

## Fourteenth Amendment Originalism

Jamal Greene<sup>†</sup>

### Introduction

In *Baze v. Rees*,<sup>1</sup> the Supreme Court rejected a death-row inmate's claim that a state's use of a lethal injection protocol that carried risks of masking severe pain violated the Constitution. Justice Thomas wrote a remarkable concurring opinion, joined by Justice Scalia, in which he argued that the plurality opinion announcing the governing standard for claims of this sort was wrong, and should better have hewed to the original understanding of the Eighth Amendment. Thomas wrote that "the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment," referring to eighteenth-century practices such as burning a person alive, public dissection, and live disembowelment.<sup>2</sup>

Yet the Thomas concurrence merits our attention less for what it says than for what it does not say. Nowhere in the opinion does Justice Thomas refer to the Fourteenth Amendment. This is so even though the Fourteenth Amendment was the constitutional provision under review in the case. For Thomas, as for many academic originalists, the Eighth Amendment applies to states only to the extent that relief from cruel and unusual punishments constituted a privilege or immunity of citizenship at the time the Fourteenth Amendment was ratified.<sup>3</sup> Failing to mention or to offer any explicit analysis of the governing constitutional text is not unusual in Supreme Court opinions, but it is a remarkable omission in an opinion in which the Court's two most prominent originalists chide their colleagues for failing to heed constitutional text and history.

The Fourteenth Amendment is the Mr. Cellophane of originalist writing. Judges, scholars, and ordinary citizens writing or speaking in the originalist tradition consistently ignore the original understanding of the Fourteenth Amendment even when that understanding should, on originalist principles, control the outcome of the case. An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the

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<sup>†</sup>Associate Professor of Law, Columbia Law School.

<sup>1</sup> 553 U.S. 35 (2008).

<sup>2</sup> *Id.* at 94–97 (Thomas, J., concurring in the judgment).

<sup>3</sup> *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring in the judgment).

rights at issue. An originalist who believes the Constitution is “colorblind” should seek justification for that view not in general considerations of policy or fairness, but in the original understanding of the Equal Protection Clause. An originalist seeking to calibrate the constitutional division of authority and responsibility between states and the national government should engage with (or expressly disclaim) changes to that division brought about by the Reconstruction amendments generally, and by the Fourteenth Amendment in particular. With limited exceptions,<sup>4</sup> originalists do not engage in these inquiries, tending instead to focus intently on the writings and utterances of the eighteenth-century constitutional drafters. Indeed, the biographies and intentions of men like John Bingham and Jacob Howard, drafters of the most important rights-related language in the Constitution, remain unknown even to constitutional lawyers and academics, to say nothing of the average Tea Partier.

I note this tension not to create a “Gotcha!” moment for opponents of originalism—there are quite enough of those—but to report a phenomenon in need of explanation. It is true, of course, that many originalists are simply Saturday sinners, inconsistent in their devotion when it leads to outcomes that are not congenial to their political preferences or cultural values. This is not a flattering charge, but it is not unique to originalists, nor does it necessarily reflect willful hypocrisy so much as cognitive dissonance. Inconsistency in application of one’s preferred constitutional interpretive methodology is a function of the human condition, and its mere existence is barely interesting. A consistent pattern of inconsistency does, however, lead one to wonder whether, far from being arbitrary, originalists in practice are faithful to a coherent set of commitments that originalism in theory simply does not recognize.

The explanations this essay proposes emerge in part from familiar places and in part from less familiar ones. Prominent originalists, Justice Scalia most famously, have conceded the need for originalism to negotiate important nonoriginalist precedents and cultural assumptions if its proponents are to remain relevant.<sup>5</sup> Respect for stare decisis may in some cases rationalize the gaps in originalist analysis of the Fourteenth Amendment. This may be particularly so in

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<sup>4</sup> See, e.g., Kurt T. Lash, *The Fourteenth Amendment and the Bill of Rights: Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447 (2009); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *Establishment*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) [hereinafter Lash, *Free Exercise*]; see also Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469 (1993); Nicholas Quinn Rosenkrantz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1059–61 (2011); MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” 357–83 (2000).

<sup>5</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

the case of incorporated rights. But *stare decisis* is only part of the story and, I will argue, a relatively small part. The missing, and less familiar, proposition I wish to advance is that originalism in practice is not just a method of interpretation, but rather—and most persuasively—a normative claim on American identity; it is most compelling as an ethical rather than hermeneutic exercise. And for several related reasons, originalists’ ethical compass infrequently points toward the Reconstruction era or the political work of the Fourteenth Amendment’s drafters.

First, the Fourteenth Amendment was a failure in its time. Akhil Amar has emphasized that America’s foundational document “was not merely a text but a deed—a *constituting*.”<sup>6</sup> The Fourteenth Amendment was designed, among other things, to “protect[] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man,”<sup>7</sup> but to the degree its central work has been accomplished, much later generations are responsible. The amendment’s inertia underwrites at least two expressive features of Fourteenth Amendment originalism that make it normatively unattractive to most professed originalists. The Fourteenth Amendment is, first, a significant resource in narratives of constitutional redemption but a weak resource in narratives of constitutional restoration. A constitutional argument taking the form of an ethical claim about American political identity makes productive use of the Fourteenth Amendment only if the claim sounds in a redemptive register—the amendment announces majestic principles that we must constantly strive, prospectively, to realize. Those who believe such principles to be central to constitutional interpretation neither need nor tend to use originalism as a justificatory framework. Second, the failure of the Fourteenth Amendment’s drafters to accomplish their ends during their lifetimes denies to them the heroic status enjoyed by Madison, Jefferson, Hamilton, and Washington. That heroic status is essential to using appeals to history as persuasive authority in modern constitutional argument.

Second, across a number of domains the Fourteenth Amendment presupposes and reinforces a commitment to pluralism rather than assimilation, and originalists tend to find comfort in ethical determinacy. Redemptive constitutionalism is attractive precisely because and to the degree that it refuses to bind modern interpretation to decisions already made, avenues already blocked, and minds already closed. Originalism is attractive to many of its proponents precisely because and to the degree that it binds interpretation to a fixed and knowable set of meanings, so as to impede the indeterminacy and opportunity associated with open-textured constitutional construction. It is no wonder that

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<sup>6</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5 (2005).

<sup>7</sup> Jacob Howard, Speech Introducing the Fourteenth Amendment, Cong. Globe, 39th Cong., 1st Sess. 2763 (May 23, 1866).

opponents of moral relativism tend disproportionately to support originalism, or that African Americans tend overwhelmingly not to support it.<sup>8</sup> And it is no wonder that an amendment committing the nation in the broadest of terms to an ambiguous set of ends is an unlikely resource in originalist arguments.

Third, the Reconstruction era is painful and embarrassing to—and therefore best forgotten by—many of those whose cultural and political commitments lead them to originalism. The promise of Reconstruction is not just, in Martin Luther King, Jr.’s memorable words, a “bad check.” It is also a symbol of two-thirds of the country’s conquest over and occupation of the other third. While the American Revolution remains a powerful expression of unification enabling and enabled by defeat of a common external enemy, the Civil War is just that, and victory in one part of the country necessarily meant defeat in the other. This obvious difference should, in principle, have no effect on constitutional interpretation generally or on the mechanics of originalism in particular, but it is likely to diminish the role of the Reconstruction era within a persuasive account of American ethos. It is particularly likely to have this effect among Southerners or among those who sympathize with either the state-centered or the white supremacist political project the Confederate states were defending.

These rationales do not suggest that the Fourteenth Amendment somehow falls outside originalists’ formal rules of engagement but rather that, in practice, it is not a part (or is only a small part) of persuasive originalist forms of argumentation. That being so, the project of reforming originalism to reflect the full impact of the Fourteenth Amendment on constitutional law is likely to resonate with a very limited audience.

## I

This Article’s premise—that originalists devote insufficient attention to the Fourteenth Amendment—will seem obvious to some but it is sure to baffle others. There is, after all, a voluminous academic literature on the drafting history of the Fourteenth Amendment, on the specific intentions of its authors and of the members of the Thirty-Ninth Congress, and on the purposes behind its broad provisions. The original understanding of the Equal Protection Clause regarding racial segregation was debated extensively in the briefing to *Brown v. Board of Education*<sup>9</sup> and has been a central concern of constitutional historians and

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<sup>8</sup> This is true even controlling for political party and ideological self-identification. See Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011).

<sup>9</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

theorists ever since.<sup>10</sup> Studies of the scope of incorporation attending intimately to the legislative debate surrounding the Fourteenth Amendment have appeared in well-known Court opinions<sup>11</sup> and in canonical academic works.<sup>12</sup> The recent case of *McDonald v. City of Chicago*, in which the Court found that the individual right to possess a loaded handgun at home extends to state and local infringements, featured extensive briefing addressing the original understanding of the Fourteenth Amendment's drafters as to gun rights, and led to dueling opinions discussing and dissecting those historical arguments. Justice Scalia's dismissive remark at oral argument in *McDonald* that grounding incorporation in the Privileges or Immunities Clause was the "darling of the professoriate" may suggest rather too much attention to the original understanding of the Fourteenth Amendment, not too little.

Some clarification of the argument, then, is in order. Originalist neglect of the Fourteenth Amendment is selective rather than general. The debate over whether the amendment was intended to incorporate some or all of the Bill of Rights continues to be waged among originalists,<sup>13</sup> but it is not accompanied by a similarly spirited debate over the degree to which any particular right in the Bill of Rights was understood by the Fourteenth Amendment's drafters and ratifiers as it was understood in 1791. To take our earlier example, suppose that Justice Thomas is correct that the Eighth Amendment was not originally understood to forbid a particular method of punishment solely based on an unintended risk of significant pain. Suppose further that those who ratified the Fourteenth Amendment believed that the Eighth Amendment in fact erected a constitutional prohibition against such a method of punishment. In a case in which the alleged infringer is a state or local rather than a federal actor, it is difficult to understand a top-down theory of interpretation under which the first view would control over the second. Indeed, for an originalist who believes *Barron v. Baltimore* was correctly decided, it is difficult to understand why the original understanding of the Bill of Rights ever should, in itself, control a constitutional case involving state and local action.

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<sup>10</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 76 (1990); Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882 (1995); Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 VA. L. REV. 947 (1995); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

<sup>11</sup> See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring in the judgment); *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

<sup>12</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 155–89 (2d ed., 1997); CHARLES FAIRMAN, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY* (1970).

<sup>13</sup> See *McDonald*, 130 S. Ct. 3089 n.2 (Stevens, J., dissenting) (collecting sources).

And yet, interpreting incorporated rights as if they were original rights is very much the norm among both originalists and nonoriginalists. Examples abound in both judicial opinions and scholarship. Take Justice Black's opinion in *Everson v. Board of Education* discussing Madison's Memorial and Remonstrance as informing the correct interpretation of the Establishment Clause.<sup>14</sup> Or Justice Scalia's opinion in *Crawford v. Washington*, which devotes extensive treatment to the common law background of the Sixth Amendment's Confrontation Clause and virtually none to the antebellum understanding of the right. Consider originalist scholar Michael McConnell's exhaustive excavation of the eighteenth century framers' understanding of the scope of constitutionally required religious accommodation.<sup>15</sup> Once one begins to look for instances of originalists' ignoring the influence of Reconstruction-era thought on the meaning of rights protected under the Fourteenth Amendment, they appear ubiquitous.

The position that only eighteenth-century views are relevant to the original meaning of the incorporated Bill of Rights is difficult to defend, but it is not impossible to articulate. Someone could arrive at this position by arguing that all the Fourteenth Amendment generation did with respect to the Bill of Rights was to apply its first eight amendments, as originally understood, to state infringements. This is not, however, a plausible interpretation of the Fourteenth Amendment, nor have I ever seen it articulated explicitly by any modern originalist. There is, first, a conceptual difficulty in proceeding in this way. As *Barron* makes clear, the ratifying generation for the Bill of Rights conceptualized the document through a federalism lens. From this vantage, one's belief as to the scope of a right is quite unlikely to be indifferent to whether the right is asserted against the centralized federal government or against a state or local actor. The difficulty is most clear with respect to those rights that may have been originally understood as purely or mostly structural, such as the Establishment Clause or the Second Amendment, but it remains problematic even for those rights that plainly implicate individual freedoms. The fact that the federal government is one of

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<sup>14</sup> 330 U.S. 1 (1947). In *Lynch v. Donnelly*, which upheld a crèche display, Justice Brennan wrote in his dissenting opinion that “[t]he intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread celebration of Christmas did not emerge in its present form until well into the 19th century.” 465 U.S. 668, 720 (1984) (Brennan, J., dissenting). Of course, the relevant framers should be the Fourteenth Amendment framers.

<sup>15</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). As Kurt Lash has written, the view that the Free Exercise Clause requires religious exemptions from neutral laws of general applicability is much more plausibly attributed to the Reconstruction Republicans, who were familiar with slave-state literacy laws that prevented Bible reading, than to the eighteenth century framers. See Lash, *Free Exercise*, *supra* note 4.

enumerated powers might, for example, reasonably influence the sorts of regulatory practices that qualify as takings under the Fifth Amendment.

Even apart from this conceptual difficulty, there would remain the problem of whose view of the Bill of Rights' original understanding is the one that controls—that of the modern judge or that of the Fourteenth Amendment ratifying generation. That generation, broken and battered by a war that may have been precipitated in part by the *Dred Scott* decision, did not trust federal judges. Nor did those Americans have the same regard many modern Americans do for the constitutional framers—William Lloyd Garrison, who called the Constitution “a covenant with death and an agreement with hell,” was invited to raise the federal flag at Fort Sumter at the conclusion of the Civil War.<sup>16</sup> It is unthinkable that that generation believed itself to be delegating interpretation of the Bill of Rights, as applied to states, to federal judges to determine how the constitutional drafters would have understood its protections (which did not at the time apply to states). If this is the view that any originalist holds, I should like to hear her advance it.

It is necessary to qualify my skepticism somewhat because one can in fact imagine a kind of fainthearted originalism that leads to the result I have so far criticized. Consider Justice Scalia, who originated the “fainthearted” label to describe his own views in 1989.<sup>17</sup> Justice Scalia has accepted certain aspects of the Court's incorporation jurisprudence as settled law.<sup>18</sup> Even though he criticizes substantive due process at every available opportunity, he is unwilling to reconsider whether incorporation—a form of substantive due process—is constitutionally legitimate or whether it might more faithfully be accomplished via a different doctrinal avenue. There are at least three levels of generality at which we might adjudicate the meaning of an incorporated right as applied to a state or local actor. At the highest level of generality, we might consider whether the entire corpus of rights protected against federal infringement in the Bill of Rights is also protected in exactly the same way against state infringement. At a medium level of generality, we might consider whether some rights but not others are protected in exactly the same way against state as against federal infringement. At a low level of generality, we might consider the degree to which the scope and substance of rights protection is the same in the states versus in the federal context. Broadly speaking, the Court has debated whether to proceed at a high versus medium level of generality, and has settled on the medium level: total incorporation has lost and selective incorporation (at a markedly low threshold)

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<sup>16</sup> See Merton L. Dillon, *The Failure of the American Abolitionists*, 25 J. SOUTHERN HIST. 159, 159 (1959).

<sup>17</sup> Scalia, *supra* note 5, at 864.

<sup>18</sup> See *McDonald* oral argument transcript.

has won.<sup>19</sup> With notable and much criticized exceptions,<sup>20</sup> the Court has focused little on the choice between a medium or low level of generality; that is, the Court has not much debated the degree to which incorporated rights should have precisely the same content at the state level versus the federal level. For most incorporated rights, the Court made no distinction at the time of incorporation and has made no distinction in subsequent cases.

Now return to our fainthearted originalist. He might believe that both the triumph of selective incorporation and the rejection of individualized consideration of the difference between state and federal rights are settled, but that the meaning of particular *federal* rights is not settled. Justice Scalia appears to fit this description. He rejects the Court's evolving standards jurisprudence in considering the meaning of the Eighth Amendment but he accepts that the Eighth Amendment is incorporated and that its meaning is identical whether applied to state or federal action. He refuses, on originalist grounds, to accept that firing (or refusing to hire) a civil servant or a public contractor based on political ideology violates the First Amendment,<sup>21</sup> but he seems to accept that the rule should be the same as between state and federal employers. It may be that many originalists are fainthearted in just this way, and so have little reason to consider the original understanding of particular privileges or immunities of citizenship. The *McDonald* majority's extensive discussion of Reconstruction-era views on gun rights may lend some support to this possibility: by suggesting that the Second Amendment might protect a right against federal but not state infringements, the *McDonald* dissenters unsettled the otherwise settled rejection of divided incorporation.

There is reason to doubt, however, that this degree of faintheartedness is a considered choice on the part of most originalists. First, and perhaps most significantly, I have never seen that argument articulated in any writing, originalist or not. It is generally just assumed without discussion that originalism requires that the original understanding of federal rights determine the meaning of incorporated rights. Second, unmooring the practice of originalism from an inquiry into the meaning of a politically significant text deprives the theory of its usual normative justifications. At no point in our constitutional history did any democratically responsible institution determine that state and local actors should be bound by Justice Scalia's considered view of the eighteenth-century meaning of the Bill of Rights. If his view as to the eighteenth-century meaning of a

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<sup>19</sup> Compare, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968), with *id.* at 163 (Black, J., concurring).

<sup>20</sup> E.g., *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring in the judgment) (arguing that the incorporated Sixth Amendment, unlike the original, does not require jury unanimity in criminal cases).

<sup>21</sup> See *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 686 (1996).



particular right happens to approximate the view as to its 1868 meaning held by the ratifiers of the Fourteenth Amendment, it is only through happenstance. And so it is not that the originalist inquiry as it is usually conducted is helpful but insufficient to decide cases involving incorporated rights; it is that the inquiry is simply the wrong one. There is literally no reason, in principle, for an originalist to privilege the meaning of an incorporated right circa 1791 over its meaning in any other year prior to 1868. Third, many originalists, including Justice Thomas, clearly are not fainthearted in this way, and nonetheless make the same choices as to interpretation of incorporated rights.<sup>22</sup>

There are, moreover, other ways in which originalists conspicuously neglect the Fourteenth Amendment. Many, for example, are famously uninterested in the original understanding of the Equal Protection Clause regarding race-conscious government action. The Congress that enacted the Fourteenth Amendment also enacted race-conscious measures designed to ameliorate the condition of former slaves.<sup>23</sup> It is reasonable to suppose that an originalist would not, then, take issue with contemporary affirmative action plans aimed at inclusion rather than exclusion of racial minorities. But many originalists, including Justice Scalia and Justice Thomas, object to such plans on the ground that the Equal Protection Clause requires both states and the federal government to be colorblind. To my knowledge, neither Justice has ever sought in writing to justify that reading in originalist terms (nor, incidentally, has either Justice justified application of the Equal Protection Clause to the federal government in such terms).<sup>24</sup>

Another area of pronounced inattention to the Fourteenth Amendment is federalism. Many originalists reject Justice Miller's view (or rather, the received wisdom as to his view)<sup>25</sup> in the *Slaughter-House Cases* that the Privileges or

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<sup>22</sup> As for *McDonald*, it remains to be seen whether future Courts inclined toward Second Amendment originalism will turn to the Fourteenth Amendment ratifiers for guidance as to the scope of the protected right and not merely the fact of its incorporation.

<sup>23</sup> See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

<sup>24</sup> Justice Thomas has, in passing, suggested that race-conscious measures enacted during Reconstruction are consistent with a colorblind Constitution insofar as they were designed as remedies for past "state-sponsored discrimination." *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring). This is not, of course, the same as affirmatively defending the colorblind view but it is something of a start. It is not clear from Justice Thomas's brief discussion how the numerous Reconstruction-era statutes appropriating money to destitute "colored" persons were narrowly tailored remedial measures. See Rubenfeld, *supra* note 23, at 430–31 (describing such statutes).

<sup>25</sup> *Slaughter-House Cases*, 83 U.S. 36 (1873). In my view, Justice Miller's majority opinion does not support the anti-incorporation view (which would, in any event, be dicta), but Justice Miller later joined Chief Justice Waite's opinion in *United States v. Cruikshank*, 92 U.S. 542 (1876), which unambiguously rejected incorporation.

Immunities Clause does not incorporate the Bill of Rights against the states. The more celebrated dissenting opinions of Justice Bradley and Justice Field both emphasized, not unreasonably, that the Reconstruction amendments were designed to effect a radical transformation in the division of authority and responsibility between states and the federal government.<sup>26</sup> It does not take much examination of the legislative history behind the Fourteenth Amendment—and the repeated invocations therein of Justice Washington’s illustrative enumeration of privileges and immunities in *Corfield v. Coryell*<sup>27</sup>—to conclude that many of those responsible for the amendment’s codification believed that it empowered the federal government to guard against state infringement of a wide array of rights both encompassing and extending well beyond those enumerated in the Bill of Rights.<sup>28</sup> Yet it remains that in both scholarship and in Court opinions the text most consistently used to reveal original understandings on federalism issues is Madison’s Federalist No. 51; we see no effort to identify or celebrate the canonical federalism-related documents of the Reconstruction era.

Members of the Court have on occasion engaged the history of section five of the Fourteenth Amendment in cases in which the scope of that provision was directly at issue. For example, Justice Kennedy’s opinion for the Court in *City of Boerne v. Flores* turned to the drafting history of the Fourteenth Amendment to aid in his conclusion that the section’s purpose was “remedial” rather than substantive. But even in cases in which section five is the very provision under review, careful attention to original understanding is the exception rather than the rule. Thus, in *Fitzpatrick v. Bitzer*,<sup>29</sup> when then-Justice Rehnquist wrote for the Court upholding the power of Congress to abrogate state sovereign immunity via section five, his opinion was deeply doctrinal in nature, referring only indirectly to the original understanding of the Fourteenth Amendment.<sup>30</sup> And in *United States v. Morrison*,<sup>31</sup> in disclaiming application of section five to an asserted pattern of state judicial underenforcement of cases involving gender-motivated violence, Rehnquist relied, in part, on nineteenth-century cases expounding federal judges’ views of Reconstruction power, without addressing the intentions or understandings of relevant members of Congress or the public at large. Indeed, he wrote that viewing section five as limited was “necessary to prevent the Fourteenth Amendment from obliterating the Framers’

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<sup>26</sup> *Slaughter-House Cases*, 83 U.S. at 83 (Field, J., dissenting); *id.* at 111 (Bradley, J., dissenting).

<sup>27</sup> 6 Fed. Cas. 546 (1823).

<sup>28</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 29–30 (1980).

<sup>29</sup> 427 U.S. 445 (1976).

<sup>30</sup> *Id.* at 453–56.

<sup>31</sup> 529 U.S. 598 (2000).

carefully crafted balance of power between the States and the National Government.”<sup>32</sup>

Simply to assert the need to prevent the Fourteenth Amendment from too radically altering the federal-state balance begs the question. An originalism sensitive to the whole Constitution would confront openly the degree to which the Fourteenth Amendment was designed to affect that balance, and not just in cases directly implicating section five. In cases like *Fitzpatrick* and *Seminole Tribe of Florida v. Florida*,<sup>33</sup> the Court treats the Fourteenth as an addendum rather than as an amendment. In the latter case, in which Chief Justice Rehnquist debates Justice Souter at great length over the extent to which the eighteenth-century Framers would have intended Congress to be able to abrogate state sovereign immunity via its Article I powers, Rehnquist writes that “*Fitzpatrick* cannot be read to justify ‘limitation of the principle embodied in the Eleventh Amendment through appeal to *antecedent* provisions of the Constitution.’”<sup>34</sup> Rehnquist was quoting Justice Scalia’s dissenting opinion in *Pennsylvania v. Union Gas*, which (like Justice Scalia’s opinions addressing incorporated rights) treats the Constitution as a linear series of provisions whose interpretation sheds no light (or rather sheds light only selectively)<sup>35</sup> on other provisions not specifically mentioned. As Charles Black writes, “in dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”<sup>36</sup>

It takes some creativity to assert that the Fourteenth Amendment enlarges the scope of Congress’s Article I powers, and I do not mean to suggest that an originalist would necessarily be wrong to deny the assertion. Consider, though, the following interpretation: section one of the Fourteenth Amendment provides the basis for an expansive definition of national citizenship, and section five permits enforcement of the Fourteenth Amendment “by appropriate legislation.” We might interpret “appropriate legislation” as the *City of Boerne* Court did: as legislation that “enforces” judicially recognized rights. But we might also interpret it in less juriscentric terms, as legislation that enforces congressionally recognized rights; the work then done by the word “appropriate,” from the perspective of a reviewing court, would be to preserve other limitations on

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<sup>32</sup> *Id.* at 620.

<sup>33</sup> 517 U.S. 44 (1996).

<sup>34</sup> *Id.* at 66 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, \_\_ (1989) (Scalia, J., dissenting)) (emphasis added).

<sup>35</sup> Consider, for example, the universal agreement among constitutional scholars that the Thirteenth Amendment abolishes the Fugitive Slave Clause, even though the amendment does not mention the Clause and the Clause does not mention slavery.

<sup>36</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

Congress's legislative power imposed by the Bill of Rights, the necessary and proper clause, Article I section 9, and the like.<sup>37</sup> Whether or not one accepts this theory, it is reasonable to expect originalists to incorporate the Fourteenth Amendment into extant accounts of federalism. If the original impulse behind federalism was to ensure that "the society itself will be broken into so many parts, interests and classes of citizens, that rights of individuals, or of the minority, will be in little danger from interested combinations of the majority,"<sup>38</sup> it would be useful to know whether and to what degree vastly expanding congressional and judicial power to preempt state exercises of the police power renders these impulses less intelligible.

It bears mention that selective neglect of the Fourteenth Amendment is not limited to law professors and judges, though we need not dwell long on the point. I regard it as nearly axiomatic that, outside of courts and academic halls, most participants in public discourse who discuss originalism fail almost entirely to discuss the Fourteenth Amendment. In his book *Liberty and Tyranny*, Mark Levin, radio host and self-styled "constitutional expert" writes, "For much of American history, the balance between governmental authority and individual liberty was understood and accepted. . . . But in the 1930s, during the Great Depression, the Statists successfully launched a counterrevolution that radically and fundamentally altered the nature of American society."<sup>39</sup> Within that ellipsis is no reference to slavery, the Civil War, the Fourteenth Amendment, or anything else that might plausibly have affected the balance between governmental authority and individual liberty prior to the New Deal. Levin does discuss slavery in the book, but he insists that:

[T]he Constitution's ratification by the southern states would ultimately mark the beginning of the end of slavery—coming to fruition with their defeat in the Civil War and the subsequent adoption by Congress *and* the states of the Thirteenth (formally abolishing slavery), Fourteenth (prohibiting the abridgement of citizens' rights), and Fifteenth (prohibiting race as a bar to voting) Amendments to the Constitution.<sup>40</sup>

Levin's narrative of continuity, in which the Fourteenth Amendment is cast as a seamless embodiment of foundational principles, is common among popular originalists. W. Cleon Skousen's *The Five Thousand Year Leap*, which has

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<sup>37</sup> Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under section five of the Fourteenth Amendment.").

<sup>38</sup> Federalist 51.

<sup>39</sup> MARK R. LEVIN, *LIBERTY AND TYRANNY* 19–20 (2009).

<sup>40</sup> *Id.* at 72

become a kind of sacred document among many Tea Partiers, was written “to catalogue the ingredients of the Founding Fathers’ phenomenal success,” but includes a single, cursory reference to the Fourteenth Amendment.<sup>41</sup> Skousen’s chapter on the principle that “All Men Are Created Equal” asserts, without referencing slavery, that “the Founders were able to establish a society of freedom and opportunity.”<sup>42</sup> When Skousen does make a fleeting reference to slavery, it is in a portion of the chapter in which he says that “the blacks” soon thereafter began to receive advancement opportunities “which no doubt the Founders such as Washington, Jefferson, and Franklin would have strongly approved.”<sup>43</sup> Skousen does not, of course, mention that two of those three men were slaveholders.

Before turning to the reasons for originalists’ selective indifference to the Fourteenth Amendment, it is worth pausing to consider the reasons for their selective *cognizance*. As mentioned above, there are indeed Fourteenth Amendment-related areas—namely the original understanding of the effect of the Equal Protection Clause on segregated public institutions and the legitimacy of incorporation itself—in which originalists (as much as others) have long been deeply engaged in historical and doctrinal debate. Might it be then, that their relative inattention to other ways in which the Fourteenth Amendment might influence modern interpretation is simply an oversight, to be expected in a methodology that until recently was not advanced with the analytic sophistication many of its modern proponents claim? Might it be that I have indeed identified little more than a “Gotcha!” to be corrected when Originalism 3.0 hits the law reviews?

It will be profitable to reconsider this objection once we have examined more rigorously the potential reasons for originalists’ selective neglect. For now, consider that the two areas in which originalists have most aggressively engaged the Fourteenth Amendment are areas in which non-engagement poses an existential threat to originalism. The most well-known originalist inquiries into the original understanding of the Equal Protection Clause with respect to school segregation are in service of the view that originalism is not inconsistent with *Brown* and therefore irrelevant. Originalist resuscitations of the Privileges or Immunities Clause are necessary in order to prevent originalism from condemning all applications of the Bill of Rights to the states. Anyone who argues that the Bill of Rights should not apply to actions by state and local officials has thereby left the mainstream conversation about rights. Continuing to make reference to the Fourteenth Amendment’s history in these contexts is, I will argue, entirely consistent with the view that originalism owes both its legal and its broader

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<sup>41</sup> W. CLEON SKOUSEN, *THE FIVE THOUSAND YEAR LEAP* 85 (rev. ed. 2009).

<sup>42</sup> *Id.* at 81

<sup>43</sup> *Id.* at 83.

cultural prominence less to any devotion to a consistent or even persuasive set of interpretive rules than to its role in advancing an influential normative argument about American identity.

## II

As Part I demonstrates, the curious gap between originalism in theory and originalism in practice regarding the role of the Fourteenth Amendment is not solely a feature of popular commentary. Were it so, one might easily dismiss the divergence as deriving from a lack of sophistication about constitutional theory. Just as participants in popular discourse continue to characterize originalism in terms of Framers' intent even as many academics have shifted to original meaning, we might suppose that misunderstanding the mechanics of incorporation or the original imperatives of the Equal Protection Clause results from little more than an unwillingness or an inability to understand what it means to practice the theory of originalism. We might assume, in other words, that the practice is coarse even as (and perhaps in part because) the theory is rich and complex. But when many of the most thoughtful and influential practitioners and explicators of a theory appear to be getting the theory wrong in practice, we must consider the possibility that the theory is less interesting than the practice, or rather that the theory of interest is simply not what its practitioners say it is. Maybe, in other words, Glenn Levin has it about right.

This Part suggests reasons why originalists systematically undervalue the Fourteenth Amendment. Those reasons are not derived from any extant theory of originalist interpretation; as I have argued, originalism in theory does not permit this undervaluation. Nor are those reasons derived wholly from cultural profiling, even as they draw from research that fits within anthropological methods. Rather, the reasons emerge in large measure from an assessment of the work constitutional history actually does in constitutional argument. This is lawyers' business, inasmuch as lawyers, in excavating and describing the architecture of legal analysis, are anthropologists within their domain.

Any competent taxonomist of constitutional argument must include history among the resources deployed, and indeed the most influential taxonomists—Philip Bobbitt and Richard Fallon—appear to give historical arguments a prominent place in their accounts.<sup>44</sup> But we must be careful to distinguish, as historians are so often eager to do, how historians and

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<sup>44</sup> Bobbitt discusses historical argument first in both of his books on constitutional interpretation, although he insists that no modality of interpretation is in practice privileged over any other. Cite. Historical argument sits second—following text—in Fallon's five-tiered hierarchy of constitutional argument. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244 (1987).

constitutional lawyers use history. “[H]istorians,” Jack Rakove writes, “have little stake in ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding.”<sup>45</sup> By contrast, originalists are interested in using history as a form of normative democratic authority, and so the search for a single, identifiable original meaning of or intention behind a constitutional provision has high stakes indeed; the stakes increase, moreover, in proportion to the quality or narrative purchase (within the legal community) of the authority invoked. While, as Rakove writes, historians may “rest content with—even revel in—the ambiguities of the evidentiary record,”<sup>46</sup> ambiguity is a potentially fatal threat to the originalist’s enterprise. It would be odd, given these constraints, if originalists regarded all equally accessible sources of meaning as equally useful to their analysis. We should instead, and appropriately, expect a vigorous contest over the meaning of particular high-reward forms of authority and relative indifference to low-reward (even if, at times, less ambiguous) forms of authority.

We should expect such a contest even among those legal academics who are fluent in historical methods (just as we should expect it among those bona fide historians who are attuned to the consequences of their work for resolution of political and legal debate).<sup>47</sup> So long as the enterprise aims to endow a set of historical materials with normative authority, it necessarily must negotiate among the disparate demands of accuracy and ethos. A careful scholar must document the complexity of the historical record, but a legal advocate must emphasize sources of authority with purchase within the community of constitutional lawyers. He cannot be all sabermetrician; he must win games *and* sell tickets. For a judge, who is unlikely to be an able historian and whose peer group does not demand the competence norms of professional academics, we should expect conclusions as to original meaning to be even more heavily leveraged by the need for certainty and the burdens of ethical argument.<sup>48</sup> As Robert Cover is said to have told his class at Yale Law School, “We view the acts of history as authoritative precisely because we read into that history that part of the past which we choose to make authoritative, which we wish to emulate.”<sup>49</sup> To this the historian Laura Kalman replies, “I doubt any historian considers the past authoritative.”<sup>50</sup>

The features of history that endow it with authority in constitutional argument cannot be adduced through historical methods and need not align with

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<sup>45</sup> JACK N. RAKOVE, *ORIGINAL MEANINGS* 9 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 169 (1998) (cautioning not to maintain a fastidious segregation between “lawyers’ legal history” and “historians’ legal history”).

<sup>48</sup> See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987).

<sup>49</sup> Tanina Rostain, *Tribute to Robert M. Cover*, 96 YALE L.J. 1713, 1715 (1987).

<sup>50</sup> KALMAN, *supra* note 47, at 180.

historians' assessments of value.<sup>51</sup> The statement that the Establishment Clause means *X* because Madison had *X* in mind when he wrote his Memorial and Remonstrance derives from an account of authority, not of history. And the reasons why Madison's actions and beliefs wield authority within arguments about the meaning of the religion clauses need not relate to Madison's particular relationship to the First Amendment.<sup>52</sup> Madison's identity as a principal drafter of *other* constitutional provisions; his authorship of the Federalist Papers; his service to the country as its fourth President and as Commander in Chief during the War of 1812; and his role in contesting the Alien and Sedition Acts all contribute to the argument that we should permit his legacy to direct modern interpretation. And yet none of those aspects of Madison's biography is relevant to assessing the contemporaneous expressive meaning of the Memorial and Remonstrance or even Madison's intentions in drafting the Establishment Clause.

For history to count as authoritative it must be prescriptive and it must be culturally resonant, but it need not, in effect, count as history. It must be prescriptive because it has a resolute function that has little to no use for ambiguity. It must be culturally resonant because it is offered as a way out of the countermajoritarian difficulty: it is a means by which we locate our constitutive commitments in the past, and situate judges as faithful agents of those commitments. It need not count as history because, as discussed above, the art of legal persuasion aligns imperfectly with the professional narration of history. Understanding the function of history in constitutional argument enables us to make better sense of originalists' systematic neglect of the Fourteenth Amendment. The basic contention is that, on the criteria just mentioned, Reconstruction is less usable, less mobilizable than the Founding era for three broad reasons. First, much of Reconstruction was a failure in its time. Second, the Fourteenth Amendment does not easily embody settled and unambiguous constitutional propositions. Third, the Fourteenth Amendment holds an awkward place within our national memory. I discuss each in turn below.

### *A. Failure*

If antagonists and partisans of the Reconstruction South can agree on anything, it is that Reconstruction was a failure. Over the decades scholars have debated the reasons for that failure, with the so-called Dunning School pinning it to the supposed incapacity of blacks to integrate into civil society, and dissenters and later revisionists more inclined to blame Southern recalcitrance in the form of

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<sup>51</sup> Powell, *supra* note 48, at 662–64.

<sup>52</sup> Indeed, the most obvious means by which one might leverage that relationship into a claim of authority—by noting that Madison drafted the Establishment Clause—is a means expressly (and often, I think, disingenuously) disclaimed by most academic originalists.



the Compromise of 1876 and the Jim Crow era that followed. No one could dispute, however, that the civil and political equality the Reconstruction amendments sought to guarantee to free blacks would not come for another century or longer. At the centennial of the Emancipation Proclamation, throughout much of the South, a black person could not vote, and was restricted in her choice of hotel, restaurant, water fountain, bathroom, theater seat, and marriage partner. Blacks remained, officially and literally, “regarded as beings of an inferior order, and altogether unfit to associate with the white race.”<sup>53</sup>

The failure of Reconstruction generally, and of the Fourteenth Amendment in particular, poses significant obstacles to the use of that amendment’s original understanding as authority in modern cases. I focus here on two in particular. First, the Fourteenth Amendment does not figure prominently in narratives of constitutional restoration. Contests over ethos conform to several dichotomies, what Balkin might call “nested oppositions,”<sup>54</sup> evident within U.S. constitutional argument. We debate whether our better nature is individualistic or communitarian, assimilationist or pluralistic, anchored in the past or realized continuously and prospectively into the future. The last of these dichotomies, which we may recharacterize as an opposition between narratives of restoration versus redemption, has long mapped onto the central divide between originalists and living constitutionalists. Those who affiliate with originalism tend to be the kinds of people who emphasize restorative narratives; those who affiliate with living constitutionalism tend to be the kinds of people who emphasize redemptive narratives. Indeed, controlling for demographic variables, issue positions, and other ideological variables, an individual’s relative level of moral traditionalism—her relative suspicion of “newer lifestyles” and embrace of tradition—is among the most robust predictors of her relative affinity for originalism.<sup>55</sup>

When we use history in constitutional argument, the sources we emphasize reinforce the orientation of the kind of narrative we wish to deploy. Because the Fourteenth Amendment did not immediately achieve its ends—and in some ways has yet to do so—it is well-suited to redemptive narratives and ill-suited to restorative ones. As Balkin writes, “[T]hrough constitutional redemption, the Constitution becomes what it always promised it would be but never was; it changes in the direction of its correct interpretation and application; it responds appropriately to alterations in time and circumstance.”<sup>56</sup> Fidelity to the broad principles of section one of the Fourteenth Amendment is not, and cannot comfortably be framed as fidelity to the world the Fourteenth Amendment

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<sup>53</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>54</sup> J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)).

<sup>55</sup> Greene, Persily, & Ansolabehere, *supra* note 8, at 408–09.

<sup>56</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 6 (2011).

actually created; all participants in modern constitutional argument agree that that world was deeply inconsistent with the amendment's promise. In order to be a Fourteenth Amendment originalist, one must be telling a redemptive narrative. But the more one focuses on redemption, the less one believes in originalism.

A second obstacle to Fourteenth Amendment originalism that arises out of the failure of its drafters is, quite simply, that its drafters were failures. Consider the dissenting opinion of then-Justice Rehnquist in *Wallace v. Jaffree*,<sup>57</sup> in which the Court invalidated an Alabama statute that required a moment of silence for “meditation or voluntary prayer” in public schools. The last piece of evidence Rehnquist marshals in support of the view that the Establishment Clause was not originally understood to prohibit a legislature from encouraging prayer is the fact that “George Washington himself . . . proclaimed a day of ‘public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.’” Rehnquist added the following coda: “History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.”<sup>58</sup>

Rehnquist's invocation of Washington in this way is interesting for several reasons. First, like many originalist opinions already mentioned, it uses eighteenth-century history to yield the “true meaning”<sup>59</sup> of the Bill of Rights as applied to state practices—in this case endorsement of institutional prayer—without acknowledging the potential relevance of the Fourteenth Amendment to the substantive inquiry. Whether or not Washington or the *Wallace* majority strayed from the original meaning of the Establishment Clause, at a minimum the Fourteenth Amendment strayed from that meaning, and yet it is treated as a technicality. Second, Washington is not invoked merely as an example of a reasonable contemporaneous reader of the Constitution. His authority derives from and is reinforced by his status as “Father of his Country.” It is a common nickname for Washington,<sup>60</sup> and indeed has been used before in the Supreme Court,<sup>61</sup> but it is particularly apt here because Washington is the Nation's father in multiple ways: the prevailing general in its war for independence; the presiding officer at its constitutional convention; and its first President, responsible for countless decisions (including the decision to step down after two terms) that would set significant and ultimately constitutive precedents. Washington is the

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<sup>57</sup> 472 U.S. 38 (1985).

<sup>58</sup> *Id.* at 113 (Rehnquist, J., dissenting).

<sup>59</sup> *Id.*

<sup>60</sup> The title has also been conferred on Cicero, Julius and Augustus Caesar, Adrea Do'rea, and Androni'cus Paleaol'ogus. E. COBHAM BREWER, *DICTIONARY OF PHRASE AND FABLE* (1898).

<sup>61</sup> Justice Frankfurter called Washington “the Father of his Country” in his concurring opinions in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring), and *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 124 (1948) (Frankfurter, J., concurring).

punctuation mark on Rehnquist's dissent because Washington is the Greatest American Hero. Third, Rehnquist contrasts Washington the hero with "the majority of the Court today." The reference announces an affinity both with those who harbor an anti-elite bias and with those who are inclined to think it self-evident that Washington's example must prevail over the views of "today."

It is impossible to imagine a judge using Bingham in a similar way. As a descriptive matter, Bingham is not a national hero. In Cadiz, Ohio, where Bingham spent most of his life, the main road out of town once bore Bingham's name, but it is now called East Market Street. The local elementary school used to be called Bingham Grammar School, but is now called Harrison Westgate Elementary School. Efforts in recent years by the Harrison County (OH) Historical Society to have the U.S. Postal Service issue a commemorative stamp in Bingham's honor have been unsuccessful. The Wikipedia page for Mercer, PA, where Bingham was born, does not mention the father of the Fourteenth Amendment, but it notes that the town is the birthplace of "the 19th century painter Samuel Waugh, actor and impresario J.C. Williamson[, and] Trent Reznor, creator of the bank Nine Inch Nails."<sup>62</sup> There are many reasons why Bingham is not memorialized,<sup>63</sup> some of which I discuss elsewhere in this section. But one of those reasons is surely that his singular accomplishment was a failure in his lifetime.

### *B. Determinacy*

The chief aim of much originalist constitutional interpretation is settlement. H. Jefferson Powell writes that "[o]riginalism's attractiveness, for the most part, lies in the possibility it seems to offer the judicial interpreter of an escape from personal responsibility;" it is a delegation, that is, to a source of authority that is sufficiently objective to enable consensus around the answers to difficult constitutional questions. The "great appeal" of originalism, originalist

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<sup>62</sup> Mercer, PA, [http://en.wikipedia.org/wiki/Mercer,\\_Pennsylvania](http://en.wikipedia.org/wiki/Mercer,_Pennsylvania) (last visited Sept. 24, 2011).

<sup>63</sup> Bingham was also demonized in the Fourteenth Amendment account of Charles Fairman, whose conclusion that incorporation was not intended had to confront Bingham's explicit statements to the contrary. Pamela Brandwein writes that the "conceptual apparatus" that shaped the debate between Fairman and William Crosskey "linked the production of institutionally 'credible' representations of Fourteenth Amendment history to political distributions that were harmful to blacks." PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 97 (1999). Educated in the heyday of the Dunning School, Fairman called the Joint Committee on Reconstruction a "conspiracy," and portrayed Bingham as unsophisticated and "confused" by Chief Justice Marshall's opinion in *Barron. Id.* at 115. Fairman was also a Harvard Law School professor during Justice Scalia's matriculation. Without veering too far towards psychoanalysis, it seems reasonable to suppose that anyone persuaded to take a dim view of incorporation and of Bingham would be unlikely, in later life, to take incorporation seriously even after grudging acceptance.

scholar Michael McConnell writes, is that it draws on “the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation’s political character—and not the political-moral principles of whomever happens to occupy the judicial office.”<sup>64</sup> It is not that originalism cannot be practiced without promising transparent—and thereby debate-stifling—criteria of adjudication, but, as Powell and McConnell imply, disaggregating modern interpretation from modern thinking would be considerably less attractive without this feature.<sup>65</sup>

The Fourteenth Amendment tends away from settlement. This is perhaps a partial restatement of the earlier claim that the Fourteenth Amendment better enables redemptive than restorative constitutional narratives, but the open-ended nature of Fourteenth Amendment interpretation in no way depends on its historical failures. The amendment represents a commitment to series of principles rather than rules or even standards. And principles often do not lend themselves to definitive application. Writes Balkin, defending the notion that living constitutionalism is not inconsistent with constitutional fidelity:

The words equal protection of the laws mean pretty much the same as they did in 1868 when the Fourteenth Amendment was adopted. However, the best way to apply these words today may be very different from the way that the generation that adopted this text would have expected or even desired.<sup>66</sup>

Ronald Dworkin has long made a similar point, that the clauses of the Fourteenth Amendment “must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power.”<sup>67</sup> And, Dworkin continues, “[v]ery different, even contrary, conceptions of a constitutional principle . . . will often fit language, precedent, and practice . . . , and thoughtful judges must then decide on their own which conception does most credit to the nation.”<sup>68</sup> The problem is that original understanding is ineffective as constitutional authority approximately to the degree that its yield may fairly be described as incommensurable visions of the good. Originalists seek answers from the Father of his Nation, not from thoughtful judges.

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<sup>64</sup> Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 YALE L.J. 1501, 1525 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)).

<sup>65</sup> See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

<sup>66</sup> BALKIN, *supra* note 56, at 231.

<sup>67</sup> RONALD DWORKIN, *FREEDOM’S LAW* 7 (1997).

<sup>68</sup> *Id.* at 11.

Originalism is most persuasive when it is, to borrow from Robert Cover, “jurispathic.”<sup>69</sup> Cover worried that law may too easily be conceived narrowly as the search for the uniquely correct application of a norm. Rather, the law always states a concept of which there are multiple competing conceptions, distributed across diverse normative communities. If Balkin and Dworkin are correct, then the Fourteenth Amendment is fundamentally jurisgenerative: fidelity to the amendment precisely requires a judge to recognize the instability of legal norms over time and across communities. This attribute endows the Fourteenth Amendment with a pluralistic character—the nation’s marginalized persons may hold out hope of redeeming its offers of citizenship, of equality, of due process, without contesting the *legitimacy* of prevailing doctrine and without sacrificing fidelity to the Constitution. By contrast, originalism in its jurispathic form denies not just the normative correctness but the very legitimacy of alternative readings of the text. Its aim is to assimilate competing normative visions into a single descriptive reality. To apply effectively to the Fourteenth Amendment, this form of originalism must deny the amendment’s basic character.

### C. Memory

The Iraqi scholar Kanan Makiya has observed that “[r]emembering is a choice we make, a political act.”<sup>70</sup> The cultural and historical treatment of Bingham is perhaps a testament to the truth of the observation. The contours of American memories of Civil War and of Reconstruction have long been shaped both by the need of Southerners at least to justify and at best to glorify the actions of their forebears and the need of both North and South to reconstitute themselves as a united state. In telling the story of the significance within the Nation’s collective memory of the war and its aftermath, David Blight reminds us that the twin ends of Reconstruction were fundamentally at odds: “Americans faced an overwhelming task after the Civil War and emancipation: how to understand the tangled relationship between two profound ideas—*healing* and *justice*.”<sup>71</sup> Healing seemed to require acts and omissions of memory that justice did not permit.

The blood was barely dry at Appomattox when the central themes of the Lost Cause movement began to take hold in the South. In its first postbellum editorial after re-opening in December 1865, the *Richmond Dispatch* maintained that the war was fought over states’ rights; that Confederate soldiers had fought with “courage and constancy;” and that the Grays’ fate was sealed by “superior numbers and resources.” The editorial did not mention slavery or emancipation.<sup>72</sup>

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<sup>69</sup> See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>70</sup> Cite

<sup>71</sup> DAVID W. BLIGHT, RACE AND REUNION 3 (2001).

<sup>72</sup> *Id.* at 37–38.

Deep into the last century, the Lost Cause movement told the dominant story of the Civil War in the South: slavery was not the cause of the war; most slaves had a benevolent relationship with their masters; Robert E. Lee was a gentlemanly, near saintly hero; and the failure of Reconstruction owed to corrupt northern “carpetbaggers” who imposed graft and subjugation, preventing the civil South from achieving reconciliation in its own way.

The United Confederate Veterans and the United Daughters of the Confederacy formed history committees devoted to rebutting alleged biases of northern historians’ telling of the war and Reconstruction.<sup>73</sup> The leaders of the UDC gave speeches, wrote editorials, and endorsed Southern-friendly schoolbooks (while condemning all others), leading Blight to conclude that “[o]n a popular level [the UDC] may have accomplished more than professional historians in laying down for decades (within families and schools) a conception of a victimized South, fighting nobly for high Constitutional principles, and defending a civilization of benevolent white masters and contented African slaves.”<sup>74</sup> UDC-approved histories emphasizing, among other things, that “Reconstruction was the vicious oppression of an innocent South and the exploitation of ignorant blacks,” became the received common wisdom in the South, eventually promoted not just by explicitly partisan organizations but by state departments of education.<sup>75</sup>

The continuing influence of this intellectual history is reflected in recent controversies over the commemoration of Confederate History Month. From 1995 to 1997 Virginia Governor George Allen issued a proclamation in connection with the commemoration in which he referred to the war as “a four-year struggle for independence and sovereign rights;” to “the honorable sacrifices of [Virginia’s] leaders, soldiers and citizens to the cause of liberty;” and to the soldiers who “overwhelmed by insurmountable numbers and resources of their determined opponents, . . . returned to their homes and families to rebuild their communities in peace.”<sup>76</sup> The proclamation did not mention race or slavery, nor (needless to say) did it refer to Black Codes or the Ku Klux Klan, which was founded by Confederate veterans at the start of Reconstruction. Allen’s successor, Jim Gilmore, responding to criticisms of Allen’s proclamation, issued a less hagiographic proclamation for a “Month for Remembrance of the Sacrifices and Honor of All Virginians Who Served in the Civil War,” in which slavery was explicitly cited as a but-for cause of the war.<sup>77</sup> In response, the Virginia chapter of the Sons of Confederate Veterans issued a competing proclamation defending

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<sup>73</sup> *Id.* at 277

<sup>74</sup> *Id.* at 278.

<sup>75</sup> *Id.* at 282–83.

<sup>76</sup> Walker, Cite, 315–16.

<sup>77</sup> *Id.* at 323–24.

Virginia's participation in the war; referring to federal troops as "an invading army;" referring to Richmond as "the wartime home of our beloved President Jefferson Davis;" and rededicating itself to "teach[ing] the true history of the South to future generations."<sup>78</sup> Two successive Democratic administrations refused to issue any proclamations, but Republican Governor Bob McDonnell revived the practice in 2010, issuing a proclamation that, like Allen's, made no mention of slavery.<sup>79</sup>

The footprint of the Lost Cause version of the war and Reconstruction was not limited to the South. Amid the cottage industry in Civil War reenactments and histories it is easy to overlook the absence of similar recognition of Reconstruction. Reconstruction entailed military occupation of the South, coerced political communion between former masters and former slaves, and the enactment, under duress, of a fundamental reordering of the Constitution. Blight writes that "[d]uring Reconstruction, many Americans increasingly realized that remembering the war . . . became, with time, easier than struggling over the enduring ideas for which [its] battles had been fought."<sup>80</sup> At a ceremony commemorating the fiftieth anniversary of the Battle of Gettysburg, President Woodrow Wilson, flanked by a U.S. flag to his right and a Confederate flag to his left, delivered the following address:<sup>81</sup>

How wholesome and healing the peace has been! We have found one another again as brothers and comrades, in arms, enemies no longer, generous friends rather, our battles long past, the quarrel forgotten—except that we shall not forget the splendid valor, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes. How complete the union has become and how dear to all of us, how unquestioned, how benign and majestic, as state after state has been added to this, our great family of free men!<sup>82</sup>

The demands of national reconciliation required, at the expense of justice, a retelling of Reconstruction that regarded its costly and failed effort to achieve substantive emancipation for millions of former slaves as an arrogant mistake.

Through the middle of the twentieth century, the dominant narrative of Reconstruction was supplied by denizens of the Dunning School, after William

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<sup>78</sup> *Id.* at 327.

<sup>79</sup> In response to the controversy, McDonnell later revised the proclamation to include a discussion of slavery. He initially defended his omission by saying that he had "focused on the [issues he] thought were most significant for Virginia." Anita Kumar & Rosalind S. Helderman, *McDonnell Revives Storm Over Va.'s Confederate Past*, WASH. POST, Apr. 7, 2010, at A01.

<sup>80</sup> BLIGHT, *supra* note 71, at 31.

<sup>81</sup> *Id.* at 10-11

<sup>82</sup> *Id.* at 11.

Dunning, whose *Reconstruction, Political and Economic 1865-1877* tells a story of peace delayed by “radicals and carpet-baggers.”<sup>83</sup> We get a glimpse of the tenor of Dunning School Reconstruction history in the writings of the influential historian and native Alabamian Walter Fleming. On Fleming’s telling, the Black Codes in Southern states and the federal government’s Freedmen’s Bureau represented two “proposed solutions” to “the same problem”<sup>84</sup> of “guiding the freedmen into a place in the social order,”<sup>85</sup> and the former solution “might have succeeded if it had been given a fair trial.”<sup>86</sup> The Bureau itself was largely populated by “men of inferior ability and character, either blind partisans of the negro or corrupt and subject to purchase by the whites.”<sup>87</sup> Fleming was deeply dismissive of the radical Republican leadership in Congress. Thaddeus Stevens was “vindictive and unscrupulous;”<sup>88</sup> Charles Sumner “unpractical, theoretical, and not troubled by constitutional scruples;”<sup>89</sup> Senators Oliver P. Morton of Indiana and Benjamin Wade of Ohio “bluff, coarse, and ungenerous;” Senator George Boutwell of Massachusetts “fanatical and mediocre;” and Massachusetts Congressman Benjamin Butler “a charlatan and demagogue.”<sup>90</sup> The Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, made “[n]o serious effort . . . to ascertain the actual conditions in the South.”<sup>91</sup> Due in large part to failures of character among Republicans, “[s]carcely a measure of Congress during reconstruction was designed or received in a conciliatory spirit.”<sup>92</sup>

Fleming says that Reconstruction wreaked havoc on the South, especially in states with large black populations; these states felt the brunt of the failed policies because occupation meant their governments were controlled by “ignorant” and “corrupt” carpetbaggers and scalawags who retained power solely due to black enfranchisement and “could secure no support from the respectable elements of the electorate.”<sup>93</sup> Conditions for emancipated blacks in these and other Southern states declined because “[t]he serious matter of looking out for himself and his family and of making a living dampened the negro’s cheerful spirits.”<sup>94</sup> Ignorant, dispossessed, and vindictive, many blacks were led to

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<sup>83</sup> WILLIAM A. DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC 1865-1877*, at 341 (1907).

<sup>84</sup> WALTER LYNWOOD FLEMING, *THE SEQUEL OF APPOMATTOX* 89 (1919).

<sup>85</sup> *Id.* at 115.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 99.

<sup>88</sup> *Id.* at 122.

<sup>89</sup> *Id.* at 123.

<sup>90</sup> *Id.* at 125.

<sup>91</sup> *Id.* at 126.

<sup>92</sup> *Id.* at 280.

<sup>93</sup> *Id.* at 220-21.

<sup>94</sup> *Id.* at 274.



violence, leading whites with little choice but to found Ku Klux Klan orders. Fleming writes:

The Ku Klux movement . . . grew out of a general conviction among the whites that the reconstruction policies were impossible and not to be endured. . . . The people of the South were by law helpless to take steps towards setting up any kind of government in a land infested by a vicious element—Federal and Confederate deserters, bushwhackers, outlaws of every description, and negroes, some of whom proved insolent and violent in their newly found freedom.”<sup>95</sup>

Fleming writes that the Klan was simply a “primitive method[] of justice,”<sup>96</sup> motivated by “[t]he lawlessness of the negroes . . . and the disturbing influences of the black troops, of some officials of the [Freedmen’s] Bureau, and of some of the missionary teachers and preachers, [which] caused the whites to fear insurrections and to take measures for protection.”<sup>97</sup> W.E.B. DuBois, who was hardly afraid to throw a punch, criticized Fleming but said that, in comparison to other prominent historians of Reconstruction, his works “have a certain fairness and sense of historic honesty.”<sup>98</sup>

According to Eric Foner, the Dunning School retained its hold on “the popular imagination” until the 1960s.<sup>99</sup> We see its fingerprints in simplistic portrayals of blacks (in blackface) and the heroic cast of the Klan in the pathbreaking film *Birth of a Nation*.<sup>100</sup> We see its legacy in Margaret Mitchell’s depictions of blacks during Reconstruction as unbridled and apelike, and her description of the Klan as a “tragic necessity” in *Gone With the Wind*.<sup>101</sup> We see it in the robes of the Statue of Liberty, which obscure the broken shackles around Lady Liberty’s feet, a tribute to black emancipation deliberately hidden from view so as not to offend Southerners.<sup>102</sup> As Blight writes, “The memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a

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<sup>95</sup> *Id.* at 243–44.

<sup>96</sup> *Id.* at 264.

<sup>97</sup> *Id.* at 48. Woodrow Wilson offers a similar explanation for the rise of the Ku Klux Klan in V WOODROW WILSON, *A HISTORY OF THE AMERICAN PEOPLE* 58 (1931) (“The white men of the South were aroused by the mere instinct of self-preservation to rid themselves, by fair means or foul, of the intolerable burdens of governments sustained by the votes of ignorant negroes . . .”).

<sup>98</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, at 720 (1935).

<sup>99</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* xix–xx (2002).

<sup>100</sup> *Birth of a Nation*.

<sup>101</sup> MARGARET MITCHELL, *GONE WITH THE WIND* 914 (1936) (“Here was the astonishing spectacle of half a nation attempting, at the point of a bayonet, to force upon the other half the rule of negroes, many of them scarcely one generation out of the African jungles.”).

<sup>102</sup> See *Making the Case for the African-American Origins of the Statue of Liberty*, 27 J. BLACKS IN HIGHER EDUC. 65, 66 (2000).

developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War.”<sup>103</sup>

The Fourteenth Amendment is a central player in a drama the Nation has chosen to forget. This status undermines the amendment’s capacity to do the work asked of originalist history. Largely absent from or rendered in diminished form within the narratives we have long told about our national identity, the Fourteenth Amendment cannot derive authority from any status as a shared point of reference. We do not regard its moment of creation as ethically unambiguous, and so it is disabled in resolving the ethical ambiguity that is the stuff of hard cases. Indeed, to the extent that the Fourteenth Amendment is viewed differently in the North and in the South, its expressive tendency is to reinforce rather than resolve cultural division.<sup>104</sup> In diagnosing the absence of originalist arguments in affirmative action cases, for example, we might note that originalists often oppose affirmative action as a policy matter, but a more complete story would recall that the Freedmen’s Bureau—the prime exemplar of race-conscious governmental action during Reconstruction—was despised in the South.<sup>105</sup> For Southerners and for those educated within the Lost Cause tradition, the Bureau evokes illegality. Likewise, the Fourteenth Amendment itself, forced down the throat of the Southern political establishment, is neither a moment of pride nor of identity-formation for subsequent generations of white southerners. The Fourteenth Amendment is unlikely to resonate with many such people, and they are unlikely to claim it, or even to recognize it, as ethical authority.

### III

There are many varieties of originalism in the legal academy, and not all treat the Fourteenth Amendment with disproportionate neglect. The theoretical integrity reflected in some of those varieties is symptomatic, however, of the missing elements in their projects—the authoritarianism and narrative force that has enabled originalism to narrow the divide between professional and public constitutional discourse. Self-described originalists who give appropriate regard to the redemptive potential of the Fourteenth Amendment are not wrong as to hermeneutics, and they are often persuasive as to the best understanding of Fourteenth Amendment principles. Where they fail, and where I fear they must

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<sup>103</sup> BLIGHT, *supra* note 71, at 4.

<sup>104</sup> Cf. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PENN. L. REV. 1291 (2003).

<sup>105</sup> FLEMING, *supra* note 84, at 89. Mississippi Governor Benjamin Humphreys called the Freedmen’s Bureau “a hideous curse.” *Id.* at 90.

fail, is in articulating a basis for Fourteenth Amendment authority that is capable of bridging the gap between originalists and nonoriginalists.

It is fitting to begin with Jack Balkin, as Balkin's provocative work inspires this essay and the symposium of which it is part. Balkin has proposed what he calls "framework originalism," under which modern interpreters are bound to the semantic meanings of the Constitution's text and to the Constitution's choice of rules, standards, and principles, but are not bound by the original intentions or original expected applications of its drafters or ratifiers. According to Balkin, framework originalism fully embraces both originalism and living constitutionalism because "[f]idelity to original semantic meaning is consistent with a wide range of possible future constitutional constructions that implement the original meaning and that add new institutional structures and political practices that do not conflict with it."<sup>106</sup> Framework originalism "allows individuals in every generation to invoke the Constitution's text and principles and call upon the American people to restore and redeem the Constitution."<sup>107</sup> For Balkin, originalism is in effect the practice of constitutional fidelity, and so rightly exercised, originalism serves both redemptive and restorative narratives.

Balkin is dealing in semantics. He implicitly concedes that most originalists are not framework originalists<sup>108</sup> and he explicitly states that "[m]ost living constitutionalists are framework originalists, even if they do not believe in it."<sup>109</sup> This is no less than an admission from Balkin that he is speaking Esperanto while the rest of us are speaking English. That is not to say that Balkin does not offer valuable insights that undermine many of the basic theoretical assumptions of both originalists and living constitutionalists—perhaps we should all speak Esperanto—but it does mean that his message is likely to be lost in translation. The dichotomy between living constitutionalists and originalists is a fact about the world that cannot be understood in isolation from other ways in which people divide themselves ideologically and culturally. I do not take Balkin's intervention necessarily to conflict with the point that the choice between living constitutionalism and originalism as it exists in the (English-speaking) world reflects divergent understandings of American identity, and that constitutional method can serve as a language through which those understandings are coded into legal argument.

Akhil Amar is only occasionally described as an originalist, and that is so in large measure because his work is not susceptible to the charges described in this essay. Indeed, his most celebrated work, *The Bill of Rights*, is precisely a call for modern Americans to understand the ways in which the first ten amendments

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<sup>106</sup> BALKIN, *supra* note 56, at 231–32.

<sup>107</sup> *Id.* at 235.

<sup>108</sup> *Id.* at 230–31.

<sup>109</sup> *Id.* at 234.

must be understood through the lens of the Civil War and Reconstruction. The book is best known for its articulation of Amar’s theory of “refined incorporation,” under which the *fact* of incorporation is determined by the extent to which a right may be conceived in terms of the privileges or immunities of citizenship.<sup>110</sup> It has been less appreciated that the book also means to advocate that the meaning and scope of an incorporated right be understood with reference to the concerns that animated the Reconstruction generation. Amar suggests, for example, that “the very meaning of freedom of speech, press, petition, and assembly was subtly redefined in the process of being incorporated,” so that the paradigm case shifted from people like John Peter Zenger to people like Harriet Beecher Stowe (or, he might have said, Hinton Helper).<sup>111</sup>

Amar has gone further, though, to suggest that modern doctrine implicitly recognizes the subtle transformative work performed by incorporation even as the rhetoric of such doctrine cites the eighteenth-century framers. Thus, the significance of the abolitionist cause to Reconstruction understandings of free speech argues for a greater role for federal judges relative to juries in protecting First Amendment rights, and modern doctrine has evolved in this direction.<sup>112</sup> To the extent Amar is correct, his observations provide even greater support for the incongruity of originalist neglect of the Fourteenth Amendment. For to the extent that he is correct, originalists interpreting incorporated rights not only work with a text crafted during Reconstruction but they often advance “originalist” claims that, in fact but not in rhetoric, are deeply affected by the Fourteenth Amendment.

Amar is often described as a structuralist or a textualist rather than as an originalist, and Amar has not otherwise promoted himself. It should be clear that this labeling impulse is itself a symptom of the problem this article identifies: those who take the Fourteenth Amendment seriously, and who (as a consequence) disclaim the kind of clause-bound interpretation described in Part I, do not tend to be coded as actual originalists. It is worthwhile, however, to consider two additional examples of conservative originalist scholars who in recent years have engaged in inquiries that do not fit neatly into the patterns this article has described: Kurt Lash and Randy Barnett. Lash has devoted considerable attention to the drafting history of the Fourteenth Amendment,<sup>113</sup> and in a series of articles in the 1990s he sought expressly to demonstrate that the Free Exercise Clause and

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<sup>110</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS* 221 (2000).

<sup>111</sup> *Id.* at 236.

<sup>112</sup> *Id.* at 242. Amar notes, for example, that *New York Times v. Sullivan* relies on the (judge-empowering) Sedition Act as its paradigm negative precedent even as it announces a rule of decision—in a civil rights case, no less—that empowers judges rather than juries. *Id.* at 243.

<sup>113</sup> See Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 *GEO. L.J.* 329 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 *GEO. L.J.* 1241 (2010).

the Establishment Clause were understood quite differently by the Fourteenth Amendment ratifying generation than by the eighteenth-century ratifiers.<sup>114</sup> More recently, he has emphasized that when we discuss “incorporated” rights, “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.”<sup>115</sup>

Barnett, who has been in the vanguard of so-called “new” originalists, has only recently begun to devote attention to Fourteenth Amendment interpretation. In an article published earlier this year, Barnett canvassed abolitionist writings for evidence of the origins of section one of the amendment. He did so, however, not in the service of the view that many significant constitutional rights casually grounded in the Founding must instead (or in addition) be viewed in light of the original meaning of the Fourteenth Amendment, but rather to demonstrate that sophisticated antislavery constitutional arguments were advanced by nineteenth century abolitionists.<sup>116</sup> Barnett’s recent work is therefore consistent with my earlier insinuation that originalist attention to the Fourteenth Amendment is a matter of self-preservation: it aids the originalist cause to demonstrate that anti-Garrisonian arguments against a pro-slavery Constitution were well-grounded. Still, Barnett’s shift in focus may be viewed more charitably as a recognition of his own previously stated view that “[d]iscerning and applying the original meaning of the Fourteenth Amendment is a tricky business.”<sup>117</sup> His recent work may be but a preliminary and incremental step towards a bolder set of arguments.

I do not doubt the sincerity of either Barnett or Lash (nor, indeed, of Justice Scalia), and it is possible that their work is in the vanguard of a “new new originalism” that takes Reconstruction much more seriously. If this essay’s claims are correct, however, any scholar’s success at advancing a new version of originalism along these lines is likely thereby to render her framework less identifiably originalist. The best either Lash or Balkin can expect is that current originalists will concede the label but find another more compelling means of self-identification that better resonates with their ethical values.<sup>118</sup> Those whose

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<sup>114</sup> See Lash, *Free Exercise*, *supra* note 4; Lash, *Establishment Clause*, *supra* note 4. Specifically, according to Lash, the Reconstruction-era ratifiers believed that the Free Exercise Clause required accommodations from neutral laws of general applicability and that the Establishment Clause came to be viewed in individual rights terms, and not merely as a federalism provision.

<sup>115</sup> Lash, *supra* note 4, at 449.

<sup>116</sup> Randy E. Barnett, *The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEG. ANALYSIS 165 (2011).

<sup>117</sup> Randy E. Barnett, *Underlying Principles*, 24 CONST. COMM. 405, 411 (2007).

<sup>118</sup> There is evidence that something like this has already happened. Thomas Colby has argued that originalism has become intellectually respectable among academics only at the expense of the claims to judicial restraint that make it respectable among members of the public. See generally Colby, *supra* note 65. Divorcing original meaning from the original intent of the drafters, which is

interests tend toward the actual rather than merely the theoretical divides in constitutional argument will then, I predict, lose interest in writing about “originalism.”

## Conclusion

In one of the 2011 Republican presidential primary debates, the audience at the Ronald Reagan Presidential Library in Simi Valley, California cheered when questioner Brian Williams noted to Rick Perry that he had overseen 234 executions as Texas governor. The crowd reaction has been much criticized, but it broadly reflects a cultural divide that exaggerates policy differences. Even as strong majorities support both capital punishment and high standards of review for capital cases, a hierarchical, law-and-order orientation is, as Balkin would say, “nested” in opposition to an egalitarian, rights-focused orientation. Cheering executions does not so much engage a policy debate as announce a cultural affinity.

There may likewise be only marginal “policy” differences between the hermeneutic practices of originalism and living constitutionalism. But originalism does much more than assist in textual analysis; it, too, announces a cultural affinity. Those sharing that affinity are suspicious rather than solicitous of Reconstruction and the work of the Reconstruction-era Republicans. For Justice Thomas’s opinion in *Baze* to have addressed that era rather than the Founding would have sacrificed a significant measure of authority for his opinion. It also would have denied him the chance to give that era’s approach to law and order a resounding cheer.

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the major innovation of “new originalism,” made some theoretical sense but it made constitutional interpretation far more open-ended. It also separated originalism from the authority of the individuals most directly responsible for the American Revolution and the original Constitution. A quarter century after this innovation was announced by Justice Scalia, it remains rare for members of the public to substitute original meaning for original intent.