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# Constitutional Law -- Was it Intended That the Fourteenth Amendment Incorporate the Bill of Rights?

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a penalty was held not to violate the constitutional guaranty against double jeopardy. The Court ruled that the double damages and the penalty were imposed merely to compensate the government for the damage done by the violations of the act, *i.e.*, the penalties were remedial, not penal.

From the above discussion, it may be seen that the only cases which hold the privilege against self-incrimination applicable where the witness may be subject to "penalties" by way of payment of money are those in which the courts feel that the "penalty" is not remedial, but criminally penal; ones where the damages sought are imposed as a criminal penalty or substitute therefore, and not where they are intended to compensate private aggrievances. Admittedly, punitive damages are "penal," as the court in *Allred* stresses;<sup>53</sup> also it is true that the defendants might become subject to body execution upon failure to pay the judgment for such damages. It is submitted, however, that the damages are not penal within the concept of "criminal prosecution," even though the defendants, in furtherance of their civil liability, might be jailed by means of body execution, and that the court erred by overlooking the distinction between merely "penal" damages which are in essence merely a further *civil* liability, and "penal" damages which come within the concept of "criminal prosecution," to which the privilege against self-incrimination extends only.

ARCH K. SCHOCH IV

#### Constitutional Law—Was it Intended That the Fourteenth Amendment Incorporate the Bill of Rights?

The Supreme Court in 1833 established the principle that the Bill of Rights did not apply to the states.<sup>1</sup> Following the Civil War the fourteenth amendment, with its "privileges or immunities" and "due process" clauses, cast doubt on this principle and raised the possibility of applying the Bill of Rights to the states by incorporating them into the amendment.<sup>2</sup>

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<sup>53</sup> 261 N.C. at 35, 134 S.E.2d at 190.

<sup>1</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>2</sup> U.S. CONST. amend. XIV, § 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

The Court early held in the *Slaughter House Cases*<sup>3</sup> that the "privileges or immunities" clause prevented the states from abridging those privileges or immunities that a person holds due to his United States citizenship, but not those privileges or immunities he might hold due to state citizenship. Thus, the decision in effect nullified the importance of this clause for purposes of incorporation.<sup>4</sup>

The "due process" clause, however, has not been construed so strictly. Instead, it has been utilized many times, particularly recently, to make certain parts of the Bill of Rights applicable to the states.<sup>5</sup> The majority position of the Court has achieved this result by a selective process of incorporating into the fourteenth amendment only those parts of the Bill of Rights the violation of which would also violate "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>6</sup> Under this process, the Court has clearly incorporated freedom of religion,<sup>7</sup> of speech,<sup>8</sup> of press,<sup>9</sup> and of assembly,<sup>10</sup> protection from unreasonable searches and seizures;<sup>11</sup> requirements of just compensation for property;<sup>12</sup> assistance of counsel;<sup>13</sup> protection from cruel and unusual punishments;<sup>14</sup> and the privilege against self-incrimination.<sup>14a</sup>

A minority position, led by Justice Black, contends that any act in violation of the Bill of Rights also violates the fourteenth amendment.<sup>15</sup> Justice Black bases this conclusion on his belief that the framers of the fourteenth amendment intended that the Bill of

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citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>3</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>4</sup> CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 187 (10th ed. 1948).

<sup>5</sup> *E.g.*, *Gideon v. Wainright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>6</sup> *In re Kemmler*, 136 U.S. 436, 448 (1890). This basic idea was earlier stated in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856).

<sup>7</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>8</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>9</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>10</sup> *De Jonge v. Oregon*, 299 U.S. 353 (1937).

<sup>11</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>12</sup> *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

<sup>13</sup> *Gideon v. Wainright*, 372 U.S. 335 (1963).

<sup>14</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>14a</sup> *Malloy v. Hogan*, 32 U.S.L. WEEK 4507 (U.S. June 15, 1964).

<sup>15</sup> *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion). Dissenting with Justice Black were Justices Douglas, Murphy, and Rutledge.

Rights be applicable to the states.<sup>16</sup> Legal scholars differ on this question of intent.<sup>17</sup> The purposes of this note are, first, to study the events pertinent to the passage of the amendment in order to determine the intent behind its passage, and, second, to discuss the influence which this intent should have on present Supreme Court decisions.

When the new Congress convened after the Civil War, the Constitution had been construed so as to give little protection against state action.<sup>18</sup> *Barron v. Baltimore*<sup>19</sup> had limited the effect of the Bill of Rights to the federal government, and the *Dred Scott*<sup>20</sup> decision had eliminated any possibility of the "privileges and immunities" clause of article IV, section 2 being used to protect the Negro. Since these decisions gave the Negro little protection against the "Black Codes"<sup>21</sup> passed by many southern states, the new Con-

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<sup>16</sup> Justice Black states: "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." *Id.* at 71.

<sup>17</sup> Favoring the intent-to-incorporate theory are: FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908) [hereinafter cited as FLACK]; GUTHRIE, *THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* (1898). Opposing this theory are: Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949) [hereinafter cited as Fairman]; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *STAN. L. REV.* 3 (1954).

Many writers contend that the fourteenth amendment was intended to greatly expand the federal power, but they make no mention of a specific intent to incorporate the Bill of Rights. COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* (1912); CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (10th ed. 1948); 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1926); Royal, *The Fourteenth Amendment: The Slaughter House Cases*, 4 *So. L. REV.* 558 (1879).

<sup>18</sup> Prior to the Civil War three decisions had severely limited federal control over state action. First, in *Corfield v. Coryell*, 6 *Fed. Cas.* 546 (No. 3230) (C.C.E.D. Pa. 1823), Justice Washington adopted a limited construction of the original "privileges and immunities" clause in article IV, section 2, so that each state was required to give only the fundamental rights to citizens of other states. Next, in 1833, the Court in the landmark case of *Barron v. Baltimore*, 32 *U.S.* (7 *Pet.*) 243 (1833), held that the Bill of Rights did not apply to the states. Finally, in *Scott v. Sanford*, 60 *U.S.* (19 *How.*) 393 (1857), the Court again limited the scope of the "privileges and immunities" clause of article IV, section 2, so that what coverage remained after *Corfield* did not apply to protect the Negro.

<sup>19</sup> *Supra* note 18.

<sup>20</sup> *Scott v. Sanford*, 60 *U.S.* (19 *How.*) 393 (1857).

<sup>21</sup> For a general comparison of these laws see Message of the President of the United States to the House of Representatives, *Freedmen*, H.R. Doc. No. 118, 39th Cong., 1st Sess. (1886).

gress immediately sought to pass remedial legislation.<sup>22</sup>

The Civil Rights Act of 1866<sup>23</sup> was the first product. Although it finally passed the Act over President Johnson's veto,<sup>24</sup> Congress itself was uncertain of its constitutional power to pass such a measure.<sup>25</sup> Thus, in order to assure constitutionality, the 39th Congress began work on a constitutional amendment.<sup>26</sup> The job of drafting what was to become the fourteenth amendment was given to the Joint Committee on Reconstruction. The first proposal from the Committee was drafted by Representative Bingham;<sup>27</sup> and, like the Civil Rights Act, the apparent purpose was to protect the Negro from discrimination by the southern states.<sup>28</sup> Up to this time there had been no proposals, bills or discussion which could possibly be construed as an attempt or desire to apply the Bill of Rights to the states via the new amendment. Before this first draft was permanently pigeonholed, however, it gave rise to some ambiguous discussion.

On February 26, 1866, Representative Bingham, in an opening speech to the House, outlined his conception of the problem:<sup>29</sup> although every word of the proposed amendment was already in the Constitution, Congress had heretofore lacked the power of enforcement.<sup>30</sup> He further declared that if Congress had previously had this power and had been able to exercise it, there would have been

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<sup>22</sup> HICKS & MOWRY, A SHORT HISTORY OF AMERICAN DEMOCRACY 339 (2d ed. 1956).

<sup>23</sup> Ch. 31, 14 Stat. 27 (1866). This bill provided that persons born in the United States under United States jurisdiction were citizens of the United States, and without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property, and to the equal benefit of all laws for security of person and property, as was enjoyed by white citizens.

In his opening speech to the Senate, Senator Trumbull clearly expressed that the purpose of the Act was to prevent discrimination in civil rights on account of race and to give all persons equal protection of the laws. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1865-1866).

<sup>24</sup> *Id.* at 1809.

<sup>25</sup> *Id.* at 1151.

<sup>26</sup> *Id.* at 2459.

<sup>27</sup> *Id.* at 806.

<sup>28</sup> This proposal provided: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property." *Ibid.*

<sup>29</sup> *Id.* at 1033.

<sup>30</sup> *Id.* at 1034. The proposed amendment was nothing more than a reiteration of article IV, section 2, and the fifth amendment. See note 28 *supra*.

no rebellion.<sup>31</sup> Bingham then concluded that the purpose of the new amendment was to give Congress power to enforce "this immortal bill of rights" upon the states.<sup>32</sup> Use of this phrase has given rise to conflicting interpretations as to what was intended by "bill of rights."<sup>33</sup>

After Bingham's opening speech to the House, there were no more references to the "bill of rights" until his closing speech, where he stated that the purpose of the proposed amendment was to arm Congress with the power to enforce the Bill of Rights against the states.<sup>34</sup> He then stated:

Gentlemen, admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law . . . .<sup>35</sup>

Shortly after Representative Bingham's closing speech, consideration of this draft was permanently pigeonholed.<sup>36</sup> However, the Joint Committee on Reconstruction immediately framed a new draft which was to become, after the Senate's definition of

<sup>31</sup> CONG. GLOBE, *op. cit. supra* note 23, at 1034.

<sup>32</sup> In part, Bingham's words were: "And, sir, it is equally clear by every construction of the Constitution, . . . that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States." *Ibid.*

<sup>33</sup> Fairman contends that "this immortal bill of rights" is to Bingham a "fine literary phrase not referring precisely to the first eight amendments." He argues that Bingham was referring to "the privileges or immunities" of article IV, section 2, and to the right of life, liberty, and property of the fifth amendment. He reasons further that if Bingham had intended to include the first eight amendments, this would have been inconsistent with his statement that had Congress had and exercised this power there would have been no rebellion, for enforcement of the first amendment would not have prevented secession. Fairman 44. On the other hand, Flack interprets Bingham's language more literally, contending that "it meant nothing less than the conferring upon Congress the power to enforce, in every State of the Union, the Bill of Rights, as found in the first eight Amendments." FLACK 57.

<sup>34</sup> CONG. GLOBE, *op. cit. supra* note 23, at 1088.

<sup>35</sup> *Id.* at 1089. Fairman again believes that Bingham did not mean "the first eight amendments" when he used the phrase "bill of rights," contending that, in this statement, Bingham made it clear from the context that he was referring to the fundamental freedoms of the "due process" and "privileges or immunities" clause. Fairman 34. Flack does not analyze the speech in detail but simply says that Bingham stated that the purpose of the amendment was to give Congress power to enforce the Bill of Rights. FLACK 59.

<sup>36</sup> CONG. GLOBE, *op. cit. supra* note 23, at 1095.

a citizen was added,<sup>37</sup> the final version of the fourteenth amendment. Thaddeus Stevens introduced this new draft into the House on May 8, 1866,<sup>38</sup> stating that he felt the purpose of the amendment was to give Congress power to correct the unjust legislation of the states.<sup>39</sup> He further expressed his belief that equal protection, designed to cure the evil of discrimination, was the dominant purpose of section 1.<sup>40</sup> Stevens reasoned that while the Civil Rights Bill secured the same protection, an amendment would prevent repeal of the protection by a simple majority of Congress.<sup>41</sup>

During the last day of the House debate, Representative Bingham added his reasons for giving Congress power to enforce the Constitution against the states,<sup>42</sup> stating: "Contrary to the express letter of your Constitution, cruel and unusual punishments have been inflicted under state laws within the Union upon your citizens . . . ."<sup>43</sup>

After passage of the amendment in the House,<sup>44</sup> Senator Howard introduced the proposal into the Senate.<sup>45</sup> His introductory speech furnishes the strongest evidence that Congress intended to incorporate the Bill of Rights into the fourteenth amendment. In defining the privileges and immunities to be covered by the amendment, Senator Howard quoted from *Corfield v. Coryell*,<sup>46</sup> which had defined them as being those privileges and immunities which are in their nature fundamental.<sup>47</sup> In furtherance of this definition, he stated: "To these privileges and immunities . . . should be added the

<sup>37</sup> *Id.* at 2897.

<sup>38</sup> *Id.* at 2459.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* Fairman utilizes Representative Stevens' speech to substantiate the position that no incorporation was intended, noting that over and over in the discussion, the correlation between section 1 and the Civil Rights Act is mentioned, and that since no one intended for the Civil Rights Act to incorporate the Bill of Rights, no one intended that the amendment do so. Fairman 44.

<sup>42</sup> *Id.* at 2542.

<sup>43</sup> *Ibid.* Flack relies on Bingham's reference to "cruel and unusual punishments" as further evidence that the Bill of Rights was intended to be incorporated. FLACK 79-80. Fairman answers this by contending that Bingham was only arguing in favor of a selective incorporation process by means of the "due process" clause. Fairman 53.

<sup>44</sup> CONG. GLOBE, *op. cit. supra* note 23, at 2545. This was done only after three days debate, the vote being 128 for and 37 against. *Ibid.*

<sup>45</sup> *Id.* at 2765.

<sup>46</sup> 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

<sup>47</sup> *Id.* at 551-52.

personal rights guaranteed and secured by the first eight amendments to the Constitution . . . .<sup>48</sup> Senator Howard then proceeded to read each of the first eight amendments,<sup>49</sup> stating that there was no power in the Constitution for Congress to enforce them, and that the purpose of the proposed amendment was to give Congress such power.<sup>50</sup>

After passage by the Senate,<sup>51</sup> the amendment was submitted to the states on June 16, 1866,<sup>52</sup> and was adopted two years later.<sup>53</sup> There was practically no discussion in the state legislatures of the conflict that the first eight amendments might have with their present state laws.<sup>54</sup> To this there was one notable exception. In the Massachusetts House the proposed amendment received an unfavorable report from its Committee on Federal Relations.<sup>55</sup> The Committee considered section 1 of the fourteenth amendment to be surplusage, stating that it did not see where this section differed from article IV,

<sup>48</sup> CONG. GLOBE, *op. cit. supra* note 23, at 2765.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Id.* at 2766. Flack points out that Howard's interpretation of the amendment was not questioned by anyone, and that since no member of the Committee gave a different interpretation or questioned his statement, his interpretation must be accepted as that of the Committee. FLACK 87. The opposing view agrees that what is said by a member for a reporting committee is ordinarily entitled to very special consideration, "but others may, without challenging those views, have supported the measure for quite inconsistent reasons." Fairman 66. It should also be noted in this context that the minority opposed the amendment for the very reasons that Howard gave in support of it. FLACK 87.

Fairman points out the repetition in incorporating the "due process" clause of the fifth amendment and also restating it in the fourteenth. Fairman 58. It would appear that this contention is somewhat irrelevant. It is true that Congress would be repeating itself by including two "due process" clauses, but this does not explain away Howard's belief that the fourteenth amendment included the Bill of Rights.

<sup>51</sup> CONG. GLOBE, *op. cit. supra* note 23, at 3042. This was done on June 8, 1866, the vote being 33 for, 11 against, with 5 absent. *Ibid.*

<sup>52</sup> FLACK 140.

<sup>53</sup> FLACK 191 n.117.

<sup>54</sup> Fairman 82. Professor Fairman points to several of the state laws which would conflict with the fourteenth amendment as evidence that the states did not intend to incorporate. He notes further that several states (Connecticut, Kansas, and Michigan) did not require that a person charged with "a capital or otherwise infamous crime" be indicted by a grand jury as is required by the fifth amendment. Yet, says Fairman, there was no suggestion by their legislatures that their state law conflicted with the fifth amendment.

Fairman also noted that New Hampshire's Constitution made provision for the support and maintenance of Protestant ministers, yet no question of the first amendment's provision for freedom of religion was discussed by the legislature.

<sup>55</sup> H.R. Doc. No. 149, 1, 25 (Mass. 1867).

section 2, and amendments I, II, V, and VIII.<sup>56</sup> During the period in which the question of ratification was before the state legislatures, there were no statements in the newspapers as to whether the first eight amendments were to be applicable to the states.<sup>57</sup>

Less than a year after the states had adopted the fourteenth amendment, the Supreme Court in *Twitchell v. Pennsylvania*<sup>58</sup> refused to consider whether the fifth and sixth amendments applied to the states. Citing *Barron*, Chief Justice Case spoke for an unanimous court in refusing to take jurisdiction by writ of error, stating that application of the fifth and sixth amendments to the states was "no longer a subject of discussion."<sup>59</sup>

Two years later, in 1871, the question arose in the House as to whether the "privileges or immunities" clause of the fourteenth amendment was intended to incorporate the Bill of Rights.<sup>60</sup> During this debate Representative Bingham read each of the first eight amendments and stated that the "privileges or immunities" clause

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<sup>56</sup> *Ibid.* Professor Flack states that this Committee report is valuable because it shows that the legislature, in adopting the report, "accepted the statements made in it that the first section was but a reiteration of the guarantees enumerated in the Amendments." FLACK 188.

Professor Fairman points out that the Committee was completely wrong in believing that the Bill of Rights applied to the states, citing *Barron*. Fairman 120. This explanation appears irrelevant for there is no significance in the fact that the Committee was unaware of this decision. What is important is that the Committee thought that the fourteenth amendment included some of the Bill of Rights.

<sup>57</sup> FLACK 153. Flack states that, "it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including jury trial, were secured by it." *Id.* at 153-54.

Professor Fairman points out that it may be equally inferred that these persons suggested a "selective" incorporation of certain freedoms expressed in the Bill of Rights. Fairman 81.

<sup>58</sup> 74 U.S. (7 Wall.) 321 (1869). The petitioner had been sentenced to death for murder. In seeking a writ of error it was contended that he had not been indicted by a grand jury, which was in violation of the fifth amendment, and that he had not been informed of the nature and cause of the accusation, which was in violation of the sixth amendment. The fourteenth amendment now guarantees the protection of the fifth amendment's privilege against self-incrimination. *Malloy v. Hogan*, 32 U.S.L. WEEK 4507 (U.S. June 15, 1964).

<sup>59</sup> 74 U.S. (7 Wall.) at 325. This case is cited as showing that the fourteenth amendment was not intended to incorporate the Bill of Rights. Fairman 132. Part of what was "no longer a subject of discussion" in *Twitchell* is now. See *Malloy v. Hogan*, *supra* note 58.

<sup>60</sup> CONG. GLOBE, 42d Cong., 1st Sess. 111-18 (1871). The fact that this question was debated within five years after passage is an indication of the conflicting intentions within Congress.

made them an express prohibition upon every state.<sup>61</sup> It would seem that this speech by Bingham is conclusive evidence that he intended the Bill of Rights to be incorporated.<sup>62</sup>

Reviewing the Congressional debate, the state legislative discussion, and the general public response, it can be seen that the evidence in favor of the intent-to-incorporate theory consists of Representative Bingham's speeches in the House, Senator Howard's introductory speech in the Senate, and the Committee Report in the Massachusetts legislature. On the other hand, the evidence opposed to the intent-to-incorporate theory consists of the total lack of newspaper discussion about incorporation, the lack of discussion in the state legislatures (except Massachusetts), and of the Supreme Court decision in *Twitchell*. Note that the evidence in favor of the intent to incorporate theory is found entirely within the congressional debates, while the evidence opposed is found entirely outside of the debates. Thus, the conclusion follows that Congress intended incorporation, while the states and the general public did not.<sup>63</sup> However, the above conclusion raises the additional problem: how could the states blindly ratify an amendment not knowing its actual intent? The post-Civil War atmosphere, which is difficult for us to comprehend today, supplies the answer. It would appear that the framers desired a strong amendment limiting states' rights and including the Bill of Rights.<sup>64</sup> Yet they saw that sufficient support in Congress did not necessarily mean sufficient support by the states.<sup>65</sup>

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<sup>61</sup> After reading the Bill of Rights, one by one, Bingham said, "These eight articles . . . never were a limitation upon the power of the State, until made so by the Fourteenth Amendment. The words of that Amendment 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' are an express prohibition upon every State." *Id.* at 115.

<sup>62</sup> Thus, Professor Fairman's contention that Bingham was using the term "bill of rights" as a fine literary phrase becomes more difficult to accept. See note 33 *supra*.

<sup>63</sup> 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 539-41 (1926); Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869, 904 (1948); Note, *Purpose and Scope of the Fourteenth Amendment*, 21 SO. CAL. L. REV. 47, 53 (1947); Note, *The Fourteenth Amendment Challenged*, 36 GEO. L.J. 398, 410 (1948).

<sup>64</sup> COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 10 (1912); FLACK 94; GUTHRIE, *THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 60-61 (1898); *The Fourteenth Amendment Challenged*, *supra* note 63, at 405; Note, *The Bill of Rights and the Fourteenth Amendment*, 33 IOWA L. REV. 666, 667 (1948).

<sup>65</sup> COLLINS, *op. cit. supra* note 64, at 10; *The Fourteenth Amendment Challenged*, *supra* note 63, at 405; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 667.

Therefore, the framers resorted to broad language that was accepted by the House after only three days of discussion and by the Senate after five days of discussion and that was ratified during the post-Civil War hate-the-South-and-help-the-Negro period.<sup>66</sup> In addition, the attention of the general population and their representatives was focused on punishing the South and finding some way to protect the newly freed Negro from the "Black Codes."<sup>67</sup> This explains why most of the discussion in Congress centered around the effects the new amendment would have on the Negro. Congress and the states no doubt thought that passing the amendment would give Congress power to carry out a program of reconstruction and that use of this power would focus naturally against the southern states.<sup>68</sup> Moreover, ratification was achieved by requiring the southern states to ratify before being re-admitted to the Union.<sup>69</sup>

The conflicting intentions of Congress and of the states raise the constructional problem of whose intent will be given the greater weight.<sup>70</sup> In *Maxwell v. Dow*<sup>71</sup> the Supreme Court stated that in the case of an ambiguous constitutional amendment the Court should not only evaluate Congress's intention but should also look to the ratifying states' intentions. In the case of an ambiguous amendment it would appear that since an amendment has no effect until ratified by the states, it should be given no broader construction than the states intended.<sup>72</sup> Thus, it follows that the fourteenth amendment was not intended to incorporate the Bill of Rights.

But, assuming that the intent-to-incorporate theory might be correct, an additional problem needs clarifying: which particular clause incorporates the Bill of Rights? Either the "privileges or immuni-

<sup>66</sup> COLLINS, *op. cit. supra* note 64, at 10-12; 2 WARREN, *op. cit. supra* note 63, at 539-40; *The Fourteenth Amendment Challenged*, *supra* note 63, at 405; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 667.

<sup>67</sup> COLLINS, *op. cit. supra* note 64, at 9; 2 WARREN, *op. cit. supra* note 63, at 540; Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 645 (1908).

<sup>68</sup> COLLINS, *op. cit. supra* note 64, at 10; FLACK 94.

<sup>69</sup> COLLINS, *op. cit. supra* note 64, at 142; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 667.

<sup>70</sup> This problem assumes that "intent" should be considered in interpreting a law. See tenBroek, *Use by The United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 437 (1938), for reasons for rejecting the "intent" theory.

<sup>71</sup> 176 U.S. 581, 602 (1900).

<sup>72</sup> tenBroek, *supra* note 70, at 453; IV Worthington, *Letters and Other Writings of James Madison* 211 (1884).

ties" clause or the "due process" clause may be relied upon to support the incorporation theory.<sup>73</sup> Three reasons favor incorporation through the "privileges or immunities" clause.

First, all the evidence (the speeches of Bingham and Howard and the Massachusetts Committee Report) in support of the incorporation theory pointed toward incorporation through the "privileges or immunities" clause, not the "due process" clause. Both Howard in his Senate address<sup>74</sup> and the Massachusetts Committee Report<sup>75</sup> stated that the privileges or immunities were those expressed in the first eight amendments. Also, Bingham said in his explanation to the House in 1871 that he intended the "privileges or immunities" clause to include the first eight amendments.<sup>76</sup> No such statements were made about the "due process" clause.

Second, the "due process" clause of the fifth amendment had been recently (1856) and clearly defined in *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>77</sup> There the Supreme Court held that an act was not due process if it violated "those settled usages and modes of proceeding existing in the common and statute law of England . . ."<sup>78</sup> This decision supports the natural law construction of the majority of the Court but not the full incorporation theory advocated by Black.

Third, the natural reading of the "privileges or immunities" clause in conjunction with the "citizenship" clause supports the incorporation theory.<sup>79</sup> Thus, incorporation must take place, if at all, through the "privileges or immunities" clause.<sup>80</sup>

Even if the intent-to-incorporate theory is correct, it does not

<sup>73</sup> Justice Black does not take a position on the question. See note 17 *supra*.

<sup>74</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-1866).

<sup>75</sup> H. R. Doc. No. 149, 1, 25 (Mass. 1867).

<sup>76</sup> CONG. GLOBE, *supra* note 60, at 115.

<sup>77</sup> 59 U.S. (18 How.) 272 (1856).

<sup>78</sup> *Id.* at 277.

<sup>79</sup> Justice Black in *Adamson v. California*, 332 U.S. 76 (1947), agrees with this natural reading and favorably quotes Professor Royal who stated in *The Fourteenth Amendment: The Slaughter-House Cases*, 4 So. L. REV. 558 (1870), "Ninety-nine out of every one hundred educated men, upon reading this section over, would at first say that it forbade a State to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States." *Id.* at 563.

<sup>80</sup> GUTHRIE, *THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 60-61 (1898); *Purpose and Scope of the Fourteenth Amendment*, *supra* note 63, at 57; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 668.

necessarily follow that the Supreme Court should today incorporate the Bill of Rights. Rather, stare decisis and the social pressures to incorporate should be considered.

The social pressures to incorporate have been held to a minimum by the "due process" clause. In order to insure justice, the Supreme Court has not needed to incorporate the Bill of Rights in its entirety.<sup>81</sup> Instead, the Court, relying on the due process clause, need only find that the state action violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>82</sup>

This selective process has the advantage of not requiring that all of the first eight amendments be applied against the states.<sup>83</sup> Some of the amendments are no longer as necessary as they once were. For example, the second amendment guaranteeing the right to bear arms is not as important today as it once was. Also, the seventh amendment's twenty dollar maximum limit on certain trials without a jury is outdated due to inflation.

Thus, even if it be assumed that the fourteenth amendment was intended to incorporate the Bill of Rights, respect for stare decisis, plus lack of pressure to overrule past decisions are sufficient reasons to reject Justice Black's incorporation theory.<sup>84</sup>

FRANK H. WALKER, JR.

### Federal Jurisdiction—Abstention—Right to Return to Federal Courts

The "abstention doctrine" is the name given to the principles applied by the federal courts when they refuse to decide a case over which they properly have jurisdiction,<sup>1</sup> and leave the plaintiff with the necessity of presenting part,<sup>2</sup> or all,<sup>3</sup> of the questions in the

<sup>81</sup> Green, *supra* note 63, at 906; Comment, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 287 (1949); *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 675.

<sup>82</sup> Palko v. Connecticut, 302 U.S. 319, 325 (1937).

<sup>83</sup> Green, *supra* note 89, at 906.

<sup>84</sup> *Purpose and Scope of the Fourteenth Amendment*, *supra* note 89, at 47; *A Study in Constitutional Technique*, *supra* note 106, at 268; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 90.

<sup>1</sup> Abstention is a decision on the merits, one which comes after the question of jurisdiction. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1963) (per curiam) (implicit), 42 N.C.L. REV. 236 (1963).

<sup>2</sup> *E.g.*, *Harrison v. NAACP*, 360 U.S. 167 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

<sup>3</sup> *E.g.*, *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).