The Incorporation Doctrine: A Legal and Historical Fallacy

BRYAN KEITH MORRIS

Published by Lonang Institute
www.lonang.com

I. INTRODUCTION

The controversy that was sparked by the public dispute between Attorney General Edwin Meese and Supreme Court Justice William Brennan over the nature of constitutional interpretation has generated a renewed interest among legal scholars in the "originalist" or "intentionalist" school of constitutional construction. At the same time, however, the dispute has provoked quite a caustic response by critics who have dismissed Meese's "jurisprudence of original intent" as arrogant, vain and irrelevant.[1]

Yet, while some observers may disagree with the Attorney General, it would be unwise for them to consider the controversy a barren discussion, for the issue of what rules of construction American judges should follow when deciding constitutional cases is a crucial and fundamental question which will affect the entire body of American Constitutional law. Indeed, since constitutional interpretation is the inevitable starting point and will determine the outcome of any constitutional question, the rules of construction that are to be followed is one of the first issues which must be resolved. For when judges choose different rules to examine the same question, it is quite likely they will reach very different results. This is true, for example, of the controversy surrounding the Supreme Court's interpretation of the 14th Amendment to make the Bill of Rights applicable to the states.

This theory, known as the incorporation doctrine, has received a great deal of attention from legal thinkers of various jurisprudential viewpoints, both inside and outside the Court. Yet, because those who have studied the incorporation doctrine have approached the issue with very different standards of constitutional interpretation, they have produced nearly as many conclusions as there are scholars investigating the issue.[2]

Despite the many different interpretive approaches that have been applied to the incorporation doctrine, however, one standard of interpretation has been overlooked by scholars and jurists alike. Therefore, the purpose of this study is to propose that the classical rules of interpretation that were followed by American jurists and statesmen throughout the 17th, 18th and early 19th centuries[3] be applied to an analysis of the 14th Amendment in order to test the validity of the incorporation doctrine.

One of the advantages that this standard of interpretation offers is the fact that it was these rules of construction by which the Constitution was written and by which it was naturally expected to be interpreted. Moreover, not only do these rules enjoy a long tradition in American jurisprudence, but when they are applied to the 14th Amendment, they offer a much more consistent rule of law than the variable standard now being applied through the selective theory of incorporation. An application of these rules to the incorporation doctrine first requires an understanding of the nature of the controversy surrounding this issue.

Before the ratification of the 14th Amendment, the Supreme Court had ruled in the case of *Barron v. Baltimore*[4] that the first eight amendments to the Constitution, aggregately known as the Bill of Rights, did not apply to the states, but were strictly limitations on the federal government. However, beginning slowly in the early 20th century and with increasing frequency in the 1960's, the Supreme

Court has interpreted the first section of the 14th Amendment to have the effect of "incorporating" the Bill of Rights by making most of the first eight amendments applicable to the states.[5]

Given the nature of the federal structure as originally framed by the Constitution, and given the restrictive nature of the Bill of Rights, the incorporation doctrine has effected a radical alteration in the relationship between the state and federal governments. Therefore, because of its profound effect on a wide range of constitutional issues, the question of the incorporation doctrine's legal validity and historical veracity has become and continues to be a hotly contested point of disagreement among the various scholars and. jurists who have studied this very critical question.

Even within the Court itself, its members have been divided among themselves as to how the incorporation doctrine is to be applied and upon what constitutional grounds it is to be justified. Again, this division can best be explained by the difference in the rules of interpretation that each school on the Court has chosen to follow.

The view that has held sway argues that it is the due process clause of the 14th Amendment that makes the Bill of Rights applicable to the states. This theory, originally established in the case of *Palko v. Connecticut*,[6] does not suggest that all of the first eight amendments should be binding on the states merely because they are contained in the Bill of Rights. Rather, the Court has held that the only rights which are to be incorporated through the due process clause are those "fundamental principles of justice" that are "implicit in the concept of ordered liberty." According to this reasoning, some rights which are not specifically mentioned in the Bill of Rights may still be made applicable to the states, whereas some provisions found within the first eight amendments may be excluded from state application. The result of this theory has been the gradual process of selectively incorporating nearly all of the first eight amendments on a case by case basis.[7]

One conflicting view, which has generated much debate but has never been accepted by a majority of the Court, argues that the Congressmen who framed the 14th Amendment specifically intended for section one of that amendment to make the entire Bill of Rights completely applicable to the states. This "wholesale" theory of incorporation was most fully articulated in Justice Black's dissenting opinion in the case of *Adamson v. California*.[8]

As it now stands, the Court has determined that its acceptance of the selective theory of incorporation is no longer open to challenge.[9] Yet, it would be neither wise nor just for the Court to deem the incorporation doctrine a closed issue without first considering what new light an application of the traditional rules of interpretation might shed on the meaning of the 14th Amendment.

Of course, there are many normative and philosophical questions which may be raised concerning the pros and cons of any scheme of interpretation. However, this study will not attempt to address those issues. Although such questions are quite valid and deserve full consideration, they are beyond the scope of this present inquiry.

What this study simply proposes to do is apply the traditional rules of interpretation to the question

of whether the 14th Amendment incorporates the Bill of Rights. Consequently, this study will demonstrate that an application of these rules to an analysis of section one of the 14th Amendment reveals that the incorporation doctrine, by either the selective or wholesale method, is a legal and historical fallacy. Indeed, as this study will further demonstrate, a just application of these rules inevitably leads to the conclusion that the idea that the 14th Amendment makes the Bill of Rights applicable to the states is neither comprehended within the language of section one nor supported by the history of the amendment.

Of course, such an examination of the incorporation doctrine is by no means completely unique. As was indicated above, quite a mountain of original and extensive research has already been done on this critical issue. Yet, of all the many scholars who have written in this area, none has combined an application of the classical rules of constitutional construction with a thorough investigation of the historical materials in order to determine the meaning of the 14th Amendment.

Charles Fairman,[10] for example, whose influential historical study effectively destroyed the "framer's intent" argument, fails to apply any interpretive analysis to the issue except to "brood" over it long enough to accept Cardozo's "concept of ordered liberty." This approach consequently leads him to swallow unquestioningly the entire "selective" process. William Crosskey[11] and Jacobus ten Broek,[12] on the other hand, not only fail to apply the traditional rules of constitutional interpretation, but also dismiss any talk of "framer's intent" as irrelevant.

William Guthrie[13] and Horace Flack,[14] two early proponents of the wholesale incorporation theory, both concluded from their historical studies of the issue that the 39th Congress which adopted the 14th Amendment fully intended by that provision to make the Bill of Rights applicable to the states. However, these two men undoubtedly stretched the historical evidence to suit their objective, and by failing to follow the traditional rules of interpretation, were much too willing to accept an expansive reading of the provisions of section one.

Alfred Avins[15] and Raoul Berger,[16] who come closest to the legal/historical analysis employed in this study, do not fully apply all of the rules of construction and rely almost exclusively on the weight of the framer's intent as conclusive evidence of the meaning of a Constitutional provision.

Admittedly, this review of exemplars is not entirely complete. Yet, inasmuch as these authors are representative of the major research that has been done on the incorporation doctrine, the fact that none have followed the approach of this present study demonstrates its originality and justifies its undertaking.

The methodology that this study will follow, then, is to first establish the classical rules of interpretation as they have been conveniently arranged in Joseph Story's Commentaries on the Constitution of the United States.[17] In addition, Mr. Story's delineation will be verified in its particulars by the respected pronouncements of John Marshall, Chief Justice of the Supreme Court from 18011835, among whose authoritative opinions these same rules may also be found. Using these rules as the standard of Constitutional interpretation, this study will compare how the three key Supreme Court cases which bear upon the incorporation doctrine have applied or failed to apply

these rules.

In addition, this study will examine most of the historical material that may, according to the traditional rules, justifiably influence a proper interpretation of the meaning of the 14th Amendment. These will include the debates in Congress over the Reconstruction amendments, the records of the state ratifying conventions, and state and federal court decisions of the period. Because the historical side of the incorporation debate has already received extensive treatment,[18] this study will rely primarily on the thorough research already completed by other diligent scholars, but will also provide original analysis of some of the key materials.

By employing this twofold legal and historical framework of analysis, this study will first examine the Supreme Court decision which is the key to understanding the incorporation doctrine – the *Slaughterhouse Cases*.[19] This study will show that by faithfully following the traditional rules of interpretation, that opinion established a justifiably limited reading of the provisions of section one which was true to both the language and purpose of the 14th Amendment, but which allowed no room for making the Bill of Rights apply to the states.

Secondly, an examination of the *Palko v. Connecticut* decision, which provided the philosophical foundation for the selective incorporation theory, will reveal that the *Palko* court made no attempt to follow the traditional rules of interpretation in order to reach what has been criticized as an illogical, unhistorical decision.[20]

Finally, an examination of Justice Black's Adamson dissent will reveal that although Black claimed to be following the classical rules of interpretation, he actually misapplied those rules in order to justify his theory of "wholesale" incorporation. Moreover, the historical case he presents in defense of his argument is completely untenable.

In essence, what this twofold legal and historical analysis will demonstrate, is that when the incorporation doctrine is tested by the Marshall/Story rules of interpretation, neither the "selective" nor the "wholesale" theory of incorporation proves to be a defensible article of Constitutional faith.

II. RULES OF INTERPRETATION – THE STANDARD ESTABLISHED

The first step towards demonstrating the claims of this study, is, of course, the establishment of the classical standard of constitutional construction. Therefore, accepting Mr. Story's invitation, "let us endeavour to ascertain what are the true rules of interpretation applicable to the Constitution."[21]

Mr. Story's exposition of the rules of interpretation is found most precisely stated in section 405 of his Commentaries:

> In construing the constitution of the United States, we are in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. Where its words are plain, clear, and determinate, they require no

> interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument. Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds. Whenever such questions arise, they will probably be settled, each upon its own peculiar grounds; and whenever it is a question of power, it should be approached with infinite caution, and affirmed only upon the most persuasive reasons. In examining the constitution, the antecedent situation of the country, and its institutions, the existence and operations of the state governments, the powers and operations of the confederation, in short all the circumstances, which had a tendency to produce, or to obstruct its formation and ratification, deserve a careful attention. Much, also, may be gathered from contemporary history, and contemporary interpretation, to aid us in just conclusions.[22]

It is evident from Mr. Story's recitation and the confirming witness of Chief Justice Marshall that the rules of interpretation suggest a sequence of steps which should be observed in the following order:

The first step one must take when interpreting the Constitution is to view it in light of its overall structure, nature and purpose. In other words, the interpreter must adopt in his mind a presuppositional framework of analysis which seeks to honor the overarching design of the Constitution and the general principles it embodies.

Chief Justice Marshall expressed this commitment to honoring the overall design of the Constitution both in word and in deed. For example, Marshall not only expressed the importance of construing the document as a whole,[23] but he also decided cases that came before him with a strong implicit consideration for the federal structure of government created by the Constitution.[24] This presupposition in favor of preserving federalism can be most readily detected in early Supreme Court cases such as *McCulloch v. Maryland*[25] that directly tested the division of powers between the state and federal governments.

Only after this presuppositional frame of mind has been adopted may the second step of constitutional interpretation be taken. The text, that is, the language of the Constitution itself, is above all the primary source from which the meaning of the Constitution is to be derived. If the language is clear and its meaning plain as used by an ordinary man, or by "those for whom the instrument was written,"[26] then the text alone is sufficient, and interpretation is unnecessary.

Implicit in this rule is the presupposition that man was created with the capacity to accurately express his will in words. Chief Justice Marshall believed, therefore, that the people who framed and adopted the Constitution "must be understood to have employed words in their natural sense, and to have intended what they have said."[27] Moreover, this rule presupposes that words that are drafted in the Constitution have an inherent, invariable meaning which must be respected at all times. The general rule is that "the meaning of the Constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass upon it."[28]

However, because of the imperfection of human language, even John Marshall was willing to concede that ambiguous terms in the Constitution may require further inquiry to determine their proper meaning.[29] This third step of constitutional interpretation involves a twofold analysis: 1) textual and 2) purposive.

In investigating further into the meaning of ambiguous language by looking to the text of the Constitution itself, Marshall suggested[30] that three particular considerations may be taken into view: context - the judge may first compare the terms with other words and sentences in the instrument; subject - the judge may take into view the nature of the matter under consideration, and inquire as to the law of nature governing it; and intent - the intention of the framers and of those who adopted it may be considered, but that intent must be derived chiefly from the text itself. On this point, Marshall offered the following caveat: "This court would not feel itself authorized to disregard the plain meaning of words, in search of conjectured intent to which we are not conducted by the language of the instrument."[31]

Despite the previous statement, however, Marshall was willing, on appropriate occasions, to allow "those considerations to which the courts have always allowed great weight in the exposition of the laws,"[32] namely contemporary interpretation.

Story is quite cautious on these points and warns that contemporary interpretation should "be resorted to with much qualification and reserve."[33] He pointed to the danger of relying on the opinion of those legislators who framed or passed a provision, because not every member understood the terms in the same sense or to the same extent of operation. Story emphasizes that

> the private interpretation of any particular man, or body of men, must manifestly be open to much observation. The Constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself ... Nothing but the text itself was adopted by the people.[34]

Therefore, although contemporary construction of a Constitutional provision by its drafters may help to illustrate or explain a doubtful phrase, such interpretation is not absolutely conclusive, but must remain true to the meaning of the text as understood by the ordinary citizens of the states who ratified it.

Marshall further stated that if there was any serious doubt as to the extent of any provision of the Constitution, the purpose of the provision and of the Constitution "should have great influence in

the construction."[35]

First, Marshall allowed that the historical circumstances which led to a provision's adoption, or "the former proceedings of the nation respecting it"[36] may be taken into consideration in order to determine its constitutional purpose. Secondly, Marshall declared that the interpretation of a particular provision must often depend on a "fair construction of the whole instrument."[37] This is determined from the nature, scope and design of the entire Constitution.

By way of summary, the following outline of the above stated rules is offered for clarification:

I. The overall design of the Constitution must always be honored.

II. If the text is unambiguous, recourse to other means of interpretation is unnecessary and improper.

III. If there exists some doubt as to the meaning of a Constitutional provision, a two-fold analysis is required.

A. Text
   1) context
   2) subject
   3) intent

B. Purpose
   1) of the provision
   2) of the instrument

Using these rules, then, as the standard of Constitutional interpretation, let us see how the Court has applied or failed to apply them in the three most significant cases that bear upon the incorporation theory: 1) non-incorporation - the *Slaughterhouse Cases*; 2) selective incorporation - *Palko v. Connecticut*; and 3) wholesale incorporation - *Adamson v. California* (Justice Black, dissenting).

III. *SLAUGHTERHOUSE CASES* – THE STANDARD APPLIED

The *Slaughterhouse Cases* of 1872 were the first major decision by the Supreme Court since the 14th Amendment had been ratified which required the Court to interpret the provisions of the first section of that Amendment. In these cases a state law requiring the establishment of a state monopoly over the slaughter of livestock was challenged as violating, in particular, the privileges and immunities, due process and equal protection clauses of the 14th Amendment. Since it is these provisions of the 14th Amendment that are usually cited, in some combination or other, as the means by which the Bill of Rights are now made applicable to the states, let us see how the Court treated the interpretation of these phrases and compare its approach with Story's rules of construction.

After first dealing with the 13th Amendment argument that had been raised by the plaintiffs in the

case, the Court began its interpretation of the 14th Amendment by engaging in a clause-by-clause, word-by-word examination of the language of section one. By honoring the text in this way, the Court demonstrated its intention to abide by one of the most important rules of the Marshall/Story standard, namely, that the language of the Constitution is the primary source from which its meaning is to be derived. Now let us see whether the Court continued to follow the remaining rules.

Privileges and Immunities – Textual Analysis

The first clause of section one which the Court examined is the privileges and immunities clause. Yet, rather than analyzing this clause in complete isolation from the rest of the amendment, the Court first considered how this clause is affected by the preceding "citizenship clause," which defines United States citizenship and distinguishes it from state citizenship.

In response to plaintiffs argument that the privileges and immunities of citizens of the United States are the same as those of citizens of the states, Justice Miller simply pointed to the language. He contrasted the language in the privileges and immunities clause of the 14th Amendment with that of Art. IV, sec. 2, and determined that these two clauses pertain to distinctly different classes of privileges and immunities enjoyed by two distinctly different classes of citizenship. He therefore concluded that an interpretation which equates the privileges and immunities of these two clauses is precluded by the sheer difference in their texts.

When Justice Miller asserted, however, that this textual distinction had been performed "understandingly and with a purpose," he was not necessarily correct. The records of the debate over the 14th Amendment demonstrate that although the 39th Congress noticed the difference in the language between the two privileges and immunities clauses, they quite remarkably recognized no difference in the meaning of the two clauses. As a result, the majority of its members understood the privileges and immunities of section one to be identical with the purposes of the clause found in Art. IV, sec. 2.[38] In order to better understand how this equation occurred, let us take a look at the historical record.

The "Original Intent"

The privileges and immunities clause of Art. IV, Sec. 2, which guarantees that "the Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States" was transposed nearly verbatim to the original draft proposal of the 14th Amendment. In fact, this first draft proposal contained a parenthetical reference to the clause of Art. IV, sec. 2, so that it read:

Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).[39]

The author of this first proposal, Congressman John Bingham of Ohio, emphasized in debate that he realized this clause was already in the Constitution. He argued, however, that because the states

had violated the privileges and immunities clause, he sought to compel the states' obedience to it by giving Congress the power to enforce it under the 14th Amendment.[40] That the privileges and immunities clause of Bingham's first proposal was to have the same effect as the clause found in Art. IV, sec. 2 was well understood by his colleagues in the House of Representatives.[41]

Bingham's original proposal did not survive, however. It was never voted on in the House and was eventually left to die. When Congress later reconvened to consider the same matter, Bingham drafted another proposal with slightly different language. This proposal, which was ultimately accepted as section one of the 14th Amendment, appeared in this form:

> No State shall make 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 within its jurisdiction the equal protection of the laws.

It should be noted that although this modification in the language of the privileges and immunities clause is only slight, the consequent modification in its meaning is significant. Whereas the former proposal had sought to protect the privileges and immunities of "citizens in the several States," the new proposal seeks to protect those of "citizens of the United States."

The Congressmen who debated this phrase did not, however, seem to recognize the difference between the two proposals. Even with this significant change, the Congressmen still equated the privileges and immunities clause of this new proposal with that of Art. IV, sec. 2. Representative Thaddeus Stevens, for example, stated in support of Bingham's proposal that "every one of these provisions is ... asserted, in some form or other, in our Declaration or organic law."[42] Congressman Bingham, in his closing speech on the proposal, even used the two phrases interchangeably.[43]

One Senator Howard, who apparently did notice the difference in the two clauses, attempted to distinguish the phrases "citizen of the United States" and "citizen of each State."[44] In doing so, however, he stumbled onto the very complex question of diversity of citizenship under our American federal system. The nation had encountered this nagging problem several times earlier in its Constitutional history,[45] but had never satisfactorily settled the issue. Now faced squarely with this difficulty, and desiring to settle the question raised by Howard's speech, the Senate voted to attach the following amendment to the front of Bingham's proposal, "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."[46]

Even with this modification, however, the Senators who followed Howard in debate still equated the privileges and immunities clause of section one with that of Art. IV, sec. 2. Senator Poland, for example, is clear on this point:

> The clause of the first proposed amendment, that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' secures nothing beyond what was intended by the original provision in the

> Constitution, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'[47]

Evidently, then, those Congressmen failed to realize the significance of the difference between the two clauses, even with the addition of the preceding citizenship clause.[48]

The Original Interpretation

Justice Miller, however, writing for the *Slaughterhouse* majority, did notice the change. Yet, when the Court proceeded to offer its definition of "the privileges and immunities of citizens of the United States" based on what it inaccurately considered to be an intentional modification on the part of Congress, the Court was not guilty of usurping the will of the legislature that had adopted the 14th Amendment. Although the Court offered an interpretation of the new privileges and immunities clause different from that given to it by Congress, the Court's interpretation, which reflected the obvious difference between the two privileges and immunities clauses, was justified by the plain language of the text of section one, whereas the interpretation given to the new clause by Congress was not. As we shall see, moreover, the Court's interpretation of the privileges and immunities clause was much more reflective of the understanding held by the ordinary citizens of the states who ratified the 14th Amendment.

By thus offering an interpretation of the 14th Amendment privileges and immunities clause which was different from that given to it by Congress, the Court was simply following one of the fundamental rules of interpretation expressed by Chief Justice Marshall: "This Court would not feel itself authorized to disregard the plain meaning of words, in search of conjectured intent to which we are not conducted by the language of the instrument."[49] Because the "conjectured intent" of the 39th Congress, which equated the two privileges and immunities clauses, could not be justified by the language of section one, the Court offered an interpretation that could.

Thus, in the above analysis, the Court has honored the following rules of interpretation: 1) it gave primary consideration to the text itself; 2) it made a contextual comparison of section one with Art. IV, sec. 2; 3) it offers a subject matter analysis of the nature of citizenship; and 4) it considers the intent of the framers of the clause, but only as this could be derived from the text itself.

Privileges and Immunities – Purposive Analysis

Furthermore, the Court goes on to answer the plaintiffs argument that the protection of all civil rights are now transferred by the privileges and immunities clause from the states to the federal government. The Court does this by engaging in an analysis of the purpose of both the 14th Amendment in particular, and of the Constitution as a whole.

Pointing to the fact that the federal structure as established by the Constitution had left the entire domain of civil rights with the states, Justice Miller argues that if the claim made by the plaintiffs were followed, such an interpretation of the privileges and immunities clause would completely destroy the original design of the Constitution. The effect of such a construction he says, would be

to "fetter and degrade the state governments by subjecting them to the control of Congress" and would "radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[50]

Therefore, because of the extreme results that would follow, the Court considered itself obligated to reject such an interpretation "in the absence of language which expresses such a purpose too clearly to admit of doubt."[51] In other words, if the Congress which drafted the 14th Amendment had intended for the privileges and immunities clause to "radically alter" the federal system, then they should have explicitly said, for example, that "the entire domain of civil rights heretofore belonging to the states are now transferred to the jurisdiction of Congress."[52]

By thus judging the plaintiffs' claim with a "presumption of invalidity" in favor of preserving the basic design of the Constitution, the *Slaughterhouse* majority was not adopting some strange new interpretive approach. Rather, it was following the precedent of Chief Justice Marshall who declared in *Barron v. Baltimore*:

> 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.[53]

Unable to locate such clear language in the 14th Amendment, the *Slaughterhouse* majority concluded: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."[54] Here again the Court is insisting on honoring the text, and refuses to adopt an interpretation not justified by it.

In the light of this analysis, the Court then goes on to offer a rather narrow, but justifiable interpretation of the "privileges and immunities of citizens of the United States" as those arising from a person's national citizenship. However, since this narrow definition left to the States the regulation of all civil rights such as those found in the Bill of Rights, it gave to the federal government no new power to protect the first eight amendments from state abridgement. Therefore, although the *Slaughterhouse Cases* did not directly address the incorporation doctrine, by adhering to the Marshall/Story rules of interpretation and construing the privileges and immunities clause in this way, the *Slaughterhouse* majority effectively eliminated this provision as justification for the claim that the Bill of Rights were thereby made applicable to the States.

Due Process

The next argument answered by the Court was the plaintiffs' claim that the Louisiana state monopoly statute violated the due process clause of the 14th Amendment. The *Slaughterhouse* majority dismissed that claim, however, in a very cursory fashion:

> We are not without judicial interpretation ... of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen

> or any that we deem admissible, 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 property within the meaning of that provision.[55]

By the time of the *Slaughterhouse* decision, the Supreme Court had had the opportunity to construe the due process clause of the Fifth Amendment on only two occasions.[56] We may reasonably infer that the opinion which the *Slaughterhouse* court "deemed admissible" was *Murray's Lessee v. Hoboken Land and Improvement Co*.[57] In that case, the Court had embraced the historically accepted interpretation of due process as it had been understood since Magna Carta.[58] It had long been held at common law that due process only refers to judicial procedure, not to executive or legislative proceedings. Moreover, due process of law had never been held to refer to general laws passed by legislatures.[59] *Murray's Lessee* did acknowledge, however, that the due process clause did restrict the legislative branch from declaring by its mere will any procedure to constitute due process of law.

Only one other Supreme Court due process precedent could have been relied upon by the plaintiff butchers in *Slaughterhouse*. That was *Dred Scott v. Sanford*.[60] In *Dred Scott*, Chief Justice Roger Taney adopted a "substantive" due process interpretation of the Fifth Amendment which ruled that due process is as applicable to general laws passed by Congress as it is to rules governing judicial procedure. That ruling however, was a clear deviation from Anglo-American legal history. Acknowledging that other parts of *Dred Scott* had been specifically overruled by the first clause of the 14th Amendment,[61] the *Slaughterhouse* Court simply assumed that the "substantive" due process of *Dred Scott* would be totally inadmissible. They thought it would have been ludicrous for the Court to have imposed upon the 14th Amendment the very interpretation of the due process clause over which the nation had just recently fought a bloody Civil War.

Clearly, then, not only was this limited interpretation of due process as declared in Murray's Lessee the one given to that phrase by the framers who included it in the 5th Amendment, but this was the same meaning given to due process by those Congressmen who included it in the 14th Amendment.[62]

The *Slaughterhouse* majority, by thus accepting this historically recognized definition of due process, had honored the literal import of that phrase as it was understood by the "ordinary man," both in England and in the United States. By doing so, the Court had attributed to that phrase a very narrow procedural meaning which could in no way be construed to incorporate the Bill of Rights.

Equal Protection

Finally, the Court undertakes an analysis of the meaning of the equal protection clause. This phrase, though by no means entirely unique to the 14th Amendment, was a bit more inscrutable than the other clauses found in section one. Therefore, the Court chose to determine its meaning not only from a textual analysis, but also from an examination of the purpose of the 14th Amendment in light of the historical circumstances that led to its adoption.

After reiterating its argument that the 14th Amendment was designed to protect the newly freed

slaves, the Court deduced from this premise that the equal protection clause had been adopted to prohibit racial discrimination against negroes as a class. Of course, the Court made no pretense of having looked to the Congressional records to derive some evidence as to how the legislature construed the term "equal protection of the laws." Yet the Court's understanding of the subject matter of the 14th Amendment, namely racial discrimination, led it to an interpretation of this clause that very closely reflected the original intent of the 39th Congress and of the states who ratified the Amendment.[63]

As a consequence of its understanding of both the subject and object of the equal protection clause, the Court declared that this provision was so clearly intended for the protection of negroes as a class that it doubted any action brought before the Court would be upheld unless it was based on a claim of racial discrimination. Obviously, then, the interpretation of this clause by the *Slaughterhouse* majority offers no room for embracing within its terms the broad and sundry liberties enumerated in the Bill of Rights.

Thus, rather than substituting its own predilections for the language of section one, the *Slaughterhouse* majority remained faithful to the classical rules of constitutional construction. The temporary results, then, of this interpretive fidelity were the rejection of any notion that the Bill of Rights were incorporated by the 14th Amendment and the consequent preservation of the federal system of government.

IV. *PALKO v. CONNECTICUT* – THE STANDARD ABANDONED

The impact of the *Slaughterhouse Cases*, however, was to be short-lived. Not long after this landmark decision, the Court began a process of gradually expanding the meaning of the due process clause to give it the effect of ultimately making nearly all of the provisions of the Bill of Rights applicable to the states. Without overruling the *Slaughterhouse* interpretation of the privileges and immunities clause, the Court, over a long period of time, essentially accomplished by the due process clause what counsel in *Slaughterhouse* had attempted via the privileges and immunities clause but had failed to do. This did require, however, a rejection of the *Slaughterhouse* interpretation of due process.

The Transformation of Due Process

Beginning in the late 19th century, the Supreme Court began to abandon the notion that due process had a "precise technical import"[64] and chose, rather, to view the term as a vague, indefinable generality. Conveniently enough, the Court welcomed this interpretive change of heart as an opportunity to impose upon the phrase its own philosophical predilections through the "gradual process of judicial inclusion and exclusion."[65] This radical alteration of the meaning of the due process clause advanced along "substantive" and "procedural" lines.

Recall that in *Dred Scott* the Court had ruled that the term "due process" referred not only to judicial procedure, but also to general legislation passed by the Congress. Rejecting this view, the *Slaughterhouse* Court chose to adhere to the historical, more narrow interpretation of due process

laid out in Murray's Lessee and explicitly overrule the "substantive" due process interpretation of *Dred Scott*. What the Supreme Court of the late 19th century did, however, was resurrect the old *Dred Scott* interpretation of due process and tacitly reject Murray's Lessee.

Moreover, in addition to transforming "due process" to now include general legislation, the Court also began to redefine the word "liberty" found in the due process clause. Rejecting the historical definition of liberty, which was limited strictly to freedom from physical restraint,[66] the Court radically expanded this phrase to now include such "substantive" economic rights as the freedom to engage in contractual relationships.

The expansion of the "procedural" dimension of due process basically involved a gradual inclusion of more and more of the judicial procedures which would fall under the term due process. Up until the mid 1800's the term due process was limited to certain basic procedures that would constitute a fair trial. According to Murray's Lessee, in order to determine what those basic procedures are, one must follow the historically accepted understanding of the term due process by looking to "those settled usages and modes of proceeding existing in the common and statute law of England."[67]

By following this rule, the Supreme Court had determined in several cases that fundamental due process requires "that the party to be affected shall have notice and an opportunity to be heard."[68] Not long after these decisions, however, the Court began to supersede this basic standard by gradually including under due process many more procedures beyond these two essential requirements.

This expansion of both the substantive and procedural aspects of the due process clause saw its ultimate judicial justification in the case of *Palko v. Connecticut*. Since it is this case that is cited as the philosophical foundation for the "selective incorporation" of the Bill of Rights, let us turn to an examination of what rules of interpretation the Court followed to decide that case.

The *Palko* "Principle"

In *Palko* the Court was asked to overrule a "double-jeopardy" conviction because it violated the 5th Amendment of the federal Constitution. Although convicted in a state court, the defendant argued that the due process clause of the 14th Amendment made the federal Bill of rights applicable to the states in all its particulars. Relying on numerous precedents, the Court rejected this argument, stressing that "there is no such general rule."[69] The Court at this point could have ceased discussion of this issue and gone on to answer the secondary question of whether the conviction violated the privileges and immunities clause. Instead, the Court proceeded to offer, by way of dicta, its understanding of the meaning of the due process clause.

Justice Cardozo, writing for the majority, began his analysis of this clause by offering a "rationalizing principle" as to why certain provisions in the federal Bill of Rights are protected against state encroachment and why others are not. His answer was that the "immunities" of "particular amendments" are protected because they are "implicit in the concept of ordered liberty," and thus made valid against the states by the 14th Amendment.

Now, as a preliminary observation, it should be noted that this privately conceived phrase "ordered liberty" exists nowhere in the Constitution. This fact of itself indicates that Justice Cardozo must have been working with a standard of interpretation different from the one followed by Justices Marshall and Story. Indeed, Cardozo's statement demonstrates that he has completely disregarded one of the foremost rules of traditional constitutional interpretation. It is not the text of the Constitution that the Court has applied in this instance. Rather, the language of the due process clause has been discarded and replaced with some new concept of the judge's own creation.

Moreover, the connection Cardozo made between his "concept of ordered liberty" and the "14th Amendment" was tenuous at best. Unlike the careful phrase by phrase analysis adhered to in *Slaughterhouse*, the Court here has asserted that certain rights have been made valid against the states by the 14th Amendment generally. There is no precise reference made to any particular provision, whether a certain word, phrase or clause. Justice Cardozo did not even specify which section is supposed to make these "immunities" valid against the states. Presumably, he was referring to the due process clause of section one. However, the degree of precision that Justice Cardozo was willing to apply in this case falls far short of the rigorous requirements of traditional constitutional interpretation.

The Perversion of Procedure

Now this "concept of ordered liberty" may seem vague and arbitrary, even to the casual observer, despite Justice Cardozo's assurances to the contrary. Yet, his attempts to clarify this new doctrine offer little assistance. These attempts amount to quoting some equally vague "natural law" concepts that have nothing to do with the classical definition of due process. In offering his definition of "procedural" due process, Justice Cardozo suggested, for example, that the rights or "immunities" that are to be protected are those "principles of justice" that should be ranked as "fundamental," and without which 'justice would perish" and no "fair and enlightened system of justice" would be possible.[70]

By volunteering these vague generalities, however, the Court has not informed us what "justice" is supposed to mean. Justice Cardozo has simply enumerated certain criminal procedures which would pass this nebulous test and others that would not. He has not specified how he came to choose particular proceedings over others but only mentioned that "there are certain students of our penal system" who considered these criminal procedures either a "mischief' or a "benefit."[71]

This, then, was the *Palko* majority's standard of Constitutional interpretation. Cardozo considered it no longer necessary to inquire into "those settled usages and modes of proceeding existing in the common and statute law of England"[72] to determine the meaning of due process. According to him, one must simply determine how the contemporary legal theorists define the term. Yet, if the *Palko* Court had followed the traditional rules of interpretation, it would have discovered a much more precise definition of due process than by asking if a certain principle of justice is "fundamental."

What the Court has demonstrated here is not only did it care to make no inquiry into the historical meaning of due process as it was understood since Magna Carta, but neither did it consider itself

obligated to make a contextual comparison of the due process clause of the 14th Amendment with the similar one found in the 5th Amendment. Nor did the Court bother to determine what was the contemporary interpretation given to the phrase by the 39th Congress or the state ratifying conventions. The "original understanding" of the phrase at the time of its adoption had no apparent relevance in the *Palko* Court's analysis.

The Court further demonstrated little concern for the plain language of the Constitution by labeling the legal procedures that are to be protected by the due process clause from state encroachment as "privileges and immunities."[73] The *Slaughterhouse* Court had made it clear that the rights guaranteed by the due process clause were by no means synonymous with those protected by the privileges and immunities clause. The *Palko* Court even acknowledged this itself when it properly addressed the privileges and immunities clause later as a separate argument. The reason for the blurring of this distinction by the Court must be attributed to its abandonment of the traditional rules' requirement that the text of the Constitution must be treated carefully.

The Court again demonstrated a careless handling of the language of the due process clause when it emphasized that its process of including particular procedures and excluding others was not arbitrary or casual, but was "dictated by a study of the meaning of liberty itself."[74] Yet, at this point in the analysis, the Court's understanding of the word liberty, which we will presently consider, was irrelevant. The question was not whether the procedures that the Court had chosen to protect are subcategories of "liberty." The question is whether such procedures are "due process." In other words, liberty is not due process; due process is not liberty. Rather than making this crucial distinction, however, the Court has confused the various terms within the due process clause as one conglomerated mass. This is evident from a later statement: "Fundamental too in the concept of due process and so in that of liberty. .."[75] Such careless analysis would be unacceptable under the traditional rules of interpretation.

"Liberty" and Substance For All

From here the Court moved into its discussion of the "substantive" aspect of due process which it considered to be more important than the "procedural" rights addressed above:

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 by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[76]

From this passage it is evident that the *Palko* Court has again deviated from the three fundamental rules of traditional interpretation. First, the Court has once more demonstrated little regard for linguistic precision. It has done so by failing to specify which "earlier" amendments it had in mind and by again inaccurately labeling the rights contained in those amendments as "privileges and immunities."

Secondly, the Court has failed to take into consideration the historical circumstances which led to the adoption of the 14th Amendment and the original purpose for which it was ratified. By doing so, the *Palko* Court has revived the "substantive" interpretation of due process which had been defeated with *Dred Scott*, slavery and the Confederacy.

It was this substantive interpretation of due process which had led the Court in *Dred Scott* to declare blacks nonpersons under the Constitution and to invalidate the Missouri Compromise and Compromise of 1850. When these two acts of Congress, which had maintained a precarious peace between the North and South were declared void, there was little left to hold the striving sections together. It was not until the Union had won the Civil War that Congress could freely adopt the 14th Amendment and thus overrule the substantive due process interpretation of *Dred Scott* and secure for blacks their inborn rights of citizenship. More specifically, the due process clause was intentionally designed to ensure that blacks would be afforded in state courts the judicial procedures historically established at common law.[77]

However, with no apparent concern for the history and purpose behind the due process clause, the *Palko* Court in cavalier fashion rejected the precedent of Magna Carta, Murray's Lessee, and *Slaughterhouse* and embraced the very same substantive interpretation that led to the Civil War. We shall see that just as the *Dred Scott* decision led to destructive results, so too has *Palko v. Connecticut*.

The *Palko* Courts' third deviation from the traditional rules of interpretation was its failure to honor the federal system that provides the framework for the Constitution. This failure is evidenced by the Courts' adoption of the so-called "process of absorption." As Justice Cardozo rightly pointed out, the Bill of Rights had always been effective only against the federal government. This was emphatically declared in Barron v. Baltimore and later re-emphasized by *Slaughterhouse*. But the *Palko* Court has here decided that if the process of absorption has taken place (which Cardozo apparently was not certain had occurred) then the "earlier" amendments of the Bill of Rights have been made applicable to the states.

The traditional rules of interpretation require that if a provision of the Constitution is to be construed so as to "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States"[78] and thereby "radically alter" the federal system, it must say so in clear and unambiguous language. Following the requirements of this test, the *Slaughterhouse* Court had failed to find within the 14th Amendment any language lucid enough to effect such a fundamental change. Therefore, *Slaughterhouse* declared, neither the Congress nor the people of the states could have intended such a purpose.

When the *Palko* Court was later asked to look at the same 14th Amendment, did it find within its provisions such a clearly stated purpose which the *Slaughterhouse* majority had overlooked? Certainly not. Indeed, Cardozo never argued that the incorporation of the "earlier articles" of the Bill of Rights was mandated by either the language or the purpose of the due process clause. Rather, he declared that his process of absorption was rooted in "the belief that neither liberty nor justice would exist if they were sacrificed."

Of course, this is a dizzying example of circular reasoning – liberty must be protected because it will perish if it is sacrificed. However, this does not explain how the due process clause justifies the destruction of the federal system.

Yet, without providing any clarification on this point, Justice Cardozo quickly jumps to the example of free speech. Of course, examples cannot define; they can only illustrate a given definition. But it is obvious that Cardozo is trying to cloak what he views as "the matrix ... of nearly every other form of freedom"[79] in the garb of special Constitutional protection.

Only after making this point did Justice Cardozo explain how he perceived the due process clause to have made certain provisions of the Bill of Rights apply to the states:

> So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.[80]

It is in these statements that Cardozo most candidly revealed the rules of construction that he followed to analyze the due process clause of the 14th Amendment: through the evolutionary process of judicial reinterpretation, the historical understanding of the due process clause has been abandoned and redefined according to the conscience of the judges and the changing values of society.

Therefore, with the Court no longer obligated to honor the definition of a word as it was understood at the time of its adoption, words have no fixed or inherent meaning, and the Constitution means whatever the Court says it means. Moreover, neither does the original purpose of the Constitution matter, for its provisions may be manipulated to meet the exigency of the day. Clearly, the possibilities created by this logic are mind-boggling, indeed.[81]

Nevertheless, even with the meaning of due process now stretched to protect from state encroachment the "fundamental principles of justice," the *Palko* majority did not argue that all of the provisions of the Bill of Rights are necessarily included within this definition. Rather, it left the judge free to include within the "concept of ordered liberty" any "fundamental" freedoms that do not happen to be found in the Bill of Rights, or conversely, to exclude some of the first eight amendments that are not so ranked.[82]

Clearly, this theory of constitutional interpretation is a radical departure from the traditional rules followed throughout our nation's early history. And the consequences of this theory have been not only radical but profound. Although the *Palko* majority probably did not expect this to happen, the Supreme Court of the 1960's used this opinion as a limitless warrant to selectively incorporate all but a few of the many provisions of the Bill of Rights, and to make even the most technical criminal

procedures found therein to be applicable to the states. In effect, the Court has become, as the *Slaughterhouse* majority feared, "a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights . . ."[83] Predictably, the impact upon the states is that they have been stripped of much of the power historically exercised by them to protect the health, safety and morals of their citizens; that power which antedated and was left intact by the Constitution.

Of course, this alteration in the fundamental structure of our system of government came about not through the adoption by three-fourths of the states of a constitutional amendment expressing such a purpose in "plain and intelligible language." It came about through the adoption of a new theory of interpretation by a majority of "nine old men."

V. *ADAMSON* DISSENT – THE STANDARD PERVERTED

Ironically, it was Justice Black, one of the members of the *Palko* majority, who was to become the most vigorous opponent of the "natural law" jurisprudence as applied in that case. At the same time, however, he also emerged to become the Court's leading proponent of the idea that the Bill of Rights were now applicable to the states via the 14th Amendment. Yet Justice Black took a different approach to this theory than did the *Palko* opinion. He came to reject the "selective" process of absorbing certain "fundamental" rights into the 14th Amendment, subject to the judge's own conscience and sense of justice. Instead, Justice Black began to assert a theory of 'wholesale" incorporation according to which the 14th Amendment makes every specific provision of the first eight amendments applicable to the states in their entirety. This theory of Justice Black's was most fully explained in his dissent in the case of *Adamson v. California*. Let us turn, then, to this opinion to determine what rules of Constitutional interpretation Justice Black followed to reach this conclusion.

In the Adamson case, the defendant was challenging a California statute that allowed for self-incrimination in that state's court proceedings, on the grounds that it violated the privileges and immunities and due process clauses of the 14th Amendment. The Court rejected both of these arguments, relying on the *Slaughterhouse* precedent to answer the first challenge. The Court answered the due process argument, interestingly enough, by stating that the framers of the 14th Amendment had not intended for that clause to make the Bill of Rights valid against the states.

Justice Black began his dissenting opinion by attacking the "natural law" theory spelled out in *Twining v. New Jersey*,[84] which Black claimed was the theory being applied by the Adamson majority. However, Justice Black took it upon himself to attack the Twining decision not only because it was founded on a "natural law" philosophy, but because it had strongly denounced the "wholesale" theory of incorporation now being forwarded by Black's dissent.

Right Rules, Wrong Results

Justice Black then moves to the discussion of his "wholesale" incorporation theory by stating:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States. With full knowledge of the import of the Barron decision, the framers and backers of the 14th Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this court interpreting the Amendment ...
>
> For this reason, I am attaching to this dissent an appendix which contains a resume, by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[85]

Now, to his credit, Mr. Black did indicate by this statement that he sought to honor the two fundamental rules of Constitutional construction, namely, honoring the text and the original intent. Yet, on closer analysis it will become evident that Justice Black has not completely followed the Marshall/Story rules of interpretation, but has overemphasized some and ignored others.

The result, then, of this less than total adherence to all of the rules of interpretation, is an unconstitutional theory which, when tested by both a legal and historical analysis, fails to find any support in either the language or the intended purpose of the 14th Amendment.

The extensive appendix, attached to Justice Black's dissent, which he claimed "conclusively demonstrates" his case for wholesale incorporation, evinces an ostensible concern for honoring the original meaning of section one by inquiring as to how it was understood at the time of its adoption. To the extent that Justice Black genuinely followed this stated objective he should be commended. Unfortunately, however, Justice Black's thesis as presented in his resume suffers from two major flaws.

First, because Justice Black failed to give foremost consideration to the plain language of the Constitution, he has adopted an interpretation of section one that is not justified by either of its provisions. Apparently aware of this fact himself, Justice Black then resorted to an unacceptable method of construction which does not analyze the four clauses of section one separately and individually, as properly should be done, but which attempts to justify a theory of incorporation based on an analysis of section one "taken as a whole." Moreover, by doing so, Justice Black destroyed his entire argument, since the only two individuals that Justice Black cited as expressing any intention of incorporating the Bill of Rights based their arguments not on section one "as a whole," but specifically on the privileges and immunities clause.

Secondly, Justice Black's historical argument, as presented in his appendix, is very weak indeed. As mentioned above, Black was able to find only two members of the 39th Congress who expressed any intention of incorporating the Bill of Rights, and the one gentleman who Black relied on as his star witness proves to be very confused and fuzzy in his understanding of the entire question.

By contrast, a veritable mountain of historical evidence to the contrary has been discovered by scholars whose findings have been widely accepted among disinterested observers.[86] As one author has concluded: "In (Justice Black's) contention that Section I was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him."[87]

Convoluted Construction

As we begin our examination of Black's interpretation of the 14th Amendment, and of his case for incorporation, the first point to notice is that Black referred to section one "separately and as a whole" as the means by which the Bill of rights were to be made applicable to the states. The first question to be asked of Justice Black is whether he really believed the equal protection clause, for example, could stand on its own as the grounds for overruling *Barron v. Baltimore*? Mr. Black faltered on this point, however, when he stated in the following paragraph that section one "taken as a whole" is the means by which the incorporation process is to take place. Here he has left off referring to the provisions of section one "separately," and apparently has conceded the point.

By saying, however, that the language of section one should be "taken as a whole," Mr. Black betrayed the fact that he did not consider the text of the Constitution to be of primary importance when interpreting it. Rather than separately analyzing the meaning of each of these provisions, which have very different meanings indeed, Mr. Black engaged in some sort of abstract Constitutional mathematics in order to achieve the desired sum total. Such a careless approach is unacceptable for the purposes of Constitutional construction, especially coming from someone who himself claimed to put great trust in the language of the instrument.

Moreover, not only was Justice Black's interpretation of section one "taken as a whole" wrong in principle, but his statement that such was the expressed purpose of those who favored and opposed the amendment is also wrong in fact. The truth of the matter is that Black's appended history of the 14th Amendment indicates, at most, that if section one was understood to make the Bill of Rights applicable to the states, this was to be done by the privileges and immunities clause. The only two sources quoted by Justice Black which indicate some intent on the part of those who adopted the 14th Amendment to incorporate the Bill of Rights are the statements of two Congressmen who helped draft section one. Yet the remarks of Senator Jacob Howard and Representative John Bingham, aside from any question of their reliability, clearly indicate that they understood amendments I through VIII to be made applicable to the states solely by the privileges and immunities clause. Their analysis of the citizenship, due process and equal protection clauses were offered independent of any discussion of either the privileges and immunities clause or the incorporation of the Bill of Rights.

As we have already seen, however, the *Slaughterhouse Cases* eviscerated this argument on the

grounds that such an interpretation of the privileges and immunities clause was not justified by its language. And the *Slaughterhouse* interpretation of that clause has not been overruled. Evidently aware of that fact, and realizing the insufficiency of the other two clauses in section one to accomplish such a purpose on their own, Justice Black relied on combining them all together in hopes of achieving the same end.

By doing so, Justice Black essentially did the same thing he accused the majority of doing: substituting his own concepts for the language of the Constitution. Although he claims that the framers of the 14th Amendment thought that section one as a whole was "sufficiently explicit" to make the Bill of Rights valid against the states, Justice Black did not point to any precise language expressing such a purpose "too clearly to admit of doubt."

When faced with this very criticism from his colleagues on the Court, Justice Black found himself stumbling over his own faulty premises. In *Duncan v. Louisiana*,[88] a case decided some twenty years after Adamson, one judge charged that Black's theory of incorporation based on a reading of section one "as a whole" was an "exceedingly peculiar" way of saying that the Bill of Rights would thereby be made applicable to the states.[89]

In response to this accusation, Justice Black stated: "I can only say that the (privileges and immunities clause) seems to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[90] By saying this, of course, Justice Black moved closer to the views of those two Congressmen he cited in support of his "original intent" argument. But this statement also runs into the obvious problem of the *Slaughterhouse* reading of the privileges and immunities clause. Clearly aware of that problem himself, Justice Black responded in two ways.

First, he decided to attack indirectly the *Slaughterhouse* decision by suggesting that any reading of the privileges and immunities clause that excludes the protection of the Bill of Rights "renders the words of this section of the 14th Amendment meaningless." Of course, *Slaughterhouse* had read the privileges and immunities clause exclusive of the guarantees of the Bill of Rights, but it had already deflated Black's argument that such an interpretation would render the clause meaningless. The *Slaughterhouse* majority had done so by enumerating some of the rights protected by the new privileges and immunities clause which are national in character. Since this ruling was still good precedent, Justice Black's statement reveals that he was either ignorant of that opinion, or he was calling for its overturn.

Apparently unwilling to admit either of these implications, Justice Black then resorted to his second technique designed to avoid the *Slaughterhouse* dilemma: Rather than pursuing the privileges and immunities clause argument, Justice Black retreated to his previous argument of taking section one "as a whole."

This approach, of course, still suffers from the same criticisms mentioned above: 1) it does not comport with the views of Howard and Bingham; 2) it fails to point to any "plain and intelligible language" expressly declaring a purpose to incorporate the Bill of Rights; and 3) it is an unacceptable method of interpretation which does not give primary consideration to the text of the

Constitution.

Although Justice Black assured us that the Constitution will survive if its purposes are "conscientiously interpreted," he himself did not seem willing to be so conscientious when its language did not support his own theory. He was quite eager to search for some "conjectured intent" in the records of Congress, but if the justice truly desired to be faithful to the Constitution, he would not adopt such a view if it was not justified by the text of the instrument.

Handicapped History

In addition to the fact that Justice Black's theory of wholesale incorporation was based partly on a faulty interpretation of the 14th Amendment, his argument that the intent of the framers of that Amendment was to make the Bill of Rights applicable to the states lacks total historicity. In short, when Justice Black's "evidence" is tested against the weight of the full historical record, it becomes apparent that he either neglected to consider a whole mountain of essential material which refutes his theory, or he inexcusably chose to dismiss the opposing material he found by unjustly weighing the evidence in his favor. To demonstrate this requires an investigation not only of the speeches made during the 39th Congress' debate over the 14th Amendment, but also public speeches, state ratification debates, and contemporary state and federal court opinions.

Congress – Bingham's Confusion

Justice Blacks' historical case begins with the first draft proposal of Black's star witness for incorporation, Representative John Bingham. The text of that proposal was quoted earlier.[91] What is so important about this proposal is that, even though it was eventually allowed to die, it generated some interesting exposition by Congressman Bingham which deserves some consideration.

It will be admitted, as Justice Black pointed out, that Bingham had made some sweeping declamations about this proposal which at first glance seem to indicate the Congressman intended for it to make the Bill of Rights applicable to the states. Illustrative of his statements is the following: "The proposition pending before the House is simply a proposition to arm the Congress ... with the power to enforce the bill of rights as it stands in the Constitution today. It hath that extent – no more."[92] Bingham even cited the case of *Barron v. Baltimore* to substantiate his point that the Bill of Rights are unenforceable against the states.[93] In an effort to change that situation, Bingham offered his first draft proposal.

Upon closer examination of Bingham's statements, however, several inconsistencies appear which reveal Bingham's misunderstanding of the whole incorporation issue. First, Bingham's use of the term "bill of rights," or "immortal bill of rights," as he was fond of saying, did not refer to the first eight amendments of the federal Constitution, but was strictly limited to the provisions contained in his first proposal – the privileges and immunities clause and the due process clause of the Fifth Amendment. In fact, at no time did Bingham ever mention amendments I to VIII. The natural conclusion to be drawn from his statements, then, is that Bingham apparently did not even know what part of the Constitution comprises the Bill of Rights.

Secondly, Bingham did not even understand the import of the Barron case that he cited. That case had clearly affirmed the rule that the first eight amendments were not binding on the states, but only on the federal government. Bingham, however, misinterpreted Chief Justice Marshall to the effect that the Bill of Rights were indeed binding on the states because of their duty to uphold the Constitution as the supreme law of the land. Congress, Bingham believed, only lacked the power to enforce that oath. Bingham's proposal, then, was designed to provide Congress with such an enforcement power.

This, of course, is a gross misreading of that landmark case. First, because the Bill of Rights were not binding upon the states, period, any "violation" of them by a state would not constitute a violation of their oath to obey the Constitution, since a state cannot violate a section of the Constitution which does not apply to it. Therefore, what the Bill of Rights failed to impose upon the state governments could not be imposed upon them by the clause which simply affirms that the Constitution is to be the supreme law of the land. Such egregious flaws in Bingham's analysis of the issue seriously question the reliability of his remarks.

Nevertheless, Bingham's first proposal was defeated and was replaced by a new draft which appears in the form of section one of the 14th Amendment. This new draft was significantly different from the first offered by Bingham, and therefore it must be considered as a totally new proposal deserving of new analysis and exposition. In Bingham's only explanation of this new section one, he never mentioned any intent to overturn *Barron v. Baltimore*, nor did he ever mention any intent to make the first eight amendments applicable to the states, as Justice Black has said. In fact, Bingham had even ceased using his beloved phrase "the immortal bill of rights." The only allusion he made in this speech to any of the first eight amendments is his suggestion that the states had, "contrary to the express letter of the Constitution,"[94] inflicted cruel and unusual punishments upon citizens for which the federal government could provide no remedy. Bingham's implied intention was to provide such a remedy by section one.

By this statement Bingham revealed that he still believed the Bill of Rights, and specifically, this portion of the eighth amendment were applicable to the states before the adoption of the 14th Amendment, despite Barron. Nevertheless, even if this provision is now to be "enforced" against the states, are we to assume that the remainder of the first eight amendments are also to be made applicable to the states? According to Barron, we are not to adopt such a view in the absence of "plain and intelligible language" expressing such a purpose. Surely, this one vague comment by Representative Bingham is, as one author has said, an "inapt way" to express the idea that section one has incorporated the Bill of Rights.[95]

The only occasion in which Bingham clearly expressed the idea that the 14th Amendment would make the Bill of Rights applicable to the states was not in debate over that amendment, but in a speech five years later. In that speech of 1871 upon which Justice Black relied so heavily, Bingham did explicitly state that the understanding that lay in his mind when he drafted section one in 1866 was that the privileges and immunities clause would make amendments I through VIII applicable to the states.

If read by itself, this statement seems conclusive. Yet, this opinion was by no means the same that he had expressed of section one when he was explaining it back in 1866. In fact, one Congressman Garfield, who was opposing Bingham's position in 1871, responded to Bingham's claim that he had made his "incorporationist" views plainly known at the time by saying: "My colleague can make but he cannot unmake history."[96] Garfield had refreshed his memory of the 1866 debates by reading the congressional records, and was therefore on good ground to rebuff Bingham's revisionism. Consequently, since Bingham's only remarks revealing any intention of incorporation amount to no more than a vague reference to "cruel and unusual punishments," his testimony on behalf of Justice Black's "wholesale" theory is insignificant indeed.

Congress – Howard's Isolation

The only real witness that Black could find who actually expressed an intention to make the Bill of Rights applicable to the states was Jacob Howard, the gentleman who introduced the 14th Amendment to the Senate. In that opening speech Senator Howard did express the view that the "privileges and immunities of citizens of the United States" includes the protections afforded by the first eight amendments to the U.S. Constitution. As we have seen, however, this interpretation of that clause was rejected by the *Slaughterhouse Cases* as not being justified by the text of the privileges and immunities clause. Moreover, neither did Howard's view comport with that of Justice Black, who insisted on analyzing section one "as a whole."

In addition, Howard's reading of the privileges and immunities clause was unique, having been held by no other member of the 39th Congress. Therefore, Howard's opinion can not be considered that of the entire body. In fact, immediately after Howard's speech, the Republicans called for adjournment to discuss in caucus some of the difficulties raised by Howard's speech concerning the meaning of section one. When the Senate reconvened, the first member to discuss section one, Senator Poland from Vermont, equated the privileges and immunities clause of the 14th Amendment with that found in Art. IV, sec. 2. This, of course, is quite inconsistent with the view expressed by Senator Howard. Moreover, this view that the new privileges and immunities clause "secures nothing beyond what was intended by the original provision" in Art. IV, sec. 2 was held by numerous other members of the 39th Congress. It would even be safe to say that this was the view held by the 39th Congress generally.[97]

Congress – The Consensus

Furthermore, the records of Congress also reveal that if any general opinion of section one "taken as a whole" was held at all, it was not that section one would incorporate the Bill of Rights, but that it would "incorporate" the Civil Rights Act of 1866. This bill, which was designed to offer some measure of protection to the newly freed slaves, had been opposed by many members of the 39th Congress because they doubted that it could be justified on any provision of the Constitution. When section one then attempted to protect some of the same guarantees of the Civil Rights Act, many of these same members supported the 14th Amendment because they saw in it a vehicle for "constitutionalizing" that Act. In fact, well over half of the 18 congressmen who spoke during the debate over the 14th Amendment expressed this view.[98]

Remarkably, this point was even recognized by Justice Black in his appendix,[99] though he failed to see its significance. The significance lies in the fact that the Civil Rights Act was limited to 1) protecting such basic rights as the right to contract, sue, hold property and give evidence in court and 2) guaranteeing equal protection of the laws. Of course, these rights bear a remarkable resemblance to the privileges and immunities enumerated in *Corfield v. Coryell*,[100] but they could by no means be interpreted to encompass the many broad and sundry freedoms found in the Bill of Rights. With such a narrow interpretation of section one having been held by a large proportion of Congress, it seems all the more incredible that Justice Black, who obviously studied these materials, would still insist that the framers of that section thought it "sufficiently explicit" to make the Bill of Rights applicable to the states.

The States

Let us turn away now from an inquiry into the intent of Congress to an examination of how the 14th Amendment was interpreted by "those for whom it was adopted," namely, the people in the states which ratified the Amendment.

Because such evidence as would demonstrate the people's understanding of section one would have "great weight in its exposition," it is rather surprising to find that Justice Black's appendix carries no such material. His only comment in this regard is a quotation taken from Black's secondary historical source, Horace Flack's Adoption of the Fourteenth Amendment.[101] Concerning the content of the public speeches made by the members of Congress during the ratification process, Flack observed:

> There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not ... but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.[102]

Now this is truly a remarkable statement. First, the fact that no mention of incorporating the Bill of Rights was made by any Congressman is incriminating of itself and weighs heavily against Black's thesis. But for him to assume that the gentlemen who made inexplicit references to the various rights mentioned above necessarily understood the entire Bill of Rights to be made wholly applicable to the states is to stretch the limits of logical inference. Even worse, if Justice Black expected these inexplicit references to have put the people who heard those speeches on notice that the 14th Amendment would make the Bill of Rights applicable to the states, then he was not only presumptuous, he was dishonest. To attribute to the people an interpretation of section one based on an assumption about their grasp of a few speakers' implied statements is absurd. As Joseph Story has said: "The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men."[103]

Actually, the "reasonable interpretation" that the people placed on section one can be easily deduced. Although Justice Black provided absolutely no discussion of the original understanding of the 14th

Amendment as may be derived from the state ratification debates, several scholars have studied this aspect of the Amendment's history and have reached the same conclusion: The general opinion of section one held by the people who adopted it was that it embodied the Civil Rights Act of 1866.[104] Yet, as we have seen, the Civil Rights Act is so limited in scope as to allow no room for incorporating the Bill of Rights. Among the scholars who have demonstrated that the people equated section one with the Civil Rights Act is Horace Flack himself.[105] Justice Black, however, seemed oblivious to this fact.

To be sure, some of the states expressed the concern that the 14th Amendment would lead to the expansion of the national government and the demise of the federal system. However, because such issues as citizenship, voting rights and other "domestic relations" had always been under state authority, it was only natural for the states to fear how these areas might be affected by the "vague generalities" of section one. Yet, the records in the states show that no one hinted, much less contemplated that either of the provisions of section one was a "Trojan Horse" concealing the incorporation of the Bill of Rights.[106] If such an intention had been suggested, it would have been bitterly opposed. In fact, Horace Flack agreed with the opinion of one Congressman who said in 1871: "If the monstrous doctrine (of incorporation) now set up as resulting from the provisions of that 14th Amendment had ever been hinted at, that Amendment would have received an emphatic rejection at the hands of the people."[107] This statement also seems to have been overlooked by Justice Black.

Further evidence which demonstrates that the states in no way understood the 14th Amendment to incorporate the Bill of Rights may be found in post-ratification events. First, several states changed or attempted to change their constitutions in a way which would make them inconsistent with one of the first eight amendments, thus indicating that the states considered themselves unbound by this federal standard.[108] Secondly, state courts continued to decide cases which sought protection from the federal Bill of Rights by deferring to the precedent of *Barron v. Baltimore*, thus demonstrating their conviction that this case was unaffected by the 14th Amendment.[109] On the basis of this evidence, then, it is clear that the states by no means understood any part of that Amendment to have the effect of making Amendments I through VIII applicable to them in their entirety.

The Supreme Court

When we turn now to an examination of how the Supreme Court has treated Justice Black's theory of wholesale incorporation, we will find that it has consistently rejected his argument. Up until the time that the incorporation theory was plainly argued before the Court, the nation's highest tribunal continued to decide cases which claimed state violation of the federal Bill of Rights by relying, as the state courts continued to do, on *Barron v. Baltimore*. The Court did this, for example, in the case of *Twitchell v. Pennsylvania*,[110] decided less than one year after the ratification of the 14th Amendment. In that case, the plaintiff claimed that the state court proceeding which convicted him had violated the 5th and 6th Amendments of the federal Constitution. The Court rejected this argument by citing Barron and declared that "the scope and application of these amendments are no longer subjects of discussion here."[111] This case demonstrates, then, that the Supreme Court, which had witnessed the entire ratification process, expressed no indication that it understood the 14th

Amendment to have the effect of incorporating the Bill of Rights.

Of course, the *Twitchell* case had only argued that the 5th and 6th Amendments were made applicable to the states by the 14th, and had not raised the broader wholesale incorporation argument. Yet, even when this argument was specifically raised by counsel in subsequent cases, the Court still flatly rejected such a claim. As we have seen, although the *Slaughterhouse Cases* were the first to construe the provisions of section one, and thereby eliminate them as grounds for making the Bill of Rights applicable to the states, that opinion did not directly address the full incorporation argument. That theory was first fully argued and addressed by the Court in the case of *In re Kemmler*.[112] There the plaintiff admitted that the first ten amendments had originally applied only to the federal government, yet, inasmuch as these amendments recognize the fundamental rights of American citizens, they are protected by the privileges and immunities clause of the 14th Amendment and now made applicable to the states.

The response of the Court, as it has been every time this argument has been raised, was to dispose of it by relying on the *Slaughterhouse* interpretation of the privileges and immunities clause. Thus, in the cases of Maxwell v, Dow (1900),[113] *Twining v. New Jersey* (1908), *Palko v. Connecticut* (1937) and *Adamson v. California* (1947), the Court has consistently rejected Black's wholesale incorporation theory.

Despite this long line of cases, however, Justice Black still insisted that his theory had not received full consideration by the Supreme Court. Yet, Justice Black himself voted with the *Palko* majority which specifically rejected Black's argument with these words:

> In appellant's view ... whatever would be a violation of the original bill of rights (amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.[114]

Moreover, although Black thought it necessary to provide his appendix of historical material in order to give the *Adamson* Court an opportunity to fully consider his wholesale theory, Black's "original intent" argument had already been answered in *Maxwell v. Dow*.

In this case the plaintiff was claiming that the criminal proceeding by which he had been convicted of robbery had violated the 5th and 6th Amendments of the Constitution and the privileges and immunities and due process clauses of the 14th Amendment.

In making his argument for incorporating the Bill of Rights through the privileges and immunities clause, counsel for the plaintiff had cited from the speech given by Senator Howard when he introduced the 14th Amendment to the Senate for consideration. The plaintiffs counsel argued that since Howard had suggested that the privileges and immunities of citizens of the United States included the first eight amendments, that the Supreme Court should therefore adopt this interpretation also.

The Maxwell Court rejected this argument, however, by stating that one man's views do not necessarily reflect the interpretation given to the Amendment by either the members of Congress who adopted it, or the majority of the state convention which ratified it. The Court was quick to add, however, that the true meaning of the 14th Amendment is to be determined not from the speeches made regarding it but from the language actually used in the amendment itself.

The Court then went on to explain more fully the proper manner for construing a provision of the Constitution:

> The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.[115]

By laying such emphasis on the "plain and unambiguous" language of the Constitution, and on the intended purpose for which it was adopted, the Court has accurately articulated and faithfully followed the traditional rules of interpretation adhered to by Marshall and Story. What is most striking about this opinion, however, is that by consistently applying these rules to the 14th Amendment, the Maxwell Court had come to a conclusion about the theory of wholesale incorporation which not only contradicts but soundly refutes the thesis of Justice Black – someone who claimed to be following these same rules.

Thus, rather than providing revealing new evidence, Justice Black's historical argument, which is based on the "conjectured intent" of one or two Congressmen, had already been weighed in the balance and found wanting. Yet, on the basis of his dissent, which is premised upon faulty interpretation and unsupportive historical materials, Justice Black would have the Court overturn 80 years of precedent. By dismissing Black's argument, however, the Adamson Court had rightly chosen to reject a legal and historical fallacy.

VI. CONCLUSION

The Court has chosen, however, to continue applying the incorporation doctrine according to the "selective" process of *Palko v. Connecticut*. Yet, as this study has demonstrated, the Court reached its conclusion in that case not by following the traditional rules of interpretation, which were accepted by the framers of the Constitution. Rather, the *Palko* Court blatantly adopted an evolutionary standard of construction in which neither the language nor the original purpose of the 14th Amendment, in particular, and the Constitution, in general, is relevant to any understanding of our nation's frame of government.

In addition, this study has also shown that although Justice Black claimed to be following the traditional rules of interpretation to devise his theory of wholesale incorporation, he failed to

completely and faithfully follow all of those rules in order to reach his erroneous conclusion.

Moreover, this study has primarily demonstrated that by applying the traditional rules of interpretation to its reading of the 14th Amendment, the Supreme Court of the late 19th Century had, in cases such as *Slaughterhouse* and *Maxwell v. Dow*, emphatically rejected both the selective and wholesale versions of the incorporation doctrine as a legal and historical fallacy.

In demonstrating these assertions, however, this study has made no attempt to prove the superiority of the Marshall/Story standard of interpretation or to make a cogent case as to why it should be adopted by American jurists, scholars, and statesmen. These are very complex and profound questions which deserve the full attention of an entirely separate study. Suffice it to say, however, that based on many moral, logical and exegetical reasons, it is the view of this author that these traditional rules of interpretation are the proper standard of construction and the one that is likely to produce the most reasonable, accurate and fair reading of the Constitution. Not least among these reasons, of course, is the fact that the Constitution should be interpreted according to the rules of construction by which the framers drafted that remarkable document.

In addition to the fact that this study has left the foregoing questions to a more in depth inquiry, neither has this study attempted to elaborately argue the pros and cons of the incorporation doctrine itself. Many legal scholars have examined this question, however, and it appears that although many scholars criticize the illogical, unhistorical approach by which the Court has made the Bill of Rights applicable to the states, very few object to holding the state governments to the same high standard as the federal government.

The ends, however, do not justify the means. Despite how strongly our constitutional scholars and judges may be convinced of the desirability of making the Bill of Rights applicable to the states, they must resist the temptation of adopting a tenuous legal theory to support their desired end. Even worse, not only has the Court failed to follow the proper rules of construction in its reading of the 14th Amendment, but far from being desirable, the effects of the incorporation doctrine have been devastating to both our governmental structure and our individual freedoms.

Of course, the problem lies not so much with the nature of the restrictions found in the Bill of Rights, for they are undoubtedly good and just. The great danger of the incorporation doctrine lies in the fact that it has 1) weakened the sovereignty of the state governments by bringing them under greater federal control; 2) expanded the autocratic power of the Supreme Court by allowing it to redefine the Constitution; and 3) eroded our inalienable rights by leaving their protection in the hands of arbitrary judges who determine the constitutionality of a law by testing whether it "shocks the conscience."

In light of this threatening situation, I believe that what is needed, in part, to restore and secure our freedoms, is a complete renunciation of the incorporation doctrine and the erroneous legal philosophy upon which it is founded. Since the root of the incorporation doctrine lies in an abandonment of the proper rules of interpretation, the key to overturning that theory is adhering to the full force of the *Slaughterhouse Cases*, which by following the Marshall/Story standard of

construction, had destroyed the entire incorporation argument.

Furthermore, the rules of interpretation, which are the key to solving many other problems created by the federal judiciary, must begin to be respected and applied to every other area of Constitutional law as well. Rather than reading into the words of the Constitution an evolving meaning which may be altered to fit the personal predilection of the judge, the federal courts must begin to respect the actual text of the Constitution as it was reasonably interpreted at the time of its adoption. Such an approach would, for example, restore the original design of our federal system, which, with its diffusion of power, was wisely recognized by our founding fathers as the best governmental device for protecting our individual freedoms.

Many of these freedoms have been lost already, and even more threaten to be taken away. Only by returning to the true rules of constitutional interpretation can we restore and continue to enjoy the protection and stability that our written Constitution provides. Only then can America hope to once again become a government of laws and not of men.

NOTES

1. William J. Brennan, Jr., "Guaranteeing Individual Liberty," USA Today, September, 1986, 40.

2. See footnotes 4 through 10 *infra*.

3. William Crosskey, Politics and the Constitution, 3 Vols. (Chicago: University of Chicago Press, 1953), Vol. I, 363-374.

4. 32 U.S. (7 Pet.) 243 (1833).

5. See footnote 7 *infra*.

6. 302 U.S. 319 (1937).

7. The First Amendment: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Everson v. Board of Education*, 330 U.S. 1 (1947). The Fourth Amendment: *Mapp v. Ohio*, 367 U.S. 643 (1961); *Kerr v. California*, 374 U.S. 23 (1963). The Fifth Amendment (Double Jeopardy): *Benton v. Maryland*, 395 U.S. 784 (1969). (Self-incrimination): *Malloy v. Hogan*, 378 U.S. 1 (1964). (Taking clause): *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The Sixth Amendment (Speedy Trial): *Klopfer v. North Carolina*, 386 U.S. 213 (1967). (Public Trial): *In re Oliver*, 333 U.S. 257 (1948). (Jury Trial): *Duncan v. Louisiana*, 391 U.S. 145 (1968). (Notice of Charge): *Cole v. Arkansas*, 333 U.S. 196 (1948); *In re Gault*, 387 U.S. 1 (1967). (Confrontation of Witnesses): *Pointer v. Texas*, 380 U.S. 400 (1965). (Compulsory Process for Obtaining Witnesses): *Washington v. Texas*, 388 U.S. 14 (1967). (Right to Counsel): *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Eighth Amendment (Cruel and Unusual Punishment): *Robinson v. California*, 370 U.S. 660 (1962). See Edward L. Barrett, Jr. and William Cohen, eds., Constitutional Law - Cases and Materials, 7th ed. (Mineola, New York: Foundation Press, Inc., 1985), 518, 519.

8. 332 U.S. 46 (1947).

9. *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985).

10. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights – The Original Understanding," 2 Stan. L. Rev. 5 (1949).

11. Crosskey, Politics and the Constitution.

12. Jacobus ten Broek, Equal Under Law. (New York: Collier-MacMillan, Rev. Ed., 1965).

13. William Guthrie, The Fourteenth Article of Amendment to the Constitution of the United States (Boston: Little, Brown and Co., 1898).

14. Horace Flack, The Adoption of the Fourteenth Amendment (Baltimore: Johns Hopkins Press, 1908).

15. Alfred Avins, "Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited," 6 Harv. J. on Legis. 1 (1968).

16. Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: Harvard University Press, 1977).

17. Joseph Story, Commentaries on the Constitution of the United States, 2 Vols. (Boston: Hilliard Gray, 1833; repr., New York: Da Capo Press, 1970), 383.

18. See Fairman, *supra* note 10; Crosskey, *supra* note 11; Flack, *supra* note 14; Avins, *supra* note 15.

19. 83 U.S. (16 Wall.) 36 (1872).

20. Leonard Levy, "Incorporation Doctrine," Encyclopedia of the Constitution, 4 Vols., Leonard Levy, Kenneth Karst, Dennis J. Mahoney, eds. (New York: MacMillan Publishing Co., 1986), 972.

21. Story, 383.

22. Story, 387-8.

23. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1803).

24. Paul Brest, "Constitutional Interpretation," Encyclopedia of the Constitution, 468.

25. *Supra* note 23.

26. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827). (Marshall, C. J., dissenting.)

27. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

28. Thomas M. Cooley, Constitutional Limitations, Walter Carrington, ed. (Boston: Little, Brown and Co., 8th edition, 1927), 123-4.

29. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 188-9.

30. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 414-15.

31. *Craig v. Missouri*; 29 U.S. (4 Pet.) 410, 434 (1830).

32. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821).

33. Story, 388.

34. Story, 388-9.

35. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 188-9.

36. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 401.

37. *Id.*, at 406.

38. The classic interpretation of the privileges and immunities clause of Art. IV, sec. 2 had been given in the case of *Corfield v. Coryell*, 6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823). In that opinion Justice Bushrod Washington had declared that the privileges and immunities of citizens of the several states are those "which are, in their nature fundamental; which belong, of right, to the citizens of all free governments." He went on to enumerate some of these privileges and immunities by listing such rights as life, liberty and property, the right to engage in economic pursuits and the right to maintain legal actions in state courts.

39. Quoted in Fairman, 21.

40. Conqressional Globe, 39th Congress, 1st session, H. 1034 (1865-66). Reprinted in Alfred Avins, ed. The Reconstruction Amendmentsi Debates (Richmond: Virginia Commission on Constitutional Government, 1967), 150.

41. The House debate on the proposal from February 26-28 clearly reveals this. *Id.*, H. 1034-1095.

42. *Id.*, H. 2459.

43. *Id.*, H. 2542.

44. *Id.*, S. 2765.

45. The most infamous treatment of the diversity of citizenship doctrine had been rendered by the Supreme Court in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

46. Congressional Globe, 39th Cong., 1st session, S. at 2869.

47. *Id.*, S. 2961.

48. In addition to Poland, Senators Davies and Henderson, who followed Howard in debate, also equated the two privileges and immunities clauses, without being contradicted by any member. *Id.*, S. 2992-3033.

49. *Supra* note 27.

50. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 78.

51. *Id.*, at 77.

52. *Ibid.*

53. *Barron v. Baltimore*, 32 U.S. (7 Pet.) at 250.

54. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 78.

55. 83 U.S. (16 Wall.) at 80.

56. Barrett and Cohen, 481.

57. 59 U.S. (18 How.) 272 (1856).

58. The term "law of the land" found in the thirty-ninth chapter of Magna Carta is recognized to be synonymous with the term "due process of law" found in the Fifth Amendment. See Justice Curtisi discussion in Murray's Lessee, 59 U.S. (18 How.) at 276.

59. See Berger, Government, 194-200.

60. *Supra* note 39.

61. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 73.

62. See Raoul Berger, "The Fourteenth Amendment: Light from the Fifteenth" 74 Nw. U. L. Rev. 311 (1979), 334-5.

63. It is well documented that the purpose of the equal protection clause was the guarantee of legal equality for blacks and the protection of basic civil rights as enumerated in the Civil Rights Act of 1866. See, for example, *Id.*, 335-340; Flack, 153; James E. Bond, "The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania," 18 Akron L. Rev. 435 (1985), 454-56.

64. Alexander Hamilton, quoted in Raoul Berger, "The Fourteenth Amendment: The Framersi Design," 30 S. C. L. Rev. 4 (1979), 505.

65. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878).

66. Magna Carta, Chapter 39. See also Berger, Government, 270.

67. *Murray's Lessee*, 59 U.S. (18 How.) at 276-77.

68. *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1864) and Hagar v. Reclamation District, 111 U.S. 701 (1884).

69. *Palko v. Connecticut*, 302 U.S. at 323.

70. *Id.*, at 326.

71. *Id.*, at 325.

72. *Supra* note 49.

73. *Id.*, at 326.

74. *Palko v. Connecticut*, 302 U.S. at 326.

75. *Id.*, at 327.

76. *Ibid.*, at 326.

77. See *infra* notes 90 and 96.

78. *Slauqhterhouse Cases* 83 U.S. (16 Wall.) at 77.

79. *Id.*, at 327.

80. *Ibid.*, at 327.

81. It was this "logic," for example, that allowed the Court to reason that capital punishment, countenanced by the 5th Amendment, "constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia*, 408 U.S. 238 (1972) at 240.

82. It is for this reason that certain provisions of the Bill of Rights, such as the 5th Amendment grand jury indictment and the 7th Amendment civil jury trial requirement have not been incorporated against the states. It is under this rationale, also, that the so-called "right to privacy," found nowhere in the text of the Bill of Rights, has been incorporated to protect from state encroachment such "fundamental rights" as abortion. See *Roe v. Wade*, 410 U.S. 113 (1973).

83. *Slaughterhouse Cases* 83 U.S. (16 Wall.) at 78.

84. 211 U.S. 78 (1908).

85. 332 U.S. at 71, 72, 74.

86. Berger, Government, 101.

87. Fairman, 139.

88. 391 U.S. 145 (1968).

89. *Id.* at 174-75, footnote 8 (Harlan, J. dissenting).

90. *Id.* at 166 (Black, J., concurring.)

91. *Supra* note 39.

92. Congressional Globe, 39th Cong., 1st. Sess. (1866). H. 1088.

93. *Id.*, H. 1089.

94. *Id.*, H. 2542.

95. Fairman, 53.

96. Congressional Globe, 42nd Cong., 1st Sess., (1871) app. 151.

97. *Supra* note 42.

98. See speeches of Stevens, Finck, Thayer, Broomall, Boyer, Garfield, Raymond, Eliot, Rogers and Kelley, Congressional Globe, 39th Cong., 1st Sess., H. 2459-2542 and speech of Henderson, *Id.*, S. 3031.

99. 332 U.S. at 107-8.

100. *Supra* note 38.

101. *Supra* note 8.

102. Flack, 153-4.

103. Story, footnote at 392.

104. Joseph B. James, The Ratification of the Fourteenth Amendment (Mercer University Press, 1984) 23-4. See also Bond, *infra* note 63, at 443.

105. Flack, 153-5.

106. Bond, 458.

107. Flack, 236-7.

108. Fairman, 84-132.

109. *Ibid.*

110. 74 U.S. (7 Wall.) 321 (1869).

111. Cited in Fairman, 132.

112. 136 U.S. 436 (1890).

113. 176 U.S. 581 (1900).

114. 302 U.S. at 323.

115. 176 U.S. at 601-2.