clause of the Fourteenth Amendment secure the freedom of speech? It has been proposed that the clause guarantees equality among a state's own citizens. Arbitrarily denying the right to a less favored class of citizens would be an "abridgement" of the right.

The difficult question, though, is how a court (or anyone else) is to know what is a genuine "regulation" of the right in question and what is an "abridgement" of that right. The general test would perhaps be something along these lines: a court must ask whether the purported regulation is genuinely related to and advances the purpose of the right or aims to prevent interference with the exercise and enjoyment of rights by others.

This test would explain why the Black Codes were unconstitutional: everyone understood that skin color was (and is) irrelevant to contract rights, property rights, or the right to defend oneself. That is also why a Catholic Code or a Gay Code would be similarly impermissible. One need not even decide that Catholic or gay Americans are protected classes. It is obvious that one's religion or sexual orientation is entirely irrelevant to the purpose of the various rights in question. Whether defining marriage to be between a man and a woman is a regulation or an abridgment is a closer question, and the argument could go either way depending on one's views of the purposes of marriage and the existing legal rules appertaining to it.⁸³

How would all of this apply to the freedom of speech? The Black, Catholic, and Gay Code examples provide an easy set of cases. Skin color, religion, and sexual orientation have nothing to do with the purpose of the right in question. Another set of easy cases, in this author's view, is viewpoint discrimination. The Privileges or Immunities Clause, as suggested here, is principally concerned with arbitrary discrimination. The central prohibition of modern First Amendment doctrine is the prohibition on viewpoint discrimination. In this sense, perhaps much of this right is "incorporated" anyway: Viewpoint discrimination is a violation of the First Amendment and would by definition also be a violation of the Privileges or Immunities Clause.

⁸³ As the author elaborates in WURMAN, *supra* note 1, at 132–34.

What about banning the sale of violent video games to minors, regulating student speech, or punishing flag burning, viewing animal crush videos, protesting at a dead soldier's funeral, or stealing valor? In this author's view, it may well be doubted whether such regulations are "abridgements" of the right to freedom of speech as opposed to genuine regulations. All of those regulations retain the core of the right, which is the right to express a viewpoint. They aim to prevent interference with the rights of others or detrimental secondary effects. Most if not all can be justified on the basis of a legitimate and genuine exercise of the state's police power over safety, health, welfare, and morals rather than on an objection to any particular point of view.

At a minimum, it is fair to say that whether or not those regulations are genuine regulations as opposed to arbitrary discriminations is fairly open to debate. The exact kind of debate the various states would have had prior to the incorporation of the First Amendment. Is it really plausible to say that the right to sell violent video games to minors is a privilege or immunity of American citizenship? To ask the question is almost to answer it.

At least when democratic majorities could plausibly come to different conclusions as to the reasonableness of a regulation, it may well be better to abandon the doctrine of incorporation and allow for continued state experimentation in the definition and regulation of rights. There is no evidence that the Reconstruction generation expected to empower the U.S. Supreme Court to define and regulate such rights for all the states of the Union.

