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CONCEIVED IN LIBERTY: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS

MICHAEL KENT CURTIS†

The history of the Constitution in general and the fourteenth amendment in particular is at the center of a storm of political controversy. As C. Vann Woodward has noted, political movements always seek to gain control of history. Woodward cites the Commisar in George Orwell's book *1984*, "Who controls the past controls the present. Who controls the present controls the future."¹

In the text of a 1985 speech to the American Bar Association Attorney General Meese warned against drifting back to the "radical egalitarianism and expansive civil libertarianism of the Warren Court." He called for fidelity to history and for a "jurisprudence of original intention."²

As the Attorney General's speech unfolded a central theme was his attack on the incorporation doctrine, the rule requiring states and local governments to obey at least most guarantees of the Bill of Rights. Mr. Meese pointed out that the Bill of Rights was "designed to apply only to the national government." He told his readers that no provision of the Bill of Rights was held to apply to the states until 1925. Indeed, he and his press spokesman, Mr. Eastland, have implied that the doctrine was not even invented until that time. Since 1925 Mr. Meese explained that much constitutional litigation had been aimed at expanding the scope of the incorporation doctrine. "But," he wrote, "the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests." Application of the Bill of Rights to the states, he warned, was a "politically violent and constitutionally suspect" blow to federalism.³

In fairness to Mr. Meese, the text as delivered departed from the text as written. Mr. Meese left out some of his attacks on the incorporation doctrine. In the storm of controversy that followed his distribution of the text of his speech, Mr. Meese has explained that he has not called for freeing the states from the Bill of Rights.⁴ Apparently, Mr. Meese continues to adhere to his call for a jurisprudence of original intention and continues to imply that application of the Bill of Rights to the states is inconsistent with original intention. (A doctrine invented in 1925 seems unlikely to reflect original intent of an amend-

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1. Woodard, *On Believing What One Reads*, in *THE HISTORIAN AS DETECTIVE* 30 (R. Winks ed. 1969).

2. E. Meese, Address before the American Bar Association, July 9, 1985, at 14.

3. *Id.* at 15, 16.

4. *E.g.*, N.Y. Times, Aug. 16, 1986, at 22, col. 4 (letter from Mr. Meese's press spokesman, Mr. Terry Eastland).

ment ratified in 1868.) Mr. Meese simply says that he is not embracing the conclusion that seems to flow inescapably from his premises.

What Mr. Meese wrote about of incorporation is part of a broader attack on the doctrine. The Reagan Administration has nominated or supported, as candidates for federal judgeships, a surprising number of people who are hostile to application of the Bill of Rights to the states.

Judge Richard Posner, appointed to the Circuit Court by President Reagan, has a view of the Constitution which he says is "incompatible with the idea that the due process clause 'incorporated' any provisions of the Bill of Rights *in toto*. That idea," he says, "attributes to those who framed and enacted the due process clause of the Fourteenth Amendment truly revolutionary intentions."⁵

Daniel Manion, approved in 1986 by the Senate as Circuit Judge, apparently also has attacked the idea that the Bill of Rights limits the states.⁶ Professor Lino Graglia, whom the Administration had hoped to place on the federal bench, wrote in *Commentary* in June of 1986 that the idea that all of the guarantees of the Bill of Rights were to be applied to the states is "implausible" and the judicial doctrine that most of them are incorporated has "no historic support at all."⁷

Scholars, politicians, and journalists have joined in the attack. Raoul Berger, on whose perception of the history of the incorporation doctrine the Attorney General relies, insists that history proves application of the Bill of Rights to the states was a mistake.⁸ Indeed Mr. Berger travels around the country calling for a rollback of the doctrine.⁹

On April 6, 1984, Gary McDowell, who later joined Attorney General Meese's staff, wrote in the *New York Times*: "Not a word in the Constitution explicitly applies the Bill of Rights to the states." Mr. McDowell said that the application was the result of "judicial rewriting," which he condemned as "activism."¹⁰

George Will, a nationally syndicated columnist, has taken up the call announcing that the Supreme Court took a "radically wrong turn when it incorporated the First Amendment into the Fourteenth."¹¹

The late Senator East of North Carolina even introduced a bill to free states and local governments from the restraints of the Bill of Rights.¹²

The *Wall Street Journal* published an article by Professor Charles E. Rice on July 31, 1985, called "Flimflam Under the 14th." The concluding paragraph, referring to application of the Bill of Rights guarantees to the states, was entitled

5. R. POSNER, *THE FEDERAL COURTS—CRISIS IN REFORM* 194 (1985).

6. Greensboro News and Record, July 8, 1983, at A13.

7. *Commentary*, June 1986, at 9. Mr. Howard Meyer, author of *The Amendment That Refused to Die*, brought this article and those in notes 10 and 13 to my attention.

8. See R. BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977).

9. Alexander, *Squaring off over the Constitution*, Greensboro News and Record, Oct. 27, 1985, at E2, col. 3.

10. N.Y. Times, Apr. 6, 1984, at A34, col. 3 (letter to editor).

11. Will, *A Labored Ruling on Pornography*, Greensboro Record, July 21, 1982, at A12, col. 3.

12. S. 3018, 97th Cong., 2d Sess., 128 CONG. REC. S13297, 13329-30 (1982).

“Doctrine is a Fraud.”¹³

On August 16, 1986, Mr. Terry Eastland, Mr. Meese’s press spokesman, wrote: “the belief that provisions of the Bill of Rights were incorporated in the 14th Amendment and thus made applicable to the states did not begin until the 1920’s.”¹⁴

Nor has criticism of incorporation been limited to those who characterize themselves as conservative. On November 10, 1985, Benno C. Schmidt, Jr., now President of Yale wrote: “There is enough doubt about whether the framers of the 14th Amendment intended to impose the Bill of Rights as constraints on the states to sustain [Mr. Meese’s] attack on incorporation, even taking the post-Civil War amendments into account.” Mr. Schmidt suggested that all Mr. Meese needed was a new speech writer.¹⁵ An increasing number of courts have also expressed skepticism about the incorporation doctrine.¹⁶

Appeals to history often play a central role in movements for political change. Attacks on the legitimacy of legal doctrines are often precursors of their elimination.¹⁷

In most of the public controversy over application of the Bill of Rights to the states, the Attorney General and others critical of the rule have simply assumed that history justifies their point of view. The method is assertion rather than demonstration. Mr. Meese’s critics have typically examined his claim that judges should follow original intent instead of examining his historical assertions. History provides one form of legitimacy, but most critics have left history to the Attorney General.

Of course, “original intent” on incorporation or any issue, is difficult to find because so many people are involved and so few speak to the issue. Generalizations about Republican ideas can, at most, express the central tendency among those who spoke out. Such evidence obviously has its limitations. But it is better than the approach typically taken by opponents of application of the Bill of Rights to the states, which is to treat silence as opposition and then to infer that such opposition was quite general because so many were silent.¹⁸

Abraham Lincoln recognized the central role of public opinion in shaping the law. Public opinion, he suggested in the 1850s, was a force deeper than constitutions, laws, and court decisions. Public opinion made the law enforceable or unenforceable.¹⁹

13. Rice, *Flimflam Under the 14th*, Wall St. J., July 31, 1985, at 18, col. 4 (Review and Outlook).

14. N.Y. Times, Aug. 16, 1986, at 22.

15. L.A. Times, Nov. 10, 1985, Part IV, at 1.

16. *E.g.*, Horn v. Kean, 796 F.2d 668 (3d Cir. 1986); Jaffree v. Board of School Comm’rs, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff’d in part and rev’d in part sub. nom.*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983).

17. See M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 201 (1986); C. PRITCHETT, THE AMERICAN CONSTITUTION 572-91 (1959).

18. See M. CURTIS, *supra* note 17, at 92-130.

19. Quoted in N.Y. Times, Feb. 12, 1987, at 23.

THE HISTORY OF THE FOURTEENTH AMENDMENT

Lincoln spoke at a time when consensus about the Constitution was breaking down.

Garrisonian abolitionists saw the Constitution as a pro slavery document, a covenant with death.²⁰ A growing number of Southerners and some Democrats saw it as a document that protected the right to take and hold slaves not only in the territories, but also in the North. For these people laws prohibiting slavery took property without due process.²¹

The radical political abolitionists thought that the Constitution made slavery illegal everywhere, even in the States.²² Because blacks had been reduced to slavery by force, not by law, the radical political abolitionists thought slavery deprived slaves of their liberty and property without due process. Most Republicans read the due process clause of the Constitution to outlaw slavery in the national territories.

While Garrisonians read the Constitution as a covenant with death that did not include blacks in its protections, Republicans read the Constitution as a document conceived in liberty. Probably most Republicans acknowledged that the Constitution permitted slavery in the states. Still, they read the document as protecting the civil liberties of citizens even in the Southern states, including the right to attack the evil of slavery in the states where it flourished.

The American crusade against slavery was a crusade for civil liberty. Not just for liberty for the slaves, but for free blacks in the North, and for whites.

State Suppression of Liberty: 1830-1866

In response to the crusade against slavery, southern states passed laws making speech or press critical of slavery a crime. The South became a closed society.²³

By the time of the Lincoln-Douglas debates, both Lincoln and Douglas recognized that Republicans could not campaign in the South.²⁴ On the floor of the United States Senate, a pro-slavery senator invited an opponent of slavery to come to Mississippi so he could be lynched.²⁵ Republicans in the North circulated, as a campaign document, Hinton Helper's book attacking slavery. Southerners who circulated the book were prosecuted.²⁶

Free blacks were stripped of basic liberties—even by some "free" states. The Oregon territory passed a law denying blacks the right to enter the state, to own property, or to maintain court actions. Similar laws existed in several

20. P. PALUDAN, *A COVENANT WITH DEATH* 3 (1975).

21. M. CURTIS, *supra* note 17, at 23.

22. M. CURTIS, *supra* note 17, at 42-43.

23. M. CURTIS, *supra* note 17, at 30-34.

24. *CREATED EQUAL, THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 290-91, 300* (P. Angle ed. 1958).

25. H. TREFOUSSE, *THE RADICAL REPUBLICANS* 8 (1968).

26. M. CURTIS, *supra* note 17, at 31; D. POTTER, *THE IMPENDING CRISIS* 387-89 (1976).

Northern states.²⁷

The courts were of little help to the cause of liberty. In *Barron v. Mayor of Baltimore*,²⁸ in 1833, the Supreme Court had held that the Bill of Rights limited only the federal government, not the states. In *Dred Scott v. Sandford*²⁹ relying on a claim of original intent, the Court held that free blacks belonged to a degraded class when the Constitution was written, could not be citizens of the United States, and were entitled to no constitutional privileges, including those in the Bill of Rights. In another case, the Court also upheld a fugitive slave law that allowed blacks in the North to be seized as slaves and summarily transported to Southern states where the law presumed all blacks were slaves.³⁰

The Old Republican Response: A Defense of Liberty

In response to these events, opponents of slavery developed a legal theory supporting liberty. Free blacks at least were citizens of the United States. All American citizens were protected by the Bill of Rights against state and federal denials of their rights. State laws like those in Oregon that denied free blacks the right to testify in court denied their liberty without due process of law.³¹

Leading Republicans held these ideas even prior to the 1866 framing of the fourteenth amendment. If the courts held otherwise, these Republicans thought it was because the law had been perverted by the slave power. The government had drifted from the old moorings of equality and human rights. Slavery had polluted and defiled the judiciary.³²

To these old time Republicans, the crusade against slavery was a crusade to protect liberty from those who planned to destroy it. The campaign slogan of Republicans in 1856 was Free Speech, Free Labor, Free Soil, and Fremont.³³

Lincoln and other members of his party expected a new *Dred Scott* decision holding free states could not ban slavery.³⁴ Because the security of slavery required the elimination of free speech, Republicans believed that all dissent would be suppressed. As one conservative Republican Congressman said in 1866, "[O]nly one of two things remained possible—either the utter destruction of slavery or the total extinguishment of freedom."³⁵

When Republicans in Congress voted to abolish slavery in 1864, congressman after congressman pointed to denial of constitutional rights by the slave states.³⁶ Congressman James Wilson, chairman of the House Judiciary Com-

27. M. CURTIS, *supra* note 17, at 59-61.

28. 32 U.S. (7 Pet.) 243 (1833).

29. 60 U.S. (19 How.) 393 (1857).

30. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

31. M. CURTIS, *supra* note 17, at 42-43.

32. CONG. GLOBE, 39th Cong., 1st Sess. 1468 (1866) (Hill); *id.* at 866 (1866); *id.* at 115 (1865); 38th Cong., 2d Sess. 142 (1865) (Orth); 38th Cong., 1st Sess. 2615 (1864) (Morris); M. CURTIS, *supra* note 17, at 83.

33. R. SEWELL, *BALLOTS FOR FREEDOM* 284 (1976).

34. II *THE COMPLETE WORKS OF ABRAHAM LINCOLN* 461, 466-67 (R. Blaser ed. 1953).

35. CONG. GLOBE, 39th Cong., 1st Sess. 1013 (1866); M. CURTIS, *supra* note 17, at 36-37.

36. M. CURTIS, *supra* note 17, at 37-40.

mittee, insisted that slavery had defied the supremacy clause and nullified the constitutional rights, privileges, and immunities of citizens:

Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together.³⁷

Still, in the South, Wilson said, “[t]he press has been padlocked, and men’s lips have been sealed. Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in this country.”³⁸ While Wilson said he “might enumerate many other constitutional rights of the citizen which slavery” had “practically destroyed,” he believed he had done enough to prove that slavery “denies to the citizens of each State the privileges and immunities of citizens in the several States.”³⁹

1866: The Renewal of State and Local Repression in the South

In 1866, after they lost the Civil War, Southern states and localities passed laws denying blacks many fundamental rights. A Louisiana parish provided that no black could pass within the parish without a permit from his employer; that blacks could not be out after ten at night without a permit from their employers; that blacks could not own houses in the parish; that blacks could not meet at all after sunset, or before sunset without written permission from the captain of patrol; that blacks could only preach or exhort with a special license from the president of the police jury; and that blacks not in the military could not have weapons without special permission. The parish would punish offenders by placing them in a barrel, but not for more than twelve hours.⁴⁰

1866: The Republican Response

A number of Republicans in Congress criticized these laws as violations of the Bill of Rights. For example, Representative Clarke of Kansas complained that the southern states were more interested in maintaining old prejudices than in “establish[ing] republican liberty.” Alabama had passed a law forbidding blacks from owning firearms. Clarke considered the Alabama law a violation of “the right of people to keep and bear arms,” a provision of the Bill of Rights he evidently considered binding on the states.⁴¹

Representative Hart noted that the Constitution provided for a Republican form of government. It was the duty of the nation to guarantee that the rebellious states had such a government.

[A] government whose “citizens shall be entitled to all privileges and immunities of other citizens”; where “no law shall be made prohibiting

37. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

38. *Id.*

39. *Id.*

40. I. W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-80 (1960).

41. CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).

the free exercise of religion"; where "the right of the people to keep and bear arms shall not be infringed"; where "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"; and where "no person shall be deprived of life, liberty, or property without due process of law."⁴²

To deal with the Black Codes, Congress in 1866 passed the Civil Rights Bill. It made blacks citizens and guaranteed blacks the full and equal benefit of all laws and provisions for the security of person and property as enjoyed by white citizens. Leading Republicans understood the "full benefit of laws for the security of person and property" to include the liberties in the Bill of Rights.⁴³ In fact, leading Republicans argued that constitutional power to pass the Civil Rights Bill could be found in the power of Congress to enforce the Bill of Rights.⁴⁴

Not all Republicans agreed that Congress had the power to pass the Civil Rights Bill. John Bingham, the future author of section one of the fourteenth amendment, insisted that a constitutional amendment was needed. And Bingham indicated that the amendment he wrote would protect Bill of Rights liberties from state violation.⁴⁵

Except for people who have suffered the handicap of a legal education, the application of the Bill of Rights to the states is suggested in the words of the fourteenth amendment. It 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 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 in its jurisdiction the equal protection of the laws.

The words of the amendment are reinforced by the remarks of Congressman Bingham⁴⁶ and of Senator Howard who presented the amendment to the Senate on behalf of the Joint Committee on Reconstruction. Howard listed rights in the Bill of Rights—from free speech to protection against cruel and unusual punishments—as the privileges that would be protected by the amendment:

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or

42. *Id.* at 1629.

43. M. CURTIS, *supra* note 17, at 74-82.

44. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (Wilson); 1163 (McKee); 1270 (Thayer); 1833 (Lawrence); M. CURTIS, *supra* note 17, at 74-82; *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1075 (1866) (Nye) (on power of Congress to enforce Bill of Rights).

45. M. CURTIS, *supra* note 17, at 82.

46. M. CURTIS, *supra* note 17, at 69-71, 87.

recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.⁴⁷

In Congress in 1866 no one contradicted Bingham and Howard. Senator Yates said the amendment provided that "rights [of citizens of the United States] shall not be abridged by any State."⁴⁸ Congressman Windom suggested that the amendment protected "all rights of citizenship."⁴⁹ Congressman Orth read the amendment to protect "all the rights of American citizenship."⁵⁰ Congressman Baker read the amendment to protect "the rights thrown around [the American citizen] by the supreme law of the land."⁵¹

The amendment was also discussed in the congressional campaign of 1866 after Congress adjourned. The general theme of the campaign was that the amendment protected "'all the rights of citizens.'"⁵² Republican supporters of the amendment referred to privileges "conferred on every citizen by the federal constitution,"⁵³ "the full enjoyment of all constitutional rights, among which are the right to free speech and to be secure in their personal property, as well as redress of their grievances,"⁵⁴ "the rights of citizens enumerated in the constitution,"⁵⁵ "the rights of American freemen . . . not the least of which are the rights to speak, to write and to impress their thoughts on the minds of others . . .,"⁵⁶

47. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866); M. CURTIS, *supra* note 17, at 88-89.

48. CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866).

49. *Id.* at 3167.

50. *Id.* at 3201.

51. *Id.* at 256 app.

52. Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237, 282 (1982) (quoting the Republican National Committee in 1866).

53. Dubuque Daily Times, Nov. 21, 1866, at 2, col. 1.

54. Dubuque Daily Times, Dec. 3, 1866, at 2, col. 2.

55. N.Y. Daily Tribune, Sept. 4, 1866, at 1, col. 4.

56. N.Y. Daily Tribune, Sept. 11, 1866, at 5, col. 1-2.

“every right guaranteed . . . by the constitution,”⁵⁷ including the right to petition for redress of grievances and the right to bear arms, and “constitutional rights” including the right to express one’s sentiments freely.⁵⁸ Statements by a number of Republicans indicated that all free citizens prior to the fourteenth amendment were vested with the privileges provided by the Bill of Rights against state action and that the fourteenth amendment was declaratory on this point.⁵⁹

Before the Supreme Court liquidated the privileges or immunities clause a number of Republicans and some Democrats agreed with the position taken by Bingham and Howard. Bingham himself reiterated the purposes of the privileges or immunities clause. In 1871, Bingham had said that the privileges and immunities of citizens of the United States were chiefly set out in the first eight amendments to the Constitution.⁶⁰ Representative Hoar, also speaking in 1871, believed that the “privileges and immunities” in the fourteenth amendment referred to “all the privileges and immunities declared to belong to the citizen by the Constitution itself” together with “those privileges and immunities which all republican writers of authority agree in declaring fundamental and essential to citizenship.”⁶¹

Also in 1871, Representative Dawes described the rights in the Bill of Rights as “privileges and immunities”⁶² and, in reference to the fourteenth amendment, said that “every person born on the soil was made a citizen and clothed with them all.”⁶³ Other influential Republicans made similar statements.⁶⁴

The idea that the privileges or immunities secured by the fourteenth amend-

57. Philadelphia Inquirer, Sept. 5, 1866, at 8, col. 3.

58. Springfield Daily Illinois St. J., Sept. 21, 1866, at 2, col. 6. See Curtis, *supra* note 52, at 281-92.

59. See Curtis, *supra* note 52, at 281-92. For a discussion of the ratification debates, see M. CURTIS, *supra* note 17, at 145-53.

60. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871).

61. *Id.* at 334.

62. *Id.* at 475-76.

63. *Id.* at 476.

64. Representative Monroe, another Republican who spoke in 1871, accepted Hoar’s analysis of the “meaning of the words ‘privileges and immunities’ ” in the fourteenth amendment. CONG. GLOBE, 42d Cong., 1st Sess. 370 app. (1871). And Representative Benjamin Butler seems also to have embraced both Bingham’s and Hoar’s views. *Id.* at 448. Several Republicans said that the rights of American citizens protected by the fourteenth amendment included absolute rights to freedom of speech. See, e.g., *id.* at 382 (Hawley), 414 (Roberts). In addition to these men, Senator Joseph Fowler and Representative Horace Maynard, both of Tennessee, adhered to Bingham’s views. See CONG. GLOBE, 41st Cong., 2d Sess. 515 (1870) (Fowler); 310 app. (1871) (Maynard).

In 1871 Representative Lawrence of Ohio insisted that the seventh amendment right to trial by jury was one of the rights protected against state interference by the fourteenth amendment. Lawrence relied on the privileges or immunities clause and also on the due process clause. While he knew that “doubts have been entertained on this subject prior to the adoption of the fourteenth amendment,” he believed that “since the adoption of the fourteenth article, it may well be maintained that a common-law trial by jury is secured.” CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).

Senator Frelinghuysen believed that “the right that private property shall not be taken without compensation is among those privileges” protected by the privileges or immunities clause of the fourteenth amendment. *Id.*, 42d Cong., 1st Sess. 499 (1871). And in 1872 Senator Sherman said that the “right to be tried by an impartial jury is one of the privileges included in the fourteenth

ment included rights in the Bill of Rights and other rights explicitly provided for by the Constitution was even accepted and advocated by a number of Democrats in the early years after the adoption of the amendment.⁶⁵

In 1874 Representative Mills noted that the demand for a Bill of Rights followed the federal convention that drafted the Constitution. And he said that the Bill of Rights "and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in Article 4, section 2, of the Constitution and in the fourteenth amendment."⁶⁶ These privileges were the same in every state and states were "impotent" to abridge them.⁶⁷

The Supreme Court at first nullified and then gradually revived the plan to require the states to obey the Bill of Rights.⁶⁸ Indeed the Court may itself be partly responsible for the present assault on the incorporation doctrine. By se-

amendment; and no State can deprive any one by a State law of this impartial trial by jury." *Id.*, 42d Cong., 2d Sess. 844 (1872).

Like a number of other Republicans, Sherman thought that the privileges or immunities clause of the fourteenth amendment included rights not explicitly listed in the Constitution. But he clearly recognized that it included rights in the Bill of Rights. "What are those privileges and immunities?" he asked. "Are they *only those defined in the Constitution, the rights secured by the amendments?* Not at all." *Id.* at 843 (emphasis added). To define the "privileges or immunities" secured by the fourteenth amendment, Senator Sherman suggested that the courts should look

first at the Constitution of the United States as the primary fountain of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . and so on back to the earliest recorded decisions of the common law.

Id. at 844. Sherman said that he did not distinguish between the words "privileges, immunities, and rights," and cited the ninth amendment in support of his broad construction of fourteenth amendment "privileges or immunities." *Id.*

65. See Law of Feb. 28, 1871, ch. 99, 16 Stat. 433; CONG. GLOBE, 42d Cong., 1st Sess. 396 app. (1871); Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 98-100 (1954); see, e.g., KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION* 129 (1985).

66. 2 CONG. REC. 384 (1874).

67. *Id.* Senator Norwood, Democrat from Georgia, also believed that the privileges and immunities of citizens of the United States protected by the fourteenth amendment included all rights in the Bill of Rights, together with other rights provided for by the Constitution. These included the privilege of the writ of habeas corpus; immunity from bill of attainder, from ex post facto laws, and from slavery or involuntary servitude except for punishment of crime; and the right not to be deprived of the right to vote on account of race, color, or previous condition of servitude. *Id.* at 241 app.

Norwood said that the argument that the amendment conferred no new rights was true in one sense, but not in another. "No new rights are enumerated; the amendment simply refers to existing rights, and in this sense no new privileges were conferred . . ." *Id.* at 242 app. But "while not technically conferring new rights," the fourteenth amendment had "given additional protection to existing rights." *Id.* This was so because before the adoption of the fourteenth amendment a state "could have deprived its citizens of any of the privileges and immunities contained in the first eight [amendments] . . ." *Id.* Before its adoption "any State might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms . . . inflicted unusual and cruel punishment, and so on." *Id.* But "the instant the fourteenth amendment became a part of the Constitution, every State was from that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution." *Id.* Other Democrats seem also to have accepted the idea that the privileges or immunities secured by the fourteenth amendment included the rights in the Bill of Rights. See 2 CONG. REC. 420 (1872) (Herndon); 4086 (1874) (Thurman).

68. M. CURTIS, *supra* note 17, at 171-211.

lectively incorporating rights the judges hold in high esteem, such as freedom of speech and religion,⁶⁹ and refusing to apply those held in lower regard, such as civil jury trial and the right to bear arms,⁷⁰ the Court has made the doctrine seem to be an entirely judicial creation. The problem has been exacerbated by the Court's nullification of the privileges or immunities clause.⁷¹

One of the early rationalizations of the incorporation doctrine, in *Palko v. Connecticut*⁷² highlights the problem that the Court has created for itself. In *Palko* Justice Cardozo wrote about the fourteenth amendment, which provides that no state shall abridge the privileges or immunities of citizens of the United States. He noted that some privileges and immunities set out in the Bill of Rights—like free speech and freedom of religion—limited the states under the fourteenth amendment. Others like double jeopardy and the right to jury trial did not. As Cardozo noted:

The exclusions of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption.⁷³

When the Court overruled *Palko*,⁷⁴ it failed to give a good explanation of why some Bill of Rights liberties limit the states and others do not.

As we celebrate the bicentennial of our Constitution we should not stop with the document of 1787—which lacked a Bill of Rights, protected slavery, and left women out of the political system. Instead, as the history of the fourteenth amendment reminds us, we should celebrate the entire Constitution. And we should celebrate those critics, abolitionists, feminists, radicals, and dissenters who insisted that the Constitution become what the Declaration of Independence and preamble of the Constitution promised—a charter of liberty.

69. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931).

70. *Walker v. Sauvinet*, 92 U.S. 90 (1876) (right to a jury trial); *United States v. Cruikshank*, 92 U.S. 542 (1876) (right to bear arms).

71. *See Palko v. Connecticut*, 302 U.S. 319 (1937).

72. 302 U.S. 319 (1937).

73. *Id.* at 326.

74. *See Benton v. Maryland*, 395 U.S. 784 (1969).

