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## Article

# Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?

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*We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights that are peculiar to our system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them . . . the right to personal liberty and individual property; to freedom of speech, and of the press . . . to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments, and to other such immunities as are indispensable to free government. Of the latter class are the . . . particular methods of procedure pointed out in the Constitution that are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.*

—*Downes v. Bidwell* (1901)<sup>1</sup>

*[I]t is a lesson which cannot be learned too soon or too thoroughly that under this government . . . no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence.*

—*In re Debs* (1895)<sup>2</sup>

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1. 182 U.S. 244, 282–83 (1901).
2. 158 U.S. 564, 598–99 (1895).

One of the most consequential debates in constitutional law, which is now being renewed over gun rights, is about whether the Fourteenth Amendment applies the Bill of Rights to the states.<sup>3</sup> In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms.<sup>4</sup> Following that decision, the Second and Seventh Circuits rejected claims that this right should be incorporated, while the Ninth Circuit held that the Due Process Clause applies *Heller*'s analysis to the states.<sup>5</sup> All of these decisions turned in significant part on opinions from the late nineteenth century in which the Court stated that the Second Amendment restricted only the federal government.<sup>6</sup>

Since Justice Hugo L. Black's dissent in *Adamson v. California*,<sup>7</sup> the incorporation debate has focused on the original understanding of the Fourteenth Amendment.<sup>8</sup> Far less attention is given to the question of why courts almost uniformly rejected the extension of the Bill of Rights to the states in the decades after the Fourteenth Amendment's ratification.<sup>9</sup> If the

3. The modern term for this doctrine, "incorporation," was not used in the nineteenth century cases discussed throughout this Article.

4. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

5. *Compare* Nat'l Rifle Ass'n v. Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. Chicago, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521), *and* Maloney v. Cuomo, 554 F.3d 56, 58-59 (2d Cir. 2009) (per curiam) (declining to apply the Second Amendment to the states), *petition for cert. filed sub nom.* Maloney v. Rice, 77 U.S.L.W. 1473 (U.S. Jun. 26, 2009) (No. 08-1592), *with* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) ("We are . . . persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.").

6. *See Heller*, 128 S. Ct. at 2813 n.23 (citing *Miller v. Texas*, 153 U.S. 535 (1894), *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1875), but declining to reach the incorporation issue); *Nat'l Rifle Ass'n*, 567 F.3d at 857 ("*Cruikshank*, *Presser*, and *Miller* rejected arguments that depended on the privileges [or] immunities clause of the fourteenth amendment."); *Maloney*, 554 F.3d at 58-59 (concluding that *Presser* was binding authority on a court of appeals); *cf. Nordyke*, 563 F.3d at 446-49 (discussing some of these cases but distinguishing them from the case at bar).

7. 332 U.S. 46, 68-92 (1947).

8. *See id.* at 71-72 (Black, J., dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.").

9. *See, e.g., Twining v. New Jersey*, 211 U.S. 78, 98 (1908) ("It is . . . not profitable to examine the weighty arguments in [incorporation's] favor, for the question is no longer open in this court."); *Maxwell v. Dow*, 176 U.S. 581, 602 (1900) (rejecting incorporation with the exception of the Takings Clause), *ab-*

original understanding supporting incorporation was so clear, why did contemporary judges reject the idea so overwhelmingly?<sup>10</sup> The most common response is that the Supreme Court gave the Privileges or Immunities Clause of the Fourteenth Amendment a stingy and erroneous reading in the *Slaughter-House Cases*<sup>11</sup> and set back incorporation for decades.<sup>12</sup> Indeed, *Slaughter-House* is one of those rare decisions, like *Dred Scott v. Sandford*<sup>13</sup> or *Buck v. Bell*,<sup>14</sup> that constitutional lawyers of all ideological stripes love to hate.<sup>15</sup>

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rogated by *Williams v. Florida*, 399 U.S. 78 (1970); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 143–57 (1949) (examining the cases on incorporation from Reconstruction until *Twining*); Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1494 (2000) (exploring the case law from 1880 until *Twining*).

10. See *Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring) (observing that of the forty-three judges who had the opportunity to review the scope of the Fourteenth Amendment in the seventy years since the Amendment's ratification, only one, "who may be respectfully called an eccentric exception," believed that the Amendment "was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States"); Morrison, *supra* note 9, at 143 ("If it was one of the chief objects of the Fourteenth Amendment to incorporate the Bill of Rights, it is certainly surprising that it should have taken so long to find this out. Whatever obscurity may clothe the question today, the major purposes of a major constitutional amendment should not have been obscure to its contemporaries. From this point of view the early decisions of the Supreme Court assume particular importance.").

11. 83 U.S. (16 Wall.) 36 (1873).

12. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 213 (1998) ("By strangling the privileges or immunities clause in its crib, *Slaughter-House* forced contrarian-minded litigants to argue that the original Bill applied against states either directly of its force or via the Fourteenth Amendment's due process clause."); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 175 (1986) ("[B]y its construction of the Fourteenth Amendment [in *Slaughter-House*,] the Court effectively nullified the intent to apply the Bill of Rights to the states."); see also *Nat'l Rifle Ass'n v. Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) (stating that *Slaughter-House* "holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states"), *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

13. 60 U.S. (19 How.) 393, 393 (1857) (declaring, inter alia, that African Americans could not be citizens of the United States).

14. 274 U.S. 200, 200 (1927) (upholding the sterilization of the mentally challenged).

15. See, e.g., CHARLES L. BLACK, *A NEW BIRTH OF FREEDOM* 55 (1999) (calling *Slaughter-House* "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court"); Leonard W. Levy, *The Fourteenth Amendment and the Bill of Rights*, in *JUDGMENTS: ESSAYS ON AMERICAN*

This Article rejects the conventional interpretation of *Slaughter-House* and offers another explanation for incorporation's demise that rests in equal measure on an unlucky sample of cases and on the unintended consequences of constitutional politics in the 1890s.<sup>16</sup> A careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation.<sup>17</sup> Indeed, no federal opinion prior to 1900 construed the case as contrary to extending the Bill of Rights to the states. The anti-incorporation reading did not emerge until *Maxwell v. Dow*, which was decided three decades after *Slaughter-House*.<sup>18</sup> By this time, though, incorporation had been undermined by two independent developments.

First, virtually all of the cases that squarely raised incorporation between 1873 and 1900 involved procedural claims.<sup>19</sup>

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CONSTITUTIONAL HISTORY 64, 69 (1972) (calling *Slaughter-House* "one of the most tragically wrong opinions ever given by the Court").

16. See GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* (forthcoming 2010) (arguing that the defeat of the Populist Party transformed constitutional law). My analysis does not distinguish between incorporation claims based on the Due Process Clause and those relying on the Privileges or Immunities Clause of the Fourteenth Amendment. See U.S. CONST. amend XIV, § 1. While there is merit in separating these claims if the question is about the meaning of each clause, this distinction is not very helpful with respect to the broader incorporation issue.

17. See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 648–49 (2000) ("I argue, contrary to the almost crushing weight of conventional wisdom, that Justice Miller's majority opinion in *Slaughter-House* did not foreclose the possibility of incorporating provisions of the Bill of Rights . . ."); Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 548 (1891) (noting that the privilege of the writ of habeas corpus, which *Slaughter-House* listed among those citizens' rights protected from state infringement by the Fourteenth Amendment, "is granted in the same way and by the same instrument as the immunity from cruel and unusual punishments: [t]he former is conferred by the original Constitution and the latter by one of the amendments"); Horace Stern, *Samuel Freeman Miller*, in 6 GREAT AMERICAN LAWYERS 539, 560–61 (William Draper Lewis ed., 1909) (stating that "the rights of personal liberty guaranteed by the 'Bill of Rights' or original constitutional amendments" were included in Justice Miller's category of national rights protected by the Fourteenth Amendment).

18. 176 U.S. 581, 591 (1900) (treating the federal privileges listed in *Slaughter-House* as exhaustive and concluding that a jury trial "right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the state and not covered by the [Fourteenth] amendment"), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970).

19. Three types of cases from this period involved incorporation but did not squarely raise the issue. First, there were suits where someone cited the relevant portion of the Bill of Rights directly instead of relying on the Fourteenth Amendment. In these cases, the Court dismissed the claim because of

In other words, the Court rarely dealt with litigants seeking protection for religious freedom, for free speech, or from unreasonable searches and seizures. Instead, the courts got a steady diet of cases seeking to invoke a right to a civil jury trial or grand jury indictment, both of which are still not applied to the states.<sup>20</sup> This pattern was significant because lawyers at this time drew a sharp distinction between substantive rights, which were fundamental and unalterable, and procedural forms, which were subject to improvement and should not be constitutionally fixed.<sup>21</sup> Thus, the initial cases that raised in-

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that pleading error. *See Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 325–26 (1868) (rejecting Fifth and Sixth Amendment claims against a state court conviction); *Newsom*, *supra* note 17, at 721–22 (examining the *Twitchell* decision). Second, there were cases where incorporation was not raised in the lower court, which resulted in procedural default. *See Miller v. Texas*, 153 U.S. 535, 538 (1894) (rejecting a claim that the Second Amendment applied to the states because “if the fourteenth amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court”); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557–58 (1874) (dismissing an incorporation question because “no such error was assigned in the [state court], and that the question was not presented to, nor was it decided by, the [state court]”). Finally, there were cases where incorporation was arguably before the Court, but its decision rested on other grounds. *See, e.g., Davidson v. New Orleans*, 96 U.S. 97, 100–05 (1878) (stating that the Takings Clause did not bind the states, but rejecting the asserted claim on general due process grounds); *United States v. Cruikshank*, 92 U.S. 542, 551–54 (1875) (discussing the application of the Petition Clause and the Second Amendment to the states but relying on the lack of state action for its holding). This Article only addresses the last of these three categories, as the cases in that set must be analyzed before they can be distinguished. *See infra* text accompanying notes 89–104.

20. *See Brown v. New Jersey*, 175 U.S. 172, 175–77 (1899) (rejecting a claim that a jury selection procedure was inconsistent with due process); *Eilenbacker v. Dist. Court*, 134 U.S. 31, 35–40 (1890) (rejecting a claim that a criminal contempt proceeding in state court without a jury trial violated due process); *Ex parte Spies*, 123 U.S. 131, 167–81 (1887) (denying an application for a writ of error for an incorporation claim based on the protection against self-incrimination and the right to an impartial jury trial); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that the Fifth Amendment grand jury right did not bind the states); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (“A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge.”); *Rowan v. State*, 30 Wis. 129, 149–50 (1872) (rejecting an argument that the Fourteenth Amendment prohibited the states from making a criminal accusation by “information,” which is proffered by the prosecutor, rather than by indictment, which requires a grand jury under the Fifth Amendment); *cf. Missouri v. Lewis*, 101 U.S. 22, 31 (1880) (“The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. . . . Each state prescribes its own modes of judicial proceeding.”).

21. *See Brown*, 175 U.S. at 175 (“The state is not tied down by any provi-

corporation drew from a distorted sample—in the area where support for the idea was at its ebb—and created precedents that made it easier for the Court to reject the entire concept later.

Second, growing unrest during the 1890s, which was associated with the Populist Party, poisoned the well against incorporation on substantive matters by persuading legal elites that states needed wide latitude to suppress dissent.<sup>22</sup> In a sense, this is a tale about how the threat of disorder leads to curbs in civil liberties.<sup>23</sup> That is a familiar story in wartime, but the link between these domestic disturbances—most notably the Pullman Strike of 1894—and the failure of incorporation is often overlooked.<sup>24</sup> While the evidence about the effect of these

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sion of the Federal Constitution to the practice and procedure which existed at the common law. . . . [I]t may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.”); *supra* text accompanying note 1.

22. See *infra* notes 160–65 and accompanying text. The only exception involved the Takings Clause, which was incorporated through the Due Process Clause in 1897. See *Chi. Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). This decision was also a reaction against the Populists; additional federal protection for property rights was designed to block redistributive schemes popular with reformers. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that the Fourteenth Amendment created a liberty of contract on the same day the Court incorporated the Takings Clause in *Chicago Burlington & Quincy Railroad Co.*).

23. The first (and only) scholar to recognize this point was L.H. LaRue, *Constitutional Law and Constitutional History*, 36 BUFF. L. REV. 373, 401 (1987).

24. See *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886) (rejecting an incorporation claim based on the First and Second Amendments made by a labor militia, in part to honor “the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine”); cf. *In re Debs*, 158 U.S. 564, 597–98 (1895) (upholding the use of contempt proceedings to crush the Pullman Strike with the admonition that “it is a lesson which cannot be learned too soon or too thoroughly that under this government . . . no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence”). For more on the tumultuous events of this decade, see generally H.W. BRANDS, *THE RECKLESS DECADE: AMERICA IN THE 1890S*, at 1 (1995), which comments on the anxiety and “*fin-de-siècle* soul searching” felt by Americans at the close of the nineteenth century and the dawn of the twentieth; OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 53–74 (1993), which tracks the events that coincided with the expansion of state power to maintain order against labor movements in *In re Debs*, 158 U.S. 564 (1895); MATTHEW JOSEPHSON, *THE POLITICOS 1865–1896*, at 559–708 (1938), for an illustration of the anger over economic circumstances that led to the formation of the Populist Party and the presidential campaign of William Jennings Bryan; DAVID RAY PAPKE, *THE PULLMAN CASE* (1999), for a discussion of the causes and consequences of the Pullman Strike; and THE

events on incorporation doctrine is circumstantial, the anti-Populist backlash offers the best explanation for the Court's refusal to incorporate almost all substantive portions of the Bill of Rights at the turn of the twentieth century.

Part I examines *Slaughter-House* and demonstrates, largely by referring to contemporary commentary on the case, that the opinion was not hostile to incorporation.<sup>25</sup> Part II explores the cases that addressed incorporation in the following two decades and shows that they were almost entirely based on procedural claims, which were treated differently from substantive ones. Part III looks at the protests that terrified the political establishment during the 1890s and argues that the reaction to these protests put the final nail in incorporation's coffin. Finally, the Conclusion applies these lessons to the issue of whether the Second Amendment should be incorporated and finds that precedent and history counsel in favor of incorporation.<sup>26</sup>

### I. *SLAUGHTER-HOUSE* UNVARNISHED

The prime suspect in the murder of incorporation is the decision in *Slaughter-House*,<sup>27</sup> but this Part argues that the charge is false. Not only was the opinion ambiguous on the question, but until 1900 no federal judges or academics read the case as authority for the proposition that the Fourteenth Amendment did not apply the Bill of Rights to the states.<sup>28</sup> *Slaughter-House*, like many so-called great cases, only became definitive on this issue due to subsequent events.

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POPULIST MIND (Norman Pollack ed., 1967), which mines turn-of-the-century primary sources in order to uncover the ideals and aims of the Populist party.

25. This argument builds on the work of my friend Kevin Newsom. See Newsom, *supra* note 17, at 648–49 (opening the door for a reconsideration of *Slaughter-House* by challenging the standard view of that case with respect to incorporation).

26. This Article does not assess the policy implications of Second Amendment incorporation. For a critical view of incorporation from that perspective, see Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW 1, 84–90 (2009).

27. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 57–83 (1873).

28. See, e.g., David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 347 (2003) (“The incorporation aspect of the *Slaughter-House* cases was of little interest to contemporaries reacting to the decision. . . . Academic reaction focused on the majority’s rejection of fundamental rights of citizenship, and paid no attention to what that rejection meant for incorporation.”).

## A. ILLUSTRATIVE OR EXHAUSTIVE: AN INTERPRETIVE PROBLEM

Almost everyone agrees that the holding of *Slaughter-House* does not speak to the incorporation issue.<sup>29</sup> Nevertheless, the opinion is considered highly relevant because of its analysis of the rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>30</sup> In rejecting a claim by a group of butchers that the new constitutional text invalidated a state monopoly that barred them from pursuing their livelihood,<sup>31</sup> the Court stated that there was a distinction between national rights, which were protected by the Fourteenth Amendment,<sup>32</sup> and common-law rights traditionally secured by state law, which were not.<sup>33</sup> The opinion then “ventured to suggest some [rights] which owe their existence to the Federal Government, its National character, its Constitution, or its laws.”<sup>34</sup> Each citizen had the right:

“[T]o assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions[,] . . . [to] free access to its seaports, . . . to the subtreasuries, land offices, and courts of justice in the several States.”<sup>35</sup>

A citizen also possessed:

[The right] to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government[,] . . . [t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, . . . [t]he right to use the navigable waters of the United States, . . . all rights secured to our citizens by treaties with foreign nations, . . . [the right to] become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State[,] . . . [and] the rights secured by the thirteenth and fifteenth articles of amendment . . . .<sup>36</sup>

This list of federal privileges or immunities is the central pas-

29. See, e.g., Morrison, *supra* note 9, at 144 (“In this opening battle under the Fourteenth Amendment the question of whether the Amendment incorporates the Bill of Rights was not raised.”).

30. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . .”).

31. See *Slaughter-House*, 83 U.S. (16 Wall.) at 44, 83.

32. *Id.* at 79.

33. See *id.* at 74–78.

34. *Id.* at 79.

35. *Id.* at (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)).

36. *Id.* at 79–80; see also William H. Dunbar, *The Anarchists’ Case Before the Supreme Court of the United States*, 1 HARV. L. REV. 307, 313 (1887) (explaining that the issue of which national rights were protected by the Privileges or Immunities Clause was the chief question that divided the Court in *Slaughter-House*).



sage in the opinion with respect to incorporation and is the principal source of confusion about *Slaughter-House*.<sup>37</sup>

One possible reading of this language is that the Court's omission of the Bill of Rights, with the exception of the Petition Clause, was a rejection of incorporation.<sup>38</sup> This is the view taken by most commentators,<sup>39</sup> an interpretation that is reinforced by the trivial quality of the rights that were included in the Court's catalog.<sup>40</sup> After all, why would the Justices mention things like seaport access or the right to travel but ignore the freedom of speech or the right to a jury trial if they thought that the Fourteenth Amendment protected the Bill of Rights? This might make sense, though, if the Court was saying that the Privileges or Immunities Clause was declaratory of rights that existed against the states prior to the Fourteenth Amendment or applied only to rights that were inherent in the federal structure.<sup>41</sup>

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37. William Crosskey argued that the ambiguity in this passage was part of a deliberate effort to undermine incorporation, but there is no evidence to support this claim. See 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1127, 1130 (1953) (attacking the majority's motives for including the list in its opinion); see also Bogen, *supra* note 28, at 349 ("The scholars' [subsequent] confusion and inattention to the incorporation issue supports the contention that the opinion was ambiguous, but it falls short of showing that the ambiguity was deliberate.").

38. The Petition Clause reference is also subject to different interpretations, as it could be referring to state action barring a petition to Congress, which would not be an incorporation of that right for citizens petitioning a state legislature. See U.S. CONST. amend. I; AMAR, *supra* note 12, at 212.

39. See Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1063 (2000) ("*Slaughter-House* has been conventionally viewed as rejecting incorporation via the Privileges [or] Immunities Clause . . .").

40. See CURTIS, *supra* note 12, at 175 ("The privileges and immunities of a citizen [in *Slaughter-House*] . . . were a narrow class of privileges, enjoyed by virtue of United States citizenship and including things such as protection on the high seas."); Newsom, *supra* note 17, at 655 ("Miller compiled a rather pitiful list of freedoms."); see also Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 654 (1994) (arguing that "the obvious omission of free speech" from the Court's list is strong evidence against an incorporationist reading). Moreover, Justice Bradley's dissent did mention portions of the Bill of Rights in his definition of privileges and immunities, which might imply that the Court's exclusion of them was significant. See *Slaughter-House*, 83 U.S. (16 Wall.) at 118–19 (stating that free speech, free press, trial by jury, peaceable assembly, and freedom of unreasonable searches and seizures were secured against state action by the Fourteenth Amendment).

41. See, e.g., *Nordyke v. King*, 563 F.3d 439, 446–47 (9th Cir. 2009) (stating that *Slaughter-House* read the Privileges or Immunities Clause as exclud-

The other interpretation is that *Slaughter-House's* discussion of national rights was illustrative and not exhaustive, which if correct would not undermine incorporation. Indeed, the Court's statement that it was describing "some" of the privileges or immunities protected by the Fourteenth Amendment supports this open-ended construction.<sup>42</sup> Other commentators go further and argue that the recitation of the Petition Clause should be taken as evidence that the Bill of Rights was fully incorporated.<sup>43</sup> This view rests on the fact that the Court counted among the category of "national rights" the ones in the Thirteenth and Fifteenth Amendments, which suggests that privileges created by the constitutional text, not just structural rights or ones that were around before the Fourteenth Amendment was ratified, were included.<sup>44</sup>

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ing "those preexisting rights the Bill of Rights merely protects from federal invasion"); Bogen, *supra* note 28, at 343 ("[T]he natural inference is that Miller was listing the privileges of national citizenship that existed when the amendment was adopted, not changing their substance."); Newsom, *supra* note 17, at 678 ("Admittedly, a number of the freedoms Miller mentioned—such as the right to access seaports and to use navigable waterways—have little, if anything, to do with the 'Constitution'; they are structural rights . . ."); Pence, *supra* note 17, at 540–41 ("[T]he clause of the Fourteenth Amendment in question created no new privileges and immunities; it had reference only to existing privileges.").

42. See *Slaughter-House*, 83 U.S. (16 Wall.) at 79; see also *Adamson v. California*, 332 U.S. 46, 77 (1947) (Black, J., dissenting) ("The Court enumerated some, but refused to enumerate all of these national rights."); cf. Newsom, *supra* note 17, at 681 ("Given Miller's general inclination to avoid unnecessary pronouncements of constitutional law, it is most reasonable to read his list—and particularly his reference to the right of assembly and the privilege of habeas corpus—as merely *illustrative* of the sorts of rights that he thought the Privileges or Immunities Clause protected, not as exhaustive of those rights.").

43. See, e.g., 2 CROSSKEY, *supra* note 37, at 1128 ("One of these rights, that of 'free assembly and petition,' is one of those covered by the first eight amendments. The Justice's 'suggestion' of this right was, then, susceptible of being taken as an indication that *all* the rights covered by the first eight amendments had been made good against the states . . ."); Newsom, *supra* note 17, at 680 ("Having expressly invoked the right of assembly and the privilege of the writ of habeas corpus, it is hard to imagine why Miller would have thought that other textually specified freedoms (including many of those enumerated in the Bill of Rights) should not follow as well."); Wildenthal, *supra* note 39, at 1101–02 ("Having included habeas corpus and two First Amendment guarantees in such an avowedly nonexhaustive list, what other federal right 'specially designated in the Constitution' could the majority have intended to exclude?" (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting))).

44. See *Slaughter-House*, 83 U.S. (16 Wall.) at 80; Newsom, *supra* note 17, at 678 (stating that several of the rights described by the Court "are uniquely constitutional, protected by the text of the Constitution itself"); cf. *id.* at 678–

Looking only within the four corners of the opinion, there is no way to settle this dispute.<sup>45</sup> This is often the case with constitutional decisions that address substantial issues, for the simple reason that no single opinion can settle such complex questions. For example, Chief Justice Marshall's discussion on the scope of implied federal power in *McCulloch v. Maryland*<sup>46</sup> is open to multiple constructions, and it perplexed nineteenth-century lawyers.<sup>47</sup> It took decades for courts and constitutional politics—namely Reconstruction and the New Deal—to “liquidate” the meaning of *McCulloch* into something resembling its modern form.<sup>48</sup> Accordingly, the place to start looking for an answer to *Slaughter-House's* ambiguity on incorporation is the case law following the decision.<sup>49</sup>

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83 (providing contemporary commentary that seems to accept this interpretation).

45. See, e.g., JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 178 (Boston & New York, Houghton, Mifflin & Co. 1886) (“The decision made in the *Slaughter-House Case[s]* can hardly be regarded as final in giving a construction to the fourteenth amendment.”).

46. 17 U.S. (4 Wheat.) 316 (1819).

47. See, e.g., *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 622–23 (1869) (reasoning that *McCulloch* required invalidation of the Legal Tender Act of 1862), *overruled by Knox v. Lee*, 79 U.S. (12 Wall.) 457, 541 (citing *McCulloch* for the opposite conclusion); GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 123–25 (2007) (examining the ambiguity of Marshall's opinion). In *Knox*, the Court observed that “[w]hensoever the extent of the ‘auxiliary powers’ of Congress is in controversy, those who take the most restrictive view are in the habit of quoting . . . *McCulloch v. Maryland*: ‘[l]et the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional.’” 79 U.S. (12 Wall.) at 523 (emphasis added) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). Today, this statement from *McCulloch* is considered the canonical statement of broad federal power.

48. See MAGLIOCCA, *supra* note 47, at 55–57, 71–73, 107–08, 117, 123–24 (exploring how *McCulloch's* meaning evolved in fits and starts); THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that when ambiguities exist in legal authority, “it is the province of the courts to liquidate and fix their meaning and operation”).

49. Reliance on the congressional record from this era is problematic. See Bogen, *supra* note 28, at 375 (“These congressional remarks are not convincing evidence of the meaning of the majority opinion in *Slaughter-House*. The only members of Congress who expressly took the incorporation reading were southern Democrats opposed to the proposed civil rights laws.”); Wildenthal, *supra* note 39, at 1116–25 (pointing out that during the debate on the Civil Rights Act of 1875 some Democrats in Congress adopted the view that the Bill of Rights was totally incorporated).

## B. THE SOUND OF SILENCE

When the search turns to federal cases before 1900 that cite *Slaughter-House* as standing for an anti-incorporation reading of the Fourteenth Amendment, the result is . . . nothing.<sup>50</sup> Absolutely nothing. This is startling given that the opinion is supposed to be so hostile to the application of the Bill of Rights to the states. And it is not just startling, it is telling about the uncertainty surrounding the case.<sup>51</sup>

Judges frequently referred to *Slaughter-House*, of course, but they did so for other points of law. For example, the case was sometimes cited for its holding that the Fourteenth Amendment did not protect common-law contract and property rights.<sup>52</sup> At other times the decision was used as authority for the general view that there was a distinction between the privileges or immunities under state law and those guaranteed by the Federal Constitution.<sup>53</sup> But in no case did a federal court say that *Slaughter-House* meant that the Bill of Rights was not incorporated by the Fourteenth Amendment. This raises an obvious question: where did that interpretation come from?

The answer is that the Justices themselves arrived at this view in *Maxwell*, a 1900 case rejecting the claim that a state

50. Cf. Pence, *supra* note 17, at 536–37 (stating that in 1891 the question of incorporation was “one of great interest and importance and [was] comparatively untouched by direct judicial precedent”). I cannot find any cases—state or federal—giving *Slaughter-House* a pro-incorporation reading.

51. There is only one state case to the contrary. See *State v. Bates*, 47 P. 78, 79 (Utah 1896) (relying on *Slaughter-House* for its claim that the Fourteenth Amendment has “no application to [criminal] jury trials in state courts”). A Louisiana case could be placed in the same category as *Bates*. *State ex rel. Walker v. Judge of Section A, Criminal Dist. Court*, 1 So. 437, 440–41 (La. 1887) (invoking *Slaughter-House* to reject a Fourteenth Amendment claim against a state statute that required most businesses to close on Sundays). One could say, however, that in holding that the Louisiana law did not violate the state’s Establishment Clause before discussing *Slaughter-House*, the *Walker* court’s subsequent discussion of the federal claim was on the merits and did not squarely address incorporation. See *id.* at 439–40.

52. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 365 (1879) (relying on *Slaughter-House* for the point that “the right to acquire and enjoy property” was not within the ambit of the Fourteenth Amendment); cf. William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 S.L. REV. 558, 581 (1878) (criticizing *Slaughter-House* for rejecting the common-law claims made by the butchers).

53. See, e.g., *In re Kemmler*, 136 U.S. 436, 448 (1890) (using *Slaughter-House* to make this point); *United States v. Cruikshank*, 92 U.S. 542, 549 (1875) (citing *Slaughter-House* for the concept that a person’s “rights of citizenship under one of these governments will be different from those he has under the other”).

conviction rendered by a jury of eight—instead of the traditional twelve—was invalid because the Sixth Amendment right to a jury trial was a privilege or immunity under the Fourteenth Amendment.<sup>54</sup> Petitioner contended that “all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are . . . to be regarded as privileges or immunities of a citizen of the United States . . .”<sup>55</sup> In response, the Court quoted extensively from *Slaughter-House* and concluded in the opinion’s crucial section on national rights that “[a] right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the State, and not covered by the amendment.”<sup>56</sup> Thus, *Maxwell* endorsed the “exhaustive” reading of *Slaughter-House* and fixed the Court’s hostility toward the Bill of Rights for the next century.<sup>57</sup>

In sum, the decisive blow against incorporation came in 1900, not when the Court decided *Slaughter-House*. This raises two questions: (1) why did this happen in 1900; and (2) what events might have shaped the Justices’ thinking in the intervening years?

## II. A PROCEDURAL PATH

This Part explores incorporation doctrine from the ratification of the Fourteenth Amendment until *Maxwell*. The most notable fact about these cases is that they largely concerned the procedural parts of the Bill of Rights (such as the grand jury, civil jury, and petit jury) rather than the substantive ones (for example, free speech, the right to bear arms, and freedom of religion).<sup>58</sup> This pattern is significant because courts were reluc-

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54. See *Maxwell v. Dow*, 176 U.S. 581, 582, 602 (1900), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970). The Court also rejected the contention that the trial violated due process. See *id.* at 602–05.

55. *Id.* at 587. In the majority opinion, Justice Peckham noted that the same argument was made a decade earlier, but the Court was able to avoid the issue. See *id.* (citing *Ex parte Spies*, 123 U.S. 131, 182 (1887)).

56. *Id.* at 591; see also *id.* at 587–91 (discussing *Slaughter-House*).

57. Instead of reexamining *Maxwell*’s reading of *Slaughter-House*, the Court eventually incorporated the Bill of Rights through the Due Process Clause under a test developed in the 1930s by Justice Cardozo. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asking whether a right is “implicit in the concept of ordered liberty”), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969).

58. This observation is certainly correct with respect to federal cases, and appears to be true for state decisions as well, although I have not read every

tant to bind the states with procedures that were considered relatively unimportant and subject to improvement.<sup>59</sup> Thus, most litigants who brought incorporation claims did so on the weakest possible grounds and created precedents that proved harmful to the broader idea.

#### A. THE SPIRIT OF PROGRESS VERSUS ETERNAL TRUTHS

What jumps out from the early cases that addressed incorporation (and were free of waiver issues or an alternative ground of decision) is that they focused on civil or criminal procedure. For instance, in *Walker v. Sauvinet*, the Court held that the Seventh Amendment right to a “trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge.”<sup>60</sup> *Hurtado v. California* held that the grand jury indictment requirement of

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state case that might be relevant. One lower federal court case that preceded *Slaughter-House* did hold that the substantive portions of the Bill of Rights, specifically the rights of free speech and petition, applied to state legislation through the Fourteenth Amendment. See *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871). And *Presser v. Illinois* presented a substantive incorporation claim, but that case involved labor unrest. See *Presser v. Illinois*, 116 U.S. 252, 254 (1886).

59. See, e.g., *Adamson v. California*, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring); *infra* notes 70–72 and accompanying text. One explanation for this distinction is that the gap between procedural protections in the Federal Constitution and state constitutions tilted the claims in the procedural direction because litigants in states without those protections would have had a clear reason to invoke the federal right. See *Adamson*, 332 U.S. at 64 (Frankfurter, J., concurring) (“It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.”). Moreover, issues such as the grand jury and civil jury rights were basically binary—you either got one or you did not. A claim based on the deprivation of one of these was more likely to be decided than one based on a right with substantive content, because a court could easily reject the argument on the merits while assuming *arguendo* that incorporation was applicable. See, e.g., *infra* note 81.

60. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875). In *Missouri v. Lewis*, the Supreme Court also argued that the Fourteenth Amendment does not grant the same legal benefits and remedies to everyone in the United States. 101 U.S. 22, 31 (1879) (“Great diversities . . . may exist in two States separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.”). *But see* Pence, *supra* note 17, at 542–43 (dismissing *Walker*’s relevance in this area); Wildenthal, *supra* note 39, at 1139 (suggesting that *Walker* should not be discussed at all, as “[a] study of the briefs filed with the Court reveals that *Walker* did not even raise before the Court the jury trial incorporation issue the Court decided”).

the Fifth Amendment did not apply to the states under the Fourteenth Amendment's Due Process Clause.<sup>61</sup> In *Ex parte Spies*, the Court rejected incorporation claims related to jury selection and the right against self-incrimination.<sup>62</sup> And in *Eilenbacker v. District Court of Plymouth County*, the Justices rebuffed an argument that the Fourteenth Amendment barred states from imposing criminal contempt sanctions without a jury trial.<sup>63</sup>

The rationale in these decisions (to the extent that there was one) was that it would be unreasonable to extend these procedural rules because doing so would hinder legal progress.<sup>64</sup> *Rowan v. State*<sup>65</sup> is a good example of this view and was the first major case to reject incorporation. In response to a claim that the Fourteenth Amendment required states to use grand jury indictment, the Wisconsin Supreme Court held that the Due Process Clause did not "confine the states to a particu-

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61. See *Hurtado v. California*, 110 U.S. 516, 538 (1884) (rejecting the argument that charging a criminal defendant by prosecutorial information instead of grand-jury indictment "after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law").

62. See *Ex parte Spies*, 123 U.S. 131, 167–80 (1887) (reviewing the voir dire proceedings of the challenged jurors); *id.* at 180–81 (concluding that petitioners' Fourth Amendment claim was procedurally defaulted). *Spies* presents two special problems. First, because petitioners brought the case on an application for a writ of error, the Court assumed that the incorporation claims were valid and rejected the Fifth and Sixth Amendment arguments on the merits. See *id.* at 179–81; Pence, *supra* note 17, at 547 ("The practice [for writs of error] is to deny the application when it is manifest upon inspection of the record that the Federal questions involved were rightly decided."); Wildenthal, *supra* note 9, at 1491 ("[The *Spies* Court] held, following detailed but unconvincing analysis, that [there was] no violation of the asserted Bill of Rights guarantees themselves (even assuming them to be applicable)."). Second, *Spies* came about because of the Haymarket Riot—exactly the type of protest that made incorporation less palatable during the 1890s. See *infra* note 122.

63. See *Eilenbacker v. Dist. Court*, 134 U.S. 31, 35–39 (1890); see also *Brown v. New Jersey*, 175 U.S. 172, 175–77 (1899) (rejecting the claim that a nonstandard jury selection method was inconsistent with the Fourteenth Amendment's Due Process and Equal Protection Clauses).

64. Although the text focuses on nineteenth-century views of this question, the sentiments expressed then carried over into the twentieth century. See, e.g., *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) ("A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights . . . would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.").

65. 30 Wis. 129 (1872).

lar mode of procedure in judicial proceedings.”<sup>66</sup> After all, “[a]dministration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society.”<sup>67</sup> Accordingly, “if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by informative, there is nothing . . . in the [Fourteenth] Amendment to the constitution of the United States, which prevents them from doing so.”<sup>68</sup>

A decade later, the same question was presented to the United States Supreme Court in *Hurtado*, and the explanation given there was even more emphatic about the need for experimentation.<sup>69</sup> The Court denied that a long-established practice—even one rooted in the text of the Constitution—was required by due process, and to hold otherwise “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”<sup>70</sup> Fundamental liberties were best “preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.”<sup>71</sup> Accordingly, the Constitution “must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”<sup>72</sup>

These incorporation precedents indicate that procedural rights were viewed less favorably than substantive privileges for two reasons. First, procedure was just a means to an end that could vary between jurisdictions without doing much

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66. *Id.* at 149.

67. *Id.*

68. *Id.*

69. See *Hurtado v. California*, 110 U.S. 516, 530 (1884) (“[F]lexibility and capacity for growth and adaptation is [sic] the peculiar boast and excellence of the common law.”).

70. *Hurtado*, 110 U.S. at 528–29 (responding to an earlier case suggesting that the specific procedural rights in the Constitution defined the Due Process Clause of the Fifth Amendment).

71. *Id.* at 530; see also *Brown v. New Jersey*, 175 U.S. 172, 175 (1899) (“The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. . . . [I]t may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.”); *Hurtado*, 110 U.S. at 531 (“[W]e should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.”).

72. *Hurtado*, 110 U.S. at 532.



harm.<sup>73</sup> Second, these forms were not sacrosanct because, in what today might be called “living constitutionalism,” there was a strong belief that they could be improved with experience.<sup>74</sup> While these two arguments are treated more skeptically today, they still retain some force in the sense that there is no clamor for overruling *Walker* or *Hurtado* to incorporate the civil and grand jury requirements. In these cases, there really is a sense that the Bill of Rights is protecting a form that is not essential (or even good) for achieving justice.<sup>75</sup>

The distinction between procedure and substance also wields a considerable (though hidden) influence over the scholarly debate about the intent of the Fourteenth Amendment. Professor Charles Fairman relied heavily on the grand jury in his famous attack on incorporation.<sup>76</sup> He noted that when the Amendment was ratified most states did not require grand jury indictments, yet almost nobody in those states raised this point during the ratification debates. Thus, he argued that those state officials must not have thought that the Bill of Rights was applicable to them.<sup>77</sup> By contrast, pro-incorporation authors

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73. See *supra* text accompanying note 1 (suggesting that the procedures set forth in the Bill of Rights were “peculiar,” and not “fundamental,” to Anglo-American law); see also *Adamson v. California*, 332 U.S. 46, 62–63 (1947) (Frankfurter, J., concurring) (arguing that requiring indictment-based prosecutions and court trials for petty civil cases, or prohibiting prosecutors from drawing adverse inferences from a defendant’s failure to testify “is, in de Tocqueville’s phrase, to confound the familiar with the necessary”).

74. See *Adamson*, 332 U.S. at 67 (Frankfurter, J., concurring) (“A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights . . . would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.”).

75. Justice Miller, the author of *Slaughter-House*, expressed this sentiment regarding civil juries. See *Newsom*, *supra* note 17, at 730–32 (revealing Justice Miller’s “aversion to the institution of the civil jury”).

76. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 82–83 (1949); see also AMAR, *supra* note 12, at 198 (“Fairman’s most dramatic evidence concerns the grand jury.”); Wildenthal, *supra* note 9, at 1476–79 (discussing Professor Fairman’s argument about grand juries and incorporation).

77. See Fairman, *supra* note 76, at 82 (noting that if the states had truly understood that ratification of the Fourteenth Amendment would incorporate the Bill of Rights to the states, “then almost certainly each legislature would take note of what the effect would be upon the constitutional law and practice of its own state”); *id.* at 84–132 (concluding from his exhaustive survey that many ratifying states did not require civil jury trial or grand jury indictment as the Bill of Rights contemplated). New Hampshire provided the only exception because some provisions of the State Constitution were probably at odds with the Establishment Clause. See *id.* at 86. But see AMAR, *supra* note 12, at

such as Akhil Reed Amar and Michael Kent Curtis pay more attention to substantive rights, such as free speech and freedom of religion, where Congress expressed support for applying the Bill of Rights to the states.<sup>78</sup> The problem is that each side in this interpretive debate is drawing a general conclusion about incorporation from its own perspective instead of conceding that there was a real difference between procedural and substantive rights in the post-Reconstruction era.<sup>79</sup>

Further evidence for this distinction comes from *O'Neil v. Vermont*,<sup>80</sup> where a substantive Eighth Amendment incorporation claim was presented and drew considerable support.<sup>81</sup> O'Neil was convicted of selling liquor without a license and sentenced to fifty-four years in prison under a state statute that mandated extra jail time if a defendant could not pay the fines imposed.<sup>82</sup> The Supreme Court held that it could not consider

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198 (criticizing Fairman's argument for failing to take into account that "[i]n nine or ten states, state constitutional provisions already on the books in 1866 or state constitutional amendments seriously considered shortly before or after had less stringent grand-jury rules than those prescribed by the Fifth Amendment").

78. Amar does not mention any members of Congress who said that they wanted to see the grand or civil jury applied to the states, except in a few cases where someone listed the entire Bill of Rights. See AMAR, *supra* note 12, at 197. And Curtis only identifies one example. See CURTIS, *supra* note 12, at 164 (finding one Congressperson who singled out the grand jury).

79. To be sure, not everyone involved in the ratification of the Fourteenth Amendment accepted this distinction, nor do the scholars take an all-or-nothing view. See *Everson v. Board of Educ.*, 330 U.S. 1, 14–15 (1947) (incorporating the Establishment Clause); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (applying the Free Press Clause to the states). Similarly, Amar admits there is a reasonable argument against incorporating the Seventh Amendment. See AMAR, *supra* note 12, at 276.

80. 144 U.S. 323 (1892).

81. See *id.* at 337–66 (Field, J., dissenting). One prior Eighth Amendment case rejected incorporation, but that was on an application for a writ of error and was a decision on the merits. *In re Kemmler*, 136 U.S. 436, 449 (1890) (concluding that execution by the electric chair was not cruel and unusual punishment) (citing *Ex parte Spies*, 123 U.S. 131, 143 (1887)). Another Eighth Amendment case followed in *Kemmler's* footsteps a year later. *McElvaine v. Brush*, 142 U.S. 155, 158–59 (1891) (rejecting a claim that solitary confinement imposed a week before execution was cruel and unusual and strongly suggesting that the decision was on the merits). Unless these cases are treated as assuming that incorporation was valid, it is hard to reconcile them with *O'Neil*, in which many of the same Justices decided that the Eighth Amendment applied to the states.

82. See *O'Neil*, 144 U.S. at 331 (1892) (describing the state court judgment); *id.* at 339 (Field, J., dissenting) (observing that a jury convicted O'Neil "to be confined at hard labor in the house of correction, for the term of nineteen thousand nine hundred and fourteen days, a period of over fifty-four

whether the sentence violated the Cruel and Unusual Punishment Clause because the issue was not raised in O'Neil's brief.<sup>83</sup> Three dissenting Justices rejected this conclusion of procedural default and reached the merits.<sup>84</sup> The lead dissent by Justice Field reasoned that the Fourteenth Amendment meant that where the Bill of Rights "declare[s] or recognize[s] the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution . . . [and] no State shall make or enforce any law which shall abridge them."<sup>85</sup> From this principle, he deduced that "[t]he State cannot apply to [a citizen], any more than the United States, the torture, the rack or thumbscrew, or any cruel and unusual punishment, . . . any more than it can deny him security in his house, papers and effects against unreasonable searches and seizures . . . ."<sup>86</sup> While this was a strong endorsement of incorporation, Field's phrasing implied that at least some procedural rights, which were not "rights of the person," should not apply to the states.<sup>87</sup> Perhaps this was just a nod to prior cases like *Walker* and *Hurtado*, but it can also be read as affirming that the line between procedure and substance was significant in interpreting the Fourteenth Amendment.<sup>88</sup>

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years"); *see also* Wildenthal, *supra* note 9, at 1494–95 (describing the Vermont statute).

83. *See O'Neil*, 144 U.S. at 331–32.

84. *See id.* at 359 (Field, J., dissenting) (arguing that when jurisdiction is established, the Justices "may look into the whole record" and take up issues that were raised in state court); *id.* at 370 (Harlan, J., dissenting) ("It is true the assignments of error do not, in terms, cover this point, but it is competent for this court to consider it, because we have jurisdiction . . .").

85. *Id.* at 363 (Field, J., dissenting).

86. *Id.*

87. *See* AMAR, *supra* note 12, at 228 ("Field went on to distinguish between those aspects of the Bill that were mere 'limitations on power' and those that instead 'declare or recognize the rights of persons.'" (quoting *O'Neil*, 144 U.S. at 363 (Field, J., dissenting))). To be fair, Justice Field did include the right against self-incrimination in his discussion of privileges or immunities, so his analysis cannot be reduced to a simple line between procedure and substance. *See O'Neil*, 144 U.S. at 363 ("The state cannot . . . compel [a United States citizen] to be a witness against himself in a criminal prosecution.").

88. Justice Harlan's dissent, by contrast, backed Justice Field's view about the Eighth Amendment but did not suggest that procedural rights were excluded. *See O'Neil*, 144 U.S. at 370 (Harlan, J., dissenting) ("[S]ince the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution."); *see also* *Hurtado v. California*, 110 U.S.

## B. POSSIBLE EXCEPTIONS TO THIS DOCTRINAL PATTERN

My claim that the initial cases on incorporation were mostly about procedure, where support for the proposition was weak, as opposed to substantive claims, where there was more enthusiasm for the idea, must address two possible exceptions: *United States v. Cruikshank*<sup>89</sup> and *Davidson v. New Orleans*.<sup>90</sup> A close survey of those cases establishes that they do not undermine the analytic framework just articulated.

*Cruikshank* made some critical comments about the incorporation of the First and Second Amendments, which are, of course, substantive rights rather than procedural forms.<sup>91</sup> Petitioners killed African Americans for organizing a militia and were convicted of participating in a mob that deprived the victims of their assembly rights and their right to bear arms.<sup>92</sup> The Court reversed these convictions and declared that the First Amendment secured the right of assembly only “against congressional interference,” and for any additional protection, “the people must look to the States.”<sup>93</sup> Likewise, the Court said

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516, 539 (1884) (Harlan, J., dissenting) (stating that procedural protections such as the grand jury were fundamental).

89. 92 U.S. 542 (1875). For a detailed narrative of the events surrounding *Cruikshank*, see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (Henry Holt & Co. ed., 2008).

90. 96 U.S. 97 (1877).

91. See *Cruikshank*, 92 U.S. at 552–53 (stating that the First and Second Amendments are not supposed to limit the state governments).

92. See *id.* at 548, 551–53; Newsom, *supra* note 17, at 712 (explaining that the petitioners in *Cruikshank* “attacked and killed a group of more than sixty black citizens” and were convicted of interfering with their rights to assemble and bear arms); Wildenthal, *supra* note 39, at 1148–49 (noting that the facts of the *Cruikshank* case resulted from the violent Colfax massacre).

93. *Cruikshank*, 92 U.S. at 552, 556–57. It is not clear what the Court meant here. See *id.* at 552 (observing that the rights of assembly and petition, “or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States”); see *id.* at 552–53 (stating that the indictment did not allege that the defendants were trying to prevent a petition meeting); Newsom, *supra* note 17, at 714–16 (arguing that there was a difference between the right to petition the government, which was protected under the Fourteenth Amendment, and the right to assemble for other purposes, which was just a common-law right). But see *Cruikshank*, 92 U.S. at 552 (“The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”); Wildenthal, *supra* note 39, at 1158 (suggesting that the Court was describing a structural right of assembly, not the First Amendment right); sources cited *supra* note 41 (po-

that the Second Amendment secured the right to bear arms, but that this meant nothing “more than that it shall not be infringed by Congress.”<sup>94</sup> Standing alone, both statements cast serious doubt on the idea that the substantive parts of the Bill of Rights attracted more support with respect to incorporation.

These negative comments, however, must be discounted because the Court also made it clear that the convictions were invalid because the petitioners were private actors rather than state actors.<sup>95</sup> *Cruikshank* held:

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.<sup>96</sup>

Indeed, the Court emphasized the lack of state action in its decision with respect to the Second Amendment issue, explaining that this text “leave[s] the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes” to state law.<sup>97</sup> This stress on violations by “fellow-citizens” rather than by the state should be read, in conjunction with *Cruikshank*’s holding, as an indication that the analysis of incorporation was not applicable to state violations.<sup>98</sup> This is important in the Second Amendment context because the Court stated (erroneously) in *Heller* that *Cruikshank* rejected the Amendment’s application to the states.<sup>99</sup>

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siting that the discussion of “natural rights” in *Slaughter-House* referred to structural rights).

94. *Cruikshank*, 92 U.S. at 553.

95. See Newsom, *supra* note 17, at 720 (“[The *Cruikshank* holding] turned exclusively on the absence of state action.”); Pence, *supra* note 17, at 544 (arguing that the *Cruikshank* Court’s conclusion that the Fourteenth Amendment secured no rights against fellow citizens was not relevant to incorporation); Royall, *supra* note 51, at 582 (explaining that the *Cruikshank* outcome does not implicate incorporation because the State of Louisiana did not “make[] or enforce[] some law abridging the fundamental rights of citizens”).

96. *Cruikshank*, 92 U.S. at 554.

97. *Id.* at 553.

98. It would be naïve to downplay the impact of this dictum on the Court’s subsequent rulings, as the *Maxwell* Court cited *Cruikshank* to support its conclusion that the Privileges or Immunities Clause did not apply the Bill of Rights to the states. See *Maxwell v. Dow*, 176 U.S. 581, 593 (1900) (arguing that *Cruikshank* would have to be overruled if incorporation went forward), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1900). My point is that reliance on this dictum was either sloppy or driven by the external political forces described in Part III.

99. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2812–13 (2008)

*Davidson* could be read as contrary to extending the Bill of Rights, but that argument also collapses under scrutiny. The petitioner in that case argued that a state assessment on a certain parcel of property violated the Due Process Clause.<sup>100</sup> In rejecting this claim, the Court held:

[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.<sup>101</sup>

Then the *Davidson* court added that “[i]f private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out . . . .”<sup>102</sup> But this line about the Takings Clause was dictum, as there is no evidence that a takings claim was made or preserved.<sup>103</sup> In fact, when the Justices extended the Takings Clause to the states, they cited *Davidson* with approval and did not mention its contrary language.<sup>104</sup> Thus, a more reasonable interpretation of *Davidson* is that the Court was just applying the principle from *Slaughter-House* that the Fourteenth Amendment did not cover common-law rights.

In sum, a review of the case law on incorporation from the 1870s until 1900 offers at least a partial explanation for the Court’s rejection of the idea in *Maxwell*. First, there was great skepticism about extending the procedural guarantees of the Bill of Rights to the states. Second, the litigation that clearly raised incorporation during this period was nearly all about

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(stating that *Cruikshank* “held that the Second Amendment does not by its own force apply to anyone other than the federal government”).

100. See *Davidson v. New Orleans*, 96 U.S. 97, 99–100 (1877).

101. *Id.* at 105.

102. *Id.*; see also *id.* at 107 (Bradley, J., concurring) (stating his view that, under the Fourteenth Amendment, the Takings Clause did apply to the states).

103. See, e.g., *In re Comm’rs of First Draining Dist.*, 27 La. Ann. 20, 21 (1875), *aff’d sub nom. Davidson v. New Orleans*, 96 U.S. 97 (1877) (explaining that this state court opinion will consider only three claims, none of which include a takings claim); see also *Davidson*, 96 U.S. at 98 (lacking any reference to a takings claim in the summary of the petitioner’s argument). In a previous article, I incorrectly stated that *Davidson* held that the Takings Clause was not incorporated. See Gerard N. Magliocca, *Constitutional False Positives and the Populist Moment*, 81 NOTRE DAME L. REV. 821, 882 (2006).

104. See *Chi. Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897) (explaining that the *Davidson* analysis supports the proposition that a naked transfer of property would violate due process).

procedural issues. What emerged was a series of precedents that were later cited by the Justices as support for the view that incorporation as a whole was invalid.<sup>105</sup> A different picture might have developed if these initial decisions had grappled with substantive claims against state action and built some positive momentum behind the incorporation project.<sup>106</sup>

Nevertheless, this argument falls short in one respect. The Justices did not draw a procedural/substantive distinction in *Maxwell*, nor did they embrace the incorporation of all of the substantive provisions in the Bill of Rights following *O'Neil*. Something else was at work outside of the Court.

### III. PANIC AND DISINCORPORATION

This Part argues that enthusiasm for extending the substantive protections of the Bill of Rights to the states evaporated during the 1890s because of the sharp increase in agrarian radicalism and labor protests. Fear of what these events meant for property rights persuaded legal elites that state authorities needed greater latitude to suppress dissent, which was hard to square with the idea that fundamental rights should be ex-

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105. See *Maxwell v. Dow*, 176 U.S. 581, 596 (1900) (“The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities.”), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1900); *id.* at 594 (noting that “a trial by jury in suits at common law in the state courts” is not protected by the Fourteenth Amendment (citing *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875))); *id.* at 598 (considering that the Fourteenth Amendment did not bar a state from adopting “any system of laws or judicature it sees fit for all or any part of its territory” (citing *Missouri v. Lewis*, 101 U.S. 22, 31 (1879))); *id.* at 602–03 (concluding that the Fourteenth Amendment does not prohibit prosecuting a “person charged with murder by an information [instead of an indictment] under state constitution and law” (citing *Hurtado v. California*, 110 U.S. 516, 538 (1884))); *id.* at 605 (“[T]he state has full control over the procedure in its courts . . . subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.” (quoting *Brown v. New Jersey*, 175 U.S. 172 (1899))).

106. One final piece of evidence that supports the Court’s “two-tiered” approach to the Bill of Rights comes from *Downes v. Bidwell*, which was quoted at the beginning of this Article and made the distinction explicit. See *supra* text accompanying note 1. *Downes* was one of the *Insular Cases*, a group of cases that examined whether the Constitution applied to the territories acquired by the United States during the Spanish-American War. See *Downes v. Bidwell*, 182 U.S. 244, 249 (1901) (discussing whether the revenue clauses of the Constitution “extend of their own force to our newly acquired territories”). This question was analogous to the incorporation issue, which considered whether the Bill of Rights applied to the states.

panded.<sup>107</sup> While this hypothesis is more difficult to prove than the doctrinal pattern discussed in Part II, the conclusion that widespread civil unrest led to the demise of incorporation rings true because it builds on a basic truth: when security threats increase, civil liberties retreat.

#### A. THE PROSPECT OF MOB RULE

To understand why the incorporation of the substantive parts of the Bill of Rights mostly failed at the turn of the twentieth century, it is necessary to explore how political conditions in the 1890s reshaped judicial attitudes. The analysis starts by looking at three pieces of evidence: (1) the Supreme Court's decision in *Presser v. Illinois*;<sup>108</sup> (2) the increase in protests that occurred after 1892;<sup>109</sup> and (3) an 1893 speech by Justice David Brewer<sup>110</sup>—one of the three dissenters who supported the incorporation of the Eighth Amendment in *O'Neil*.<sup>111</sup>

##### 1. *Presser* and Signs of Trouble

Let us begin with *Presser*, an 1886 case that involved Illinois's attempt to regulate armed workers' associations.<sup>112</sup> In response to the violence that often greeted strikes, a German-American labor group called *Lehr und Wehr Verein* began drilling its members in military tactics to prepare for future confrontations.<sup>113</sup> An alarmed state legislature retaliated by pass-

107. See *infra* text accompanying notes 160–65 and accompanying text; cf. Edward S. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 66 (1911) (stating that in the mid-1890s “the Supreme Court began to regard itself as the last defense of the country against socialism”).

108. 116 U.S. 252 (1886).

109. See, e.g., FISS, *supra* note 24, at 38 (noting that the Homestead Strike of 1892 was one example of how laborers “in the early 1890s confronted capitalism in massive, bitter, and often violent ways”).

110. See DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* 120 (1999).

111. See *O'Neil v. Vermont*, 144 U.S. 323, 371 (1892) (Harlan, J., dissenting) (noting that Justice Brewer “in the main” concurred with the dissenters). Granted, there is an ambiguity here, since we do not know exactly with what Justice Brewer was concurring. Nevertheless, the most reasonable interpretation is that he agreed with the incorporationist position.

112. See *Presser*, 116 U.S. at 253–54; see also Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 975–76 (1999).

113. See *Presser*, 116 U.S. at 254; Halbrook, *supra* note 112, at 947 (“Founded in reaction to election fraud and police violence, the *Lehr und Wehr*



ing a law that barred any group other than the state militia and federal troops from “associat[ing] themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State” without a license.<sup>114</sup> As a local paper stated, this was “intended to afford to life and property and the public peace by denying to bands of Socialists and Communists the privilege of appearing with arms at drill or parade.”<sup>115</sup>

The Court upheld this statute against an incorporation challenge based on the assembly-and-petition right.<sup>116</sup> (Presser also made a Second Amendment claim, but that was dismissed because he did not cite the Fourteenth Amendment.<sup>117</sup>) Though the Court said that assembly-and-petition was a privilege or immunity of national citizenship and quoted the First Amendment to that effect, *Presser* held that the right to peaceably assemble did not extend to militias because they did not issue petitions.<sup>118</sup> But the Court did not stop there: it went on to say that the exercise of state authority over militias “is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.”<sup>119</sup> Since the militia in *Presser* never engaged in any violence, the “riot and rapine” language is curious.<sup>120</sup>

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*Verein* modeled itself on the republican tradition of the armed citizen militia . . . .”); LaRue, *supra* note 23, at 387 (noting that “the organization of ‘self-defense’ associations” increased as a response to the Great Strike of 1877).

114. *Presser*, 116 U.S. at 253.

115. Halbrook, *supra* note 112, at 956 (referring to the *Chicago Daily Times Herald*) (internal quotation marks omitted).

116. *See Presser*, 116 U.S. at 267. The Illinois statute was also attacked for being inconsistent with the Militia Act of 1792 and the Militia Clause of Article I, Section 8 of the United States Constitution. *See id.* at 261–64 (rejecting this statutory challenge); *id.* at 268–69 (rejecting the Militia Clause argument). Notably, Presser failed to cite any specific right in support of his Fourteenth Amendment argument. *See id.* at 267 (“The only clause in the constitution which, upon any pretence, could be said to have any relation whatever to his right to associate with others as a military company is found in the First Amendment . . .”).

117. *See id.* at 264–65.

118. *See id.* at 266–67 (citing *United States v. Cruikshank*, 92 U.S. 542 (1875)). The Court’s citation of *Cruikshank* lends support to Newsom’s interpretation of the assembly right in that case as a constitutional, rather than structural, right. *See supra* note 93.

119. *Presser*, 116 U.S. at 268.

120. *Id.*; *see* Halbrook, *supra* note 112, at 978 (“[T]he incident before the Court involved a peaceable march, where Presser intentionally got himself ar-

*Presser* represents a crucial inflection point in the incorporation story. In one respect, the case can be read as an actual incorporation of the Petition Clause, which the Court described as a First Amendment right that was absorbed by the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>121</sup> On the other hand, the Court's rejection of *Presser*'s claim on the merits contained language that raised concern about what would happen if these rights were extended to groups like his.<sup>122</sup> What if the objects of state regulation were armed groups bent on overthrowing the political order? Would the application of the Bill of Rights cripple efforts to stop them? This concern was far-fetched in the 1880s, but that was about to change.

## 2. A Surge of Discontent

Frustration with Gilded Age economic arrangements was mounting prior to the 1890s, but that anger boiled over during the devastating Panic of 1893, which ushered in what one historian calls "the *année terrible* of American history between Reconstruction and the [First] World War."<sup>123</sup> Unemployment reached extraordinary levels that would not be seen again until the Great Depression, and disillusionment with the failure of government economic policies spilled into the streets.<sup>124</sup> It is

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rested, probably with the cooperation of local authorities, in order to test the law's validity.").

121. *Presser*, 116 U.S. at 266–67.

122. *Ex parte Spies*, 123 U.S. 131 (1887), also presented a version of this problem. Petitioners—including members of *Lehr und Wehr Verein*—were convicted of causing the Haymarket Riot, a labor protest in Chicago that led to several deaths. See Halbrook, *supra* note 112, at 980 (stating that the named party in *Spies* was a *Lehr und Wehr Verein* member); LaRue, *supra* note 23, at 388–89 (describing the Haymarket events in the context of larger labor unrest). While the case raised incorporation claims about trial procedures, it is hard to avoid the conclusion that the petitioners' argument failed in part because of disdain toward their political attitudes. See Wildenthal, *supra* note 9, at 1485 ("Among other problems, the trial judge and jury were hopelessly biased against the defendants, jury selection was rigged, the prosecutor was allowed to indulge in outrageous misconduct and to introduce inflammatory and irrelevant evidence focusing on the defendants' unpopular political views, and the trial judge authorized the jury to convict on the basis of a startlingly far-reaching and legally unfounded theory of conspiracy and accomplice liability."); see also Halbrook, *supra* note 112, at 985 ("[A]ll of the Haymarket defendants, after a public education campaign led in part by Clarence Darrow, would be pardoned posthumously in 1893 by Illinois Governor John Altgeld, on the basis of a total lack of evidence to convict them.").

123. ALLAN NEVINS, *GROVER CLEVELAND: A STUDY IN COURAGE* 649 (1932).

124. See HERBERT CROLY, *MARCUS ALONZO HANNA: HIS LIFE AND WORK*

hard to overstate how much these events frightened the establishment and forced lawyers to rethink their assumptions about federalism.

One source of this turmoil was the Populist Party, which was formed in 1891 as a vehicle for concerns about the decline of rural life in an era of industrialization.<sup>125</sup> The Populists argued that society's ills were the result of excessive concentration of wealth and power in private hands, and they therefore backed the imposition of an income tax, the free coinage of silver, and the nationalization of industry.<sup>126</sup> And in the South, Populists fought for African-American rights and attacked the Democratic Party power structure as hostile to the interests of white and African-American farmers alike.<sup>127</sup>

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210 (1912) (“[T]he business depression, coincident with Mr. Cleveland’s second administration, stirred the American people more deeply and had graver political consequences than had any previous economic famine.”); FISS, *supra* note 24, at 39 (explaining that the rate of unemployment in manufacturing may have reached fifty percent).

125. See JAMES L. HUNT, MARION BUTLER AND AMERICAN POPULISM 38 (2003) (discussing the formation of the Populist Party); Magliocca, *supra* note 103, at 834–40 (laying out the grievances of the rural reform movement that led to the founding of the Populist Party in 1891).

126. See, e.g., EDWARD IRVING, BREAKERS AHEAD!: AN ANSWER TO THE QUESTION WHERE ARE WE AT? 59 (Stockton, T.W. Hummel Co. 1894) (“There is but one party which is ready, willing and eager to tear from off the people the OCTOPUS CLASP of the money power. That party is the PEOPLE’S PARTY.”); MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN 61 (2006) (“[W]e will answer their demand for a gold standard by saying to them: You shall not press down upon the brow of labor this crown of thorns, you shall not crucify mankind upon a cross of gold.” (quoting William Jennings Bryan, Democratic National Convention: The Cross of Gold (July 9, 1896))); JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS’ ALLIANCE AND THE PEOPLE’S PARTY 442–43 (1931) (quoting the Omaha Platform, a manifesto adopted by the Populist Party at their founding convention on July 4, 1892, which described the Populists’ goals to “demand free and unlimited coinage of silver,” and to nationalize railroads, the telegraph, telephones, and banks) (internal quotation marks omitted); *id.* at 440 (talking about the need to prevent “governmental injustice [that] breed[s] the two great classes—tramps and millionaires”).

127. See, e.g., JOSEPH COLUMBUS MANNING, FADEOUT OF POPULISM 35 (1928) (“The Peoples Party . . . did bring to the South its first real democracy and the only democracy the South has ever known.”); Magliocca, *supra* note 103, at 862 n.234 (“We condemn lynching and demand of our public servants the rigid enforcement of our laws against this barbarous practice.” (quoting *Georgia Populists Platform*, PEOPLE’S PARTY PAPER, Sept. 11, 1896, at 8)); see also C. VANN WOODWARD, TOM WATSON: AGRARIAN REBEL 220 (1938) (quoting from Georgian Populist leader Tom Watson’s statements to African-American and white voters in 1892 that “[y]ou are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves

While the Populists always had an uneasy relationship with labor (after all, workers lived in cities),<sup>128</sup> these factions were able to forge an alliance of convenience as the Panic deepened. For instance, in 1894 a Populist activist named Jacob Coxey led a protest march of the unemployed to Washington, D.C., to call for increased spending on public works.<sup>129</sup> The *New York Times* called this march a “Battle between Law and Anarchy,” and when the marchers arrived police greeted them with beatings and arrests.<sup>130</sup> Sympathy strikes quickly broke out across the nation, and one editorial lamented that “in no civilized country in this century, not actually in the throes of war or open insurrection, has society been so disorganized as it was in the United States during the first half of 1894.”<sup>131</sup> Never, it added, “did the constituted authorities appear so incompetent to enforce respect for the law.”<sup>132</sup>

### 3. Justice Brewer Thinks Aloud

The conservative reaction to these developments is exemplified by a speech Justice David Brewer gave to the New York State Bar Association in 1893.<sup>133</sup> Just one year earlier, Brewer

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you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars both”) (internal quotation marks omitted).

128. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM* 82 (1955) (quoting Tom Watson as stating that “[s]ome of our principal cities are more foreign than American. . . . The vice and crime which they have planted in our midst are sickening and terrifying”) (internal quotation marks omitted).

129. See BRANDS, *supra* note 24, at 160–76 (describing Coxey’s March).

130. See *id.* at 171 (quoting the *New York Times*); *id.* at 171–73 (describing the clash between the police and protesters); MARTIN RIDGE, *IGNATIUS DONNELLY: THE PORTRAIT OF A POLITICIAN* 329–30 (1962) (recounting the violence that met the protesters in Washington, D.C.); cf. Editorial, *The Right to Petition*, *WEALTH MAKERS*, Apr. 5, 1894, in *THE POPULIST MIND*, *supra* note 24, at 345 (arguing that governmental reaction to Coxey’s March infringed on the Petition Clause). White supremacists in the South launched a similar, though more vicious, campaign to intimidate and silence the Populists there. See WOODWARD, *supra* note 127, at 236–41 (describing the climate of terror that pervaded the 1892 campaign in Georgia); cf. MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 3 (2004) (“In the years 1895–1900, an average of 101 blacks were lynched a year—mostly in the South. In 1898, a white supremacist campaign to eliminate black political influence culminated in a race riot in Wilmington, North Carolina, which killed at least a dozen blacks.”).

131. JEAN STROUSE, *MORGAN: AMERICAN FINANCIER* 336 (1999) (internal quotation marks omitted).

132. *Id.*

133. See FISS, *supra* note 24, at 53–57 (recounting the historical circumstances and rhetorical progression of the speech); STEPHENSON, JR., *supra* note 110, at 120 (describing Justice Brewer’s speech as “prescient” in relation to

had joined the dissenters in *O'Neil* in concluding that the Eighth Amendment should be incorporated.<sup>134</sup> When *Maxwell* was decided at the end of the decade, however, Brewer did not dissent from the Court's ruling against the incorporation doctrine.<sup>135</sup> Accordingly, the New York Bar speech is worth examining for clues to explain why Justice Brewer, and by extension supporters of substantive incorporation, might have changed their minds.<sup>136</sup>

The theme of Brewer's address, entitled "The Nation's Safeguard," was that only property rights stood between anarchy and civilization.<sup>137</sup> In blunt terms for a sitting Justice, he commented on the contemporary political scene: "Who does not hear the old demagogic cry, '*Vox populi vox Dei*,' . . . constantly invoked to justify disregard of those guaranties [sic] which have hitherto been deemed sufficient to give protection to private property?"<sup>138</sup> Denouncing "the black flag of anarchism" and "the red flag of socialism," he asked, "[w]ho does not see the wide unrest that fills the land; who does not feel that vast social changes are impending, and realize that those changes must be guided in justice to safety and peace or they will culminate in revolution?"<sup>139</sup>

These fears of revolution, which were first suggested in *Presser*, raised the question of whether the Bill of Rights should

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*Debs*). This speech occurred a year before the Pullman Strike, but the sentiments expressed by Justice Brewer do shed light on *Debs* and, for the reasons stated in the text, the drift of incorporation thinking. See *infra* Part III.B.

134. *O'Neil v. Vermont*, 144 U.S. 323, 366–71 (1892) (Harlan, J., dissenting).

135. *Maxwell v. Dow*, 176 U.S. 581 (1900), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1900).

136. Since *Maxwell* concerned a procedural claim, Justice Brewer's vote there could be squared with his contrary view in *O'Neil*. *Id.* at 602. On the other hand, Brewer never again endorsed incorporation except in relation to the Takings Clause.

137. See FISS, *supra* note 24, at 53.

138. See STEPHENSON, JR., *supra* note 110, at 120. This concern for property rights runs through Justice Brewer's jurisprudence, and was on display in one of his prior dissents. See *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) ("The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection of him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property?").

139. FISS, *supra* note 24, at 56–57.

be extended in such dangerous times.<sup>140</sup> Brewer's comments are especially interesting because he would write the *Debs* opinion, in which the Court upheld the actions taken to break the Pullman Strike and made some extraordinary statements about the need for unfettered law enforcement in times of crisis.<sup>141</sup>

## B. THE PULLMAN STRIKE AND THE REVERSION OF FEDERALISM

Fear of a breakdown in law and order reached a climax during the Pullman Strike of 1894, which paralyzed the nation and could only be put down by federal soldiers acting under an emergency decree.<sup>142</sup> This unprecedented disruption, which was aided and abetted by state officials, led to *In re Debs*<sup>143</sup> and marked a major shift in the meaning of federalism. While that trauma increased interest in expanding federal protection for property rights, it had the opposite effect when it came to other parts of the Bill of Rights.

### 1. Shutting Down the Railroads

The Pullman Strike began as a local dispute but escalated when Eugene V. Debs, the famed labor leader, called for a total boycott of Pullman's railroad cars.<sup>144</sup> Railroad traffic across the country soon ground to a halt, but Governor Altgeld of Illinois refused to intervene even though the strike was based in Chicago.<sup>145</sup> He explained that "local self government is a funda-

140. See *Presser v. Illinois*, 116 U.S. 252, 267 (1886).

141. See, e.g., *In re Debs*, 158 U.S. 564, 582 (1895) ("The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care.").

142. See *FISS*, *supra* note 24, at 73 ("The Chicago disturbance started as an ordinary strike but quickly took on extraordinary dimensions. It created a mass disorder, paralyzing the national rail and postal systems and threatening the very idea of an economic union."); see also Proclamation No. 11, 28 Stat. 1249 (1894), reprinted in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 499 (James D. Richardson ed., 1899) [hereinafter *Emergency Order*] ("[I]t has become impracticable in the judgment of the President to enforce by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois and especially in the City of Chicago . . .").

143. 158 U.S. 564, 566-67 (1895).

144. See *BRANDS*, *supra* note 24, at 147-49 (describing the strike); *PAPKE*, *supra* note 24, at 11-25 (providing background on these events).

145. See *FISS*, *supra* note 24, at 65 (noting that Governor Altgeld "was prepared to deploy state law enforcement against actual violence . . . [but] was not in the least inclined" to interfere with the strike itself); see also *BRANDS*, *supra* note 24, at 153 (describing Governor Altgeld's pro-union sympathies).

mental principle of our constitution . . . . Especially is this so in matters relating to the exercise of the police power and the preservation of law and order.”<sup>146</sup> President Grover Cleveland, however, rejected this assertion and obtained an injunction ordering Debs and other strike leaders to halt their activities.<sup>147</sup> When they refused, the President ordered troops into Chicago, which led to bloody clashes before order was restored.<sup>148</sup>

Contemporary observers saw this standoff between the President and the Governor as the gravest threat to the union since the Civil War.<sup>149</sup> Critics asserted that the supporters of the strike wanted to “take[] us back to 1861, when governors were abetting rebellion . . . . This country is not ripe for such another struggle, nor ready to approve the doctrine that the Federal Government cannot fight for its own life in spite of all the mayors, governors, or sheriffs in existence.”<sup>150</sup> The Attorney General said that federalism was “a far more serious matter than the money question, or any of the other questions now before the people,” because if the government “do[es] nothing to protect the property . . . of the United States unless and until the officers of another government request or consent, then we really have no Federal Government.”<sup>151</sup> As one officer who was

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146. W.F. BURNS, *THE PULLMAN BOYCOTT* 63 (Saint Paul, McGill Printing Co. 1894) (internal quotation marks omitted); *see also* WILLIAM JENNINGS BRYAN, *THE FIRST BATTLE: A STORY OF THE CAMPAIGN OF 1896*, at 410–11 (Chicago, W.B. Conkey Co. 1896) (asserting that the Guarantee Clause implied that state officials needed to give their permission before federal troops could enter a state for law enforcement).

147. *See* BRANDS, *supra* note 24, at 152. This action was grounded in the federal government’s Commerce Clause authority, which was ironic because it was the Populists who brought the Commerce Clause back into the legal mainstream. *See* Magliocca, *supra* note 103, at 840–44, 849–50 (exploring this issue).

148. *See* PAPKE, *supra* note 24, at 33 (noting that eleven people were killed and fifty were wounded); *see also* Emergency Order, *supra* note 142, at 499 (“Those who disregard this warning and persist in taking part with a riotous mob in forcibly resisting and obstructing the execution of the laws of the United States . . . cannot be regarded otherwise than as public enemies.”).

149. *See, e.g.*, DELMORE ELWELL, *A WALL STREET VIEW OF THE CAMPAIGN ISSUES OF 1896*, at 4 (1896) (discussing the “railroad strike riots of 1894” and stating that “[t]here are still a few blue-coated veterans of the Civil War who will . . . register a prayer for a revival of the spirit of 1860”); PAPKE, *supra* note 24, at 35 (observing that the nation was “fighting for its own existence just as truly as in suppressing the great rebellion”) (internal quotation marks omitted).

150. REPUBLICAN CAMPAIGN TEXT BOOK 138 (Washington, Hartman & Cadick 1896).

151. CAMPAIGN TEXT-BOOK OF THE NATIONAL DEMOCRATIC PARTY 1896, at 1.93 (Chicago & New York, Nat’l Democratic Comm. 1896) (providing the

involved in suppressing the strikers explained, “[m]en must take sides . . . either for anarchy, secret conclaves, unwritten law, mob violence, and universal chaos under the red or white flag of socialism on the one hand; or on the side of established government.”<sup>152</sup>

From a constitutional standpoint, the reaction against the Pullman Strike affected how people thought about federalism by emphasizing the fragility of property rights. In a sense, this harkened back to the Framers’ view that the chief threat to personal rights came from the new federal government—hence the need for a Bill of Rights that applied only to federal actions—while the principal threat to property rights came from state governments, which is why the Contracts Clause and restrictions on paper money applied only to the states.<sup>153</sup> The struggle against slavery, though, convinced lawyers and citizens that the states also posed a threat to personal rights. This new concept of federalism motivated Justice Field’s dissent in *O’Neil*:

[W]hen the late civil war closed, and slavery was abolished by the Thirteenth Amendment, there was legislation in the former slaveholding States inconsistent with these rights, and a general apprehension arose in a portion of the country—whether justified or not is immaterial—that this legislation would still be enforced and the rights of the freedmen would not be respected.<sup>154</sup>

The Pullman Strike turned this logic on its head. First, the inaction of state authorities in the face of what was seen as a local mob bent on confiscating property fit snugly into the Framers’ view of federalism. Second, the strike implied that extending free speech, the right to bear arms, or the freedom from unreasonable searches and seizures to the states would make it more likely that people like Debs would succeed in their redistributive aims.<sup>155</sup> Finally, this episode undermined the logic of

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views of Democrats who rejected Bryan’s platform in 1896).

152. PAPKE, *supra* note 24, at 32 (internal quotation marks omitted).

153. See U.S. CONST. art. I, § 10, cl. 1 (stating that no state may pass any law “impairing the Obligation of Contracts” or “make any Thing but gold and silver Coin a Tender in Payment of Debts”); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (holding that the Bill of Rights does not apply to the States).

154. *O’Neil v. Vermont*, 144 U.S. 323, 362 (1892) (Field, J., dissenting).

155. There is a powerful connection between this idea and other significant legal developments at this time. First, in the same year that *Debs* was decided, the Court handed down its controversial ruling in *Pollock v. Farmers’ Loan & Trust Co.*, which held that the federal income tax enacted in 1894 was unconstitutional. *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 583, 586 (1895), *modified on reh’g*, 158 U.S. 601 (1895); see also Magliocca, *supra*



*Slaughter-House*, which held that common-law property rights were not protected by the Fourteenth Amendment although personal rights could be.<sup>156</sup> None of this boded well for substantive incorporation outside of property rights.

## 2. *Debs* and the Crackdown on Freedom

All of these threads came together in *Debs*, which rejected an appeal by the strike leaders of the contempt sanctions imposed upon them for failing to comply with the federal injunction.<sup>157</sup> In their habeas claim, they argued that their Sixth Amendment right to a jury trial was denied<sup>158</sup> and that “[n]o more tyrannous and arbitrary government can be devised than the administration of criminal law by a single judge by means

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note 103, at 864–73 (discussing the decision and the rehearing petition). *Pollock I* reversed a century of judicial deference to congressional tax policy and rested on concern about the growing clamor for redistribution, which indicates the strong influence of political events on doctrine. See *Pollock I*, 157 U.S. at 608 (White, J., dissenting) (“[T]he result of the opinion . . . just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years . . . .”); *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 674 (1895) (Harlan, J., dissenting) (“[B]y much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism.”).

Second, African American voting rights disappeared during this era, even though the Fifteenth Amendment guaranteed this privilege against state action. See, e.g., *Giles v. Harris*, 189 U.S. 475, 486–88 (1903) (holding that courts had no power to order an equitable remedy for voting restrictions in Alabama); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 83–85 (commemorative ed. 2002) (chronicling the proliferation of disenfranchisement measures in the South during the 1890s and early 1900s); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 296 (2000) (“If canonization requires a ready focal point, [*Giles*] is it for (anti-)democracy in American constitutional law.”). This disincorporation of voting rights (and it may be fairly called that) was driven by a desire to deprive the Populists of support. See Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 29 (2002) (“The Populist agenda was too dangerous, Populist appeal too popular, Populist growth too alarming, and the enormity of the black belt vote fraud too embarrassing for the Bourbon[] [Democrats] to shoulder.”); Florence Emeline Smith, *The Populist Movement and Its Influence in North Carolina* (Dec. 1929) (Ph.D. dissertation, University of Chicago), *microformed on* Thesis No. 7938 (Dep’t of Photoduplication, Univ. of Chi. Library) (“The Democrats did not wish to continue such campaigns as the one of 1898 and the only way to prevent the regular recurrence of them every two years was to disenfranchise the negro.”).

156. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–78 (1873).

157. See *In re Debs*, 158 U.S. 564, 572–73, 599–600 (1895).

158. *Id.* at 576–77.

of injunction and proceedings in contempt.”<sup>159</sup> Justice Brewer, writing for a unanimous Court, rejected this argument out of fear that a jury drawn from a venire in the heartland of the strike would not convict its leaders.<sup>160</sup> The Court stated that “[i]f all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure.”<sup>161</sup> Thus, if a jury trial right were enforced, the “interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.”<sup>162</sup> In other words, juries were now dangerous. *Debs*’s presumption of jury nullification was accompanied by fire-and-brimstone quotes about the threat of disorder (one of which appears at the start of this Article<sup>163</sup>) that echoed what was said in *Presser* and in Justice Brewer’s New York Bar speech.<sup>164</sup> For instance, the Court stated that “[i]f ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations.”<sup>165</sup>

Even though *Debs* receives plenty of attention for its discussion of the Commerce Clause and its blessing of equitable action against strikes,<sup>166</sup> its implications for incorporation are just as important. If a constitutional right in federal court could not stand its ground against the argument that civil order was in peril, then how could the extension of that right (or almost any other part of the Bill of Rights) to the states move forward? Of course, one could say that *Debs* involved a procedural right, and thus the decision there might simply reflect the ho-hum at-

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159. PAPKE, *supra* note 24, at 64 (quoting from petitioners’ brief) (internal quotation marks omitted); *see also In re Debs*, 158 U.S. at 576–77 (noting petitioners’ Sixth Amendment argument); JOSEPHSON, *supra* note 24, at 606 (stating that an injunction “was a formidable legal weapon, making possible imprisonment for contempt of court without a hearing, and without trial by jury, of those who organized labor action”).

160. *See In re Debs*, 158 U.S. at 581.

161. *Id.* at 581–82.

162. *Id.* at 582.

163. *See* text accompanying note 2.

164. *See supra* Part III.A.

165. *In re Debs*, 158 U.S. at 592.

166. *See, e.g.,* Magliocca, *supra* note 103, at 860–64 (discussing *Debs* in the context of the Commerce Clause).

titude that the Justices took toward these kinds of claims.<sup>167</sup> Yet injunctions against strikes could also be seen—and were seen by at least some Populists—as a free speech issue, as they effectively barred workers from persuading their fellow citizens through protests.<sup>168</sup> Either way, *Debs* crystallized the doubts about the Bill of Rights in this era and laid the foundation for the burial of incorporation and rebirth of the Fourteenth Amendment as a device for protecting property rights.

### C. THE TRANSFORMATION OF *SLAUGHTER-HOUSE*

Not long after the defeat of William Jennings Bryan and his allies in the 1896 presidential election, the Justices embarked on significant doctrinal changes that embodied the post-Pullman spirit of federalism.<sup>169</sup> The centerpiece of this effort was the Court's expansion of the Fourteenth Amendment's protection of property rights through the incorporation of the Takings Clause<sup>170</sup> and the creation of the "liberty of contract."<sup>171</sup> Though the former act was consistent with the doctrinal pattern distinguishing substantive and procedural incorporation claims, the latter decision emptied *Slaughter-House* of its original content and opened up the case for reconsideration in *Max-*

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167. See *supra* text accompanying notes 60–75.

168. See Lorenzo D. Lewelling, Governor of Kan., Industrial Slavery (July 28, 1894), in *THE POPULIST MIND*, *supra* note 24, at 8 ("Under the decision of the United States Supreme Court you have no right to convince a man to your opinion. You have no right to ask a man to quit work today, no matter what the cause."). A similar argument was made about the attack on Coxey's March. See BRANDS, *supra* note 24, at 174–75.

169. The campaign reinforced the themes that emerged during the Pullman Strike, and I will not repeat them at length here. See, e.g., James A. Barnes, *Myths of the Bryan Campaign*, in WILLIAM JENNINGS BRYAN AND THE CAMPAIGN OF 1896, at 68, 73 (George F. Whicher ed., 1953) (referencing the *Philadelphia Press's* view that Bryan's 1896 platform "is the concrete creed of the mob. It is rank Populism intensified and edged with hate and venom. It rests upon the four corner stones of organized Repudiation, deliberate Confiscation, chartered Communism, and enthroned Anarchy") (internal quotation marks omitted); *The Week*, *NATION* (N.Y.), Nov. 5, 1896, at 337 ("Probably no man in civil life has succeeded in inspiring so much terror, without taking life, as Bryan.").

170. See, e.g., *Chi. Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233–41 (1897) (applying the Takings Clause to the states through the Due Process Clause). There is nothing to be gained from discussing the Takings Clause further, as that result was consistent with the Court's greater enthusiasm for substantive incorporation (as discussed in Part II) and the shift in favor of federal property protection after the Populist revolt.

171. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

*well*. And incorporation (outside of the Takings Clause) bore the brunt of this revisionism.

Just a few days before William McKinley's inauguration in 1897, the Supreme Court handed down its decision in *Allgeyer v. Louisiana*, which invalidated a Louisiana statute regulating insurance contracts on the grounds that the Due Process Clause protected a liberty of contract.<sup>172</sup> Justice Peckham, who would later author both *Lochner v. New York*<sup>173</sup> and *Maxwell*,<sup>174</sup> held that the Fourteenth Amendment guaranteed the right "to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential."<sup>175</sup> The crucial point about *Allgeyer* is that it repudiated *Slaughter-House*, which held that state contract and "livelihood" rights were not covered by the Amendment.<sup>176</sup> Though the Justices did not say that they were overruling *Slaughter-House*, the meaning of that case was now up for grabs.

This brings us back to *Maxwell*, the 1900 decision about the Sixth Amendment's application to the states in which the Court revisited *Slaughter-House* and gave it a strong anti-incorporation reading.<sup>177</sup> The Court resolved the ambiguous definition of federal privileges or immunities against the inclusion of the Bill of Rights (except for the Takings Clause) in part because of decisions on procedural rights that leaned in that direction.<sup>178</sup> But there is a larger point here: in the aftermath of *Allgeyer*, the Justices could not understand what

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172. See *id.* at 589–92; see also Magliocca, *supra* note 103, at 881–87 (discussing how *Allgeyer* and *Chicago Burlington & Quincy Railroad Co.* fit into the narrative of the Populist defeat).

173. 198 U.S. 45 (1905).

174. 176 U.S. 581, 582 (1900), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1900).

175. *Allgeyer*, 165 U.S. at 589.

176. See *Adamson v. California*, 332 U.S. 46, 80 (1947) (Black, J., dissenting) ("[The Court in *Allgeyer*] substantially adopted the rejected argument of counsel in the *Slaughter-House Cases*, that the Fourteenth Amendment guarantees the liberty of all persons under 'natural law' to engage in their chosen business or vocation.").

177. See *supra* text accompanying notes 56–57.

178. See *supra* text accompanying note 105. Justice Harlan, the lone dissenter in *Maxwell*, rejected the distinction between substantive and procedural incorporation. See *Maxwell*, 176 U.S. at 616 (Harlan, J., dissenting) ("The privileges and immunities specified in the first ten Amendments as belonging to the people of the United States are equally protected by the Constitution. No judicial tribunal has authority to say that some of them may be abridged by the states while others may not be abridged.").

*Slaughter-House* meant if it was not against incorporation. In a revealing statement, *Maxwell* claimed that a broad reading of privileges or immunities would require the Court to overrule *Slaughter-House*.<sup>179</sup> This was ironic because *Slaughter-House* was effectively overruled by *Allgeyer*,<sup>180</sup> but the statement makes sense in that *Slaughter-House* now either had no relevance or needed a totally new rationale. Given the drift in thinking about federalism and the wisdom of applying the Bill of Rights to the states, the time was ripe for a new interpretation—one that was hostile toward incorporation and is now accepted as the correct reading of *Slaughter-House*.<sup>181</sup>

Admittedly, there is nothing in *Maxwell* that expressly supports this theory. Justice Harlan's dissent did say that incorporating the Takings Clause and nothing else meant that "the protection of private property is of more consequence than the protection of the life and liberty of the citizen," which could be read as a criticism of the Court's response along the lines sketched out here.<sup>182</sup> More important is the circumstantial evidence discovered in the years preceding *Maxwell*—the statements about mob rule in *Presser*,<sup>183</sup> the public discussion of federalism that followed the Pullman Strike, the reasoning of *Debs*,<sup>184</sup> the transformation of the Fourteenth Amendment in *Allgeyer*,<sup>185</sup> and the change of Justice Brewer's views from *O'Neil*<sup>186</sup> to *Maxwell*.<sup>187</sup> All of this suggests that the political turmoil in the 1890s played a significant role in the Court's revision of *Slaughter-House* and in the failure of substantive incorporation.

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179. See *Maxwell*, 176 U.S. at 593 (arguing that if the Fourteenth Amendment incorporates the Bill of Rights, "then the sovereignty of the State in regard to [its citizens] has been entirely destroyed, and the *Slaughter-house cases*, and *United States v. Cruikshank* are all wrong, and should be overruled").

180. See *Allgeyer*, 165 U.S. at 589.

181. See *supra* note 12 and accompanying text. The Justices were probably reluctant to overrule *Slaughter-House* explicitly because it was the Court's first case interpreting the Fourteenth Amendment. Repudiating such a decision outright would be a major embarrassment.

182. *Maxwell*, 176 U.S. at 614 (Harlan, J., dissenting).

183. See *Presser v. Illinois*, 116 U.S. 252, 268 (1886).

184. See *In re Debs*, 158 U.S. 564, 597–98 (1895).

185. See *Allgeyer*, 165 U.S. at 589.

186. See *O'Neil v. Vermont*, 144 U.S. 323, 366–71 (1892) (Harlan, J., dissenting).

187. See *Maxwell*, 176 U.S. at 593.

## CONCLUSION

This Article sought to clear up some myths about incorporation and clarify what the Justices will face when they decide the Second Amendment's application to the states. One important lesson is that *Slaughter-House* was not hostile to the extension of the Bill of Rights until 1900 and hence cannot be blamed for the delay in that development. Another takeaway is that, prior to *Maxwell*, courts were more supportive of substantive incorporation claims than procedural ones. Finally, the decline of substantive incorporation in the late nineteenth century (outside of the Takings Clause) is largely attributable to the reaction against protests in the mid-1890s and the fear that extending new legal protections against state action would be dangerous.

What do these principles tell us about how the Supreme Court should view a Second Amendment incorporation claim? First, this is one of the few substantive portions of the Bill of Rights that have not overcome the hostility toward incorporation generated by the backlash against the Populists and labor.<sup>188</sup> This exception is hard to justify more than a century after William Jennings Bryan's defeat in the 1896 campaign. Second, a review of the Court's Second Amendment decisions from the 1870s until the 1890s, which are the only ones that address incorporation, shows that there is no holding rejecting the idea.<sup>189</sup> Consequently, this historical inquiry counsels in favor of a conclusion that the Second Amendment should be extended against the states to join its compatriots in textual freedom.

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188. The Third Amendment is an unincorporated substantive provision, but that issue has never been seriously litigated in the Supreme Court, nor has there ever been a case addressing whether the Excessive Fines Clause of the Eighth Amendment applies to the states. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (declining to address whether the Fourteenth Amendment incorporates the Excessive Fines Clause of the Eighth Amendment).

189. In *Cruikshank*, the Second Amendment analysis turned on the lack of state action. See *supra* text accompanying note 94. In *Presser*, the Second Amendment claim failed because the Fourteenth Amendment was not cited. See *supra* text accompanying note 117. And in *Miller v. Texas*, 153 U.S. 535, 538 (1894), the argument was dismissed because no Second Amendment claim was raised in the lower courts.