EUCLIDEAN TRADITIONALISM

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In Bruen *in 2022, the Supreme Court noted an "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)," as Akhil Amar and Kurt Lash have suggested. The difference between the traditions of 1791 and 1868 did not matter in* Bruen *nor in* Rahimi *two years later, but the issue is definitely on the Court's radar and will surely recur. Neither 1791 nor 1868, however, should be the temporal key for tradition-based readings of the application of Bill-of-Rights liberties to states. The relevant text of the Fourteenth Amendment—"the privileges or immunities of citizens of the United States"—is tied neither to the Bill of Rights, and thus 1791, nor to 1868. Modern technology sometimes requires the curtailment of liberties—the right to move slowly on a public road, for instance—universally recognized in a simpler time. Justice Sutherland explained this basic point about civil liberties compellingly for the Court in* Village of Euclid v. Ambler Realty Co. *in 1926.*

This Essay explains five problems each for both "1791ism" (the view that the Fourteenth Amendment requires states to abide by traditions of civil liberty prevalent seventy-seven years before the Fourteenth Amendment's adoption) and "1868ism" (the view that the Fourteenth Amendment requires states to abide by the meanings ascribed to the text of the Bill of Rights seventy-seven years after that text was adopted as a restriction on the federal government). 1791ism (1) would be a very odd policy to adopt, (2) ignores the difference in responsibilities between the federal and state governments that make different rights appropriate, (3) relies too heavily on a First Congress too busy to comprehensively survey civil liberty, (4) lacks support during Reconstruction among proponents of the Fourteenth Amendment, and (5) can only work textually if federally enumerated constitutional rights are a ceiling as well as a floor, inconsistent with the right to make contracts being a privilege of citizens of the

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United States, as it very clearly was under the Civil Rights Act of 1866. 1868ism, on the other hand, (1) is also a bad idea, as Euclid *explains, (2) is implausible with respect to the text of the Fourteenth Amendment, which lacks any temporal language like "current" or "now," (3) is implausible with respect to the text of the Bill of Rights, which, like the rest of our Constitution, expressed its meaning at the time of its adoption, not seventy-seven years later, (4) is inconsistent with the Reconstructors' view that the Civil Rights Act of 1866 was merely a first step, not a final one, and (5) does not fit the acknowledgement of emergent traditions elsewhere. Rather than focusing on 1791 or 1868, the Court's protection of nationwide civil liberties should look, as Justice Kavanaugh suggests in his* Bruen *concurrence, at the prevalence of rights today. Issues remain of how long a consensus on rights must last to count as privileges of Americans generally, but at a minimum, the consensus must be alive today.*

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I. INTRODUCTION: 1791 VERSUS 1868

In *New York State Rifle & Pistol Ass'n v. Bruen* in 2022,[1] the Supreme Court adopted a tradition-based approach to the Second Amendment, rejecting the means-ends scrutiny that lower courts had used for the Second Amendment after *District of Columbia v. Heller* in 2008,[2] and which the Court has used in many areas of Equal Protection and First Amendment law.[3] The Court noted its concern with the views of Akhil Amar and Kurt Lash, i.e., the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)."[4] The Court said the Amar-Lash 1868-focused proposal was not immediately relevant because "the public

1 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

2 District of Columbia v. Heller, 554 U.S. 570 (2008).

3 *See Bruen*, 142 S. Ct. at 2125–26 ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.); *see also, e.g.*, *id.* at 2176–77 (Breyer, J., dissenting); *cf.* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[P]revious cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Christopher R. Green, Equal Citizenship Yes, Intermediate Scrutiny No (Jan. 17, 2026) (unpublished manuscript), https://ssrn.com/abstract=4958163 [https://perma.cc/S3TU-2FAW] (explaining six problems for intermediate scrutiny but arguing that, as citizens, women are entitled to the impartial attention of the state toward their interests as beneficiaries of the state's actions as trustees); United States v. Rahimi, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring) ("Some say that courts should determine exceptions to broadly worded individual rights, including the Second Amendment, by looking to policy. Uphold a law if it is a good idea; strike it down if it is not. True, the proponents of a policy-based approach to interpretation of broadly worded or vague constitutional text usually do not say so explicitly (although some do). Rather, they support a balancing approach variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny. Whatever the label of the day, that balancing approach is policy by another name. It requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important."); *id.* at 1921 ("The Court 'appears to have adopted' heightened-scrutiny tests 'by accident' in the 1950s and 1960s in a series of Communist speech cases, 'rather than as the result of a considered judgment.'" (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in judgment))); *id.* at 1921 n.7 ("The Court has articulated a heightened-scrutiny test in some pockets of free-speech jurisprudence. But even when invoking heightened scrutiny in that context, the Court still often relies directly on history."); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080 (2011) ("The levels of scrutiny are essentially balancing tests . . . .").

4 *Bruen*, 142 S. Ct. at 2138 (first citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xiv, 223, 243 (1998); and then quoting Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022)).

understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."[5] Justice Barrett expressed skepticism for the Amar-Lash view because "if 1791 is the benchmark . . . Reconstruction-era history . . . is simply too late," and because 1791, not 1868, is most important for the First Amendment.[6] The Court reiterated its agnosticism on the 1791 versus 1868 issue two years later in *United States v. Rahimi* in 2024.[7] Justice Jackson called the issue one of several "[e]xtremely pertinent inquiries" that "await resolution."[8]

While it is good to see the Court engage with scholarship on the original meaning of the Fourteenth Amendment, it is a mistake to frame the issue of tradition-infused readings of the Bill of Rights as a decision between 1791 and 1868. That dichotomy obscures the key interpretive issue because it misreads how the Fourteenth Amendment's textual principle of equal civil rights for all Americans relates to the incorporation of the Bill of Rights. Neither 1791 nor 1868 understandings of the 1791 words of the Bill of Rights should be the key for traditionalism with respect to states, because the relevant text of the Fourteenth Amendment—"the privileges or immunities of citizens of the United States"[9]—is tied neither to the Bill of Rights and thus to 1791, nor to the privileges presently existing in 1868. Rather, it is best read as supporting the approach suggested in Justice Kavanaugh's opinion in *Bruen*,[10] as well as the approach of many of the incorporation cases from the 1960s,[11] that requires a continuing consensus in favor of a

5 *Id.*

6 *Id.* at 2163 (Barrett, J., concurring) (citing rejection of mid-nineteenth-century evidence in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), because a tradition that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" (omission in original) (quoting *Espinoza*, 140 S. Ct. at 2258–59)).

7 *See Rahimi*, 144 S. Ct. at 1898 n.1.

8 *Id.* at 1929 n.4 (Jackson, J., concurring).

9 U.S. CONST. amend. XIV, § 1. For my explanations why the Court's official vehicle of incorporation, the Due Process Clause, cannot do the job, see generally Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73 (2017); Christopher R. Green, *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1147 (2019); and Christopher R. Green, *Twelve Problems with Substantive Due Process*, 16 GEO. J.L. & PUB. POL'Y 397 (2018).

10 *See Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("[T]he Court's decision does not affect the existing licensing regimes—known as 'shall-issue' regimes—that are employed in 43 States."); *id.* ("The Court's decision addresses only . . . unusual discretionary licensing regimes . . . ."); *id.* (discussing "New York's outlier may-issue regime"); *id.* at 2162 (referring three separate times to "43 States").

11 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 345 (1963) ("Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now

right for Americans today as a precondition for requiring outliers to come in line.[12] Justice Breyer was right about this point in his *McDonald v. City of Chicago* dissent: "[T]his Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration. Rather, the Court has either explicitly or implicitly made clear in its opinions that the right in question has remained fundamental over time."[13]

Under an outlier-status-based view of the Fourteenth Amendment, rights universally recognized as proper at the Founding or Reconstruction, but which very few or no states recognize today, are not privileges of American citizens today.[14] Modern technology sometimes requires the curtailment of liberties—the right to move slowly on a public road, for instance—that everyone recognized in a simpler time.

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be overruled. We agree." (quoting Brief for the State Government Amici Curiae at 24, *Gideon*, 372 U.S. 335 (1963) (No. 155))) (discussing Betts v. Brady, 316 U.S. 455 (1942), *overruled by*, *Gideon*, 372 U.S. 335); Duncan v. Louisiana, 391 U.S. 145, 154 (1968) ("The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so."); Pointer v. Texas, 380 U.S. 400, 404 (1965) ("[T]he right of confrontation [is] . . . '[o]ne of the fundamental guarantees of life and liberty,' and . . . 'guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.'" (third alteration in original) (quoting Kirby v. United States, 174 U.S. 47, 55–56 (1899))); Klopfer v. North Carolina, 386 U.S. 213, 225–26 (1967) ("That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens." (footnote omitted)); Benton v. Maryland, 395 U.S. 784, 795 (1969) ("Today, every State incorporates some form of the prohibition in its constitution or common law."); Griffin v. California, 380 U.S. 609, 611 n.3 (1965) ("The overwhelming consensus of the States . . . is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, 'an unwarrantable line of argument.'" (quoting State v. Howard, 14 S.E. 481, 483 (S.C. 1892))).

12 *See supra* notes 10–11 and accompanying text.

13 McDonald v. City of Chicago, 561 U.S. 742, 917 (2010) (Breyer, J., dissenting). Given the repeated emphasis on consensus today in earlier incorporation cases, it is quite remarkable that the Court relied only on the 22-15 split in state constitutional rights to keep and bear arms in 1868, *see id.* at 777, rather than the 44-6 split that exists today, which appeared in many of the briefs in *McDonald*, *see, e.g.*, Petitioners' Brief at 69, *McDonald*, 561 U.S. 742 (No. 08-1521); Brief of the Maryland Arms Collectors' Association, Inc., as Amicus Curiae in Support of Petitioners at 28, *McDonald*, 561 U.S. 742 (No. 08-1521), and which Justice Scalia even mentioned at oral argument ("I believe something like 44 States currently have in their constitutions protection of the right to bear arms."), Transcript of Oral Argument at 48, *McDonald*, 561 U.S. 742 (No. 08-1521).

14 For a general defense of such an interpretation, integrating it with a requirement of equal citizenship, see CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015).

Such an approach was most fully explained compellingly by the Court in 1926, in Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.*[15] The Court confronted and generally upheld zoning laws, though they had not existed at the time of the Fourteenth Amendment.[16] Why was 1868 not the proper measure of the constitutional rights of Americans? Despite the fact that Justice Sutherland was famously and steadfastly opposed to "elasticity" for constitutional *meaning*,[17] he allowed that a new sort of regulation, emerging only decades after the Fourteenth Amendment, could nonetheless be constitutional. Here is his explanation for the Court:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago [(note that Justice Sutherland writes fifty-eight years after the adoption of the Fourteenth Amendment)], probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the

15 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

16 *See id.* at 386–87, 396–97. Two years later, the Court struck down a more extreme zoning ordinance in *Nectow v. City of Cambridge*. *See* Nectow v. City of Cambridge, 277 U.S. 183, 185, 188–89 (1928) (noting an ordinance "of the same general character" as the one in *Euclid*, *id.* at 185); *see also id.* at 188 ("The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.").

17 In addition to the paragraph that follows, which opposes the elasticity of meaning, Justice Sutherland echoed Thomas Cooley in rooting the unchanging nature of constitutional meaning in the Article VI oath. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting) ("[A] court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." (omission in original) (emphasis omitted) (quoting 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 124 (Walter Carrington ed., Little, Brown & Co., 8th ed. 1927))); *see also* U.S. CONST. art. VI, cl. 3.

> advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.[18]

Euclid is based on the simple idea that times change, and technology matters for the proper scope of civil liberty. Even a uniform consensus among states in 1868 that zoning interferes unconstitutionally with property rights, the Court says, was not binding in 1926.[19] And this from one of the "Four Horsemen"![20]

This Essay's next two Parts explain five problems each for "1791ism" and "1868ism." Our goal is to assess what criterion was expressed in context by the words of the Fourteenth Amendment, particularly "the privileges or immunities of citizens of the United States." Like Socrates interrogating Euthyphro about piety, I assume that this criterion for what makes privileges of citizens of the United States to be such constitutional privileges is unitary: that there is a single property of a right that renders it a constitutional right of citizens of the United States under the Fourteenth Amendment.[21] Is that criterion

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18 *Euclid*, 272 U.S. at 386–87. For much, much more on the distinction here between meaning and application, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 575–76 (2006).

19 *See Euclid*, 272 U.S. at 386–87.

20 Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559 (1997) ("'Outlined against red velvet drapery on the first Monday of October, the Four Horsemen rode again. In dramatic lore they are known as Famine, Pestilence, Destruction, and Death. These are only aliases. Their real names are Van Devanter, McReynolds, Sutherland, and Butler. They formed the crest of the reactionary cyclone before which yet another progressive statute was swept over the precipice yesterday morning as a packed courtroom of spectators peered up at the bewildering panorama spread across the mahogany bench above.' Or so Grantland Rice might have written, had he been a legal realist. For more than two generations scholars have seen the Four Horsemen as far right, reactionary, staunchly conservative apostles of laissez-faire and Social Darwinism. And with good reason. . . . One can hardly avoid coming away from these and other decisions with the impression that these were men fanatically devoted to property rights and callously indifferent to the commonweal." (footnotes omitted)); *cf.* Grantland Rice, *Cadets Prove No Match for Speedy Backs*, S. BEND TRIB., Oct. 19, 1924, at 1.

21 *Cf.* PLATO, *Euthyphro*, *in* 2 THE DIALOGUES OF PLATO 65, 79–80 (photo reprt. 1931) (B. Jowett trans., 3d ed, London, Humphrey Milford 1892) (c. 400 B.C.E.).

tied to the original meaning of the Bill of Rights, on the one hand, or to civil liberties prevalent in 1868, on the other? I say no on both counts.

Part II criticizes 1791ism: the view that for rights in the Bill of Rights, the Fourteenth Amendment requires states to abide by the traditions of civil liberty prevalent seventy-seven years earlier, because "privileges or immunities of citizens of the United States" means "privileges that constitutionally restrain the federal government." First, 1791ism would be a very odd policy to adopt. Even if sometimes it might be a good idea to "stand[] athwart history, yelling Stop,"[22] it would be quite surprising if yelling "Back up Seventy-Seven Years!" were good general advice with respect to states' views on religion, free speech, gun rights, search and seizure, and criminal procedure. Second, 1791ism blurs the difference in responsibilities between the federal and state governments, as Justices Jackson and Harlan explained without adequate reply. The sorts of rights one needs with respect to a federal government of enumerated powers—and no general power over education or labor conditions—are very different from those one needs with respect to states that have been forced to emancipate large populations. Third, 1791ism relies too heavily on a First Congress that had no time to comprehensively survey civil liberty, or even to avoid mistakes like that in the proposed but unratified Second Amendment,[23] which was impossible to satisfy when the population of America

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> [Socrates:] I adjure you to tell me the nature of piety and impiety . . . . What are they? Is not piety in every action always the same? and impiety, again—is it not always the opposite of piety, and also the same with itself, having, as impiety, one notion which includes whatever is impious?
>
> [Euthyphro:] To be sure, Socrates.
>
> [Socrates:] And what is piety, and what is impiety?
>
> [Euthyphro:] Piety is doing as I am doing . . . .
>
> . . . .
>
> [Socrates:] Remember that I did not ask you to give me two or three examples of piety, but to explain the general idea which makes all pious things to be pious. Do you not recollect that there was one idea which make the impious impious, and the pious pious?
>
> [Euthyphro:] I remember.
>
> [Socrates:] Tell me what is the nature of this idea, and then I shall have a standard to which I may look, and by which I may measure actions, whether yours or those of any one else, and then I shall be able to say that such and such an action is pious, such another impious.

Id.

22 William F. Buckley, Jr., *Publisher's Statement*, NAT'L REV., Nov. 19, 1955, at 5.

23 *See infra* notes 48–51 and accompanying text.

was between eight and ten million people. Fourth, 1791ism had no support during Reconstruction among proponents of the Fourteenth Amendment. No one at all suggested, in so many words, going back to the Bill of Rights and other enumerated limits on the federal government for a comprehensive statement of the privileges of citizens of the United States until Democratic Senator Allen Thurman—a firm opponent of Reconstruction and the Fourteenth Amendment—proposed it on February 6, 1872. Fifth, 1791ism can only work textually if federally enumerated constitutional rights are both a ceiling as well as a floor—if "privileges or immunities of citizens of the United States" just *means* "privileges expressed against the federal government in the constitutional text." But that means leaving out the very first privilege of citizens of the United States set out in the Civil Rights Act of 1866: the freedom of contract, lying at the core of the free-labor-ideology Republicans insisted that the South respect for the freedmen.

Part III, on the other hand, targets 1868ism: the view that the Fourteenth Amendment requires states to abide by the meanings ascribed to the 1791 Bill of Rights text at the time the Fourteenth Amendment itself was adopted. First, 1868ism is also a bad idea as a policy matter. It is not *quite* as strange as the demand in 1791ism that states go back seventy-seven years, but a demand that progress in civil liberties stop, adopted in the middle of the century in which America and the rest of the world began to see continuous technological advancement, is still pretty strange. *Euclid*'s argument about traffic laws, quoted above,[24] is compelling. Second, 1868ism is implausible with respect to the text of the Fourteenth Amendment, which lacks any temporal language like "current" or "now." The Northwest Ordinance was protected by the limit in the pre-1808 slave-trade protection to states "now existing"; Congress was allowed to create the people of Ohio as an entirely free people because in 1788 Ohio was not a state "now existing."[25] By contrast, the Fourteenth Amendment protects privileges of Americans that will exist in the future, not just privileges "now existing" in 1868. Third, 1868ism is not a sensible way to read the Bill of Rights of 1791. The Bill of Rights was written in the language of the late eighteenth century, not the middle nineteenth century. Just as "now existing" in Article I, Section 9, Clause 1[26] excludes Ohio because its constitutional meaning is what the term expressed at the time of its adoption, not later on, "the right . . . to keep and bear Arms"[27] and the rest of the Bill of Rights express meaning at the time of their adoption

24 *See supra* note 18 and accompanying text.

25 U.S. CONST. art. I, § 9, cl. 1; *see* 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 375–81 (John C. Fitzpatrick ed., 1933); *cf.* Enabling Act of 1802, ch. 40, 2 Stat. 173.

26 U.S. CONST. art. I, § 9, cl. 1.

27 *Id.* amend. II.

as part of the Constitution. Fourth, 1868ism is inconsistent with the Reconstructors' view that the Civil Rights Act of 1866 was merely a first step. They explained this view many times when they moved on from the freedom of contract to the rights in the Civil Rights Act of 1875, like common carrier rights and, in earlier drafts, education. Fifth, by excluding new privileges of citizens of the United States 1868ism does not fit the acknowledgement of emergent traditions elsewhere, for instance Justice Scalia's view of traditionalism in *Burnham v. Superior Court*.[28]

The concluding Part IV considers, briefly, the temporal thickness of Fourteenth Amendment rights. 1791ism and 1868ism both assume that the privileges of citizens of the United States are anchored, definitionally, in a relatively short slice of time—either 1791 or 1868. I agree with this assumption, but think that *today*, rather than either of those dates, should ground such rights' status as constitutional privileges of American citizens. However, the common small-time-slice assumption could be wrong if it takes longer for something to count as a privilege of citizens of the United States. Future work should consider this issue in more detail.

II. FIVE PROBLEMS FOR 1791ISM

A. The Strangeness of "Go Back Seventy-Seven Years!"

The Reconstructors who adopted the Fourteenth Amendment were, of course, admirers of the Founders and of those like James Madison and others in the First Congress who wrote the Bill of Rights.[29] But they were not so enamored of them that they wanted to go back to the state of civil liberty of several generations earlier. Republicans had long sought to put slavery on the "course of ultimate extinction,"[30] and had now achieved their aim; regressing to the state of civil liberty of the Founding generation, rather than consolidating the progress made during intervening generations, would be quite unexpected. If the Fourteenth Amendment text were clear about requiring states to respect rights that were prevalent in 1791, of course, its adopters were at liberty to adopt a very strange rule; policy considerations are distinct

28 Burnham v. Superior Ct., 495 U.S. 604 (1990) (plurality opinion).

29 *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 183 (1866) (statement of Rep. William D. Kelley) ("I was brought up in the Democratic party. I honor and adhere most loyally to the teachings of its fathers and early leaders, and gladly go as to a pure fountain, with which I am thoroughly familiar, to the writings of James Madison for guidance on points like these."); *id.* at 1093 (statement of Rep. John Bingham) ("The words of Madison cited are very significant . . . .").

30 Abraham Lincoln, A House Divided: Speech at Springfield, Illinois (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953).

from interpretive ones. In cases where the text is imperfectly clear, though, the strangeness of a proposed interpretation can help resolve ambiguity.[31]

B. Enumerated Federal Power Justifies Different Rights

Independent of the wisdom in general of jumping back in time seventy-seven years to anchor civil liberties against states, the setting for the Bill of Rights was very different from that of Reconstruction. Because the federal government had particular limited duties and powers, while states retained broad, unspecified portfolios, the rights needed at the state level were often quite different from those needed nationally. The Philadelphia Convention did not guard against the threat of national tyranny chiefly by specifying rights that the national government could not infringe, but instead by separating power among its branches and, critically, enumerating federal powers. The Antifederalists ultimately won the argument about whether a constitutional list of rights would also be helpful in that design, but even once Federalists agreed to support a constitutional enumeration of rights, that list of rights was only one part of a larger machine for promoting freedom, and not its most important part. That is why Article I, Section 9, limiting the federal government, only partly overlapped with Article I, Section 10, limiting states.[32] Neither level of government could, under the original Constitution, grant titles of nobility[33] or pass bills of attainder or ex post facto laws;[34] only the federal government is restricted regarding habeas corpus,[35] and only states are restricted regarding the impairment of contracts.[36] Supplements to Article I, Section 10 were rejected during the drafting of the Bill of Rights;[37] only rights appropriate to a limited-power federal government made the cut. *Barron v. Baltimore* confirmed in 1833 that the Bill of Rights was only an addition to Article I, Section 9, not Article I, Section 10.[38] Even if Americans' attitude toward government responsibilities had shifted by the time of Reconstruction, so that federal and state responsibilities were seen as closer than they had been understood in 1791, that later change in attitude would not act retroactively to change the collection

31 *See generally, e.g.*, Christopher R. Green, *Moral Reality as a Guide to Original Meaning: In Defense of* United States v. Fisher, 14 J. CHRISTIAN LEGAL THOUGHT 35 (2024).

32 *Compare* U.S. CONST. art. I, § 9, *with id.* § 10.

33 *See id.* § 9, cl. 8; *id.* § 10, cl. 1.

34 *See id.* § 9, cl. 3; *id.* § 10, cl. 1.

35 *See id.* § 9, cl. 2.

36 *See id.* § 10, cl. 1.

37 *Compare* 1 ANNALS OF CONG. 435 (1789) (statement of Rep. James Madison), *with* U.S. CONST. art. I, § 10.

38 *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 248–50 (1833).

of words adopted in 1791 as an auxiliary safeguard for a limited-responsibility federal government into an appropriate catalogue of basic rights of citizens of all governments. Such a change in attitude might justify writing a new bill of rights for all levels of government, but it certainly would not change the nature of the old one.

Justice Jackson's dissent in the 1952 group libel case, *Beauharnais v. Illinois*, explained well why states' more general responsibility to protect reputations justified a looser rule than made sense for Congress:

> The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.
>
> As a limitation upon power to punish written or spoken words, Fourteenth Amendment "liberty" in its context of state powers and functions has meant and should mean something quite different from "freedom" in its context of federal powers and functions.[39]
>
> . . . .
>
> More than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws. We are justified in assuming that the men who sponsored the Fourteenth Amendment in Congress, and those who ratified it in the State Legislatures, knew of such provisions then in many of their State Constitutions. Certainly they were not consciously canceling them or calling them into question, or we would have some evidence of it. Congresses, during the period while this Amendment was being considered . . . , approved Constitutions of "Reconstructed" States that expressly mentioned state libel laws, and also approved similar Constitutions for States erected out of the federal domain.
>
> Certainly this tolerance of state libel laws by the very authors and partisans of the Fourteenth Amendment shows either that they were not intending to incorporate the First Amendment or that they believed it would not prevent federal libel laws. Adoption of the incorporation theory today would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments. . . .
>
> The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is

39 Beauharnais v. Illinois, 343 U.S. 250, 288, 292–95 (1952) (Jackson, J., dissenting) (footnotes omitted).

> predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as protection of interstate commerce. When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> For these reasons I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power.[40]

Justice Jackson's views echoed Justice Holmes and Justice Brandeis's views in *Gitlow v. New York*:

> The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment . . . although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.[41]

Later, Justice Jackson was himself echoed, repeatedly, by Justice Harlan,[42] without any substantive rejoinder from the Court.[43]

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40 *Id.* at 292–95 (footnotes omitted).

41 Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., joined by Brandeis, J., dissenting).

42 *See, e.g.*, Roth v. United States, 354 U.S. 476, 503–07 (1957) (Harlan, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 678–82 (1961) (Harlan, J., dissenting); Gideon v. Wainwright, 372 U.S. 335, 349–52 (1963) (Harlan, J., concurring); Malloy v. Hogan, 378 U.S. 1, 21–27 (1964) (Harlan, J., dissenting); Pointer v. Texas, 380 U.S. 400, 408–09 (1965) (Harlan, J., concurring in result); Washington v. Texas, 388 U.S. 14, 23–25 (1967) (Harlan, J., concurring in result); Duncan v. Louisiana, 391 U.S. 145, 173–82 (1968) (Harlan, J., dissenting); Benton v. Maryland, 395 U.S. 784, 808–09 (1969) (Harlan, J., dissenting); Williams v. Florida, 399 U.S. 78, 128–34 (1970) (Harlan, J., concurring in result); *see also, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring).

43 *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (noting the Court's rejection of the view that Justice Jackson and Justice Harlan "advanced forcefully," but not answering their arguments); McDonald v. City of Chicago, 561 U.S. 742, 784 (2010) (plurality opinion) (noting that Justice Harlan argued "repeatedly and eloquently" and that he "fought a determined rearguard action," but that he failed to persuade the Court, and again, failing to answer Justice Jackson and Justice Harlan's argument about the difference between state and federal responsibilities).

C. The First Congress Was Too Busy to Comprehensively Canvass Civil Rights

This objection, I should say up front, is the weakest of the five. But it has some weight. At the Philadelphia Convention, George Mason—himself the author of Virginia's May 1776 Declaration of Rights—pushed for inclusion of a similar declaration at the federal level.[44] Delegates urged that it was too hard to do properly.[45] Antifederalists like Melancton Smith in the New York ratifying convention eventually secured promises from Federalists that they would seek a bill of rights once the new government was operational,[46] and Madison overcame James Monroe to win election to Congress by promising one as well.[47] But the First Congress in 1789 was, like the Philadelphia Convention, beset by many other distractions, and independent of the vast differences in federal and state responsibilities, we should be skeptical that the First Congress is the best guide for a comprehensive assessment of our most important rights.

The hastiness of Congress in drafting and passing the Bill of Rights is particularly evident in the fact that one of its proposals contained contradictory requirements, which probably caused its failure of ratification.[48] The original Second Amendment proposed by Congress regulated the size of the House, requiring steadily increasing minimum numbers of Representatives until the relevant American population reached 8,000,000 (200 representatives of 40,000 constituents each).[49] But then the proposal imposed two requirements that would be contradictory until the population reached 10,000,000. One

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44 *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587–88 (Max Farrand ed., 1911); Gary Williams, *George Mason and the Bills of Rights*, FOUND. FOR ECON. EDUC. (May 1, 1992), https://fee.org/articles/george-mason-and-the-bills-of-rights/ [https://perma.cc/5SMD-8GA4].

45 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 44, at 588 (Roger Sherman opposed a bill of rights, stating: "There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted."); *id.* at 587 (Nathaniel Gorham stated: "It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.").

46 *See* John P. Kaminski, *Restoring the Grand Security: The Debate over a Federal Bill of Rights, 1787–1792*, 33 SANTA CLARA L. REV. 887, 911–12 (1993).

47 *See* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 335–36.

48 *See* H.R. Con. Res. 3, 1st Cong., 1 Stat. 97, 97 (1789) (enacted) ("[T]here shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.").

49 *See* H.R. Con. Res., 1 Stat. at 97 (enacted).

requirement was that the number of representatives would stay at least 200.[50] The final requirement said, however, "nor *more* than one Representative for every fifty thousand persons."[51] That meant that if the population were 8,000,000, the House would be capped at 160 representatives, and only once 10,000,000 constituents were available could there simultaneously be at least 200 representatives, but no more than one per 50,000 constituents.[52] My point here is not so much to find fault with the First Congress. But if we recognize how taxed the First Congress's bandwidth was, we should be particularly careful ourselves not to read the Fourteenth Amendment to push the Bill of Rights into new untested territory outside its design conditions.

D. The Bill-of-Rights-Only View of the Privileges or Immunities Clause Was a New Democratic Idea in February 1872

On February 6, 1872, Democratic Senator Allen Thurman unveiled a new idea: that the "privileges or immunities of citizens of the United States" meant all and only rights set out explicitly in the document as limits on the federal government.[53] Accordingly, rights related to education and common carriers, which Republicans wanted to desegregate in the precursors of the Civil Rights Act of 1875,[54] were outside the Fourteenth Amendment.[55] Before Senator Thurman, the idea had not been broached. Indeed, two weeks earlier, the incorporation-only idea had not even occurred to Senator Thurman himself; he said that the reason why "make or enforce" was included in the Privileges or Immunities Clause was to prevent states from enforcing preexisting

50 *See id.*

51 *Id.* (emphasis added).

52 *Id.*

53 U.S. CONST. amend. XIV, § 1; *see* CONG. GLOBE, 42d Cong., 2d Sess. app. at 26 (1872) (statement of Sen. Allen Thurman) ("[T]he rights of the citizen, as such, are found in the Constitution."). For later similar Democratic suggestions, see *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209–10 (1871) (intimating the existence of "strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States."), *noted in Against Mixed Schools in Ohio*, EVENING STAR (D.C.), May 8, 1872, at 1 (noting that the Ohio Supreme Court's decision was "yesterday") *and in Mixed Schools*, OHIO STATESMAN, May 8, 1872 at 4 (identifying 1872 as year of opinion); 2 CONG. REC. 342–43 (1873) (statement of Rep. James Beck); 3 *id.* app. at 117–20 (1875) (statement of Rep. Eppa Hunton); 2 *id.* at 383–85 (1874) (statement of Rep. Roger Mills); *id.* app. at 1–3 (1874) (statement of Rep. Milton Southard); and *id.* app. at 233–44 (1874) (statement of Sen. Thomas Norwood).

54 Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

55 CONG. GLOBE, 42nd Cong. 2d Sess. app. 26 (1872) (statement of Sen. Allen Thurman) ("[W]here is there in the Constitution of the United States any such right guaranteed to a citizen as that he shall go into a common school in company with every other child that goes to that common school? Where is there any provision in the Constitution that gives him a right to sit upon a jury in a State court?").

laws barring testimony on the basis of race.[56] The right to testify, of course, was not enumerated as a limit on the federal government, but Senator Thurman very clearly identified it in January as a privilege of citizens of the United States, contrary to his view two weeks later.

References to applying the Bill of Rights against the states by Republicans do not take the enumeration of a right as limiting the federal government as a definitional criterion. Senator Jacob Howard's introduction to the Senate, for instance, mentioned the Bill of Rights as an addendum to *Corfield v. Coryell*, the famous explanation in 1825 of Article IV.[57] After quoting *Corfield*, Senator Howard noted:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution . . . .[58]

It is natural to read Senator Howard's reference to *Corfield* as the definitional model for Fourteenth Amendment privileges and the reference to the Bill of Rights as an application of the *Corfield* standard. This, for instance, was how future Justice Woods, informed by correspondence with Justice Bradley, read the Privileges or Immunities Clause in his *United States v. Hall* circuit court case of 1871[59]:

> What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of

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56 *Id.* at 526 (statement of Sen. Allen Thurman) (internal quotation marks omitted) ("Why is that word 'enforced' put in there [(i.e., in the Privileges or Immunities Clause)]? It was put in for a twofold reason: first, because there were already on the statute books of some of the States enactments that did discriminate between different classes of citizens: that is, between those who were made citizens by this amendment and those who were formerly citizens. For instance, in the State of Kentucky, at the time this amendment was passed, a negro man could not testify against a white man; and I am told that the State law on that subject has not been repealed yet. Very well; here, then, comes in this constitutional provision that Kentucky shall not enforce that law. It was because of these statutes that were upon the statute-books of some of the States, already made, not to be made, that this provision was put in that the States shall not enforce any law which makes any such discrimination."); *see also* U.S. CONST. amend. XIV, § 1.

57 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230); U.S. CONST. art. IV, § 2, cl. 1; *see* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard). Although *Corfield* is often cited as an 1823 decision, the opinion was not issued until 1825. *See* Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019); *see also* McBurney v. Young, 569 U.S. 221, 229 (2013) (citing 1825 as *Corfield*'s year of decision).

58 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard).

59 United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

> all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.[60]

Senator Howard himself used Article IV as his basis in 1869 for explaining the lack of voting rights under the Fourteenth Amendment.[61] Another frequently-cited piece of evidence on the Bill of Rights, Representative John Bingham's 1871 speech, says only that the rights of citizens of the United States are "chiefly defined"—not *exclusively* or *exhaustively* defined, but only "chiefly"—by enumerated rights against the national government.[62] Like Senator Howard, Representative Bingham also took *Corfield*, not the Bill of Rights, as his guide in explaining why voting rights were not included in the Fourteenth Amendment.[63] Contrary to Democrats like Senator Thurman, Representative Bingham in 1872 voted in favor of civil rights legislation outside the enforcement of the Bill of Rights, though the evidence is relatively thin.[64]

Indeed, the lack of enumerated voting rights in the Constitution would have offered Republicans a very straightforward answer to a persistent Democratic critique of the Fourteenth Amendment. Democrats alleged repeatedly that Section 1 would make the freedmen voters,[65] and Republicans answered that it covered only civil rights, not political rights; women and children were citizens entitled to civil rights, but

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60 *Id.* at 81 (citation omitted) (citing *Corfield*, 6 F. Cas. 546).

61 *See* CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (statement of Sen. Jacob Howard) ("The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to secure absolutely the citizens of the United States in the various States against an infringement of their rights and privileges under [the Article IV Privileges and Immunities Clause]. . . . [U]nless the Senator from Vermont and the Senator from Massachusetts can derive the right of voting from this ancient second section of the fourth article upon the ground that the citizens of each State are entitled to all the privileges and immunities of citizens of the several States, they must give up the argument . . . .").

62 *Id.*, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. John Bingham).

63 *See* H.R. REP. NO. 41-22, at 2 (1871).

64 *See* CONG. GLOBE, 42d Cong., 2d Sess. 1956, 2270, 3931 (1872) (showing that Representative Bingham voted in favor of procedural motions to advance the precursor of the Civil Rights Act).

65 *See, e.g.*, Senator Thomas A. Hendricks, Speech at Indianapolis (Aug. 8, 1866), *in* THE CINCINNATI COM., SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA AND KENTUCKY 9, 9 (1866); Rep. John P.C. Shanks, Speech in the Eleventh District of Indiana (Aug. 25, 1866), *in* THE CINCINNATI COM., *supra*, at 22, 22; Thomas W. Bartley, Speech at Democratic Meeting at Mozart Hall (Sep. 29, 1866), *in* THE CINCINNATI COM., *supra*, at 48, 48. For much more, see Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 122–23 (2015).

not electors entitled to vote.[66] This distinction would have been unnecessary if Senator Thurman's enumerated-rights-against-the-federal-government position had been anyone's reading of the Privileges or Immunities Clause. Republicans would have merely replied that voting rights were not constitutionally enumerated. But they never did.

E. If "Privileges or Immunities of Citizens of the United States" Means "Constitutional Rights Enumerated Against the Federal Government," It Excludes Free-Labor Rights to Make Contracts

An exclusive focus on constitutional rights against the federal government as definitionally tied to the nature of privileges of citizens of the United States has a final glaring historical problem: The right to make contracts lies outside the Bill of Rights. But it was included as the very first right of citizens of the United States in the Civil Rights Act of 1866,[67] which was the precursor to the Privileges or Immunities Clause.

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . .[68]

Senator Lyman Trumbull explained the bill in terms of the rights of citizens of the United States:

> [W]hat rights do citizens of the United States have? To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free

66 *See, e.g.*, Oliver P. Morton, Ind. Governor, Speech at New Albany, Indiana (July 18, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 3, 3; Schuyler Colfax, Speaker, U.S. House of Reps., Speech at Indianapolis (Aug. 7, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 14, 14; John Hannah, U.S. Dist. Att'y, Speech at Indianapolis (Aug. 25, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 21, 21; Shanks, *supra* note 65, at 22, 22; Representative Columbus Delano, Speech at Coshocton, Ohio (Aug. 28, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 23, 23; Representative Thomas Ewing, Jr., Speech at the Cleveland Soldiers and Sailors Convention (Sep. 17, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 25, 25; Representative Thaddeus Stevens, Speech at Bedford, Pennsylvania (Sep. 4, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 27, 27; Robert G. Ingersol, Speech at Indianapolis (Sep. 11, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 29, 29; Oliver P. Morton, Ind. Governor, Speech at Anderson, Madison County, Indiana (Sep. 22, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 35, 35; Henry E. Noyes & George Hoadly, Speeches in Avondale (Sep. 29, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 48, 48; Robert C. Schenck & Senator Benjamin Wade, Speech at Mozart Hall (Oct. 3, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 47, 47; Senator Zachariah Chandler, Speech at Mount Clemens, Macombe County, Michigan (Oct. 22, 1866), *in* THE CINCINNATI COM., *supra* note 65, at 56, 56.

67 *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

68 *Id.*

> citizens or free men in all countries, such as the rights enumerated in this bill . . . .[69]

Speaker of the House Schuyler Colfax on the campaign trail explained the Privileges or Immunities Clause in terms of the Civil Rights Act:

> We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property, and be subject to like punishments. That is the last law upon the subject.[70]

President Johnson's veto of the bill asked regarding the freedmen, "Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?"[71] Both the Civil Rights Act itself, and then the Privileges or Immunities Clause replicating President Johnson's language, were an emphatic "yes" to President Johnson's rhetorical question.[72]

1791ism is only plausible if "privileges or immunities of citizens of the United States" just *means*, as Senator Thurman argued, "rights constitutionally enumerated against the federal government."[73] If rights outside the Bill of Rights are included within the phrase "privileges or immunities of citizens of the United States"—and the example of the right to contract means that they must—such rights must be included on the basis of meeting some criterion expressed by the Fourteenth Amendment's constitutional text. Whatever that criterion is, rights in the Bill of Rights must meet it as well, spelling doom for 1791ism.

But what about 1868?

III. FIVE PROBLEMS FOR 1868ISM

A. The Implausibility of "Stop!"

1868ism holds that the Bill of Rights, as a limit on states, should be construed according to the understanding of those rights that was current during Reconstruction. Rather than interpreting the Fourteenth Amendment to command, "Don't violate the Bill of Rights!" this view reads it as saying "Don't violate current understandings of the

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69 CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Lyman Trumbull).

70 Colfax, *supra* note 66, at 14.

71 CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866) (veto message from President Andrew Johnson).

72 *Cf.* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; U.S. CONST. amend. XIV, § 1.

73 U.S. CONST. amend. XIV, § 1; *see supra* note 53 and accompanying text.

Bill of Rights!" (A variant might be more general: "Don't violate current understandings of civil rights!") Rather than a command to take the American tradition of civil liberty and go back seventy-seven years, it is merely a command to stop. But freezing civil rights in 1868 amber is also a pretty questionable idea. The policy argument from *Euclid* above for the importance of accommodating technology is compelling.[74] Sometimes rights become obsolete. The mere fact that a right was prevalent, even universal, in 1868 does not mean that it must stay so. "Stop!" is a more plausible policy, to be sure, than "Go back seventy-seven years!" But it is sufficiently unwise that we should not construe the Fourteenth Amendment to require it if we can find another reasonable interpretation of its words.

B. The Lack of Fourteenth-Amendment Temporal Language

The Constitution uses several types of temporal language that situate the document in time and space. The Preamble refers to "ourselves and our Posterity," making clear that "We the People" who "do ordain and establish this Constitution" are the people of the Founding generation alone, rather than existing intergenerationally.[75] The reference to states "now existing" in the slave-trade-protection provision of Article I, Section 9, Clause 1 likewise excludes Ohio only if we read it as expressing meaning before 1803, when Ohio became a state.[76] The Confederate Constitution's reference to "slavery as it now exists" was

74 *See supra* Part I.

75 U.S. CONST. pmbl.

76 *Id.* art. I, § 9, cl. 1; *see* Act of Feb. 19, 1803, ch. 7, 2 Stat. 201. For James Wilson's reading of the provision that way, see 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 452 (Jonathan Elliot ed., New York, Burt Franklin 1888).

> Under the present Confederation, the states may admit the importation of slaves as long as they please; but by this article, after the year 1808, the Congress will have power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania. It is with much satisfaction I view this power in the general government, whereby they may lay an interdiction on this reproachful trade: but an immediate advantage is also obtained; for a tax or duty may be imposed on such importation, not exceeding ten dollars for each person; and this, sir, operates as a partial prohibition; it was all that could be obtained. I am sorry it was no more; but from this I think there is reason to hope, that yet a few years, and it will be prohibited altogether; and in the mean time, the *new* states which are to be formed will be under *the control* of Congress in this particular, and slaves will never be introduced amongst them.

Id.

likewise tied to the moment the Confederacy was created in 1861.[77] The Reconstruction Act of 1867 begins with a recitation that "no legal State governments or adequate protection for life or property *now exists* in the rebel States."[78] Other such statutes during Reconstruction with explicit temporal tags are common.[79] But the Fourteenth Amendment contains no such temporal language. The verbs of the Privileges or Immunities Clause explicitly look to the future in imagining constitutional violations: "No State shall make or enforce any law *which shall* abridge the privileges or immunities of citizens of the United States."[80] The natural reading would be to take "the privileges or immunities of citizens of the United States" to likewise refer to an entity existing in the future. As long as a right bears the relevant relationship to "citizens of the United States" at the time that the Fourteenth Amendment is being applied, it should count as a right "of" such citizens. The clause is not time-dated.

C. Bill of Rights Anachronism

The temporal language of the Constitution makes clear that the constitutional text expresses its meaning at a particular time: when that text is added to the Constitution. It does not matter what "now existing" expressed in 1803, because that language was not placed in the Constitution in 1803. Ohio is excluded because it was a mere territory when the Constitution was adopted.[81] The readings given to 1791 words in 1868 are of course important as part of the larger project of understanding America. As a matter of constitutional interpretation, however, we properly care about 1868 because we care about the *Fourteenth Amendment's* language and what it expressed then, not because we care about what the Bill of Rights' 1791 language expressed seventy-seven years after its adoption. Because the Reconstructors were not the authors of the text of the Bill of Rights, as a constitutional issue it is not crucial what those words expressed to *them*. It matters what *the text of the Fourteenth Amendment* expressed to them, of course; they were the ones that approved putting the language "No State shall make or

77 CONFEDERATE STATES CONST. of 1861, art. IV, § 3, cl. 3.

78 Reconstruction Act of 1867, ch. 153, pmbl., 14 Stat. 428, 428 (emphasis added).

79 *See, e.g.*, Act of June 3, 1864, ch. 106, § 12, 13 Stat. 99, 103 (referring to banking associations "now existing"); Act of Feb. 23, 1865, ch. 50, § 2, 13 Stat. 436, 436 (referring to "the law as it now exists"); Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 472 (referring to "a lottery now existing"); Act of Feb. 5, 1867, ch. 32, 14 Stat. 391, 391 (referring to "pension agencies . . . now existing"); Act of Feb. 18, 1867, ch. 47, 14 Stat. 396, 396 (referring to rights "now existing"); Act of Mar. 2, 1867, ch. 144, 14 Stat. 418, 418 (referring to "works now existing").

80 U.S. CONST. amend. XIV, § 1 (emphasis added).

81 *Cf.* Enabling Act of 1802, ch. 40, 2 Stat. 173.

enforce any law which shall abridge the privileges or immunities of citizens of the United States" into the Constitution.[82] The Reconstructors' reading of the First Amendment might tell us a little bit about how they understood the word "abridge," of course.[83] To the extent that the amendments' actual words overlap, that reading is informative. But "the freedom of speech"[84] and "the right . . . to keep and bear Arms"[85] were not incorporated into the Constitution in 1868. How *those* words were understood in 1868 is not the linchpin for anything, constitutionally speaking.

D. The Civil Rights Act of 1866 as a First Step

During Reconstruction, Republicans repeatedly referred to the Civil Rights Act as the paradigm of the sort of statute that the Privileges or Immunities Clause would authorize. Speaker Colfax, quoted above, is a very prominent instance.[86] They made clear, however, that the Civil Rights Act was not a complete catalogue of such rights. Like the Philadelphia Convention and the First Congress, they did not undertake to compose a catalogue of rights that would be fixed for all time. The Reconstructors rather adopted a much more general standard: "the privileges or immunities of citizens of the United States." Senator Trumbull, also quoted above, noted that the privileges of citizens of the United States encompassed rights "such as" those in the Civil Rights Act of 1866.[87] Justice Field noted the distinction in his dissent in the *Slaughter-House Cases*:

> What, then, are the privileges and immunities which are secured against abridgment by State legislation?
>
> In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated *some of* the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, *speaking more accurately, I should say, to obviate objections to legislation of a similar character,*

82 U.S. CONST. amend. XIV, § 1.
83 *Id.*; *cf. id.* amend. I.
84 *Id.* amend. I.
85 *Id.* amend. II.
86 *See supra* note 70 and accompanying text.
87 *See supra* note 69 and accompanying text.

> extending the protection of the National government over the common rights of all citizens of the United States.[88]

The discussions of the Civil Rights Act of 1875 make clear that the identification of privileges of citizens of the United States and their protection by federal law was a gradual process that was not over in 1875, much less in 1866.[89] The education provision was ultimately deleted from the bill,[90] but its supporters expressed hopes that school desegregation would be accomplished someday. Senator George Edmunds noted,

> I am not surprised that when we come now in some measure—not a large measure I am sorry to say, not a full measure I am sorry to say—but in some measure to protect the fundamental rights of citizens of the United States under its Constitution, we find the same party [i.e., the Democratic Party] occupying its same old attitude.[91]

Representative Julius Burrows noted, "[W]hatever the late contest in this House—unprecedented almost in parliamentary history—may have failed to establish, one thing it has demonstrated beyond all controversy, and that is, that the struggle for the equal rights of all American citizens before the law is not yet ended."[92] Senator John Lewis added, "After a few years we have a right to hope that the world will advance; that the ideas of men in our country especially will advance enough to recognize the justice and the propriety of this measure."[93]

E. Emergent Traditions Elsewhere

Justice Scalia famously advocated a tradition-based reading of personal jurisdiction limits in 1990 in *Burnham v. Superior Court*.[94] Tag service of process as a method for asserting power over a defendant was proper, not because it satisfies judges' notions of fairness, as held by Justice Brennan's dueling opinion, but solely because it was traditional.[95] Justice Scalia noted, however, that new traditions could emerge, and be required by due process, if enough states adopted them: "Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction. And

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88 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96–97 (1873) (Field, J., joined by Chase, C.J., Bradley & Swayne, JJ., dissenting) (emphasis added) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

89 Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

90 *See* 3 CONG. REC. 1010–11 (1875).

91 *Id.* at 1869 (statement of Sen. George Edmunds).

92 *Id.* at 999 (statement of Sen. Julius Burrows).

93 *Id.* at 998 (statement of Sen. John Lewis).

94 Burnham v. Superior Ct., 495 U.S. 604 (1990) (plurality opinion).

95 *See id.* at 624–27; *id.* at 629 (Brennan, J., concurring in judgment).

nothing prevents an overwhelming majority of them from doing so, with the consequence that the 'traditional notions of fairness' that this Court applies may change." [96] Again, just because an emergent-tradition approach seemed obvious to Justice Scalia in a personal jurisdiction context does not mean that it would make sense in the Fourteenth Amendment's more general protection of rights. But it is suggestive.

IV. CONCLUSION: HOW TEMPORALLY THICK ARE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES?

If, then, neither 1791 nor 1868 is the proper criterion for the rights of American citizens covered by the Fourteenth Amendment, where should we look? I have already indicated my preference: by looking at the pattern of rights recognized by states today to see what civil rights are possessed by similarly situated fellow citizens of the United States. As soon as a consensus emerges on new rights, they become the common rights "of"—i.e., rights generally enjoyed by—"citizens of the United States."[97] But it is possible to avoid the shoals of both 1791ism and 1868ism without reading the Privileges or Immunities Clause as entirely focused on the prevalence of rights today. *Corfield v. Coryell*, for instance, whose definition of Article IV privileges of citizens was heavily influential during Reconstruction as a model for Fourteenth Amendment privileges,[98] said that Article IV privileges "have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[99]

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96 *Id.* at 627 (plurality opinion).

97 U.S. CONST. amend. XIV, § 1. A separate issue is how to integrate into a unitary criterion the rights of citizens of the United States that exist in virtue of a national consensus, i.e., being given to similarly situated fellow citizens nationally, with such rights that exist in virtue of being given to similarly situated fellow citizens locally. For my attempt, see GREEN, *supra* note 14.

98 *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 100–01 (1873) (Field, J., joined by Chase, C.J., Bradley & Swayne, JJ., dissenting) ("What [Article IV, Section 2, Clause 1] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.").

99 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 n.22 (2022) (recognizing the importance of *Corfield* to interpreting the Privileges or Immunities Clause and quoting the "at all times" language (quoting *Corfield*, 6 F. Cas. at 551)). David Upham's excellent book on the Fourteenth Amendment likewise requires that national privileges have been recognized continuously since American independence in 1776. *See generally* DAVID R. UPHAM, TAKING

This locution is consistent with *Euclid*, because it would allow the privileges of citizens of the United States to erode over time, for instance as automobiles replaced horses on the roads. Rights like anti-zoning rights on which there is only a consensus from 1776 to 1900 do not make the cut. But taking the "at all times" super seriously would not allow *new* privileges to emerge; as railroads or airplanes become common carriers in addition to ferryboats, rights with respect to them would not become privileges of Americans generally, no matter how long they last, because such rights had not existed at Independence. Other formulations might allow more temporal thickness but not insist on history all the way back to 1776; we might insist that rights last about fifty years, which is about how long such rights had existed at the time of *Corfield* itself. We might insist that rights be possessed by a suitable fraction of all the American citizens who have ever lived, which would weight things significantly toward Americans alive now, when its population is greater. We might insist that rights last about a generation.

The salience of *Corfield* during Reconstruction is indeed a very strong argument for taking its statements about the privileges of citizens as definitional. But one way to reconcile a narrow-time-slice view of what "privileges or immunities of citizens of the United States" *means* is to treat *Corfield*'s "all times" language (or its approval as an interpretation of the Fourteenth Amendment) as merely a *synthetic* judgment true in part because of the assessment of facts, rather than an *analytic* one true solely on the basis of meanings alone.[100] If we assume that the American tradition of civil liberty was fairly stable from 1776 to 1825, then *Corfield* was right to point to long-lasting liberties as the ones that counted as privileges of citizens in America in general. Between 1776 and 1825 there might have been relatively few rights that had eroded or emerged among all states. It took much longer in the pre-telegraph days before 1837, of course, for information about the law to travel from one state to another. Traditions of new civil rights could not emerge overnight as easily as they can today. We might, therefore, read rights' long-lasting nature, as described in *Corfield*, as a mere proxy for their present nationwide scope. But I leave such temporal-scope issues for another day. As far as temporal location, Fourteenth Amendment privileges of citizens of the United States are not confined either to 1791 or 1868.

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100 For more on that distinction, see, for example, Evan D. Bernick & Christopher R. Green, *There Is Something That Our Constitution Just Is*, 27 TEX. REV. L. & POL. 247, 253, 284, 289–303 (2023).