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978-1-107-02326-0 - The Fourteenth Amendment and the Privileges and Immunities of American Citizenship

Kurt T. Lash

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## THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP

This book presents the history behind a revolution in American liberty: the 1868 addition of the Privileges or Immunities Clause of the Fourteenth Amendment. This exhaustively researched book follows the evolution in public understanding of “the privileges and immunities of citizens of the United States” from the early years of the Constitution to the critical national election of 1866. For the first ninety-two years of our nation’s history, nothing in the American Constitution prevented states from abridging freedom of speech, prohibiting the free exercise of religion, or denying the right of peaceful assembly. The suppression of freedom in the southern states convinced the Reconstruction Congress and the supporters of the Union to add an amendment forcing the states to respect the rights announced in the first eight amendments. But rather than eradicate state autonomy altogether, the people embraced the Fourteenth Amendment that expanded the protections of the Bill of Rights and preserved the Constitution’s original commitment to federalism and the principle of limited national power.

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**KURT T. LASH**

University of Illinois College of Law



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32 Avenue of the Americas, New York, NY 10013-2473, USA

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107023260](http://www.cambridge.org/9781107023260)

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First published 2014

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Lash, Kurt T., author.

The Fourteenth Amendment and the Privileges and Immunities of American Citizenship /  
Kurt Lash, University of Illinois College of Law.

pages   cm

Includes bibliographical references and index.

ISBN 978-1-107-02326-0 (hardback)

1. United States. Constitution. 14th Amendment – History.   2. Privileges and immunities –  
United States.   3. Federal government – United States.   4. Civil rights – United States.  
5. United States. Constitution 14th Amendment – History.   I. Title.

KF455814th.L37   2014

342.7308'5–dc23       2013042146

ISBN 978-1-107-02326-0 Hardback

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## Preface

What are our constitutional rights as American citizens, and where do they come from? If asked, most US citizens would probably point to some or all of the first ten amendments to the United States Constitution, the Bill of Rights: the rights of free speech, free press, and the free exercise of religion; protections against unreasonable searches and seizures, the taking of property without just compensation, the deprivation of life or liberty without due process of law. Although many Americans might think these rights protect them against the wrongful actions of any official with a badge, those most familiar with the Constitution know that the Bill of Rights binds only the national government. Under the original Constitution, states and state officials remained free to abridge speech, impose religious orthodoxy, imprison without due process, and take private property without paying a dime.

Today, of course, courts in the United States *do* apply the Bill of Rights against both state and federal officials. They do so because of the addition of the Fourteenth Amendment. Adopted in the aftermath of the Civil War, the Fourteenth Amendment declares (among other things): “No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, or denying any person life, liberty or property without due process of law.” Unlike the Bill of Rights, this amendment expressly requires state officials to respect the rights of national citizenship. According to the Supreme Court, this includes most of the provisions in the Bill of Rights. So, for example, both state and federal officials must respect your freedom of speech and your right to free exercise of religion.

What is not clear, however, is *why* the Fourteenth Amendment forces the states to follow the federal Bill of Rights. The justices of the Supreme Court and the finest minds in the American legal academy have disputed the matter

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for more than a century.<sup>1</sup> Not even the members of the current US Supreme Court agree with one another regarding which provision in the Fourteenth Amendment prevents the state police from knocking down your door when you speak against your governor, seek solace from your God, or take refuge in your home.<sup>2</sup>

Initially, the Supreme Court rejected the idea that the Fourteenth Amendment applies the Bill of Rights against the states.<sup>3</sup> In the early twentieth century, however, the Supreme Court reversed course and began to “incorporate” certain federal rights against the states into the Court’s reading of the Fourteenth Amendment’s declaration that “nor shall any state deprive any person of life, liberty or property without due process of law.”<sup>4</sup> One by one,

<sup>1</sup> For a small sample of the debate over the Bill of Rights and the Fourteenth Amendment, see *United States v. Cruikshank*, 92 U.S. 542 (1876) (Waite, C.J.) (the Fourteenth Amendment does not apply the Bill of Rights against the states); *Gitlow v. New York*, 268 U.S. 652 (1925) (Sanford, J.) (the Fourteenth Amendment’s Due Process Clause applies some of the Bill of Rights against the states); *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring) (the Fourteenth Amendment does not apply any of the Bill of Rights against the states); *id.* at 68 (Black, J., dissenting) (the Fourteenth Amendment applies all of the first eight amendments against the states); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (the Fourteenth Amendment’s Due Process Clause applies only those provisions from the Bill of Rights that are “implicit in the concept of ordered liberty” against the states); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (the Fourteenth Amendment’s Due Process Clause applies all of the first eight amendments against the states); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (the Fourteenth Amendment’s Privileges or Immunities Clause applies “fundamental” rights listed in the Bill of Rights against the states); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989) (the Fourteenth Amendment does not apply any of the Bill of Rights against the states); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993) (the Fourteenth Amendment’s Privileges or Immunities Clause applies all of the first eight amendments against the states); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (the Fourteenth Amendment’s Privileges or Immunities Clause applies most of the first eight amendments against the states); *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (Alito, J.) (the Fourteenth Amendment’s Due Process Clause applies the Second Amendment against the states); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011) (the Fourteenth Amendment does not apply any of the Bill of Rights against the states).

<sup>2</sup> Compare *McDonald v. Chicago*, 130 S. Ct. 3020, 3031 (2010) (Alito, J.) (relying on the Due Process Clause of the Fourteenth Amendment as the textual vehicle for applying provisions of the Bill of Rights against the states) with *id.* at 3060 (Thomas, J., concurring) (arguing that the Privileges or Immunities Clause is the proper textual vehicle for applying provisions of the Bill of Rights against the states).

<sup>3</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>4</sup> U.S. CONST. amend. XIV.



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provisions like the Takings Clause,<sup>5</sup> the Freedom of Speech Clause,<sup>6</sup> and the Free Exercise Clause<sup>7</sup> were announced by the Court to be “fundamental liberties” protected against state action under the doctrine of “substantive” due process.

This reading of the Due Process Clause is in serious tension with the text. Rather than guaranteeing certain substantive rights, the text suggests that life, liberty, and property *may* be deprived so long as a state provides “due process.”<sup>8</sup> Worse, this reading seems clearly contradicted by the Bill of Rights itself, which includes a Due Process Clause (in the Fifth Amendment) separate from the other rights listed in the first eight amendments,<sup>9</sup> indicating that the protections of the Due Process Clause do not include these other substantive rights. There is no evidence whatsoever that any framer of the Fourteenth Amendment believed the Fourteenth Amendment’s Due Process Clause applied the Bill of Rights against the states, and the vast majority of Fourteenth Amendment scholars believe that the Court has chosen the wrong Clause (and the wrong doctrine) for incorporating the Bill of Rights.<sup>10</sup> When recently offered the opportunity to abandon the doctrine, the Court stood by substantive due process, not as a matter of a persuasive reading of the text, but simply due to the force of precedent and the doctrine of *stare decisis*.<sup>11</sup> In other words, the Court’s current practice of enforcing the Bill of Rights against the states is due more to the inertia of past precedent than a result of a persuasive reading of the Constitution.

<sup>5</sup> *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

<sup>6</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>7</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>8</sup> In the famous formulation by John Ely, the phrase “substantive due process” is an oxymoron, a contradiction in terms with no more meaning than the phrase “green pastel redness.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

<sup>9</sup> U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”).

<sup>10</sup> Pro-incorporation scholars almost universally agree that the Privileges or Immunities Clause, not the Due Process Clause, is the text that binds the states to enforce the Bill of Rights. *See, e.g.*, AMAR, *supra* note 1, at 183; JACK BALKIN, *LIVING ORIGINALISM* 199–201 (2011); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 60, 194 (2004); CURTIS, *supra* note 1, at 2; Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L. REV. 1143, 1151–52 (1992); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692.

<sup>11</sup> *McDonald v. Chicago*, 130 S. Ct. 3020, 3030–31 (2010) (Alito, J.) (“We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”).

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One suspects the reason the Supreme Court has avoided the Privileges or Immunities Clause is due to the failure of lawyers and legal scholars to articulate a historically plausible and judicially manageable interpretation of the “privileges or immunities of citizens of the United States.” For example, in the 2010 case *McDonald v. Chicago*, the Supreme Court was presented with the rare opportunity to shift its Fourteenth Amendment individual rights jurisprudence from the embarrassment of “substantive due process” to the far more textually plausible Privileges or Immunities Clause. While making his argument before the Supreme Court, plaintiff’s counsel was asked to define the limits of the Privileges or Immunities Clause. Although his client sought nothing more than incorporation of the Second Amendment, counsel nevertheless responded that “it’s impossible to give a full list of unenumerated rights that might be protected by the Privileges or Immunities Clause.”<sup>12</sup> The reply almost guaranteed that the Court’s decision would *not* invoke Privileges or Immunities Clause, if only to avoid opening a Pandora’s box of “impossible to fully list” unenumerated rights.<sup>13</sup>

But legal scholars have done no better in defining the scope of the “privileges or immunities of citizens of the United States.” Despite widely divergent interpretations of the Privileges or Immunities Clause, almost all current Fourteenth Amendment scholars believe that the Clause was modeled on Article IV, Section 2 of the federal Constitution, which declares “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>14</sup> The most famous antebellum decision involving the so-called Comity Clause was a circuit court opinion written by George Washington’s nephew, Bushrod Washington, in *Corfield v. Coryell*.<sup>15</sup> In *Corfield*, Judge Washington wrote that the provision protected “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”<sup>16</sup> Because the same members of the Thirty-Ninth Congress who framed and adopted the Privileges or Immunities

<sup>12</sup> Transcript of Oral Argument at 5, *United States v. McDonald*, 561 U.S. 3025 (2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1521.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf).

<sup>13</sup> See *McDonald*, 130 S. Ct. 3020, 3030 (2010) (Thomas, J., concurring) (“[P]etitioners are unable to identify the Clause’s full scope.” [citing Tr. of Oral Arg. 5–6, 8–11]).

<sup>14</sup> U.S. CONST. art. IV, § 2. Just a small sample of current Fourteenth Amendment scholars who link the Privileges or Immunities Clause to the Comity Clause of Article IV includes AMAR, *supra* note 1, at 177–79; BALKIN, *supra* note 10, at 208–09; BARNETT, *supra* note 10, at 62–63; CURTIS, *supra* note 1, at 114–15; Hamburger, *supra* note 1, at 132–34.

<sup>15</sup> 6 F. Cas. 546 (C.C.Pa. 1823).

<sup>16</sup> *Id.* at 551.

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Clause also frequently discussed *Corfield*, scholars have concluded that the Clause somehow embraces the case.<sup>17</sup> These scholars disagree about the particular manner in which *Corfieldian* “fundamental rights” bind the states, but all agree that the Comity Clause of Article IV and cases like *Corfield* are the lens through which we (and courts) should view the Privileges or Immunities Clause of the Fourteenth Amendment.

This book explains why this is wrong, both as a matter of text and as a matter of history. The Privileges or Immunities Clause of the Fourteenth Amendment is not based on the language of Article IV; it is based on the language of antebellum national treaties like the Louisiana Cession Act of 1803 and the 1848 Treaty of Guadalupe Hidalgo, and echoed in the Alaskan Cession Act of 1867. These acts declared the rights, privileges, and immunities “of citizens of the United States,” a category of “privileges or immunities” altogether different from the rights of state citizenship protected under Section 2 of Article IV. As the framer of the Fourteenth Amendment, John Bingham, explained,

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.<sup>18</sup>

These personal rights are “chiefly defined” in the Bill of Rights, but they include *all* constitutionally enumerated personal rights. More controversially, perhaps, the original meaning of the Privileges or Immunities Clause included only those rights enumerated in the Constitution. Neither Congress nor the country in 1866 wished to erase constitutionally established limits on federal power, including the limited powers of the federal courts. What was lacking was a constitutional provision expressly requiring the states to respect those rights placed in the Constitution by the people themselves and which had come to be viewed as representing the privileges and immunities of citizens of the United States.

<sup>17</sup> See AMAR, *supra* note 1, at 177–79; BALKIN, *supra* note 10, at 208–09; BARNETT, *supra* note 10, at 62–63; CURTIS, *supra* note 1, at 114–15; McCONNELL, *supra* note 10, at 694. *But see* HAMBURGER, *supra* note 1, at 146 (agreeing that the Privileges or Immunities Clause should be read as modeled on the Comity Clause, but criticizing *Corfield* as a proper interpretation of Article IV).

<sup>18</sup> CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871).

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## METHODOLOGY

This book presents the history of a legal concept: the constitutional privileges and immunities of citizens of the United States. Although it includes analysis of key historical figures and events, the focus throughout is on the evolution of an idea and its entrenchment as fundamental law. This is, in other words, a book of *legal* history. The analysis in the chapters that follow presumes that law, as such, reflects particular social movements of the time but also plays a role in affecting and shaping those movements.<sup>19</sup> Law is itself a player in the drama of American history; it transcends the moment of its enactment and sets into motion future consequences that may or may not have been anticipated or intended by those who brought the law into being. This is true of all law, and it is particularly true of constitutional law.

To constitutionalize a subject or right means to place the matter beyond the reach of ordinary political decision making. The goal of one who frames and adopts a constitutional text is to constrain the options of future political actors and protect the future people from the self-interested or short-sighted decisions of future politicians. Put another way, a constitution is meant to “secure the blessings of liberty to ourselves *and our posterity*.”<sup>20</sup> But those who frame constitutional text control neither its interpretation nor its actual operation. Political partisans inevitably seek to bend a legal text to their will, regardless of original or even *current* consensus understanding of the text. Times change and post-adoption events may illuminate issues and concerns unknown or underappreciated at the time of enactment, developments that affect how people read and understand constitutional text. At the very least, one may expect that politicians have an incentive to claim that the pressures of the moment illuminate needs unconsidered by the people of the past. There is no guarantee, in other words, that one’s posterity will actually enjoy the blessings of liberty one seeks to secure by way of constitutional entrenchment.

Those who shaped the fundamental legal texts of American law understood the realities of time, passion, and politics. But they also shared an almost religious faith in the possibility of text-based constraints on the powers and actions of government officials. The American Constitution, a written and

<sup>19</sup> I agree with Ted White that law is, at the very least, partially autonomous from its cultural context and is therefore a proper object of historical investigation. See G. EDWARD WHITE, *LAW IN AMERICAN HISTORY*, VOL. 1, at 10 (2012) (arguing that law and American history have a reciprocal relationship and rejecting past schools of historical scholarship that treated law as nothing more than a nonautonomous “mirror of society”).

<sup>20</sup> U.S. CONST. pmbl.

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judicially enforceable charter of government power, is itself an expression of the newly formed faith of American revolutionaries in popular sovereignty.<sup>21</sup> Unlike their contemporaries in England, who had cast off the prerogative of Kings in favor of the sovereignty of the English Parliament, legal and political theorists in the Atlantic colonies embraced the idea that the people stand over and apart from their institutions of government.<sup>22</sup> Governments and political representatives are not the people themselves. They are no more than the people's agents, whose powers go no further than that authorized by the people in a written and enforceable constitution. A written constitution serves as a lasting expression of the people's will and declares the degree to which the people consent to the exercise of government power. The document both defines and limits the legitimate powers of the people's agents and continues to act as a constraint until such time as the people themselves alter or abolish their fundamental law through constitutional amendment or political revolution.

It is this lasting effect of entrenched principles of law, law immunized from the choices of transient political majorities, that makes constitutional law an especially appropriate choice for independent historical investigation. "Constitution" law not only plays the same partially autonomous role of all law, it is peculiarly designed to play such a role. Rather than merely mirroring the political choices of an age, it sets the terms for and, to a certain degree, the boundaries of future political choices. The same is true of all statutes and foundational documents which, even if not legally entrenched, nevertheless serve as constitutive elements of majoritarian political culture. Examples would include the Declaration of Independence, the Northwest Ordinance,<sup>23</sup> and, perhaps, major judicial opinions such as *Marbury v. Madison*<sup>24</sup> and *McCulloch v. Maryland*.<sup>25</sup> Political movements that plausibly frame their efforts in conjunction with these culturally embraced legal landmarks increase their odds of public acceptance and success. Likewise, political movements that appear out of step with constitutive laws and documents will pay a political price, and, to that degree, are less likely to succeed. Nor are these cultural legal landmarks limited to celebrated past events. Notorious past events, such as the Supreme Court's decision in *Dred Scott v. Sandford*,<sup>26</sup> may become a framing device for understanding proposed legal reforms. In all cases, the

<sup>21</sup> See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1998).

<sup>22</sup> *Id.* at 372–83.

<sup>23</sup> 1 U.S.C. lv (1787).

<sup>24</sup> 5 U.S. 137 (1803).

<sup>25</sup> 17 U.S. 316 (1819).

<sup>26</sup> 60 U.S. 393 (1857).

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participants in legal movements have an incentive to frame their efforts in legal language that draws on popular understanding of constitutive or foundational documents, laws, and judicial opinions.

Consensus understanding of past law not only affects the likely success of later legal movements, but also shapes the legal rhetoric and the proposed legal language of later successful movements. If one seeks to discover the original public understanding of a legal text in general, and of a constitutional text in particular, one must understand the relationship between the officially adopted text and the historical antecedents that informed the framers' choice of that text and the likely public understanding of that text. For example, seen from afar, the language in the Fourteenth Amendment seems to have nothing to do with the second Bank of the United States, oyster raking in New Jersey, or the purchase of the Louisiana Territory. Zoom into the actual legal debates surrounding the adoption of the Amendment, however, and the reader discovers that the framers of the Amendment self-consciously framed their efforts in accordance with their understanding of the bank case *McCulloch v. Maryland*, the oyster case *Corfield v. Coryell*, and the rights conferred by the Louisiana Cession Act.

The goal of this book is to illuminate the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. I define "original meaning" as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who were aware of the context in which the text was communicated for ratification.<sup>27</sup> Determining original meaning requires investigating historical events and texts antecedent to the proposed amendment in order to understand the full historical context in which a proposed text is debated and ratified. This is not an effort to recover the "true" or even "best" meaning of antecedent events and texts. Instead, the goal is to recover how these legal antecedents were broadly understood, correctly or not, at the time of the adoption of the Fourteenth Amendment.

As an investigation of the original public meaning of Section One of the Fourteenth Amendment, this book differs from earlier works on the historical Fourteenth Amendment. Beginning with the Fairman-Crossky debates

<sup>27</sup> See Lawrence B. Solum, *Originalism and Constitutional Construction*, FORDHAM L. REV. (2013) (manuscript at 6), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307178](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307178) ("Public Meaning Originalism' names the version of originalist theory holding that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens.").

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of the mid-twentieth century until very recently,<sup>28</sup> most work on the Fourteenth Amendment has sought to uncover the original intentions of the men who framed the text. This “framers’ intent” scholarship fell into two broad categories: those who found meaning in the views of particular men like Thaddeus Stevens and John Bingham, and those who rejected even the possibility of finding meaning due to the multiplicity of views espoused by different framers.<sup>29</sup> In recent decades, however, originalist scholarship has generally abandoned the search for framers’ intent and instead seeks to uncover evidence of the original meaning of a text.<sup>30</sup> This is an empirical inquiry that looks for common patterns of linguistic usage among competent speakers of the English language. Original meaning investigations have no guaranteed success: It may be possible to find evidence of historical consensus and original understanding in regard to some legal texts, less possible in regard to others, and perhaps not possible at all in regard to a few. And, in all cases, our understanding will be at best only partial. But the reality of incomplete knowledge does not prevent the legal historian from determining whether some meanings are more or less likely than others to have been the *original* meaning. Just as importantly, sometimes it will be possible to determine that certain textual understandings, even if theoretically possible, are not at all likely.

<sup>28</sup> See Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1243–56 (1995).

<sup>29</sup> See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1998).

<sup>30</sup> See Lawrence Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 148–53 (2012) (describing the history of originalist scholarship and the emergence of original meaning originalism).

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## Acknowledgments

By way of thanks, I am indebted to many individuals who have inspired me and helped me grapple with the original meaning of the Fourteenth Amendment. The path-breaking work of Gordon Wood has been foundational in my understanding of the American project of popular sovereignty and the role of written constitutions. While at Yale Law School, I had the great good fortune to learn from theorists like Akhil Amar and Bruce Ackerman, both of whom embraced the normative importance of discovering and keeping faith with the People's past constitutional commitments. Lawrence Solum has been a faithful and invaluable friend and colleague whose thoughtful work on contemporary originalism has helped shape my own views about the uses of history in the understanding and application of constitutional text. All historical work on the Privileges or Immunities Clause of the Fourteenth Amendment owes an enormous debt of gratitude to the work of Michael Kent Curtis and his influential efforts to provide historical support for the doctrine of incorporation. Others who have toiled diligently in the fields of Reconstruction and the Fourteenth Amendment and whose work and advice have greatly helped this project include Richard Aynes, Randy Barnett, Anthony Bellia, Michael Les Benedict, Garrett Epps, Philip Hamburger, John Harrison, Heidi Kitrosser, Gerard Magliocca, Earl Maltz, Jennifer Mason McAward, Michael McConnell, John McGinnis, William Nelson, William Van Alstyne, G. Edward White, Bryan Wildenthal, and Rebecca Zietlow. I also thank the *Georgetown Law Journal*, which previously published portions of Chapters 2, 3, and 4.

Finally, I gratefully and happily thank my wife, Kelly, whose constant love, friendship, and wisdom have made this and all other endeavors in my life a joy.