The Bill of Rights:
Its Text, Structure and Scope

HERBERT W. TITUS

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TABLE OF CONTENTS

THE TEXT

The first Ten Amendments to the United States Constitution, popularly known as The Bill of Rights, has become the world's hallmark of liberty. Yet, as a charter of liberty, most Americans have little understanding of its various provisions. Too often we are content to leave that to the experts, especially the lawyers.

But the Bill of Rights, like all of law, is too important to leave to lawyers. Somehow most of us know that, but believe that the subject is too complex to master, particularly when told that one has to read a passel of court opinions in order to really know our rights.

The purpose of this introduction and following series is to provide a primer on the Bill of Rights without bogging the reader down with a bunch of court precedents.

My goal is not to give a professional working knowledge of the guarantees, but to illumine the fundamental principles as written in the constitution, itself. After all, Article VI of the Constitution states: "This Constitution ... shall be the supreme law of the land ...." Court opinions, however relevant and helpful, are not to be substituted for the constitutional text.

The entire text of the Bill of Rights appears at the end of this essay so that the reader may read the original language. In this day of language overload one is struck first by the brevity of the text: Only 468 words total, ranging from a mere 12 in Article VIII (the 8th Amendment) to a maximum of 117 in Article V (the 5th Amendment).

The Bill was not produced with remarkable foresight that one day America would be plagued by a generation of non-readers spoiled by television. No, the Bill is brief primarily because its framers had something definite in mind when they wrote it.

For example, the word, "religion," and the phrase, "the freedom of speech," did not occur for the first time in Article I (the 1st Amendment). As for the word, *religion*, it had appeared 15 years earlier in the 1776 Virginia Bill of Rights and was defined as those duties "which we owe to our Creator... [which] can be directed only by reason and conviction, not by force or violence ...."

Today, courts and legal scholars act as if the word, religion, is undefinable, so one looks in vain for a definition in the key court opinions applying the two religion clauses in Article I.

By ignoring the plain language of the text and its historic antecedents, the courts have proceeded to rob the American people of their God-given rights. See Titus, "Religious Freedom: The War Between Two Faiths," 1984-85 *Journal of Christian Jurisprudence* 111-138.

"The freedom of speech" had been guaranteed members of the English Parliament in the 1689 English Bill of Rights. While that phrase was not defined in the document, the historical events that occasioned it was the king's use of executive power to destroy his political enemies by prosecuting them for seditious libel or stirring up sedition. *Sources of Our Liberties* 233-35, 247 (R. Perry, ed.,

1978).

Today, courts and legal scholars have substituted phrases such as "free speech" and "free expression" for "the freedom of speech," and, thereby, have extended constitutional protection beyond the textual language to such activities as pornography. See Titus, "The United States Supreme Court and Obscenity: Reversed and Remanded," in *Pornography: Solutions Through Law* (C. Clancy, ed., 1985).

The founders did not choose language with any expectation that the words they used would be open-ended categories into which courts and lawyers could shove whatever suited their political or legal philosophies.

To the contrary, almost all of the operative words and phrases in the Bill of Rights were carefully selected from pre-existing documents which either defined the word more specifically or which reflected well-known events that had inspired earlier foundational documents.

Some of those expressions, like "due process of law" in Article 5, stretched as far back as 1354 when the English Parliament declared:

> *That no man ... shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without ... due process of law.*

Others, like "free exercise" of religion in Article I were of more recent vintage, dating back only 15 years to the 1776 Virginia Bill of Rights which provided that "all men are equally entitled to the free exercise of religion .... "

It is true that some language appeared for the first time in the Bill of Rights. For example, no pre-existing document contained the phrase prohibiting any "law respecting an establishment of religion." But the principle in that maxim is unmistakably linked to Jefferson's famous Statute for Establishing Religious Freedom enacted in Virginia in 1786. Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumberland Law Review* 505, 506-507 (1992-93).

The Bill of Rights of 1791, then, marked the culmination, not the beginning, of an historical drama for freedom. Not only was it preceded by the Magna Carta, but by a host of other English documents dating from 1215 and extending to the English Bill of Rights of 1689.

Moreover, the Bill of Rights was preceded by a number of American documents beginning with the colonial charters of the early 17th century and continuing with the 1776 Declaration of Independence and the State constitutions that preceded the United States Constitution.

As part of its contribution to the bicentennial celebration of America's birth as a nation, the Committee on American Citizenship of the American Bar Association recommended that this documentary history be made available in a single volume. As a result the American Bar

Foundation, under the inspired editorship of Richard Perry, compiled a book of the major original sources and published them in a book entitled *Sources of Our Liberties.*

In his introduction to the 1215 Magna Carta, Perry laid the foundation for America's legacy of freedom with the following paragraph:

> *The liberties of the American citizen depend upon the existence of established and known rules of law limiting the authority and discretion of men wielding the power of government. Magna Carta announced the rule of law.... It is this characteristic which has provided ... the foundation on which has come to rest the entire structure of Anglo-American constitutional liberties.*

What sets the 1791 Bill of Rights apart from its predecessors is its economy of expression and its demarcation of jurisdiction. Those twin features have been lost to a modem world inundated with a glut of bureaucratic regulations of an increasingly totalitarian state.

This predicament, however, is not without precedent. Jesus Christ chastised the lawyers of his day for having placed upon the people "burdens grievous to be borne" (Luke 11:46). The intricate and innumerable regulations governing the keeping of the Sabbath (*See, e.g.*, Mark 2:27) triggered in Jesus a response calling the people back again and again to the simple, but straightforward, decalogue given to Moses.

So it should be likewise in America. We should return to the simple and straightforward language of our nation's founding documents. Because of the importance placed today on the Bill of Rights, it seems appropriate to begin with that document.

In the next [section] I will set forth the jurisdictional structure of the Bill of Rights. That structure, together with the specific textual expressions, must first be understood before one can comprehend each of the individual protections found in the Amendments, themselves.

ITS STRUCTURE

On July 4, 1776, with the signing of the Declaration of Independence, the United States of America proclaimed dissolution of "all political connexion" with "the state of Great Britain" and claimed nation status with "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts ... which INDEPENDENT STATES may of right do."

In November 1777, the Articles of Confederation provided the governing structure of the United States lasting until September 13, 1787, when the Congress ordered the newly ratified United States Constitution to be placed in operation. *Sources of Our Liberties* (hereinafter *Sources)* 399, 408 n. 29 (R. Perry, ed., 1978).

The original Constitution did not contain a Bill of Rights. Inclusion of a comprehensive enumeration of the liberties of the people was debated towards the close of the Convention, but a

bid to add a formal statement of liberties failed. *Sources,* at 403-05.

Many delegates opposed including a bill of rights believing that it was unnecessary "in a constitution founded upon the will of the people themselves." Others claimed that the people's liberties received sufficient protection in the existing state constitutions. *Sources,* at 404-05.

The case for a bill of rights, however, did not die. The first 5 states that ratified the constitution did so without proposing any amendments to secure the people's rights. But the sixth, Massachusetts, after narrowly approving the constitution, "enjoined its representatives in Congress ... to secure approval of nine amendments ...." *Sources,* at 419.

Prompted by continuing efforts to reject the Constitution for having omitted a bill of rights, Alexander Hamilton defended the omission in Federalist No. 84, but to no avail. Opponents rallied in Virginia, North Carolina, New York, and New Hampshire threatening its defeat.

In order to save the Constitution, its backers agreed "to support a bill of rights when the First Congress had been assembled ...." *Sources,* at 421. With this assurance, the Constitution was ratified and became the new form of government for the United States. *Sources,* at 419-20.

On June 8, 1789, James Madison introduced in the House of Representatives a set of proposed amendments to the Constitution. The Madison proposal served as the working draft of the Bill of Rights that eventually emerged from Congress. *Sources,* at 421-25.

Madison's offer began with the guarantee of freedom of religion followed in order by speech, press, assembly, petition, keep and bear a:ms, and freedom from the quartering of soldiers. The order in which these freedoms were initially stated was never altered. Eventually, these guarantees would appear in the first three amendments to the Constitution.

The Rule of God

The appearance of the freedom of religion as the initial liberty in a bill of rights was no accident. Securing such freedom is the first business of any civil order. In his famous *Memorial and Remonstrance,* James Madison stated its preeminence:

> *Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Great Governor of the Universe; And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign ....*

This obligation to God, Madison claimed, provided the foundation for the freedom of the heart and mind of every man from civil rule:

> *The Religion ... of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may indicate. This right in its nature is an unalienable right. It is unalienable; because the opinions of men ... cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator.... This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.*

The freedom of religion clauses in the First Amendment were designed to provide constitutional security to those rights of man that are mirror images of man's duties subject only to the rule of God. In order to acknowledge God's exclusive sovereignty over such rights, freedom of religion required jurisdictional immunity from the power of the civil authorities.

So the language of the First Amendment is stated in absolute terms: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....* For, as Madison maintained in his *Memorial and Remonstrance,* "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."

The Rule of the People

Unconditional protection was also extended to the next four freedoms and packaged into the same First Amendment: *Congress shall pass no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

These rights were granted constitutional security in recognition of the continuing sovereignty of the People after the institution of a civil order.

According to the Declaration of Independence, this principle was established by the laws of nature and of nature's God {that is, by the very will of God [See Titus, "The Law of the Land," 6 J. of Christ. Juris. 57, 59-63 (1986)]}:

> *When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them ....*

Later, the Declaration invoked this principle to justify their action:

> *(T)hat all men ... are endowed, by their Creator, with certain unalienable rights .... That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.*

Prior to the American Revolution, the People of Great Britain had relied on their representatives in Parliament to guard their God-given rights. The American colonists discovered, however, that the English Parliament was not a faithful guardian of their rights as Englishmen.

In constituting the government of the United States, they would not make the mistake of their English forefathers. Thus, Madison proclaimed:

> *In the United States ... (t)he people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power .... Hence ... the great and essential rights of the people are secured against legislative as well as executive ambition. Sources*, at 425-26.

Because sovereignty remained in the people, "the freedom of speech" that had been guaranteed to Parliament in the 1689 English Bill of Rights was extended to the people in the 1791 American Bill of Rights. "The freedom of the press" that had been left by the 1689 English Bill of Rights to be protected by Parliament from executive encroachment was now protected from Congressional infringement by the 1791 American Bill.

The right of the peoples representative's to assemble to consult for the common good protected in the 1689 English Bill of Rights was extended to the people in the 1791 American Bill. And the right of the people to petition the king for redress of grievances, secured by the 1689 English Bill, was extended to the right to petition the "government."

But what if the exercise of these rights fail to preserve the liberties of the people? America's founders hoped that they would, but knew that any government, no matter how well constituted, could become tyrannical necessitating the people to take up arms.

The Declaration of Independence affirmed such a right in the people: *(W)hen a long train of abuses and usurpations ... evinces a design to reduce ... (the people) under absolute despotism, it is their right, it is their duty, to throw off such government....*

In order to secure this right in the people, Madison proposed constitutional security for the "right of the people to keep and bear arms" and to be free from the forcible quartering of soldiers.

The right to bear arms had been affirmed in the 1689 English Bill of Rights, but it had been limited to "Protestants ... for their defence suitable to their conditions, and as allowed by law." *Sources,* at 246. Madison's proposal extended the right to all of the people for the purpose of securing "a free country." *Sources,* at 422.

The practice of forcible quartering of soldiers on people's property had been condemned in England since the 1628 Petition of Right (*Sources,* at 72, 74, 75), but it had never been adequately protected. In 1765 Parliament had authorized the quartering of British soldiers to enforce the hated stamp tax, and again in 1774, "to quell riots within the city" of Boston after the Boston Tea Party. *Sources,* at 72, 277-79.

The Second and the Third Amendments, then, embraced two rights to guarantee to the people the means to resist tyranny should their civil rulers persist in violating their rights.

The Rule of Law

Once the sovereign rule of God and the people were secure, then Congress could turn its attention to securing the rights of the people in the exercise of power in those areas where the civil authorities have jurisdiction. Thus, Amendments 4 through 8 guarantee the exercise of civil power according to certain procedural rules limiting the exercise of government power. The 4th and 5th Amendments primarily provide rules of law governing the exercise of executive power, whereas the 6th, 7th and 8th Amendments primarily set such rules limiting judicial power.

The final two amendments (9 and 10) state rules of construction of the Constitution now that it contained a Bill of Rights. While neither offers constitutional security for any substantive or procedural right, both affirm two important constitutional realities. The 9th Amendment testifies that the rights of the people did not originate with the constitution, but preexisted it in the unwritten law of nature. The 10th Amendment attests that the United States government is a government of enumerated, not plenary, power, thereby preserving the states as independent political entities.

In the next [section] I will address a second structural issue. Does the Bill of Rights apply only to the general government, or does it apply to each of 50 state governments? This examination will focus primarily upon the impact of the 14th Amendment on the applicability of the Bill of Rights to the exercise of state government power.

THE SCOPE OF THE BILL OF RIGHTS

Since the early 1970's, the Supreme Court has routinely applied to the States all but five of the specific guarantees contained in the first eight articles of the Bill of Rights of the United States Constitution. Nowak, Rotunda, and Young, *Constitutional Law* 316-18 (3d ed. 1986).

The Court has justified its decisions, not on the original text of the Bill of Rights, nor upon the original intent of the Bill's framers, but on the due process clause of the 14th Amendment (adopted in 1868) which reads, as follows: "(N)or shall any State deprive any person of life, liberty, or property without due process of law."

For over one hundred years, from 1873 to the late 1970's, various justices on the High Court waged a vigorous battle over the claim that the 14th Amendment made the Bill of Rights applicable to the state governments. At first, this claim rested on the "privileges and immunities" clause of the 14th Amendment. But the Court ruled squarely against it in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 72-80 (1873).

24 years later, however, the Court held that the due process clause of the 14th Amendment made the Fifth Amendment guarantee that private property could not be taken for public use without just compensation applicable to the States. *CB&Q RR v. Chicago,* 166 U.S. 226 (1897).

In the early 20th Century, efforts to extend the due process clause to incorporate other guarantees of the Bill of Rights largely failed until the Court began in the 1920's to apply the freedoms of speech, press, and assembly to the States. *Palko v. Conn.,* 302 U.S. 319, 324 (1937).

The Court reasoned that these guarantees applied to the States because they were "implicit in the concept of ordered liberty:"

> *[F]reedom of thought and speech ... is the matrix, and indispensable condition, of nearly every form of freedom. Id.,* 302 U.S. at 325-27.

Under this scheme, none of the specific guarantees extended by the Bill of Rights to defendants in criminal cases, such as the privilege against self-incrimination, were found fully applicable to the States. *Adamson v. Cal.,* 332 U.S. 46 (1947).

The Warren Court Coup

Beginning in the 1960's the Warren Court began a constitutional revolution, overruling *Adamson,* and applying the self-incrimination privilege to the States via the due process clause. *Malloy v. Hogan,* 378 U.S. 1 (1964).

By the end of the decade, the Court had ruled that state criminal investigations and trials were governed by Articles 4 and 6 of the Bill of Rights, and by all but one provision of Article 5 and by the cruel and unusual punishment rule of Article 8. Stone, Seidman, Sunstein and Tushnet, *Constitutional Law* 783-84 (2d ed. 1991).

Only Justice Hugo L. Black tried to justify this revolution as consistent with the language and intent of the framers of the 14th Amendment:

> *[The] words "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" seems ... an eminently reasonable way of expressing ... that henceforth the Bill of Rights shall apply to the States. What more precious "privilege" ... could there be than that privilege to claim the protection of our great Bill of Rights. Duncan v. Louisiana,* 391 U.S. 145, 166 (1968).

Black's colleagues paid attention to neither text nor original intent, but only to Court precedents. Justice Byron R. White simply stated that, according to its prior rulings, the due process clause required the application to the States of all "procedures necessary to an Anglo-American regime of ordered liberty," including the right to trial by jury. *Id.,* 391 U.S. at 149, n. 14.

Yet, from the Magna Carta through the 1791 Bill of Rights, the guarantee of trial by jury had always been treated as a separate and distinct right from that of due process of law. *Sources of Our Liberties* 5-9, 406, 422-24, 428-29 (R. Perry, ed. 1978). Thus, Madison and his Congressional colleagues included in Article 5 of the Bill of Rights a due process clause and, also, a right to jury trial in criminal cases in Article 6. If due process of law included the jury trial right, then there

would have been no need for its explicit protection.

Indeed, if due process of law meant to Madison and his colleagues what it meant to the Warren Court, then why all the specific guarantees in Articles 4 and 6, and the additional ones in Article 5? For all of these guarantees (except for the requirement of a grand jury indictment) had been found by the Warren justices to have been incorporated by the due process clause of the 14th Amendment and, thereby, made applicable to the States.

These textual issues were never addressed by any member of the Warren Court majority. Nor have they been attended to by recent Republican appointees, notwithstanding the efforts by several GOP Presidents to reverse the Warren Court's revolution.

Today's justices, whether liberal or conservative, pay little heed to the constitutional text, much less to the original intent of its framers. That was not, however, the case in the early history of the Court when it ruled that the Bill of Rights did not apply to the States.

The Marshall Legacy

In 1833, a man named, Barron, sued the city of Baltimore claiming that it had impaired the value of his wharf in the Baltimore harbor without paying him any compensation. Barron contended that this action violated the Constitution because the city had taken his property without just compensation in direct violation of the "takings" clause in Article 5 of the Bill of Rights.

Barron insisted that the Bill of Rights restrained "the legislative power of the state, as well as of that of the United States." Chief Justice John Marshall, writing for a unanimous Court, ruled that the Bill of Rights applied only to the United States government, not to the States. *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

In his short opinion of 8 pages, Marshall stated that the question raised by Barron was of "great importance, but not of much difficulty."

First, the Chief Justice turned to the written Preamble of the United States Constitution and observed:

> *The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.*

Next, he stated that "(e)ach state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated."

Then, he noted that in the constitution creating the general government there were two kinds of limitations, those written in general terms and those written in language specifically naming the States. This, Marshall said, reflected the very nature of the federal system contemplated by the

framers, namely, the continued existence of the States as independent political entities governed by their own constitutions, unless specifically modified by the U.S. Constitution.

Marshall called attention to Article I, Section 10 of the U.S. Constitution which explicitly limited the States from enacting a "bill of attainder or an ex post facto law," even though the immediately preceding Section 9 prohibited their enactment in general terms.

Marshall further noted that Section 9 also contained specific references to Congress, reinforcing his understanding that limitations written in general terms apply to the government created by the constitutional document, not to governments created by other constitutions.

From this pattern of written limitations contained in the original Constitution, Marshall turned to the First Ten Amendments with the following rule of construction:

> *If the original constitution ... draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if, in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.*

Noting that the language of the Bill of Rights followed the precise pattern of Article I, Section 9, namely, the First Amendment like the first paragraph included a specific reference to Congress followed by generally stated limitations, Marshall clinched his case:

> *Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.*

35 years later, Congress had before it this very opportunity when it addressed the proposed 14th Amendment. The language of that Amendment was chosen with care and deliberation. In 1873, the Court in the *Slaughter-House* Cases chose to follow the Marshall legacy that constitutional law was found in the written text, not in the original intent of the framers, much less in some judicial scheme of ordered liberty.

IMPACT OF THE 14TH AMENDMENT

From 1833 until 1871 the Supreme Court's holding in *Barron v. Baltimore,* 32 U.S. (7 Pet.) 24 (1833) went unchallenged: The Bill of Rights applied only to the general government. The States were to be limited by the bills of rights in the several State constitutions, except as explicitly provided for in the original U.S. Constitution.

Following the Civil War, however, Congress sought to extend the reach of the U.S. Constitution to

the States. In 1865, the 13th Amendment outlawing slavery and involuntary servitude was ratified.

But the 13th Amendment did not bring to the newly freed slave class the same legal benefits as was enjoyed by white citizens. Various States enacted Black Codes depriving the Freedmen of their basic common law rights, such as, to purchase and own real property, and denying to them statutory and constitutional benefits, such as, the right to give testimony in court. *Slaughter- House Cases,* 83 U.S. (16 Wall.) 36, 70-71 (1873).

At first, Congress responded to these actions by passing the Civil Rights Act of 1866, which would have repealed the Black Codes as "badges of slavery" forbidden by the 13th Amendment. But President Andrew Johnson vetoed this bill as not authorized by the Constitution.

Even before Congress passed the bill, doubts about its constitutionality led Representative John A. Bingham of Ohio to introduce the first version of what later became the 14th Amendment.

Adoption of the 14th Amendment

Bingham's initial proposal authorized Congress to enact "all laws which shall be necessary and proper to secure 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." Cong. Globe, 39th Cong., 1st Sess. 813, 1034 (1866).

Two months later, and after extensive debate, Bingham's proposal was reported out by the Joint Committee on Reconstruction with substantial modifications. First, the proposal was changed from an affirmative grant of power to Congress to a negative limit on the States: "No state shall ... abridge ... nor shall any state deprive ... [or] deny ...." Congress was authorized to act, but only with laws "appropriate" to enforce the specified limits upon the States. *Civil Rights Cases,* 109 U.S. 3 (1883).

Second, the proposal was amended to specify more precisely the "privileges and immunities" contained in the Bingham draft. Instead of protecting "all privileges and immunities of citizens in the several states," the new version protected "the privileges or immunities of the citizens of the United States."

Finally, the proposal was changed by adding a due process clause, identical to the one already in the Bill of Rights, but this time as a limit on the States.

In this form, the 14th Amendment passed the House. Later, the Senate gave its approval after adding an introductory first sentence defining the requisites for citizenship in the United States and m the States:

> *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.*

The House concurred. The 14th Amendment was ratified on July 28, 1868. 5 years later, the United

States Supreme Court had its first opportunity to state and apply the new Amendment's guarantees.

Privileges and Immunities: States

In the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873), the plaintiff butchers claimed that they had been denied their rights under the U.S. Constitution by a Louisiana statute granting to a named company the exclusive right to maintain a slaughter-house within a certain geographical area within the state.

The plaintiffs' major claim rested upon the 14th Amendment's prohibition against any state law that abridged "the privileges or immunities of the citizens of the United States." They contended that one of the named privileges and immunities was the right to be free from any state-licensed business monopoly.

Prior to the 14th Amendment some, but not all, State constitutions included provisions in their bills of rights protecting the people from state-granted monopolies. Article XXIII of the 1776 North Carolina Constitution, for example, prohibited "perpetuities and monopolies" as "contrary to the genius of a free state." On the other hand, the 1776 Virginia Constitution contained no such protection. See *Sources of Our Liberties* 356, 311-13 (R. Perry, ed. 1978).

If the plaintiffs in the *Slaughter-House Cases* succeeded with their claim under the privileges and immunities clause of the new 14th Amendment, then all of the States would be required to conform to the North Carolina standard.

This result would have unmistakably followed had the 14th Amendment contained Bingham's original language granting to citizens "all privileges and immunities of the citizens in the several States." Identical language had already appeared in Article IV, Section 2, and had been construed to include the "fundamental" right to engage in a lawful occupation subject only to "restraints as the government may prescribe for the general good of the whole." *Coifield v. Coryell,* 6 F. Cas. 546 (1823).

Under Article IV, Section 2, however, constitutional protection was granted only when a State law denied such a right to an out-of-state citizen, while at the same time it guaranteed that same right to an in-state citizen.

But that was of no help to the Louisiana butchers in the *Slaughter House Cases*, for they were not out-of-state citizens and, therefore, did not come under the protection of Article IV, Section 2. They sought protection from their own State's denial of what they claimed to be their fundamental right to engage in an occupation free from the grant by the State of an exclusive special privilege.

To accomplish this goal, they claimed that the 14th Amendment's "privileges and immunities" included such a right, because Article IV's "privileges and immunities" clause had been so construed. But the two clauses did not read exactly alike, one referred to the privileges and immunities of citizens of the United States and the other to the privileges and immunities of the

citizens in the several states.

Privileges and Immunities: United States

A majority of 5 justices in the *Slaughter-House Cases* considered this difference in language decisive.

First, the majority noted that the language of the 1st sentence of the 14th Amendment recognized two classes of citizens in the United States, citizens of the United States and citizens of the State. Because one person could be a citizen of both the United States and of the State in which he resided, he had two sets of privileges and immunities, those arising out of his United States citizenship and those arising out of his State citizenship. The new 14th Amendment gave protection only from State action abridging those privileges and immunities linked to the plaintiffs' citizenship in the nation, not to their citizenship in Louisiana. *Id.*, 83 U.S. at 72-75.

Second, the majority pointed out that the original Bingham language was found in Article IV, Section 2 of the Constitution's original text. Had the framers of the 14th Amendment desired to extend the protection found in Article IV, Section 2 to that found in the 14th Amendment, the majority asserted, then they would have used the same language. But they did not. *Id.*, 83 U.S. at 75-77.

Finally, the majority noted that the plaintiffs' claim, if it prevailed, would change dramatically the federal structure of the Constitution. No longer would the States be governed by their own Bills of Rights, but by the United States Bill of Rights which had been originally designed to apply only to the general government. The majority maintained that such a profound change should not be effectuated "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Id.*, 83 U.S. at 77-78.

Justice Stephen Field, one of the 4 dissenters, excoriated the majority for having construed the "privileges and immunities" clause in such a way as to render it a "vain and idle enactment." He claimed that the privileges and immunities that citizens enjoyed as members of the national polity had been protected from state infringement by the Constitution from the beginning. He, therefore, concluded that "no new constitutional provision was required to inhibit such interference." *Id.*, 83 U.S. at 96.

This was reason enough, argued Field, to read the privileges and immunities clause to include the identical rights encompassed by the phrase, "all privileges and immunities of citizens in the several states," even though the language used in the clause referred to "the privileges or immunities of the citizens of the United States."

The majority demurred. They claimed that there were several "national privileges and immunities" that were distinct from "state privileges and immunities." They provided a partial list, including the right of the people to assemble, but they did not explain why these privileges and immunities had not been protected from state interference prior to the 14th Amendment. They just assumed that

such protection was not there before its ratification.

This assumption was made because, in 1873, the Court had not yet conceded to Congress authority to regulate almost any subject, if it were found to be in the nation's economic interest. That view of the sweeping scope of national power did not appear until the 1940's when the High Court finally ruled that the New Deal was constitutional. *See, e.g.*, *Wickard v. Filburn,* 317 U.S. 111 (1942).

In 1873, Congress still could not legislate for the purpose of establishing a national standard of health, safety, or morals, much less a set of national fundamental rights. Again, a more expansive view of national legislative power would not come until the early 1900's. See *Champion v. Ames,* 188 U.S. 321 (1903).

Had the majority in the Slaughter-House Cases bothered to explain its assumption, they could have pointed out that the First Amendment prohibited Congress from making any law "abridging ... the right of the people peaceably to assemble", but granted no authority to Congress to guarantee, or otherwise facilitate, the exercise of that right. Congress, being a legislature of enumerated powers, could not claim the power to protect the right of the people to assemble peaceably, for that was part of the police power that remained in the States. *Willson v. Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245 (1829).

Given this original understanding of the limited powers of Congress, the "privileges and immunities" clause, as construed by the *Slaughter-House* majority, was not a "vain and idle" enactment.

Due Process of Law

The *Slaughter-House* majority opinion limiting the scope of the 14th Amendment's privileges and immunities clause has never been modified or overruled. But the plaintiffs in the *Slaughter- House Cases* did not just rely on the "privileges and immunities" clause. They also claimed that Louisiana grant of monopoly privilege "deprived" them of their "property" without due process of law.

Without analysis or discussion, the Court dismissed the plaintiff's due process claim with only one sentence:

> *[U]nder no construction of that provision have we ever seen, or that we deem admissable, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of their property within the meaning of that provision.*

This summary disposition provided opportunity 24 years later to a new Supreme Court which struck down in the name of due process a Louisiana statute intruding upon the fundamental right of the liberty of contract. *See, e.g.*, *Allgeyer v. Louisiana,* 165 U.S. 578 (1897). It would also leave the "open door" for the Warren Court to work its constitutional revolution in the 1960's whereby it incorporated through the due process clause almost all of the Bill of Rights and applied them to the

States.

THE DUE PROCESS CLAUSE

Prior to the Civil War, the United States Supreme Court was urged to try "its hand at resolving the conflict" over slavery in the United States. D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 192-94, 206-08 (1978).

In 1857, Chief Justice Roger B. Taney delivered the opinion of the Court in *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857) in which he pronounced that a Negro slave could not be a citizen of a state "within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts ...." *Id.*, 60 U.S. at 427.

In addition, Taney ruled that the United States Congress could not deny to a slaveholder the right to take and keep slaves in any territory of the United States:

> *[An] act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name due process of law.... Id.,* 60 U.S. at 450.

With this stroke of his pen, Taney decreed that the Congressional compromise prohibiting slavery in the territory north of Missouri was unconstitutional.

Instead of resolving the slavery crisis, the Dred Scott decision intensified it, ultimately propelling Abraham Lincoln to the presidency and the secession of the South.

Following the defeat of the Confederacy, Congress proposed and the States ratified the 13th Amendment abolishing slavery. In an effort to provide additional constitutional guarantees to the newly freed slave class, Congress proposed and the States ratified the 14th Amendment.

Dred Scott Is Overruled

The first sentence of the first section of the 14th Amendment was designed specifically to overturn the ruling in *Dred Scott* that a Negro slave could never be recognized as a citizen under the United States Constitution. As the majority in the *Slaughter-House Cases* observed, the first sentence made "all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit [of no doubt]." *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 73 (1873).

But what of the *Dred Scott* ruling that to deny to the owner of a slave his property interest in that slave, was a deprivation of the slave owner's liberty and property without due process of law? By securing the ratification of the 13th Amendment, had not Congress done just that? Or was the *Dred Scott* opinion in error on that point?

Chief Justice Taney neither cited precedent nor provided reasons for ruling that the due process clause prevented Congress from outlawing slavery in the Territories. Prior to *Dred Scott,* the American courts had assumed, with one exception in New York, that the due process clause simply did not address the power of civil government to define the substance of "life, liberty and property."

Indeed, the question of the legality of slavery, itself, had been left by the United States Constitution to the States to be resolved by statute or by state constitution. While slavery was considered to be contrary to the "law of nature," the Supreme Court had no jurisdiction to enforce that law. *The Antelope,* 23 U.S. (10 Wheat.) 66, 120-22 (1825).

On the other hand, it had been assumed that Congress could abolish slavery if it had jurisdiction to act. When Chief Justice Taney ruled otherwise, in the name of the due process clause, his ruling would have also prevented the States from abolishing slavery, for almost every State constitution contained a due process clause identical to the one in the Bill of Rights. That would have been unthinkable, for everyone conceded that the States could abolish slavery within the geographic territory over which they exercised jurisdiction. See *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393, 534-64 (1857) (Justice McLean dissenting).

Given this assumption that the *Dred Scott* ruling on the due process clause was wrong, there was no need for the 14th Amendment to overrule that part of the case.

Due Process of Law: Stated

When the plaintiff butchers in the *Slaughter- House Cases,* 83 U.S. (16 Wall.) 36 (1873) invoked the due process clause in support of their claim that Louisiana could not take away their property or liberty to enter the slaughterhouse business as they saw fit, the Court majority recognized that the plaintiffs were making the same kind of argument as the slave owner had made in *Dred Scott.*

In *Dred Scott,* the slave owner claimed that the due process clause protected his substantive right to own slaves. In the *Slaughter-House Cases,* the butchers claimed that the due process clause protected their substantive right to engage in a lawful business. The Court majority in *Slaughter-House* simply rejected the butchers' argument as inadmissable, as one would expect of the Court given "its aversion to the Dred Scott decision." Brest & Levinson, *Processes of Constitutional Decision Making* 276 (1992).

But the Court majority in *Slaughter-House* found the butchers' claim not only inadmissable, but also unsupported by any valid precedent.

At the time, the leading Supreme Court precedent, applying the due process clause, was *Murray v. Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272 (1856). That case posed the question whether the United States could, pursuant to a distress warrant, seize property from a customs official to satisfy an alleged debt arising out of his official duties without first giving the official a hearing in a court of law.

Clearly, the claim raised in the case presupposed that the government could seize the property from the official if the charge was true.

But it was claimed that no seizure of the property could be made, consistent with the due process clause, unless the procedural safeguards available in a judicial proceeding were afforded prior to the seizure.

The Supreme Court responded by acknowledging that the constitutional protection offered by the due process clause was procedural only. First, it noted that historically "due process of law" was identical to the phrase, "the law of the land" as set forth in the Magna Carta. It further noted that this language appeared in the same clause of the Magna Carta as the jury trial guarantee, signaling that it was procedural in nature, not jurisdictional or substantive. *Id.,* 58 U.S. at 276.

Second, it assessed whether the summary process invoked by the government in the case was the "process due" or whether some form of "judicial process" was required. In addressing this question, the Court did not even hint at the possibility that the due process clause concerned anything but procedure. *Id.,* 58 U.S. at 276-86.

In the *Slaughter-House Cases*, the plaintiff butchers did not invoke the due process clause to complain about the procedure by which the slaughter-house monopoly had been granted, but rather the substantive appropriateness of the monopoly, itself.

Likewise, the due process claim in *Dred Scott* had nothing to do with the process by which a slave owner could be deprived of his slaves. Rather, it was invoked and applied to prohibit Congress from outlawing slavery altogether. It was not the fairness of the process by which Congress had acted that was at issue, but that Congress had acted at all.

Given the textual and historic understanding that the due process clause concerned only the fairness of the process by which the government acted, and that *Dred Scott* was a thoroughly discredited decision, the *Slaughter-House* majority dismissed the plaintiff butchers' due process claim summarily and without explanation or discussion.

Due Process of Law: Perverted

Had this ruling in *Slaughter-House* prevailed, the Supreme Court could never have justified applying to the states any of the protections of the First Amendment, because it contains guarantees that are substantive or jurisdictional in nature.

But the majority view did not prevail. "By the end of the 19th century, a majority of the Court embraced substantive due process; and in the first three decades of the 20th century the Court applied that doctrine frequently." Gunther, *Constitutional Law* 410 (12th ed. 1991).

By the 1940's, however. the Court repudiated substantive due process in cases involving economic regulations or "property" interests, but continued the doctrine in cases involving "liberty" interests,

including the freedoms of speech and assembly. Contrast, *e.g.*, *Lincoln Federal Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525 (1949) with *Kovacs v. Cooper*, 336 U.S. 77 (1949).

The Court has never offered a satisfactory answer to explain why the due process clause offers "substantive" protection for "liberty" interests, but none to "property" interests. Consider B. Siegan, *Economic Liberties and the Constitution* (1980). Nor has it ever provided a textual historical argument that the due process clause goes beyond the procedural meaning given to it by the Court in the 1856 *Hoboken* case.

To the contrary, the Court has used the due process clause as a catch-all for all of the First Amendment substantive protections (as well as the so-called right to privacy) in total disregard of the text, context, and history of that clause and of the guarantees that it allegedly "incorporates."

Does this mean, then, that the Supreme Court's application of the Bill of Rights to the States is completely illegitimate? To answer this question one must reexamine the 14th Amendment's privileges and immunities clause and the relationship of that clause to the Bill of Rights.

THE CITIZENSHIP CLAUSE

From the date of the Declaration of Independence the people of the United States have held citizenship in two political entities, the United States and the States. This dual citizenship is reflected in the language of the original Constitution.

In setting the standards for eligibility for election to the United States Congress, a member of the House of Representatives must be "seven years a citizen of the United States" (Art. I, Sec. 2) and a member of the Senate must be "nine years a citizen of the United States" (Art. I, Sec. 3).

As for eligibility for the Presidency, one must be a "natural born citizen" of the United States, unless one was such a citizen at the time of the adoption of the Constitution (Art. II, Sec. 1).

With regard to State citizenship, Article III, Section 2 provides, *inter alia*, that disputes "between citizens of different States," may come before federal courts created pursuant to Article III, Section 1. Moreover, Article IV, Section 2, Clause 1 provides that the "citizens of each state shall be entitled to the privileges and immunities of citizens in the several States."

U.S. Citizenship: Authority to Confer

While the original Constitution recognized two kinds of citizenship, it did not define them. The terms of eligibility to hold the office of the Presidency did, however, contemplate that one could become a "citizen of the United States" by "natural" birth. In doing so, the Constitution recognized that there was a law of nature that governed one's citizenship. Presumably, that law also applied to State citizenship, but that was left to the individual States.

In *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), however, Chief Justice Roger Taney ruled

that a State could not confer the rights of state citizenship on a person so as to qualify him as eligible to sue as a State citizen in the federal courts. Rather, the privileges of state-conferred citizenship were only those that could be exercised within the territorial boundaries of the conferring State. *Id.,* 60 U.S. at 405.

Justice Benjamin Curtis filed a vigorous dissent, maintaining that the "Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States ...." The only power in Congress, Curtis claimed, was the authority to naturalize foreign-born citizens, as provided for in Article I, Section 8, Clause 4 of the Constitution. *Id.,* 60 U.S. at 582.

After the Civil War there was great concern that the Constitution did not sufficiently define citizenship for the newly freed slaves. So the first sentence of the 14th Amendment was written not only to overrule *Dred Scott,* but to bestow by constitutional command citizenship status in both the United States and in the States:

> *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.*

U.S. Citizenship: Constitutional Significance

Of what significance was this constitutional conferral? Of first importance, it has provided constitutional protection for the native born citizen who cannot be involuntarily deprived of his citizenship. Such a citizen may not lose his citizenship, he may only voluntarily give it up by a clear and convincing act. Nowak, Rotunda, and Young *Constitutional Law* 626-27 (3d ed. 1986).

Second, it has established that one's primary citizenship is that of the United States, not that of the States. Prior to the ratification of the 14th Amendment one's United States citizenship was dependent on one's State citizenship, as Justice Curtis demonstrated in his *Dred Scott* dissent:

> *When ... the Constitution speaks of citizenship of the United States, existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the Government which existed prior to and at the same time of such adoption ....*
>
> *That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern ... [which did not include power] to act on any question of citizenship, or to make any rules in respect thereto. Dred Scott v. Sandford, supra,* at 572.

After the 14th Amendment one could not be a citizen of a State unless he qualified first as a citizen of the United States. Now that United States citizenship had become primary, there was a need to insure that the "privileges and immunities" related to that citizenship would not be subordinated to the States.

Consequently, the first clause of the second sentence of the 14th Amendment was inserted in order to protect the privileges and immunities of United States citizenship from any State's making or enforcing any law "which shall abridge" them.

The question became, what are the privileges and immunities of United States citizenship? In the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873), the Supreme Court ruled that they were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws," not those "which belong to citizens of the States as such." *Id.,* 83 U.S. at 79, 78.

U.S. Citizenship: its Application

The Court in *Slaughter-House* provided a short list of such privileges and immunities, including the "right to peaceably assemble and petition for redress of grievances" from the First Amendment to the Constitution. Subsequent to *Slaughter- House,* a Court minority concluded that this right to assemble was a right to come together to discuss national issues, not state and local ones. *Hague v. CIO,* 307 U.S. 496, 516, 517 (1939).

But can the right to assemble be bifurcated in this way and still be preserved from State abridgment? The right of the people to assemble cannot, by definition, be protected if a State may break up a peaceable assembly based on its assessment that the subject of the assembly is state and local, not national. Government regulation of the gathering of people even on property open to the public generally must be "content neutral" and limited to concerns regarding only "time, place, and manner." *See, e.g., U.S. v. Grace,* 461 U.S. 171 (1983). As a matter of constitutional law, the subject matter of an assembly is for the people to decide, not for the governmental authorities. That is the very essence of the right.

An even more dramatic example of the impossibility of bifurcation may be drawn from the Second Amendment. If that Amendment protects the right of an individual to bear arms, then a State cannot ban the possession of guns without abridging the privilege of a citizen of the United States to bear arms. One simply cannot divide this right in two.

However, one can bifurcate the rights of defendants in criminal cases without such a spill-over effect. For example, denying to a defendant in a State criminal case the right to a jury trial in no way implicates the right of that same person should he be tried in a federal court on federal criminal charges. A State regime of criminal justice without jury trial can coexist with a national regime requiring such a trial. So denial by the State would not constitute an "abridgment" of the citizen's national privilege.

This approach to the privileges and immunities protection afforded by the 14th Amendment would lead to national protection from State action abridging the privileges and immunities contained in the First, Second, and Third Amendments. On the other had, it would leave States to be governed by their own laws and constitutions in criminal and civil cases arising under State and local law. In other words, the guarantees in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments would not apply to the States.

This not only makes practical sense, but it also conforms with the text. The guarantee of freedom of religion, for example, requires "jurisdictional immunity from the power of civil authorities." If a State intrudes on a matter of religion, that is, upon a duty owed exclusively to God, it abridges the immunity guaranteed in the Constitution.

Likewise, the guarantees of the freedom of speech, of the press, etc. are jurisdictional in nature. If a State intrudes on a civil matter that has been left with the people, it necessarily abridges the privileges guaranteed to a United States citizen in the U.S. Constitution. For example, no State may establish a licensing scheme governing the publication of ideas without abridging the national guarantee protecting the freedom of the press, the very essence of which is to prohibit the government from exercising editorial power over the people. See *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

CONCLUSION

With the ratification of the 14th Amendment, U.S. citizenship became paramount, but not exclusive. Under a proper reading of the text, only those privileges and immunities in the first three Amendments in the Bill of Rights are applicable to the States. By failing to apply the Second and Third Amendments and by applying almost all of the provisions of the Fifth through the Eighth Amendments to the States via the Due Process Clause, the Supreme Court has ignored the constitutional text in favor of a scheme of unitary citizenship in derogation of the Constitution.

APPENDIX - THE BILL OF RIGHTS

ART. I Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ART. II A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ART. III No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ART. IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ART. V No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ART. VI In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

ART. VII In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law.

ART. VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ART. IX The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ART. X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

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